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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Issue No.2 of Volume 3 of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude to those who made this impressive journey viable and sustainable. We are exceptionally grateful to Fiona McKinnon who did the painstaking editorial work of this issue excellently. It is her devotion and full engagement in the editorial work that enabled us to come on the track again after losing our previous edited work accidentally. We also proudly acknowledge Melkamu Aboma's contribution in preparing the final layout.

On this occasion, again, the Editorial Committee would like to make it clear that the *Bahir Dar University Journal of Law* is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of the law and the practice of the country and to contribute toward the betterment of the legal system. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider regional, supranational and global perspectives are welcome.

The Editorial Committee renews its appeal to all members of the legal profession, both in the academia and in the world of the practice, to assist establishing a scholarly tradition in this well celebrated profession in our country. It is time to see more and more scholarly publications by various legal professionals. It is time for us to put our imprints in the legal and institutional reforms that are still underway across the country. It is commendable to pay a close scrutiny of the real impacts of our age-old and new laws upon the social, political, economic and cultural life of our society today. It is vitally important to study and identify areas that really demand legal regulation and to advise law-making bodies to issue appropriate legal instruments in time. Many aspects of the life of our society seem to require that we in the legal profession do something today. The Bahir Dar University Journal of Law is here to serve us as a forum to do meaningful contributions to our society and to the world at large.

The Editorial Committee is hopeful that the *Bahir Dar University Journal of Law* will engender a culture of knowledge creation, acquisition and dissemination in the field of law and justice system of our beloved country.

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Bahir Dar University Journal of Law

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Director's Message and Brief Report

Mizanie Abate Tadesse (PhD)

Director and Assistant Professor, Law School of Law

Dear Friends of the School,

Since its official establishment as the Department of Law in 1993 E.C., Bahir Dar University (BDU) School of Law has been operating with the broad mission of producing competent professionals in law via quality education and training, conducting legal research that assist in solving societal problems and providing community services at the regional and national level that help accelerate the overall socio-economic development of the country. The School is currently targeting to meet the lofty visions of BDU.

The School has continued its task of giving training in its two departments: Department of Law and Department of Governance and Development. We have many students in the regular, summer, evening, and distance programs. Because of the ever increasing demand for qualified legal professionals with high level of training, the School has already started expanding its horizons of training into master of laws programs. There are three specialized LL.M Programs: LL.M in Environmental and Land Law, LL.M in Criminal Justice and Human Rights and LL.M in Business and Corporate Law. In addition to the regular programs, we have broadened students' and stakeholders' access to our LL.M through summer programs. We are hosting students from various offices of Amhara Region as well as Gambella Region and the Ministry of Defense. We have planned to expand the sphere of our summer trainings to other federal and regional justice sector professionals in partnership with the relevant offices.

We believe that access to, and quality of, education are two sides of the same coin. Consequently, we are working tirelessly to ensure high quality education on top of increasing access of the same. In this regard, we have designed and implemented a comprehensive intervention in respect of inputs and processes. We have, *inter alia*, employed six more instructors, equip instructors' offices and classrooms with the necessary facilities; and step up the multifaceted role of course chairs and peer-led learning groups.

In the realm of research, instructors have been engaging in research on thematic areas identified by the School utilizing a modest funding from the University. The School has indentified Criminal Justice and Human Rights; Economic and Business Laws; Environmental and Land Law, and Good Governance and Democratization issues as the pertinent and timely thematic areas. Some instructors are doing researches on some of these thematic areas. I would like to seize this opportunity to express our readiness to undertake joint research in collaboration with partner institutions. In order to promote academic discourse and exchange of ideas among our instructors, the School continues to organize Friday seminars.

The School's Legal Aid Center is an important avenue through which instructors and senior law students provide pro bono legal services to women, people with disability, prisoners and to those others that couldn't afford hiring a lawyer. Thanks to the assistance of the Ethiopian Human Rights Commission, the United Nations Children's Fund and BDU, we have resumed the operation of our service which was closed down quite for some time for lack of funding. Many women, children and elderly people have benefited so far from the Center's legal counseling service, preparation of legal documents, and/or representation before courts. Apart from the Legal

Aid Center, the School has established three more centers that will play a central role in realizing the core missions of the School. Established in 2013, the Arbitration Center is meant to serve as a hub for research, training and service delivery on commercial arbitration. The Criminal Justice and Human Rights Center, on the other hand, is destined to be a focal point for our research, training, advocacy and outreach activities pertaining to criminal justice and human rights issues. The Moot Court Center is fully operational and it has got its own separate building within the Law School and Institute of Land Administration Campus. Except for some equipment, this Center is well furnished by now.

With a view to creating a forum for dissemination of legal research findings from instructors of law schools and professionals of justice sector institutions, the School continues to publish Bahir Dar University Law Journal since 2010. In presenting Volume 3 Number 2 of the Journal, I am extremely pleased to announce that the Journal is given a reputability status by Senate of BDU right from the first issue. To ensure the accessibility of the journal online, we are making the necessary preparations to upload all issues on the website of the School. On behalf of the School of Law, I thank you all who in one way or another have contributed to the publication of Volume 3 Number 2 of Bahir Dar University Law Journal. Particular thanks are due to those who have contributed articles, case comment and reflection, as well as to the assessors, members of the Editorial Committee, and the Editor-in-Chief. As Fiona McKinnon’s involvement in the process has been immense, it is apposite to extend a special note of gratitude.

More information about the centers and other activities of the School is available at the website of our School**: http://www.bdu.edu.et/law/.**

Child Participation: A Forgotten 'P' Under the Ethiopian Legal System?

Yitagesu Alamaw Muluneh♣

Abstract

The Federal Democratic Republic of Ethiopia's 1995 Constitution has been praised for its long and relatively comprehensive list of human rights, providing for the rights of the child under Article 36. However, it has not categorically specified the principles underlying these rights, which are enshrined in the United Nations' Convention on the Rights of the Child, 1989 (CRC), and the African Charter on the Rights and Well-being of the Child, 1991 (ACRWC). Thus it is logical to question the constitutional placement of these principles. This article analyzes one of the basic principles upon which the rights of the child are established, i.e., participation. The author attempts to evaluate the place of children's right to participation within the hierarchy of the Constitution and the legal system it establishes.

Although the Constitution does not explicitly provide for participation as one of the principles underlying the rights of the child in the CRC and the ACRWC, Ethiopian legislation as well as practice in the legal system afford opportunities in which children's right to participate may be implemented. Thus, the author recommends that the Constitution be read critically where the rights of the child are concerned, and further recommend the strengthening of practices that recognize children's right to participation and the creation of more space to accommodate it properly, as there are limitations at present in these areas. Finally, the author advocates proper utilization of the rule of interpretation provided under the Constitution, as this rule has great significance in the realization of the right to child participation and general protection of this right.

Key Terms*:* Child participation, Rights of the Child, Child participation in Ethiopia

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Introduction

It has been said that children's views should be listened to and respected, as they are people with dignity.[1] However, children have long been denied their right to participation for various reasons.[2] This problem has been taken seriously in modern times.[3] Today, in various countries, there are attempts to enable children to express their views on matters that concern them.[4] The CRC provides for the right of child participation in different contexts, under various articles.[5] The same holds true for the ACRWC.[6] This paper focuses on Article 12 of the CRC and Article 7 of the ACRWC and discusses child participation in Ethiopia in light of these provisions.

Child participation is important in almost all areas of law, policy and practice, but the author will focus specifically on child participation under the FDRE Constitution, the Revised Family Code of Ethiopia (2000), the Criminal Procedure Code of Ethiopia (1961), and the Civil Procedure Code of Ethiopia (1965). Accordingly, Section 1 examines the concept of child participation. It closely examines the meaning, nature, scope and rationales of child participation. Section 2 reviews the legal framework dealing with child participation in Ethiopia. Section 3 will attempt to give a highlight of child

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[1] ROOTS, *Child Participation*, Tearfund, Teddington, UK, 2004, p. 5.
[2] Id. at p. 17; H. Matthews et al., 'Young people's participation and representation in society,' *Geoforum*, vol. 30, 1999, p. 136.
[3] For reasons and forms of child participation, see G. Lansdown, The evolving capacities of the child, 2005, UNICEF, pp. xiii-xiv; ROOTS, *supra* note 1, pp. 11-20; UNICEF, The state of the world's children 2003: Child participation, available at: http://www.unicef.org/sowc03/contents/childparticipation.html, accessed on 20 September 2008.
[4] ROOTS, Id., pp. 23-37.
[5] H. Matthews et al., *supra* note 2.
[6] See Articles 4 and 7 of the ACRWC.

participation practice in Ethiopia. The article then concludes with conclusions and recommendations.

1. Child participation: Meaning, nature, scope and rationales

1.1 Meaning

Child participation has no single, consistent definition in international law. The lack of a generally accepted definition has emanated not only from the advocates' practice of defining the concept in various ways, but also from the fact that the concept is relatively new, representing a paradigm shift in beliefs relating to children in society. Child participation has been ignored for a long time, unlike the other cardinal principles of child rights. Thus, it has been defined by many scholars in different ways, based on the element(s) that they wanted to emphasize and the context in which they wanted to use the concept. The definitions of some writers even "seek to go beyond simply defining participation by focusing on the quality and genuineness of... participation."[7]As noted above, child participation is a right envisaged in various provisions of the most important documents on the rights of the child, i.e., the CRC and the ACRWC. And so in this work, participation is defined based on Article 12 of the CRC, as this is the provision most commonly identified as portraying the right of child participation,[8] and Article 7 of the ACRWC, which may be regarded as the African version of the former. Under

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[7] L. Jackson, Citizenship education through community action: The potential for effective human rights education through community participation, 2008, p. 5, available at: http://www.citized.info/pdf/commarticles/Lee_Jackson.doc, consulted on 9 September 2008.

[8] M.S. Pais, Child participation, *Documentação e Direito Comparado,* No. 81/82 2000, p. 94, available at: http://www.gddc.pt/actividade-editorial/pdfs-publicacoes/8182MartaPais.pdf, consulted on 9 September 2008.

the CRC, child participation is defined as the right to freely express views in all matters affecting the child available to every child who is capable of forming his/her own views on such matters.[9] The ACRWC also defines child participation as the right to express opinions in all matters freely available to every child who is capable of communicating his or her own views.[10] Upon first reading, the definitions given under these instruments seem similar. But it is important to note that there are differences between these definitions. The differences relate to the scope of child participation.

With regard to the CRC definition, Chawla defines child participation as:

… a process in which children and youth engage with other people around issues that concern their individual and collective life conditions. […] Formal processes of participation deliberately create structures for children's engagement in constructing meaning and sharing decision making.[11]

By way of conclusion, one may say that child participation is a right that is meant to ensure that children influence "issues affecting their lives, by speaking out or taking action in partnership with adults" and each other.[12]

1.2 Scope

As explained above, the concept of child participation under the CRC and the ACRWC differs in scope. First, the CRC confers the right to

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[9] Article 12 (1), Convention on the Rights of the Child (CRC), adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 on 20 November 1989, *entry into force* 2 September 1990, in accordance with Article 49.
[10] ACRWC, Article 7.
[11] L. Chawla, Evaluating children's participation: Seeking areas of consensus, p. 1, available at: http://pubs.iied.org/pdfs/G01959.pdf, consulted on 10 August 2013.
[12] R. Blackman (ed.), Child participation, p. 5, available at: http://tilz.tearfund.org/webdocs/Tilz/Roots/English/Child%20participation/Child_participation_E.pdf, consulted on 8 September 2008.

participation on every child that is capable of *forming* his or her own view, whereas the ACRWC confers the right to participation on every child who is capable of *communicating* his or her own view. This difference becomes significant particularly when considered in light of the possibility that the ACRWC may be interpreted to apply only to children who are capable of communicating their views in certain modalities, such as speech or writing. Thus the ACRWC may exclude children who are capable of forming their own views but unable to communicate them in particular ways.

Should we resort to an interpretation that holds that the word *communicating* is general and should be understood to refer to all possible modalities of expression that children may employ to convey their views? Although this argument seems to minimize the undesirable effects of limiting the formulation of the concept of child participation in the ACRWC, there are also problems with this line of argument. Such a broad approach also has an undesired result, as it may incorporate an unlimited category of children. Even infants could be entitled to the right to participation, as they may communicate their views in various ways, by crying or covering their faces or laughing.

The CRC, on the other hand, explicitly entitles all children capable of *forming* their views to participation. Thus the scope of the entitlement is wider than the scope under the ACRWC, applying to all children regardless of their ability to communicate their views. This further complicates things as it covers all categories of children. Even a newborn is arguably able to form his/her own opinions, as all human beings possess conscious minds as of birth. Therefore, practically speaking, the ACRWC is framed in a better manner than the CRC, as it could be put into effect if all the reasonably understandable and clear modalities of communication were defined and listed. This might benefit all children who are able to express their views by using any one of these means of communication. Theoretically speaking, however, the CRC is framed in such a way that it benefits many more children, including those excluded by the ACRWC.

The CRC also entitles children to participate *in all matters affecting the child*.[13] Hence, it allows children to take part only with respect to issues that affect them. This rule does not govern the participation of children in other matters. The problem that centers around this distinction is that governments, families and other pertinent bodies ignore the fact that almost all actions taken by such organs affect children in one way or another, and thus qualify as *matters affecting the child*. Therefore such organs should take all the necessary cautions when categorizing any matter they are going to decide. It is worth mentioning that the CRC guarantees the right to participation to the child at all times and in all instances and places, so long as the matter under consideration is regarded as a matter affecting the child.

Under the ACRWC, the right to participation is provided for children *on all matters*.[14] This provision seems to be free of the qualification relating to the matters in which children are entitled to participate under the CRC. The ACRWC seems to enable children to participate in many more issues. This may be taken as one of the innovations of the ACRWC. This is in line with

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[13] CRC, Article 12 (1).
[14] ACRWC, Art. 7.

the submission that almost all matters to be carried out by governments, families and relevant bodies affect the child in one way or another.

Thirdly, the CRC and the ACRWC provide for specific matters in which children *must* participate, in addition to the matters generally referred to, as discussed above. Under the CRC, it is stated that children *shall in particular be provided* [with] *the opportunity to be heard in any judicial and administrative proceedings affecting the child*.[15] Children shall be able to participate in judicial and administrative proceedings provided that the proceedings affect their interests individually or collectively. It is useful to distinguish this provision from the *matters affecting the child* contemplated under the CRC as discussed above. Moreover, these proceedings are just two fora for child participation. This is to say, children shall be provided with the opportunity to take part in proceedings before the courts of law if such proceedings have to do with actions in which their interests are involved. Similarly, children shall be granted an opportunity to participate in administrative decisions affecting them. Thus children shall be provided with the opportunity to express views when any issue affecting them arises in the judicial and executive branches of government.

The ACRWC has similar rules. It provides that the child shall be granted the opportunity to be heard in administrative and judicial proceedings affecting him or her.[16]

Fourth, with regard to the judicial and administrative fora where matters involving children are decided, under both the CRC and the ACRWC,

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[15] CRC, Art.12 (2).
[16] ACRWC, Art.4 (2).

participation in such proceedings may be carried out by the child directly or through a representative or an appropriate body.[17] But the ACRWC is distinct in two ways here. First, the ACRWC requires that indirect participation be carried out by an *impartial* representative,[18] whereas the CRC is silent on this point. The ACRWC emphasizes the objectivity of the representative. Second, the ACRWC is not clear with regard to the manner of participation, unlike the CRC, which provides that the manner of the indirect participation must conform to the domestic procedural laws of the respective signatory states.[19] However, this lapse may be overcome through the ACRWC's requirement that orders the relevant bodies to take the views of the child into account in such proceedings, in accordance with the relevant domestic laws of states.[20] The CRC does not have such rule.

Fifth, the CRC and the ACRWC do not require the relevant bodies to take all children's opinions into account and give effect to the same. The CRC requires that the views of the child shall be *given due weight in accordance with the age and maturity of the child*.[21] The higher the age and level of maturity of the child, the more weight his or her views shall be given. This is in line with the concept of the evolving capacities of the child. According to this concept, the scope of the enjoyment of the rights provided under the CRC shall expand as the child grows. In the language of the CRC:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as

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[17] CRC, Art.12 (2), ACRWC, Art.4 (2).
[18] Ibid.
[19] ACRWC, Art.4 (2).
[20] Ibid.
[21] CRC, Art.12 (1).

provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.[22]

On the basis of the Recommendations issued during its 37th Session in Geneva on 17 September 2004, the Committee on the Rights of the Child has clearly enunciated the concept of evolving capacity of the child with respect to child participation. In the Committee's own words:

States parties must take all appropriate measures to ensure that the concept of the child as rights-holders is anchored in the child's daily life from the earliest stage: at home (and including, when applicable, the extended family); in school; in day care facilities and in his or her community. States parties should take all appropriate measures to promote the active involvement of parents (and extended families), schools and communities at large, in the promotion and creation of opportunities for young children to actively and progressively exercise their rights in the everyday activities. In this regard, special attention must be given to the freedom of expression, thought, conscience and religion and the right to privacy of the youngest children, according to their evolving capacity.[23]

From this paragraph of the Recommendation, two crucial points can be deduced. First, the undertaking to facilitate and ensure child participation begins from the earliest involvement of the child in both family and community life.[24] Article 12, in particular, requires states to consider children and young people as citizens with both the capacity and the right to exercise agency rather than construing children as awaiting transformation into mature,

[22] Id, Art.5.

[23] A. Graham et al., "Progressing Participation: Taming the Space between Rhetoric and Reality." *Children, Youth and Environments*, vol. 16, no. 2, 2006, p.233. The full text of Recommendations issued by the Committee on the Rights of the Child during its 37th Session in Geneva on 17 September 2004 is available at: www.crin.org/docs/resources/treaties/crc.37/Recommendations.doc.

[24] Id., p. 234.

rational and competent adults.[25] Moreover, in terms of policy and practice, it is important to understand that the right to participate is not static or fixed. Instead, the right to participate expands with the increasing maturity of the child, which implies that the processes enabling participation must be adapted according to the child's evolving capacity.[26]

Second, a substantial proportion of the participation right afforded by the CRC can only be exercised if mechanisms are in place to facilitate the participation of children. These mechanisms are required to negotiate access to the personnel, bureaucracies, policies, processes, systems and facilities that govern these areas of public life.[27] Many commentators have pointed out that Article 12 of the CRC poses serious challenges, both in practical terms concerning how to hear and act upon what children say and in conceptual terms vis-à-vis how to elevate their social status in ways that take account of their rights, their contributions to the social order and their citizenship.[28]

At this juncture, it is important to note that the CRC adopts an approach that recognizes the development of the individual and his or her evolving autonomy, in contrast to the status approach that focuses on chronological age alone.[29] In the real world, due to various factors, children of

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[25] Ibid.
[26] Ibid.
[27] Id., p. 235.
[28] Ibid.
[29] M. Brazier and C. Bridge, 'Coercion or caring: Analysing adolescent autonomy,' in M. Freeman (ed.), *Children, Medicine and the Law,* USA, Aldershot: Ashgate, 2005, p. 8 [hereinafter Freeman, *Children, Medicine and the Law*,]; G. Van Bueren, 'Children's rights: Balancing traditional values and cultural plurality,' in G. Douglass and L. Sebba (eds.), *Children's rights and traditional values*, Brookfield, USA: Ashgate, Dartmouth, 1998, p. 21. Philosophers also label children as incompetents "because they are supposed to be incapable of 'cognitive-complexity, to have unstable, transient values, no real concept of 'the good', of

the same age may have different capacities to form and express their views. These factors can generally be categorized as biological, internal or natural factors and external factors.

Although the ACRWC requires the relevant bodies to take the views of the child into account in judicial and administrative proceedings, in accordance with the relevant domestic laws of states, it does not deal with the application of the concept of evolving capacities of children and the right to participation. This distinguishes it from the CRC.

Based on all of the above, it is possible to conclude that children's right to participation not only requires states to protect this right and allow children to express their views, but also to provide various fora or opportunities for their participation. It is also significant to note that the right to participation may be exercised directly or indirectly. The right to participation does not guarantee children that their views will be admitted and considered in all cases, nor does it oblige states to do so. Rather, it entitles children to express their views on the matters that affect them, and it requires the relevant organs to take the views of children so expressed into account, in good faith or reasonably,[30] while making decisions.

1.3 Rationales

Under this subsection, the author will discuss some of the rationales for child participation. The central issue is: Why? In the 1980s and 1990s,

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death, of their future, or of their likely future values." See P. Alderson, 'In the genes or in the stars? Children's competence to consent,' in Freeman, *Children, Medicine and the Law*, p. 551.

[30] CRC Art. 3 (1), ACRWC Art. 4 (1).

citizens' participation increased in most states in the contemporary world. At the same time, the concept of child participation was included in the CRC and the ACRWC as one of the cardinal principles of these instruments, central to the rights of children. Various writings on the concept of child participation proliferated, and persistent attempts were made to promote this right. All of these developments have been influenced not only by the children's rights agenda but also by emerging theories of the new social studies of childhood that emphasize children's capacity as well as their dependency.[31]

Be that as it may, why do we need child participation? What is its benefit? This question reveals the rationale for child participation, and in fact, it has been suggested that there are several. The well-established ones include enhancement of skills, competence, capacity and self-esteem;[32] improved self-efficacy;[33] strengthening of social, judgment and negotiation skills through compromise, trial and error;[34] and increased protection, due to the existence of the opportunity to identify issues and be heard.[35] In addition, child participation is important from the point of view of the benefits that can result from adults and children talking together while making decisions. This

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[31] A. Graham et al., *supra* note 24, p. 233.

[32] Ibid., P. Alderson, *Young Children's Rights, Exploring Beliefs, Principles and Practice,* Jessica Kingsley Publishers and Save the Children, 2000 [hereinafter Alderson, *Young Children's Rights, Exploring Beliefs, Principles and Practice*].

[33] Ibid., V. Morrow, 'We Are People Too: Children and Young People's Perspectives on Children's Rights and Decision-Making in England,' *International Journal of Children's Rights*, 1999, vol. 7, 1999, p. 150.

[34] Ibid.

[35] Ibid., Alderson, *Young Children's Rights, Exploring Beliefs, Principles and Practice*.

enables adults and children to mutually propose and agree to decisions, thereby improving the chances of the decisions working.[36]

More often than not, rights and social justice discourses underline the identified benefits of child participation. These benefits also show us the importance of recognizing children's need for care, protection and guidance in the milieu of warm, respectful and reciprocal relationships.[37] This is most evident from the fact that the participation of children provides opportunities for them to learn that they have rights and responsibilities, to discern what their rights and responsibilities are, to make out which rights predominate in what contexts, and to become more cognizant of the idea that one's rights and freedoms can affect the rights of others.[38] It has also been argued that child participation has social benefits, as it contributes to an increased understanding of the democratic process and to the development of notions of citizenship.[39]

Legally speaking, the concept of children's right to participate in decisions on matters that affect their lives is firmly enshrined in the CRC on the basis of any one of the theories discussed above.

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[36] Ibid.

[37] Ibid., B. Neale, 'Dialogues with Children: Children, Divorce and Citizenship,' *Childhood*, 2002, vol. 9, no. 4, p. 455; N. Taylor, *Care of Children: Families, Dispute Resolution and the Family Court*, PhD thesis, University of Otago, Dunedin, 2005; C. Smart, 'From Children's Shoes to Children's Voices,' *Family Court Review*, 2002, vol. 40, pp. 307-319.

[38] Ibid., G. Lansdown, *Promoting Children's Participation in Democratic Decision-Making*, Florence: UNICEF Innocenti Research Centre, 2001; R. Hart, *Children's Participation from Tokenism to Citizenship*, London: UNICEF, 1992; P. Kirby, 'Involving Young People in Research,' in B. Franklin, (ed.), *The New Handbook of Children's Rights,* London: Routledge, 2003.

[39] Ibid.

2. Child Participation in Ethiopia

The Ethiopian population is very young, with an average age of about 17 years.[40] Children constitute about 50% of the total population. This can be estimated based on the fact that, children aged under 15 years of age constituted 44% of the population in 2004.[41] As this statistic left out children between 15 and 18 years old, it is easy to see that the proportion of the child population in the country reaches approximately 50% of the population if the number includes children up to 18 years of age. This makes the implementation of the regional and international conventions on the rights of the child especially significant. For this reason, the country ratified the CRC in 1991 and the ACRWC in 2000.[42] Ethiopia has also ratified some of the other instruments pertaining to child rights. It has ratified the Convention on the Elimination of the Worst Forms of Child Labour, ILO Convention No. 182, and the ILO Convention on Minimum Age (1973), No. 138.[43]

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[40] National Population Policy of Ethiopia, available at: http://www.un.org/popin/regional/africa/ethiopia/policy/policy.htm#AGE, consulted on 8 September 2008.

[41] Population Council, Child marriage briefing: Ethiopia, available at: http://www.popcouncil.org/pdfs/briefingsheets/ETHIOPIA.pdf, consulted on 8 September 2008.

[42] S. Yohannes and A. Assefa, Harmonization of laws relating to children Ethiopia, p. 3, available at: http://www.africanchild.info/index.php?file=Ethiopia%20final%20Sarah.doc, consulted on 18 September 2008.

[43] Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44 of the Convention, Third periodic report of States Parties due in 2003, Ethiopia, p. 13, available at: http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/512c282017f34921c12570b2003f5410/$FILE/G0544522.pdf, consulted on 10 September 2008 [hereinafter Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44 of the Convention, Third periodic report of States Parties due in 2003, Ethiopia].

The country has submitted all its required reports to the Committee on the Rights of the Child in accordance with Article 44 of the CRC. It submitted its first report in 1995, a second report in 1998, and a third periodic report in 2005.[44] In its concluding remarks about the second report, the Committee appreciated some of Ethiopia's developments with respect to the right to be heard, but also expressed concern that this right was not sufficiently respected, particularly in rural areas.[45] It expressed further concern about the fact that young children and adolescents are not always permitted to express their opinions freely. On the basis of these concerns, the Committee recommended that Ethiopia strengthen its efforts to ensure that children's views are given due consideration in the community, the family, schools, courts and relevant administrative and other settings, in accordance with Article 12 of the convention.[46]

With all of this as background, the paper will engage in an examination of Ethiopia's legal regime relating to child participation. However, this examination must be preceded by a discussion of the challenges of child participation in this country, as this will provide context

[44] Id., p. 7; Committee on the Rights of the Child, Twenty-sixth session, Consideration of reports submitted by State Parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child, available at: http://www1.umn.edu/humanrts/crc/ethiopia2001.html, consulted on 10 September 2008; Ethiopia Reporting History, available at: http://www.bayefsky.com/pdf/ethiopia_t3_crc.pdf, consulted on 8 September 2008.

[45] Committee on the Rights of the Child, Twenty-sixth session, Id.; Committee on the Rights of the Child, Forty-third session, Report on the Forty-third session, Geneva, 11-29 September 2006, p. 30, available at: http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC_C_43_3.doc, consulted on 10 September 2008 [hereinafter Committee on the Rights of the Child, Forty-third session, Report on the Forty-third session].

[46] Ibid.

for the study. The cultural set-up is central to these challenges in Ethiopia.[47] Generally speaking, the country's culture is not favorable for child participation.[48] Although children are viewed as needing care and protection, their participation is not welcomed. Sayings such as '*lij yabokaw le'erat ayibekam*'[49] '*lelij kesakulet*'[50] and '*lelij fit atistu*'[51] have dominated and shaped the parent-child and community-children relationships for centuries.[52] As a result, children have been viewed as knowing nothing. They are treated as if they would be rude or go beyond limits if given the chance to say something. These are the connotations of these sayings. In the words of Tekilemariam, the culture in Ethiopia shows that 'children are not seen as ones that have views and opinions.'[53] Moreover, a child who challenges others to express his or her views is regarded as undisciplined.

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[47] Teklemariam, S. The concepts of SC Norway, at WWW https://www.reddbarna.no/default.asp?V_ITEM_ID=11777&bandwidth=low , (consulted on 15 September 2008) [Teklemariam, herein after].

[48] Ibid. This is also observed by the Committee on the Rights of the Child. In the third country report, 'the Committee remains concerned that traditional societal attitudes appear to limit children in freely expressing their views in the community, schools, courts, or within the family.' Committee on the Rights of the Child, Forty-third session, Report on the Forty-third session, Geneva, 11-29 September 2006; 'The Committee recommends that the State party strengthen its efforts to ensure that children's views are given due consideration in the community, the family, schools, courts and relevant administrative and other settings, in accordance with article 12 of the Convention.'

[49] This means that a child does not know even what amount of food is enough for a family for a dinner, let alone other things.

[50] If you are not serious with children, they will fail to respect you.

[51] Do not give opportunity to children.

[52] For more sayings, see Save the Children, Child situation analysis for Ethiopia, May 2004, p. 45, available at: http://www.savethechildren.org.nz/ethiopia/publications/CHILDSITUATIONANALYSIS.pdf, consulted on 18 September 2008.

[53] Teklemariam.

In addition to a deep-rooted tradition that does not welcome child participation, the "lack of understanding of ... the concept of child participation" and the shortage of both financial and human resources present a great challenge in Ethiopia.[54] Therefore a great deal of work is required from all parties interested in child rights. A coordinated effort has the best potential to bring a sustainable and radical shift in the life of children in Ethiopia.

In the subsequent parts of this article, I will focus on the legal regime relating to child participation in Ethiopia. The study relates to the status of the CRC and ACRWC in relation to the FDRE Constitution, the Revised Family Code of Ethiopia (2000), the Criminal Procedure Code of Ethiopia (1961), and the Civil Procedure Code of Ethiopia (1965).

2.1. The status of the CRC and the ACRWC

As treaties or conventions become part and parcel of the law of the land upon ratification, the CRC and the ACRWC have become part of Ethiopian domestic law.[55] But their place in the hierarchy of the domestic laws of Ethiopia is a subject of controversy among scholars. Some argue that human rights conventions have higher status or, at least, equal status to the FDRE Constitution. This is based on the fact that Article 13 (2) of the Constitution requires that the human rights section of the Constitution,

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[54] Ibid.

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

Section Three, be interoperated in conformity with international human rights instruments.

Others argue that human rights conventions ratified by Ethiopia have the status of ordinary legislation because they are adopted in the same organ that makes ordinary legislation.[56] However, they may be said to be lifted to a constitutional status as some of their cardinal principles have been included in the FDRE Constitution.[57] Unfortunately, the right of child participation is not clearly incorporated into the Constitution. Therefore the status of this right is much more controversial. Some argue that it is a right emanating from ordinary legislation, while others see it as a fundamental right having equal status with others provided for in the Constitution. Given the rank of the organ that adopts international human rights instruments, I believe the former view is more strongly supported, as participation rights are not clearly embodied in the text of the Constitution.

Another point worth noting is that the CRC and the ACRWC are significant as the most important documents guiding child rights in Ethiopia. Together with the other human rights documents ratified by Ethiopia, they shall be used as an instrument of interpretation of child rights under the supreme law of the land, the Constitution.[58] The Constitution obliges any organ of the state, at the federal and regional levels, and particularly the executive and the judiciary, to respect, protect and enforce the rights of the child as provided therein and interpreted according to the CRC and

[56] Id., Article 55 (12). This placement is controversial. Others say it has equal status with the Constitution. See Ethiopian Law and the Convention on the Rights of the Child: A comparative study, p. 33, unpublished.
[57] Id., Article 36.
[58] Id., Article 13 (2); Ibid.

ACRWC.[59] The judiciary and the House of Federation are obliged to interpret the rights of the child under the Constitution in light of these international instruments.[60] The Constitution also nullifies any act, law, practice and decision of the government at any level if found to be contrary to the Constitution in general and the rights of the child provided therein in particular.[61] At this juncture, it is important to see whether by failing to make explicit reference to child participation, the Constitution fails to attach such significance to this right in a clear manner.

2.2 Child rights and the FDRE Constitution

The FDRE Constitution deals with the rights of children under Article 36. This article provides for some of the basic principles of the CRC and the ACRWC. The principles enshrined therein are the principles of the right to life, survival and development, as well as protection rights and the best interests of the child.[62] The Constitution also provides for the principle of non-discrimination based on the status of birth, in particular. It prohibits discrimination against a child based on whether she or he is born within wedlock.[63]

As far as the other cardinal principle of the CRC and ACRWC and the focus of this article is concerned, the Constitution makes no explicit reference. Hence, the constitutional nature of the right is disputable as

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[59] Id., Article 13 (1).
[60] Id., Article 13 (2).
[61] Id., Article 9 (1).
[62] Id., Article 36.
[63] *Id*, Articles 36 (5), Article 25; Rights under the Convention on the Rights of the Child, at WWW http://www.unicef.org/crc/index_30177.html, (consulted on 18 September 2008).

aforementioned. However, the Constitution has some important provisions that imply a right to child participation. To begin with, a general right of participation has been recognized as one of the fundamental rights and freedoms for persons of all ages and sexes under the Constitution.[64] Child participation can be inferred from this general participation right, as it is guaranteed to all persons regardless of their age, among other things. The Constitution not only provides the right to participation but also clearly states that the government has the duty to respect, protect and enforce this right.

The Constitution is also significant as it expressly states that, sometimes, the obligation of the state is not limited to allowing and protecting the participation right of the people. It goes farther to impose rules regarding mandatory consultation of the people.[65] By implication, this may be taken to mean that children have the right to participate and the government has the duty to respect, protect, and enforce this right. This is acceptable, as these rights are stipulated to apply to all regardless of age, and they should be harmoniously interpreted as applying to children just as '[t]he principles outlined in ... the international human rights framework apply both to children and adults.'[66] The only provision in the FDRE Constitution that limits child participation is Article 38 (1) (b). This provision sets participation in voting for elections only upon attaining 18 years of age.[67]

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[64] Id., Articles 27, 29 (1) (2) (3), 30, 31, 35 (3) (6), 38, 39 (2), 43 (2), 89 (6) (7).
[65] Id, Articles 35 (6), 43 (2).
[66] UNICEF, Understanding the Convention on the Rights of the Child, at WWW http://www.unicef.org/crc/index_understanding.html , (consulted on 12 September 2008) [Understanding the Convention on the Rights of the Child, herein after].
[67] Children are also not allowed to hold public office. See FDRE Constitution, Article 38 (1)(a). Any person is eligible for candidature at the age of 21. See the Proclamation to ensure the conformity of the electoral law of Ethiopia with the Constitution of the Federal

From the above arguments, it is possible to conclude that children's right of participation and right to be consulted are recognized in the Constitution, and that the rights recognized in the Constitution shall be understood in light of the CRC and the ACRWC. As indicated above, the Constitution situates these instruments, placing them in the position of providing the guiding principles of interpretation. The Constitution unequivocally imposes a duty on any organ of government to interpret the rights under the third chapter of the Constitution, including the right to participate and be consulted, in conformity with the relevant international instruments ratified by Ethiopia. Accordingly, all the elements of the relevant provisions of the CRC and ACRWC need to be considered in order to interpret the concept of child participation under the Constitution so that the Constitution itself accommodates children's participation rights.

Finally, it is important to note that the FDRE Constitution has room and flexibility for inclusion in the Ethiopian legal system of child participation rights according to the CRC and the ACRWC, with all its developments. This is because the mechanism of interpretation requires the interpreter to see the developments at the global, regional and domestic levels relating to child participation rights in order to give sound current interpretation of the rights under the Constitution, in case of confusion and absurdity during enforcement of the rights.

Democratic Republic of Ethiopia, Proclamation No.111/1995, Article 38 (1)(c). They can, however, form associations if the special and general requirements of some associations allow them to do so. See Id., Article 38 (2)-(4). A person less than 18 years of age cannot recall an elected representative. National Electoral Board of Ethiopia, Regulation No. 2/1999, Article 5 (2)(c).

Be that as it may, it is advisable to make explicit reference to Article 36 of the Constitution in order to avoid possible arguments and confusion for failing to explicitly include participation rights, and in order to be in accordance with the international practice and rationale for adopting a separate Convention on the Rights of the Child. In addition, such explicit reference lifts the status of the right to a constitutional level within the legal system.[68]

In the next subsection, this paper will discuss the importance or status given to child participation under the federal laws. As a result, the discussion is limited to the FDRE Constitution, the Revised Family Code of Ethiopia, the Criminal Procedure Code of Ethiopia, and the Civil Procedure Code of Ethiopia.

2.3 Child participation in court proceedings

One of the areas where child participation should be sought is in the case of court proceedings involving children. This is provided for explicitly as one of the venues for child participation under Article 12 (2) of the CRC and Article 4 (2) of the ACRWC. However, the former specifies this venue as one of the most significant, using language that emphasizes its importance, i.e., "the child shall *in particular* be provided the opportunity to be heard in any judicial ... proceedings affecting the child."[69] The opportunity to be heard in

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[68] A separate Convention on the Rights of the Child is necessitated by and is provided to modify or adapt international human rights standards to meet the needs and concerns surrounding the rights that are distinct for children. The CRC, for instance, brings the human rights of children articulated in other international instruments together, articulates them more completely and provides a set of guiding principles that greatly shapes our outlooks towards children. See Understanding the Convention on the Rights of the Child, *supra* at note 67.
[69] *Ibid*. Emphasis mine.

such proceedings may be taken in accordance with the procedural laws of the respective countries' domestic laws, as noted above. Furthermore, the participation may take two forms. The child may participate in such proceedings directly, by himself, or indirectly, through a representative.

Following this line of analysis on the theme of child participation in court proceedings, the subsequent sections discuss the federal laws of Ethiopia.

2.3.1 The FDRE Constitution and child participation in court proceedings

The FDRE Constitution clearly entitles *"[e]very one* to bring a justiciable matter to ... a court of law or any other competent body with judicial power."[70] However, this constitutional principle entitling every person to bring a legal action is restricted under the procedural laws to mean capable persons.[71] A person who is less than 18 years of age lacks capacity under the Ethiopian law, as she or he is a minor.[72] The child is "placed under the authority of a guardian" "as regards the proper care of his [or her] person" and "is represented by his [or her] tutor" "concerning his [or her] pecuniary interests and the administration of his [or her] property."[73] Therefore, under

[70] FDRE Constitution , Article 37 (1). Emphasis mine.
[71] The Civil Procedure Code of Ethiopia, Decree No. 52/1965, *Negarit Gazeta*, Extraordinary Issue No. 3 of 1965, Articles 31-33 [hereinafter, Civil Procedure Code]; The Civil Code of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, Extraordinary Issue No. 2 of 1960, Articles 193, 197 and 198 [hereinafter, Civil Code]; The Federal Family Code of Ethiopia (FFC), Proclamation No. 213/2000, *Federal Negarit Gazeta*, 6th Year Extraordinary Issue no. 1, Article 310 (a).
[72] FFC, Article 215.
[73] *Id.*, Article 216.

this principle, a child cannot bring a legal action under these laws to protect his rights, although the Constitution seems to entitle such right to "[e]very one" regardless of age. Though one may imagine that such a restriction under the procedural laws is unconstitutional, in the light of Art 9 (1) of the Constitution, the vast majority of practice shows otherwise. There are instances, however, where children were allowed to bring actions to protect their interests or rights despite their legal incapacity.[74] To cite one such example, a direct action was brought when six children filed an action claiming their share from the inheritance of their deceased father and the case went up to the Supreme Court of the Addis Ababa City Administration.[75]

When the procedural laws prohibit a child from bringing a legal action to the courts, how can he or she enforce his or her rights? This can be done only through a representative. As far as the FDRE Constitution is concerned, representation can be made by legal counsel in the following manner. A child may be represented by a legal counselor. This legal counselor may be appointed by the persons who can represent the child in order to enter into legal service contracts in case of civil proceedings, and either by such persons or by the state in criminal cases.[76] In civil cases, since a child has no capacity

[74] Save the Children Alliance, Orphans and Vulnerable Children Affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia, 2001, p. 17, available at: http://www.aidsalliance.org/graphics/OVC/documents/0000206e00.pdf, consulted on 10 September 2008 [hereinafter, Orphans and Vulnerable Children Affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia].

[75] *Ibid*. It is important to note that although the case is important to participation, it is not without defects. It has been criticized because the judgment disregarded the best interests of the child. *Ibid*.

[76] FDRE Constitution, Article 20 (5).

to enter into a contract,[77] he or she cannot hire the service of a legal counselor by him- or herself. This limits the right of children to participation to cases in which the child has a guardian and/or tutor that is willing to represent the child or hire a person to exercise such power or a legal counselor, or where the legal counselor is willing to provide his or her service regardless of the legal effects of such representation or contracts, as he may be prevented from requiring the performance of the contract from the minor child

In criminal cases, the same story is true, save for the addition of the possibility of appointment of a legal counselor. The government may appoint a legal counselor. The FDRE Constitution provides that a state-appointed legal counselor is available, but only where the child[78] has no "sufficient means to pay for" such service and "miscarriage of justice would result" unless represented by a counselor.[79] At this point, it is possible to see that these two requirements silence the voice of the child if they are applied cumulatively. Unless a child is represented by a legal counselor in criminal proceedings, the likelihood of miscarriage of justice is greater. A number of reasons can be provided to substantiate this argument. First, it is difficult for any layman to understand the law to a reasonable extent, and argue and challenge the evidence introduced against him or her by a public prosecutor,

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[77] Civil Code, Article 1678 (a).

[78] FDRE Constitution, Article 20 (5). In criminal cases, children less than nine years old are not criminally liable, children above nine and below 15 years are responsible and tried with special procedures, and children above 15 years of age are tried in the same way as adults. See The Criminal Procedure Code of Ethiopia, Proclamation No. 185/1961, *Negarit Gazeta*, Extraordinary Issue No. 2 of 1960, Article 171 [hereinafter, The Criminal Procedure Code] and The Criminal Code of the Federal Democratic Republic of Ethiopia, *Proclamation No.414/2004*, Article 52.

[79] FDRE Constitution, Article 20 (5).

who is a legal expert. This difficult technical task requires proper knowledge of the law. Children are even less likely to be equipped for this than adults. Hence, a child is always given the right to participate through a state-appointed counselor in a criminal case.

Secondly, although there is a special procedure for young offenders in Ethiopia, practical adherence to this procedure is minimal.[80] Most children are being “tried in the same court of law that tries adult cases by the same judges.”[81] For this reason, it has been submitted that although it may be theoretically possible to think so, it is “difficult (if not impossible) for members of the bench to be ‘double faced’” in practice.[82]

Thirdly, most of the judges are not experts in child law. Therefore they may need assistance in ascertaining, promoting and enforcing the best interests of the child, as the courts must also be guided by this constitutional principle. In this, the presence of a legal counselor in all criminal cases will help the court to discharge its duty to promote, protect and enforce the best interests of the child while dispensing justice in child-related cases. This reasoning may also be forwarded to argue that children with no guardian, tutor or volunteer legal counselor should be represented by an institution, not necessarily the state, in civil cases.

Fourthly, although the law has a special informal procedure for criminal cases involving children, such cases are not always entertained in

[80] Orphans and Vulnerable Children Affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia, p. 14.
[81] Ibid.
[82] Ibid.

informal ways.[83] Though the country has made an effort to establish child-friendly courts in all regions, in practice cases involving children are decided in formal proceedings in many courts.[84] These formal proceedings are intimidating to children, making it more difficult for them to express their views properly. They need the assistance of a legal counselor.

For the aforementioned reasons, a child who cannot pay for legal services in criminal cases has to be represented by a state-appointed counselor so that justice will be served properly. An interpretation of the Constitution is advisable for any organ entrusted with such interpretation and committed to promoting and enforcing the best interests of the child.

2.3.2 The Revised Family Code of Ethiopia (2000) and child participation in court proceedings

The Revised Family Code of Ethiopia (2000)[85] provides some space for child participation in court proceedings. It allows for both direct and indirect participation. Direct participation refers to the direct involvement of the child in court proceedings with no representation. This happens in adoption cases, custody cases and appointment of guardian or tutor cases. In other cases, however, children may participate indirectly through their representatives. Let's begin with the case of direct participation:

2.3.2.1. Direct participation

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[83] Ibid., p. 15. See Criminal Procedure Code of Ethiopia, Article 176 (2).

[84] Orphans and Vulnerable Children Affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia, p. 15.

[85] The Revised Family Code Proclamation, No. 213/2000, *Federal Negarit Gazeta*, Extraordinary Issue No. 1/2000 [hereinafter RFC].

a) Adoption cases

Under chapter ten, the Revised Family Code of Ethiopia regulates issues relating to adoption. In adoption cases, this Code provides that a child to be adopted must be given the right to be heard before the court under specific circumstances.[86] The child has the right to express his or her opinions about the adoption, and the court is obliged to seek them. Furthermore, the court has the duty to take the opinion of the child, if any, into consideration in making decisions about the adoption of the child, among other things.[87]

However, the law-maker has not clearly provided for the child's right to be heard. Articles 191 (3) and (4) and 194 (3)(a) are confusing on this matter. It seems that the child is primarily entitled to be heard in adoption cases if two conditions are satisfied. The first condition is that the consent of both parents cannot be obtained. This may happen where both parents are there but one is not willing to give his or her consent to the adoption, where one of the parents is "dead, absent, unknown or incapable to manifest his will,"[88] or where the child has no ascendant who is capable of giving his consent.[89] The second condition is that the child be above 10 years of age.[90] A close reading of Article 194 (3)(a) makes matters clear. It requires the court to hear what the

[86] Id., Articles 191 (3) and 194 (3)(a).
[87] Id., Article 194 (3).
[88] This is not stated clearly, but if the child should be heard when one of the parents is unwilling to consent, there is an even stronger reason that he or she should be allowed to participate when one of the parents is dead, incapable or unknown. In this situation, only one parent is consenting, which is a situation similar to when both parents are present but one is not willing to give consent.
[89] In such situations, hearing to the child's opinion may be very helpful to the court in adjudicating what is in the best interests of the child in the case at hand.
[90] RFC, Article 191 (3).

child thinks of the adoption in all cases except where the adopter is the government or a private orphanage, or where the adopter is a foreigner.[91]

Finally, in relation to adoption, it is important to understand that a child may bring action to a court for revocation of adoption by himself.[92] The Revised Family Code does not provide a minimum age for the exercise of the right to participation by the child in revocation of adoption cases. Regardless of age, "the adopted child" is entitled to petition the court of law for revocation of his or her adoption.[93] The court is also obliged to receive such petitions and evaluate the genuineness of the claim.[94] This may be lauded as being progressive insofar as it allows a wider range of children to benefit from the right to participation. This approach clearly reflects Article 12 and Article 5 of the CRC, which are not based on age but on the evolving capacity of the child.

b) Custody of children

The other area where child participation is reasonably expected is in cases of child custody. Under the Revised Family Code of Ethiopia, the court handling divorce proceedings is required not only to decide on the divorce itself but also on its consequences, particularly on the "custody of children, care of their education, health, maintenance and the rights of the parents and the children to visit each other," if any.[95] While deciding on the latter issues,

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[91] Cumulative reading of RFC Articles 192, 193 and 194 (3)(a).
[92] Id., Article 196 (1).
[93] Ibid.
[94] Id., Article 196 (2).
[95] Id., Article 113 (1).

the court must take some factors into consideration. These factors are related to the parents' situations, i.e., their income, age, health and living conditions, and to the children, i.e., their age and interests.[96] In discharging its duty, the court is required to know the opinions of the children as to, for instance, their preference of custodial parent, before deciding upon the same. The court can discover the opinions of the children only if the children's right to express their views and to be heard is respected. Otherwise it is very difficult for the court to decide what is in the best interests of the child. Hence, one can and should introduce a reasonable degree of the right of the child to be heard into such proceedings.

c) Appointment or removal of guardian or tutor

Child consultation should also be conducted by the court in cases of someone's appointment or removal as a guardian or tutor of a child.[97] However, such consultation is left to the discretion of the court. The court is to consult the child only "[w]here it thinks fit."[98] Such open vagueness has both advantages and disadvantages.[99] The advantage lies in the fact that it gives the court broad discretion to allow child participation, which is not permissible in cases where a certain age limit is set. For instance, a 10 year old child may be as capable of forming and expressing his or her opinion as a 15 years old child. In such cases, a court handling matters relating to the appointment or removal of a guardian or tutor has the power to consult the

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[96] Id., Article 113 (2).
[97] Id., Article 249 (2).
[98] Ibid.
[99] See G. Lansdown, *Promoting Children's Participation in Democratic Decision-Making*, 2001, Florence: UNICEF Innocenti Research Centre, pp. 49-53.

child. The disadvantage is that courts may prejudice the right of the child, as the court also has full discretion to decide on his or her fitness to be consulted. When is a child considered "fit" to be consulted? But Ethiopia's third report stated that "the views of the child shall be invariably heard in the case of decisions regarding the appointment or removal of guardian."[100] But such an interpretation is far from what the law says on its face. If the intention of this provision is as indicated in the report, judges should interpret it in the same manner.

2.3.2.2 Indirect participation

The Revised Family Code provides for indirect participation of the child. The child is to be represented in expressing his or her views and opinions in matters that concern him or her. The manner in which children's views are to be expressed is examined below.

a) Participation through parents, relatives, public prosecutors and other interested parties

In principle and by law, parents are the guardians and tutors of their children.[101] Therefore parents are responsible for the necessary care of their children and their pecuniary and property interests as guardians and tutors. In exceptional cases, guardianship and/or tutorship may be assigned to one

[100] Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44 of the Convention, Third periodic report of States Parties due in 2003, Ethiopia, p. 21.
[101] RFC, Articles 219-220.

parent, to relatives or to other persons, as the case may be.[102] These persons may represent a child in any action relating to the protection of matters of the child. For instance, the tutor can represent a child in bringing a legal action relating to the child's property. The question is: How can a child enforce his rights if the action or omission of his or her tutor infringes upon them? To deal with such occurrences, a rule that allows children direct participation should be devised. Similar concerns may be raised about a guardian as well.

At this juncture, it is important to consider the times when relatives of a child, as representatives, play an important role in protecting the child's rights, even if they are not legal guardians or tutors. A child's ascendants, brothers and sisters above 18 years of age can represent the child before an Officer of Civil Status in opposition to marriage due to violation of one of the essential conditions of marriage, i.e., consanguinity or affinity.[103]

A public prosecutor can also represent a child, but not in court proceedings. Rather, the public prosecutor can represent a child before an Officer of Civil Status where a marriage is to take place in violation of any one of the essential conditions of marriage, for instance, in cases of marriage at an early age.[104]

Other organs may also represent children in court proceedings and before an Officer of Civil Status.[105] Such organs include non-governmental organizations or government institutions working on behalf of children's rights. If, for instance, a child is to marry before reaching the legal age, such

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[102] Id., Articles 219-234.
[103] Id., Article 18 (b).
[104] Id., Article 18.
[105] Id., Article 18 (a).

interested parties can oppose the marriage and bring an action before the Officer of Civil Status and courts.[106] The same applies in revocation of adoption cases.[107]

Finally, a government organ authorized to monitor the well-being of the child may appear before a court to help ensure that the rights of the child are protected by the court of law. This is particularly important in adoption cases.[108]

2.3.2.3 The Revised Family Code and child consultation in all important matters: The case of the tutor

A child must be consulted by a tutor "in all important acts concerning him" or her, provided that the child is not less than 14 years of age.[109] Although this may seem like a good thing, this participation is very limiting. In particular, it fails to address the following issues which may be used against the consultation right of the child. First, it does not specify what constitute "important acts concerning" a child. And secondly, it does not indicate who is to decide whether a certain act is "important." Thirdly, the child to be consulted must be at least 14 years of age, which does not necessarily conform to the evolving capacity of the child standard as provided in Article 5 of the CRC.

2.4. The Civil Procedure Code of Ethiopia

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[106] Ibid.
[107] Id., Article 196 (1).
[108] See Id., Articles 192-196.
[109] Id., Article 291 (1).

The issue of who can be a party to a civil action is addressed by the Civil Procedure Code of Ethiopia.[110] According to this law, a person is required to be capable under the law to sue or be sued.[111] One of the grounds of incapacity under Ethiopian law is minority.[112] A minor is a child "who has not attained the full age of eighteen years."[113] Therefore, a person under 18 is not allowed to bring legal action.[114] Therefore the only way for children to sue or being sued is through a representative.[115] In the absence of such representation, a court cannot proceed to entertain the case. In such situations, "the case shall be stayed until a legal representative is appointed in accordance with the relevant provisions of" applicable laws.[116]

2.5. The Criminal Procedure Code of Ethiopia

The Criminal Procedure Code of Ethiopia obliges the lower courts to appoint a legal counselor for a young person, but only in limited instances. Such appointment is required only if one of the following conditions is fulfilled: the child has no parents, guardian or "other person *in loco parentis*" to represent him or her; or the offence the child is charged with is a serious one, i.e., "carries a penalty of over 10 years rigorous imprisonment or death as a possibility."[117]

[110] Civil Procedure Code, Article 32.
[111] Id., Articles 3 (h) and 32.
[112] Civil Code, Article 172; RFC, Articles 215-156.
[113] RFC, Article 215.
[114] It is important to note at this juncture that a child may be emancipated and be deemed an adult in some instances. See Id, Articles 310-314.
[115] Civil Procedure Code, Article 34 (1).
[116] Id., Article 34 (2). The applicable law, in our case, is the RFC.
[117] Criminal Procedure Code, Article 174.

This shows that children with no parents, guardians or "other person *in loco parentis*" are to be represented in all criminal proceedings, regardless of the nature of the crime and whether or not miscarriage of justice may occur.[118] Such representation is paid by the state, and the understanding is that a case involving children should always be treated as a case in which "miscarriage of justice" is a risk in the language of the Constitution. However, children with parents have more limited representation options, as a state-appointed legal counselor is available only if the crime they are charged with is a serious one.

With respect to children with parents, two points are also worth considering. First, the representation is to be made regardless of the parents' ability to pay for legal services in all serious offence cases. This is slightly different from the Constitution. Second, children charged with other offences are not guaranteed representation. For such children, interpretation of the Constitution as suggested above is beneficial. For instance, a child charged with a crime carrying imprisonment for nine years, whose parents cannot pay for legal counsel, should also be given the chance to have a representative appointed. The laudable part of the Criminal Procedure Code, however, is the part that guarantees that when a child offender is charged and has no other person to represent him or her, the court is obliged to inquire into the

[118] Save the Children Alliance, Orphans and vulnerable children affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia, 2001, p. 14 [hereinafter, Orphans and vulnerable children affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia].

existence of a parent, guardian or “other person *in loco parentis*” with a view to the child’s representation.[119]

Finally, practice shows that children are not participating or represented at the investigation stage of criminal cases.[120] This also curtails their interests and could expose them to violation of their rights, because they may be interrogated without the help of any representative. Any statement a child gives without any legal counseling may be presented against him or her before the court per Article 27 (2) of the Criminal Procedure Code.

During the hearing, a child is given the chance to answer the charge or accusation and also to request the appearance of witnesses.[121] In assessing the guilt and deciding the punishment in criminal cases, the court is expected to hear the views of the accused.[122] This equally applies to the case of children.[123] However, children should preferably be assisted once again by a legal counselor who can help them to express their views. This is useful not only for the protection of the child, but also for the court. The child gets his or her views considered by the court and the court also discharges its duty to promote, protect and enforce the best interests of the child, and serve justice.

1. Child participation in court proceedings as witnesses

Book 4, Title One, Chapter 4 of the Criminal Procedure Code of Ethiopia does not fix the minimum age for a child witness. A child can be a

[119] Criminal Procedure Code, Article 173.
[120] Orphans and vulnerable children affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia, p. 14.
[121] Criminal Procedure Code, Article 176(3)(6).
[122] Id., Articles 176 (7), 177, 148 and 149.
[123] Ibid.

witness based upon his level of maturity. If she or he is mature enough to express him- or herself about what happened or what he or she has seen, the court may allow the child to be a witness. This has also been confirmed in practice.[124] The same is true for cases under the Civil Procedure Code.[125] However, it must be noted that for such participation to take place, the discretion lies with the court. In its first report, the government stated that it is committed to providing a minimum age by which children may participate as witnesses in court proceedings.[126] As the drafting of a new procedural code is underway, consideration of the age cut-off may be made and we may have a defined minimum age in the future. But this matter requires a cautious approach. It should not be taken to mean that age is to be set as regards matters concerning the child. In such matters, the evolving capacity of the child rule under Article 5 of the CRC should be used.

3. Child Participation in Practice in Ethiopia

The Federal Government of Ethiopia is working towards enabling children to participate in different ways. The most significant development is the establishment of a Child Parliament in Konso, in Southern Nations, Nationalities and Peoples' Region of Ethiopia in 2006.[127] This is a model

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[124] Committee on the Rights of the Child, Fourteenth session summary recording of the 350th meeting at www http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a073212afe95a37ac12564290032b932?Opendocument, (consulted on 15 September 2008) [Hereinafter, Committee on the Rights of the Child, Fourteenth session summary recording of the 350th meeting].

[125] Ibid.

[126] Ibid.

[127] Institution of the Ombudsman, Ethiopia, Konso Children Parlament [sic] available at http://ethombudsman.org/am_publications.php?id=17, accessed on 15/09/08.

parliament to be established throughout the country in the future.[128] It was established in recognition of "the need to raise the participation of children in development issues thereby increasing their confidence."[129] A number of child parliaments have been established since then in various parts of the country. There are now nearly 80 children's parliaments in major cities of the country, each consisting of about 100 child members, and the representatives of these parliaments often attend meetings in the regional parliaments, regional and city council meetings in order to express their views and concerns.[130] Children also have the opportunity to express their views in public associations and Community Care Coalitions (CCC), as well as orphan children clubs.[131]

The Ministry of Education is also "actively encouraging the establishment of Student Councils in schools; as a result, children are now given the opportunity to get involved in the decision-making process of the

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[128] Ibid.

[129] Ibid. 'The major objectives of the Konso Child Parliament include: To provide a platform for the children for interaction and collective participation in local forums and decision making processes; [t]o help them develop and run specific projects and events that demonstrate ways in which the rights of the child, as enshrined in the Convention the Right of the Child (CRC), can be practically implemented; [t]o create opportunities for children to meet and exchange their views on what matters to them and what is happening in to their surrounding; [t]o share their opinions, experiences and ideas and learn from each other; [t]o present the voices of children in Woreda and Regional forums and in discussions and actions on child issues; [t]o transform events into processes of empowerment among the children in order to allow them to develop self-confidence, self awareness and self-esteem.' Ibid.

[130] Combined 4th and 5th Periodic Reports of the Federal Democratic Republic of Ethiopia to the UN Committee on the Rights of the Child (2006 – 2011), April 2012, p. 12 [hereinafter, Combined 4th and 5th Report of the Federal Democratic Republic of Ethiopia]

[131] Ibid.

educational system."[132] Furthermore, "children are participating in an education contest broadcast weekly on Ethiopian TV;"[133] children are given airtime to broadcast their own programs. Radio *Fana* and Ethiopian Radio also have a space for child participation. In addition, children were given the chance to participate "in the coordinating body and in the preparation of the National Plan of Action for Children."[134]

In addition to the aforementioned venues, various events and forums solicit the participation of children in affairs that affect them, such as the discussion of the draft comprehensive child policy, and events and celebrations such as the Day of the African Child and Universal Child Day.[135]

However, it is significant that child participation was omitted in the Poverty Reduction Strategic Program (PRSP) at the stage of formulation and implementation.[136] Furthermore, there was no reaction from NGOs on exclusion of children from participation in the PRSP consultation process.[137] Civil society and government actors reacted only to "a narrow range of

[132] Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44 of the Convention, Third periodic report of States Parties due in 2003, Ethiopia, p. 21.
[133] Ibid.
[134] Ibid.
[135] Combined 4th and 5th Report of the Federal Democratic Republic of Ethiopia, p. 12.
[136] N. Jones et al., Mainstreaming children into National Poverty Strategies: A child-focused analysis of the Ethiopian Sustainable Development and Poverty Reduction Program (2002–05), pp. 20-25, available at: http://www.idrc.ca/uploads/user-S/11345271331WP22Mainstreaming-final.pdf, consulted on 16 September 2008.
[137] Ibid.

issues" relating to the child.[138] There seems to be no improvement in this regards as far as the Growth and Development Plan (GDP) is concerned.

In addition to the aforementioned practices of participation, children are given some additional space for participation and free expressing. Children are empowered to employ different mechanisms to be heard. There are non-governmental organizations (NGOs) that are helping children to report abuse[139] and neglect, and child-led groups that participate in protecting child rights.[140] This includes school child rights clubs and child parliaments. To mention a few examples, the Association for Nation-wide Action for Prevention and Protection against Child Abuse and Neglect (ANPPCAN) has established 400 school child rights clubs and children's parliaments in three parts of Addis Ababa: Addis Ketema, Arada and Yeka sub-cities.[141] These clubs and parliaments have children as their members.[142] This NGO also allowed children to participate in all of its program offices in relation to the preparation, monitoring, evaluation and implementation of its child projects.[143] Children are also getting the NGO's assistance to prepare a children's magazine called Children's Voice, to be put out by children

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[138] Ibid.

[139] ANPPCAN-Ethiopia, Main Intervention Areas, available at http://www.anppcan-eth.org.et/index4.html, consulted on 16 September 2008 [hereinafter ANPPCAN- Ethiopia, Main Intervention Areas].

[140] Ibid.

[141] Ibid.; A. Wandega, We need meaningful child participation, Daily Monitor, 17 June 2008, available at: http://www.monitor.co.ug/artman/publish/opinions/We_need_meaningful_child_participation.shtml, consulted on 17 September 2008.

[142] ANPPCAN-Ethiopia, Main Intervention Areas, *supra* note 142.

[143] Ibid.

themselves and focusing on their rights.[144] Children are also participating in trainings about child rights, tutorial classes and experience sharing with the help of ANPPCAN-Ethiopia.[145]

The effort to encourage and realize child participation through groups such as school club is also part of the project plan of Save the Children Norway.[146] Child participation is said to be one of the main principles guiding their project in Ethiopia.[147] The Ethiopian Teenagers Forum in Addis Ababa is also an important forum for child participation.[148] The Forum consists of 200 young people and children from different elementary and high schools in Addis Ababa.[149]

4. Conclusions and Recommendations

4.1. Conclusions

It has been said that as children are people with dignity, their views should be listened to and respected. However, children in Ethiopia have been denied their rights to participation for various reasons. This problem has become a serious concern in modern times. Today, there are attempts to enable children to express their views on matters concerning them in many

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[144] Ibid.
[145] ANPPCAN-Ethiopia, Annual Report, 2007, p. 17, available at: http://www.anppcan-eth.org.et/ANPPCAN%20ETHIOPIA%20ANNUAL%20REPORT%20FOR%20THE%20YEAR%202007.pdf, consulted on 18 September 2008.
[146] Teklemariam.
[147] Ibid. The author has no access to resources on how the project is being implemented.
[148] The Ethiopian Teenagers' Forum Recommendations and Action Plan on the Millennium Development Goals (MDGs), 20 October 2004, available at: http://www.unicef.org/ethiopia/ET_media_PR_MDG.pdf, consulted on 16 September 2008.
[149] Ibid.

countries. Therefore Ethiopia has adopted the CRC and the ACRWC and has made them part and parcel of the law of the land.

The FDRE Constitution (1995), which has been praised for its long and relatively comprehensive list of human rights, provides for the rights of the child under Article 36. However, it does not specify the principles underlying the rights of the child in general and the principle of child participation in particular. Thus the constitutional placement of the principle of child participation is subject to argument.

However, an evaluation of the place of children’s right to participation in the Constitution and the legal system it establishes shows that there has been a steady move towards the right of child participation. The rules of interpretation of human rights under Article 13 (2) and the rights of participation available to all persons as enshrined in the Constitution, the Revised Family Code, the Civil Procedure and the Criminal Procedure Codes and other legislation, as well as the practice of the legal system, all evidence opportunities for child participation to be given effect.

4.2. Recommendations

First, the culture in Ethiopia has been unfavorable to child participation. Therefore, the government has much to do in order to create an acceptable environment in line with its international obligations. It has to involve adults, families and the community in changing perceptions concerning child participation. Second, the work done thus far, although appreciable, is insufficient.[150] Particularly, exclusion of children from participation in policy formulation is unacceptable for any reason. The government must consider child participation in such cases.

Third, laws such as the Revised Family Code, the Civil Procedure Code, the Criminal Procedure Code, the CRC and the ACRWC need to be implemented in full. In addition, the Civil and Criminal Procedure Codes and the laws that affect the interests of children should be amended in such a way that the manner, issues and scope of child participation is dealt with properly. The amendments should also be oriented to avoid uncertainty relating to child participation under existing law. Children have the right to participate in matters that concern them, and their participation should be an integrated part of government programs and plans. The government and NGOs should encourage child participation in all social and institutional spheres.

Some courts have made a good start in mainstreaming the professional assistance of social workers and psychologists in court proceedings, and significant improvements have been observed in ensuring child participation. This is because less intimidating court environments enhance children's participation in criminal and civil cases.

Finally, as child participation requires resources, the role of international and local NGOs is significant. The government and the NGOs in Ethiopia must cooperate for the full-fledged realization of child rights in general, and the right to participation in particular.

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[150] Committee on the Rights of the Child, Forty-Third Session, Report on the Forty-third session.

Compensation for Expropriation in Ethiopia and the UK: A Comparative Analysis

Daniel Weldegebriel Ambaye (PhD) ♣

Abstract

Land expropriation, also known as compulsory purchase in the UK, is a common practice both in the UK and Ethiopia. The purpose of this paper is to compare and contrast the valuation systems and compensation methods used in Ethiopia and the UK in a bid to establish the levels of compensation paid to those who have lost their property in the interest of society. The method employed is micro-comparison, as opposed to macro-level comparison which focuses on the general aspect of comparison of two legal systems. The findings of this study show that the principle of compensation as "the full recompense of the property lost" has been observed in the UK, while this has not been the case in Ethiopia, mainly because land has no value to the holder.

Key Words: Land, Expropriation, Compensation, Valuation

Introduction

Expropriation is a forced taking of land[1] by the state for public purpose activities and upon advance payment of compensation. Expropriation is an inherent power of the state that stems from the very existence of the state. Thus it is argued that national constitutions give only recognition of this right, rather than authorization. Expropriation assumes different names in different countries, such as compulsory purchase in the United Kingdom (UK), expropriation in continental Europe, and eminent domain in the United States (US). As Ethiopia follows the Civil Law legal system in its substantive laws,

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[1] In this article the word "land" refers to the surface of the earth and any fixture of value attached to it. Of course, in Ethiopia the ground and the buildings belong to two different bodies and are also treated as two different properties. On the other hand, in the UK and many other countries, land signifies the ground and the buildings and other properties thereon.

the term expropriation is used in this country. However, in this article, all three terms will be used interchangeably, as necessary.

The purpose of this article is to compare and contrast the valuation systems and compensation methods in Ethiopia and the UK. The method employed is micro-comparison as opposed to macro-level comparison, which compares two legal systems or a broader aspect of the legal systems. Section one acquaints readers with the concept of expropriation and its limitations; section two deals with the methodology and briefly describes comparative legal research. Section three is about conceptualizing valuation and compensation methods while sections four and five deal with the compensation methods followed in the UK and Ethiopia, respectively. Finally, section six presents observations and conclusions.

1. Conceptualizing Expropriation

Sustainable development requires governments to provide public facilities and infrastructure that ensure safety and security, health and welfare, social and economic enhancement, and protection and restoration of the natural environment.[1] An early step in the process of providing such facilities and infrastructure is the acquisition of appropriate land. Governments may use alternative land acquisition mechanisms such as purchase to secure land for public purpose activities. But it is impossible to rely completely on the land market as individuals may hold out and refuse to sell land required for projects or the land required may involve the interests of many owners, such that the exercise of expropriation power is warranted. And in some systems, land might not be put up for sale at all.

Black's Law Dictionary defines eminent domain as "the power to take private property for public use by the state, municipalities, and private persons or corporation authorized to exercise functions of public character."[2] An older legal dictionary, Bouvier, defines the term as "the superior right of property subsisting in sovereignty by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner."[3] Eminent domain is also defined in Nichols as "the power of the sovereign to take property for 'public use' without the owner's consent."[4]

In all the definitions, eminent domain or expropriation is described as the power of the sovereign state or agencies delegated by it to compulsorily take land for public use purposes. What is missing from the definitions is the "compensation" element. In some modern definitions of the terminology, the element of compensation is still left out. The FAO's definition of the term is a

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[1] FAO 2008. Compulsory Acquisition of Land and Compensation. *FAO Land Tenure Studies 10*. Rome: Food and Agriculture Organization of the United Nations. p. 1.
[2] BLACK, H. C. 1991. Black's Law Dictionary. 6th ed. St. Paul, Minn.: West Group.
[3] BOUVIER, J. 1984. Bouvier's Law Dictionary. 4th ed.: William S. Hein & Co.
[4] NICHOLS, P. 2007 (Sackman J. et al. (eds.)). *Nichols on Eminent Domain*. Matthew Bender & Company, Inc., 1.11.

good example: “Compulsory acquisition is the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society.”[5] It must be admitted, despite the accuracy of the foregoing definition and despite the fact that the payment of compensation is not a part of the *meaning* of eminent domain, it is still an essential element of the *valid exercise* of such power. The absence of an explicit provision requiring compensation for the taking of property should not be seen as evidence of a rejection of the compensation principle. On the contrary, compensation is a well-established feature of takings by eminent domain in most countries, as we shall see in the next section.

In Ethiopia, the first systematic definition of the concept was given in the 1960 Ethiopian Civil Code. The Code, under Article 1460, provides:

> *Expropriation proceedings are proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for public purposes*.[6]

In this definition, the idea of the taking of private land by the state or authorities without the consent of the owner for public purpose is clearly articulated. The phrase “expropriation proceeding” is employed here instead of the word “expropriation” because of a translation error from the original French version.[7] It is said that the original French version has defined the

[5] FAO, supra note 2, § 2.1.
[6] THE CIVIL CODE OF ETHIOPIA. *Negarit Gazeta: Gazette Extraordinary.* Proclamation No. 165/1960. (hereinafter Ethiopian Civil Code), Article1460.
[7] GETACHEW-DESTA. 1975. *Expropriation: Law and Practice.* Unpublished senior thesis at the Faculty of Law of Addis Ababa University. Addis Ababa, p. 6. The original draft of the Civil Code was prepared by the French comparative lawyer René David, in French, and then translated to English and from that to Amharic. There are many translation errors throughout the code, article 1460 being one of them.

term as follows: "expropriation is a procedure by which the administration obliges an owner to surrender to it the ownership of an immovable which it needs for the purpose of public utility."[8] And yet, like the above definitions, the rule noticeably fails to include the element of compensation in its definition.

Without undermining the above definitions, the following one may be considered as a working definition in discussing the details, as it is more comprehensive. This definition elaborates on the concept of eminent domain as follows:

> *… [I]t is the right of the nation or state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property without the owner's consent on paying the owner a due compensation to be ascertained according to law.*[9]

This definition seems more complete, since it includes all of the basic elements. First of all, expropriation or compulsory purchase is a right that is exercised by the state itself or its sub-branches such as municipalities and other public or private companies and people legally authorized by the state/legislature. In both England and Ethiopia it is the legislator who ultimately decides about the use of the expropriation power. The legislator,

[8] Ibid.

[9] AMENDOLA, F. C. et al. (eds.) 2006. Eminent Domain *Corpus Juris Secondum*. 29A C.J.S: Thomson West. § 2 (hereinafter C.J.S.).

through special statutes, authorizes government agencies, companies and private individuals to expropriate land for public purpose activities.[10]

The second element is that the state or the organs authorized to take such lands must follow a procedure. In the US, it is known as a "condemnation proceeding," while in other countries, mainly in Europe, it is referred to as an "expropriation procedure." The main idea is that the state must ensure due process of law before appropriating the property. In the UK, the process involves the administration and courts. Once an authorized public or private body, delegated by parliament, finds the activity for which the land is needed a public purpose, it serves a "notice of treat" on all interested parties. The notice should specify the amount of land and the purpose for which it is required.[11] If the interested party (owner or another) fails to respond to the notice, or if he disagrees on the modality and compensation amount, then the case will be transferred to the land tribunal for its final decision.[12] In Ethiopia, the process is purely administrative in nature. The "public purpose" determination as well as the decision to expropriate is carried out by the administration. Courts are involved only if there is a complaint about denial or insufficiency of compensation.[13]

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[10] Parliament in both Ethiopia and the UK provides expropriation power to public agencies (municipality, planning agencies, public utility agencies), to companies, or private individuals. The difference, while in the UK, parliament passed different legislations on the procedures and powers of these organs, in Ethiopia there is only one encompassing expropriation legislation that addresses all. Secondly, in Ethiopia, the power is vested only in the Woreda or the municipality. On the UK side see DENYER-GREEN, B. 2009. *Compulsory Purchase and Compensation*, London, EG Books. pp. 21-28.

[11] Id., p. 109-111; See also the English English Compulsory Purchase Act 1965., Sec. 5.

[12] Ibid.

[13] See FDRE Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation, Proclamation No. 455/2005. *Negarit Gazeta*. Year 11, No. 43.

The third point worth discussing is the issue of "public use." The doctrine of expropriation stands in opposition to the right of private property. Thus, expropriation requires the balancing of the public need for land, on the one hand, and the provision of land tenure security and the protection of private property rights on the other. In seeking this balance, expropriation principles include the requirement of "public interest" as one limitation on the state power of expropriation. This limitation or requirement is known by different names in various countries, such as public use, public benefit, public good, public interest, public purpose or public welfare.[14] The idea is that there may be exceptional times and places in which the very foundations of public welfare cannot be laid without requiring concessions from individuals. These individuals must give up their private property in the interest of the common good.

The usual debate in relation to public purpose is the scope of its applicability to private interests. There is little controversy if land is required by a public body or company in the interest of society. The problem arises when land is needed for a private use. It is the task of the legislator in Ethiopia to delimit the scope of the expropriation power of the state. The Civil Code of Ethiopia, which is no longer applicable in determining public purpose, for instance, declared that land could not be expropriated purely for

(Hereafter cited as Federal Expropriation Proclamation), Art 11. Whether the administrative decision on public purpose or other procedural matters is challengeable is not clear. Whereas the expropriation proclamation puts the possibility as open, the new lease proclamation prohibits any appeal to regular courts except on the insufficiency of amount of compensation (See Art. 29(3) of Urban Lands Lease Holding Proclamation, Proclamation No. 721/2011. *Negarit Gazeta*. Year 18, No. 4.

[14] FAO, *supra* note 2, p. 10.

financial benefit.[15] But under the current expropriation proclamation, public purpose is understood as an activity that may be carried out by public bodies, private investors or non-governmental organizations, and that provides *direct and indirect benefits* to society.[16] The "direct and indirect benefits" standard allows the Ethiopian government to exercise its expropriation power without limits.

In England, public purpose is not specifically defined as such in the statutes. Rather, the "public interest" definition which is stated in Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is considered to be binding in the UK as well:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*[17]

Concerning interpretation of the "public interest" requirement of the European Convention, it is said that

> "*in cases involving the transfer of property from one private person to another, the Court of Human Rights allows States to frame the purpose of a taking so broadly that it is difficult to imagine how a redistribution would serve a public interest in some way.*"[18]

The Court of Human Rights has stated that economic policy may justify the transfer of property amongst private persons. For example, the

[15] Ethiopian Civil Code, Art. 1464.
[16] See Article 2(5) of the Federal Expropriation Proclamation.
[17] COUNCIL-OF-EUROPE 1952. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Paris.
[18] ALLEN, T. 2008. Control Over the Use and Abuse of Eminent Domain in England: A Comparative View. In: MALLOY, R. P. (ed.) *Private Property, Community Development, and Eminent Domain*. Hampshire: Ashgate Publishing Limited, p. 78.

Court has found that "the public interest in managing the economy justifies consolidations of private agricultural land, majority buy-out rules in company law, and compulsory debt adjustment programs."[19] The Court has not given details on the relation between personal economic benefits and "public interest." Instead, it seems, it is enough for the Court if the state believes that the interference with property will have a positive impact on the economy.[20]

The appropriation or taking, mentioned in the definition, is also an important aspect or stage in the expropriation procedure. There are several types of appropriation which can occur through expropriation: total appropriation, partial appropriation, temporary appropriation, easement and right of way being the main ones. Under the Ethiopian Civil Code, the expropriation rules show that expropriation may be used either to acquire or terminate rights *in rem* such as servitude, usufruct or lease.[21] Expropriation differs from similar concepts like police power (as it is termed in the USA) or regulations that limit the use right of the property due to public health, public safety, etc., in that it involves the loss of the core constituent right of disposal. In the latter case, what the owner loses is some part of his use right over his property, while in the former case he loses the entire property, or part of it.

The fifth element of the definition is the absence of consent on the part of the owner. The power of eminent domain/expropriation is a sovereign power of the state to take private land without the consent of the owner. What makes expropriation different from other consensual types of land acquisition

[19] Ibid.
[20] Id., p. 80.
[21] See Ethiopian Civil Code, Articles 1460-61.

mechanisms is the complete absence of consent on the part of the property owner. It is true that many public and private organs do also collect land through purchase and similar transactions which are based on the willingness of the owner. Even if this is not applicable in Ethiopia, in England, for example, public authorities are delegated to try to buy land by agreement first, before they resort to compulsory purchase proceedings.[22]

But it may not be realistic to totally rely on the good will of the owner to get land for different reasons. The state, hence, resorts to coercive proceedings for two main reasons: first, owners may create a hold-out on public development activities, either by totally refusing to sell the land at any given price, or by requesting unrealistically high prices for the sale of their property; and second, public development projects which demand long and continuous land holdings involve the interest of many owners, and it may be difficult to reach agreement with all owners.[23] In both ways, owners try to impede the public good that could be attained by using their land.

The last principle included in the definition is the obligation of payment of fair compensation. This principle is the most important guarantee to individual property owners of their lawful possession. All major legal systems and constitutions include this concept as a guarantee to the owner and as a limitation on the power of government. The just compensation obligation requires that the state reimburse the owner for the value of the property interest taken and place him in as good a pecuniary position as if the property

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[22] Denyer-Green, *supra* note 11, p. 93. See also section 3 of the 1965 English *Compulsory Purchase Act*; and section 120 of the English *Local Government Act* of 1972.
[23] MERRILL, T. W. 1987. The Economics of Public Use. *Cornell Law Review*, 72**,** 61-116. p. 77.

had not been taken.[24] The assessment of compensation is extremely complicated, and countries incorporate different valuation methods in their expropriation legislation. Nevertheless, the existence of compensation makes expropriation tolerable and differentiates it from other government actions, such as confiscation, nationalization and eviction, in that these three are devoid of the state obligation to compensate for the taking.

2. Research Method

2.1 Comparative Law Method

Comparison is the operation that follows the determination of some identical or divergent elements of two phenomena. Zweigert and Kötz, authorities on comparative law, simply define the subject as "the process of comparing the different legal systems of the world."[25] Comparative law describes "*the systematic study of particular legal traditions and legal rules on a comparative basis*."[26] From this it follows that comparative legal research methodology is based on the comparison of legal systems or specific rules within two or more legal systems. Yntema has summed up the

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[24] This position was held first by a US Court (in Olson v. United States) and became an accepted principle in almost all countries. See details in EPSTEIN, R. A. 1985. *Takings, Private Property and the Power of Eminent Domain.* Cambridge: Harvard University Press, p. 182.

[25] ZWEIGERT, K. & KÖTZ, H. 1998. *An Introduction to Comparative Law*. Oxford and New York: Oxford University Press, p. 2.

[26] CRUZ, P. D. 1999. *Comparative Law in a Changing World.* London: Cavendish Publishing Ltd., p. 3. Italics in the original.

importance of comparative law as a tool of legal research as “the constant refinement and extension of our knowledge of law.”[27]

Researchers use the comparative method to compare and contrast the laws of different countries *on different scales*, *for different purposes* and *based on different factors/parameters*. Zweigert and Kötz identified four ways in which the comparative study of legal systems can be beneficial: as an aid to legislature, as a tool of construction (interpretation of national law), as a component of the curriculum of universities, and as contribution to the systematic unification of laws.[28]

Comparison may be made either at macro or micro levels. The terms *macro-comparison* and *micro-comparison* are now reasonably well established in comparative legal studies.[29] Macro-comparison refers to the study of two or more entire legal systems, while micro-comparison generally refers to the study of topics or aspects of two or more legal systems.[30] A macro-comparison study is done on such subjects as legal methods, procedures, roles of professionals, and style of codification. By contrast, in micro-comparison, researchers focus on a specific legal institution or problem to be solved.

Certain factors are considered to be relevant in legal comparisons at the macro or micro level, respectively. Grossfeld lists the following determinative factors for macro-comparison: the cultural, political and economic

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[27] YNTEMA, H. E. 1956. Comparative Legal Research: Some Remarks on “Looking Out of the Cave”. *Mich. L. Rev*, 54**,** 899. p. 901.
[28] Zweigert and Kötz, *supra* note 25, pp.16-26.
[29] De Cruz, *supra* note 26, p. 227.
[30] Ibid.

components of society and a particular relation of the state and citizens.[31] Comparativists have also stressed the need for "comparability", a similarity of the comparable legal systems in terms of stage of legal evolution. In this regard, Gutteridge, for example, notes that "[l]ike must be compared with like," by which he means that "the concepts, rules or institutions under comparison must relate to the same stage of legal, political and economic development."[32] A similar caution was provided earlier by another comparative lawyer, Echmitthoff, who argued for "*strict observance of comparability.*" The comparison must extend to the same evolutionary stage of the legal systems which are being compared.[33]

But this does not mean that the door is completely closed for the comparison of legal systems found at different stages of evolutionary development. Indeed, Gutteridge points out that ´comparability´ would not be a serious problem if the purpose of the comparison were to illustrate the differences that operate at different stages of legal, political and economic evolution. De Cruz also stressed this line of argument, stating that "the choice of legal systems (for comparison) must, ultimately, depend on the main aims and objectives of the particular comparative investigation."[34] Comparison of the *incomparable*, if made focused, may be extremely useful and illuminating.

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[31] GROSSFELD, B. 1990. *The Strength and Weakness of Comparative Law*. Oxford: Clarendon Press.

[32] GUTTERIDGE, P. H. 1941. *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research*, Cambridge: Cambridge University Press. P. 73.

[33] De Cruz, *supra* note 26, p. 221.

[34] Id., p. 222.

Concerning micro-comparison, it is true that the ´comparability´ requirement is also applicable, but on a less strict level. What is important is the purpose of the comparison. According to De Cruz, irrespective of their ´incomparability,´ two legal systems may be compared at a micro level if the intention is, for example, to trace the development of a particular institution, in a comparable society, at a comparable stage of its legal and economic development; or to illustrate the variety of responses to similar problems that exist in societies which have totally different perceptions of law, or rights, or have a different attitude to distributive justice or, indeed, a totally different conception of all three.[35] But caution is required when considering whether or not to impose a Western solution, if the comparison is between Western and non-Western legal systems.

2.2 Comparison: How

The specific purposes of the comparison method are determined by the existing relations between objective properties of the compared categories. The comparison implies the use of logical instruments, such as classification, definition and analogy.

In this paper, the comparative method is employed at the micro level. A micro-comparison is made of the compensation systems of Ethiopia and the UK. It is obvious that both countries are found at different stages of legal and economic development. Furthermore, the political ideologies which both countries follow with respect to property rights are divergent. In the UK, even if in theory it is said that the Crown owns all land, the private property right

[35] Id., p. 228.

(freehold) to land is accepted in practice. Individual landholders have the right to use, exclude, and alienate their land freely. In contrast, in Ethiopia land ownership is vested in the state and the people, a principle which is inherited from the previous socialist government and prohibits the sale and exchange of land.

Yet the reason for comparing these systems is to show in bold terms the difference between the Ethiopian compensation system and that of a typical Western country, where private ownership is sanctified. By presenting such differences, it is possible to show how far Ethiopian law lags behind other systems, and what changes may be made to minimize this difference.

In analyzing the difference between these compensation systems, we use a doctrinal research method which is confined to the analysis of laws and cases. In other words, this research does not involve empirical data analysis. Accordingly, from the Ethiopian side, the author has employed the Federal Constitution, federal and regional land-related legislation, and the Expropriation Proclamation and Regulation. From the UK perspective, the author reviews the statutes related to Compulsory Purchase, such as the 1965 Compulsory Act, the various Planning Acts, the Human Rights Act of 1998, the Land Compensation Acts of 1961 and Land Compensation Acts of 1973, and the Local Government Act of 1972. The author has also consulted secondary sources such as books and journals articles dealing with the compulsory purchase and compensation systems of both countries.

3. Conceptualizing Valuation and Compensation

3.1 What is Compensation?

Compensation is defined as "full indemnity or remuneration for the loss or damage sustained by the owner of the property taken or injured for the public use."[36] The compensation requirement under the law demands that the expropriator reimburses the expropriated for the property interest taken and places the latter in as good a pecuniary position as if the property had not been taken.[37]

Payment of compensation is justified by socio-political and economic theories. Compensation is a means of maintaining social justice. It protects the rights of politically under-represented groups,[38] requiring the government to bear the inconveniences resulting from expropriation. Hence, it is argued that no single individual should bear the cost of government projects that are intended to be for the common good.[39] There is no compelling reason to single out one individual and oblige him to shoulder the entire burden for the benefit of society at large. This also serves as a protection against arbitrary and unauthorized actions of the legislature or the executive branches of the government. As Joseph Sax has argued, a compensation guarantee serves as a check on self-interested acts of public authorities.[40]

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[36] C.J.S., *supra* note 9.
[37] EPSTEIN, *supra* note 24, p. 182.
[38] NDJOVU, C. E. 2003. *Compulsory Purchase in Tanzania: Bulldozing Property Rights.* PhD Thesis, Kungl Tekniska Hogskolan, p. 21.
[39] EPSTEIN, R. A. 1993. *Bargaining With The State.* New Jersey: Princeton University Press, p. 6.
[40] SAX, J. 1964. Takings and the Police Power. *Yale Law Journal,* 74**,** p. 36.

Economically speaking, if the government is forced to pay for what it acquires, this may discourage it from making unwise decisions.[41] It will always strive to make rational economic decisions that will bring beneficial development to all parties. In addition to this, the law has to give reasonable protection to the expectations of those who have relied on it. Should the law deny this protection and fail to protect property, owners might not be willing to take risks and invest in their properties, for the benefit may be reaped by others. Nor would banks be willing to lend money for such risky business.[42]

3.2 Object of Compensation

There are two theories concerning the amount or level of compensation that should be paid to the owner of the expropriated property: indemnity and taker´s gain theories. Under the indemnity principle, which is also called "owner's loss" theory, the owner is entitled to be put in as good a pecuniary position as he would have been if his property had not been taken.[43] This principle is predominant in most western countries, though there are slight variations. It assumes that a "dispossessed owner would go out into the market and purchase with his compensation money a property roughly [equal] to that which had been acquired, any incidental loss or expense being met from the proceeds of the disturbance claims."[44]

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[41] NDJOVU, *supra* note 38, p. 21.

[42] VIITANEN, K. 2002. Just Compensation in Expropriation. *FIG XXII International Congress.* Washington, D.C., USA: International Federation of Surveyor, p. 3.

[43] KRATOVIL, R. & FRANK J. HARRISON, J. 1954. Eminent Domain: Policy and Concept. *Cal. L. Rev.*, 42**,** 596-652, p. 615.

[44] NDJOVU, *Supra* note 34, p. 20.

In the United States, court decisions show that the compensation to be paid to the owner is not measured by the value of the land to the property taker.[45] In France, as in the USA, compensation does not reflect what the taker has gained, but rather, what the owner has lost. Moreover, its purpose is to compensate for the taking and not to pay the cost of equivalent reinstatement directly.[46] In France, in addition to the market value of the deprived property, loss of rent, trading loss, moving expenses, dismissal benefits, severance damages and the like are also coverable, although the taker gets nothing from this.

In England, in addition to the full compensation of the land acquired, the expropriating organ is also obliged to pay "compensation for disturbance of interest and compensation for severance and injurious affection."[47] Severance occurs when the physical taking of the part of a parcel of land depreciates the value of the remaining land. Injurious affection applies to the depreciation in the value of the remaining land caused by the construction of and use of the works for which the part was taken. Hence, to put the owner of the expropriated property in the same economic position, during the course of valuation, these laws consider the loss of the property owner. Whether the expropriating organ gets much or little benefit from the taking does not matter.

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[45] MCCORMICK, C. T. 1932. The Measure of Compensation in Eminent Domain. *Minn. L. Rev.*, 17, no. 5, p. 465.
[46] PICARD, E. 1990. Expropriation in France. *In:* ERASMUS, G. M. (ed.) *Compensation for Expropriation: A Comparative Study.* Oxford: St. Edmund Hall University of Oxford, p. 57.
[47] MOORE, V. Ibid. Compulsory Purchase in the United Kingdom. In: ERASMUS, G. M. (ed.). National Committe of Comparative Law. Vol. I, p. 6.

The second theory is known as the "taker´s gain" theory, which holds that "the government should pay only for what it gets."[48] This argument stems from the fear that allowing compensation for things like disturbance of a business on the land or similar remote damages may drain the purse of the government or other beneficiaries. Although it may make the owner whole, if paid, it is said that compensation for consequential damages, such as the future loss of profits, expenses of moving fixtures and personal property, and the loss of goodwill that inheres in the location, should not be paid.[49] This is because the government or other expropriating organ takes only the land, having no use for any business operated thereon, and this theory holds that it should pay only for what it gets, which is, of course, the market value of the land.

A case in point is the Chinese compensation principle enshrined in Article 47 of the 1986 (as amended in 2004) Chinese Land Administration Law (LAL).[50] Paragraph 1 of Article 47 clearly states, "Land expropriated shall be compensated for on the basis of its original purpose of use." Indeed, the details of the compensation for expropriation of arable land show that the farmer receives no market value for the loss of land. Rather a lump sum of money calculated at 6-10 years annual production is provided besides other minor payments.

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[48] KRATOVIL and HARRISON, *Supra* note 43, p. 615.
[49] Ibid.
[50] The People's Republic of China Land Administration Law. Available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383939.htm.

The right to and extent of compensation is not mentioned in the Chinese Constitution.[51] The basic rationale for using this principle in China is that land is the collective property of the people, and individual persons are provided with "use right" for a fixed period of time. So when the state expropriates land, what it is taking is not private property, but use right. In other words, it is not expropriating but "resuming."[52] Therefore, "the compensation in the expropriation of land is not for ownership but for land use rights, and paying that compensation is based on the national policy."[53]

Both arguments try to determine the modalities that should be employed and the elements that should be included in assessments of compensation. Today, with the emphasis on property around the world, the indemnity principle prevails.

3.3 Level of Compensation

Most laws (constitutions or other minor legislations) which allow expropriation of private property usually add an adjective to the requirement of the payment of compensation. Depending on the legislation of each

[51] BIN, Z. X. 2002. Compensation System in the People's Republic of China. In: KOTAKA, T. & CALLIES, D. L. (eds.) *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries*. Honolulu: University of Hawai'i Press, p. 93.

[52] Land expropriation refers to the case in which the government does not have ownership of the land. For example, the land occupant has the freehold interest in the land, and the government needs to acquire ownership of the land through a compulsory acquisition process. This kind of 'land acquisition' is also known as a 'compulsory purchase'. Compulsory 'land resumption' refers to the case in which the government, not the land occupants, has the ownership of the land. For example, the occupants only have a leasehold interest in the land. Through the compulsory acquisition process, the government acquires the user rights and gets back the land it originally owns. This kind of compulsory land acquisition is known as 'land resumption'. (CHAN, N. 2003. Land Acquisition Compensation in China – Problems & Answers. *International Real Estate Review*, 6., p. 138.)

[53] Id., p. 95.

country, it may be termed as compensation, fair compensation, just compensation, reasonable compensation, adequate compensation or any other, like 'commensurate compensation' in Ethiopia.

In most Western countries[54] and, as shown in Kitay, in most developing countries,[55] the fundamental principle that guides valuations under expropriation laws is the payment of *fair market price* or *market value*. In other words, *market value* is generally taken as a test for the existence of just compensation.

Market value, as defined in *Appraisal of Real Estate*, is:

> *The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.*[56]

The reason why market value is favored by courts or legislators is that because it is believed that the amount of compensation is believed to cover the damage sustained by the owners. The amount of compensation will enable owners to go to the market and fetch similar property for the same price. The former owner should neither suffer a detriment nor reap a windfall profit.

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[54] The term "just compensation" in the USA Constitution is understood by courts as "fair market value" (PAUL, E. F. 1987. *Property Rights and Eminent Domain*, New Brunswick and London, Transaction Publishers., p. 81); the same conclusion is held in Europe as observed from the decisions of European Court of Human Right (ALLEN, T. 2007. Compensation for Property Under the European Convention of Human Rights. *Michigan Journal of International Law*, 28**,** 287-335. p. 288).

[55] KITAY, M. G. 1985. *Land Acquisition in Developing Countries: Policies and Procedures of the Public Sector*, Boston, Oelgeschlager, Gunn & Hain, Publishers, Inc., p.50.

[56] APPRAISAL-INSTITUTE 2001. *The Apprisal of Real Estate*, Chicago, Apprisal Institute., p. 22.

3.4 Fairness and Objectivity of Market Value

Researchers question whether market value is really a fair and objective measure to determine compensation for expropriation. Although market value is taken as the most probable price that reflects the loss, it nevertheless is not an ideal one as it does not give full compensation to those who lose the property. The central difficulty of the market value formula for compensation is that it denies any compensation for real but subjective values.[57] Kalbro calls these subjective values "individual values" or "reservation prices."[58]

A reservation price is defined as, "the lowest price at which a property owner would sell the property without the threat of expropriation."[59] Reservation prices are, in short, the prices an owner would place on the non-monetary values of the property, such as sentimental attachment, family history and similar personal assessments. The purpose of the expropriation may be another factor that alters the reservation value. It is argued that if people believe that the purpose is for social and public benefit, they tend to agree to lower compensation amounts. But if the land required is for private operators, such as the Telecom Company, owners demand higher compensation.[60]

In general, since these sentiments have no monetary value, they are not considered during valuation. It is important to note that the market value for a

[57] EPSTEIN, *supra* note 24, p. 183.
[58] KALBRO, T. 2003. Private Compulsory Purchase and the Public Interest. In: KALBRO, T. (ed.) *Urban Land Management: Papers on Property Development and Compulsory Purchase*. Stockholm: KTH, p. 59.
[59] NORELL, L. 2008. Is the Market Value a Fair and Objective Measure for Determining Compenation for Compulsory Purchase. *Land Reform.* Rome: FAO. p. 21.
[60] KALBRO, *supra* note 58, p.60.

given property can only be *assessed* or estimated, not calculated or exactly determined. Had the owner been allowed to fix the price, s/he would have added the subjective or personal price to the market value. For this reason, it is said that market value does not provide full compensation.[61]

To tackle these problems, Epstein proposed fixing the amount of compensation somewhere between the market value and the reservation price of the owner.[62] But since this approach still creates ambiguity about the amount, the same writer suggested another solution. He proposed a bonus increase over the market value.[63] This proposal has been adopted by some countries that have included it in their legislation. The mechanism increases the compensation amount by a percentage over the market value assessed by the valuator. For example, for many years now, a 10 percent bonus has been allowed in England to compensate those who lose their property to compulsory purchase.[64] In addition to the fair market value of the property, home owners get 10 percent of the value of the home subject to a minimum of £4,000 and a maximum of £40,000; for businesses, the amount is 7.5 percent of fair market value up to a maximum of £75,000.[65] Recent legislation in Sweden also allows for a 25 percent increase in the market value.[66] The

[61] NORELL, *supra* note 59, p. 21; KALBRO, *supra* note 58, pp. 59-60.
[62] EPSTEIN, *supra* note 24, p. 183.
[63] Ibid.
[64] Id., p. 184; COMMENTS 1958. Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses. *Yale Law Journal*, 67, p. 66.
[65] ALLEN, 2008, *supra* note 19, p. 84; see also the British *Land Compensation Act* of 1973, ss 29-30, 33.
[66] An Amendment to the Swedish Expropriation Act, SFS 2010:832, July 2010.

percentage increase over the market price enables owners to acquire the lost property and regain part of the reserved price.

Kalbro and Epstein propose a slightly different but discriminatory approach concerning the increase above market value. This approach proposes that instead of increasing the reserved price across the board, it is possible to impose the increase only in cases of private use. If the expropriation is made in the interest of the public, the owner will be satisfied by the compensation of market value, but if it is made for private economic gain, then an increase can be conferred, in the form of profit sharing.[67]

3.5 Valuation Methods

Valuation is the process of estimating the compensation amount for the property taken. In a typical western country, the purpose of valuation is to determine the market value of the expropriated property. There are three common methods of appraisal. These are the sales comparison approach, the income capitalization approach, and the cost approach.

3.5.1 Sales Comparison Approach

The sales comparison approach is a technique in which the value of the real property is determined by comparing property recently sold in the "market" to the land being appraised. This approach is the most common method of land valuation. It relies on market information to value the property.[68] The underlying concept assumes that a recent sale from a willing seller to a willing buyer of a property (the comparable property) best reflects

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[67] KALBRO, *supra* note 58, p. 60; EPSTEIN, *supra* note 24, p. 184.
[68] Id.

the value of similar land (the subject property) in the vicinity. This method models the behavior of the market by comparing the subject property under valuation with similar property or properties that have recently been sold, or for which purchase offers have been made. It assumes that a rational and prudent buyer will not pay more for the comparable property, while a seller in the same situation will not accept less for the same property. The sale price finally reached reflects the balance of supply and demand for properties in a given market.[69] Therefore, if the subject property under valuation were offered for sale in the same market at around the same time, the transaction would be completed at approximately the same price.

3.5.2 Income Capitalization Approach

The income (or capitalization of income) approach is an alternative to the comparative sales approach, typically used in situations where markets are relatively inactive. It is most applicable to agricultural land and investment properties. In this approach, an appraiser analyzes a property's capacity to generate future benefits and capitalizes the income into an indication of present value. In other words, the value of the land derived from this approach is the estimated present value of future benefits, including streams of income during the lifetime of the property and proceeds from the sale of the property.

This valuation approach derives land or building value by dividing annual net income from the property by an estimated capitalization rate. Under this approach, valuation of a property is accomplished through capitalization.

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[69] WYATT, p. 2005. *Property Valuation in an Economic Context.* Oxford: Wiley-Blackwell, p. 128.

Capitalization is the division of a present income by an appropriate capitalization rate to derive the value of the income stream.[70]

3.5.3 Cost Approach

The cost approach is a valuation technique in which the appraiser adds property value to the depreciated value of improvements so as to determine the value of the subject property. In this approach, the value of a property is derived by adding the estimated value of the land to the current cost of constructing a replacement for the improvements and then subtracting the amount of depreciation.[71] The appraisal is based on what it would cost to replace the existing facilities.[72]

The replacement cost approach for structures in a typical developed country setting of active markets is based on the theory that the market value of an improved parcel can be estimated as the sum of the land value and the depreciated value of the improvements. In other words, this approach is based on the assumption that cost equals value. The reliability of the cost method depends on the validity of this assumption, and there are many circumstances where such an assumption is not justified.

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[70] UNECE 1996. *Land Administration Guidelines.* Geneva, United Nations Economic Commission for Europe, p. 38.

[71] APPRAISAL-INSTITUTE 2001. *The Apprisal of Real Estate,* Chicago, Apprisal Institute. p. 63.

[72] SAYCE, S., SMITH, J., COOPER, R. & ROWLAND, P. V. 2006. *Real Estate Appraisal: From Value to Worth,* Oxford: Blackwell Publishing, p. 16.

4. Compensation in the United Kingdom

4.1 Compensation Principle

The essence of compensation in England is well expressed in what an Australian Court once said:

> *Compensation prima facie means recompense for loss and when an owner is to receive compensation for being deprived of real property… his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As… the pecuniary value of the object is contained in the asset, the compensation cannot be less than the money value into which the owner might have converted his property had the law not deprived him of it.*[73]

As explained above, the indemnity principle requires equivalence in the damage caused to the expropriated person. English law follows this principle as well. The statutory principle concerning the compensation level was first included in the 1845 Land Consolidation Act, and rewritten in the Compulsory Purchase Act of 1965, which currently applies. Section seven of the Act reads as follows:

> *In assessing the compensation to be paid by the acquiring authority ... regard shall be had ... to the value of the land to be purchased by the acquiring authority.*

The meaning and implication of this principle was refined by the courts. In its 1880 decision, the court in *Livingstone* v. *Rawyards Coal Company* declares:

> *In setting a sum of money to be given for reparation of damages, you should as nearly as possible get at that sum of*

[73] *Nelungaloo Properties Ltd* v. *The Commonwealth (*1948), as quoted in Denyer-Green, *supra* note 10, p. 197.

> *money which will put the party who has been injured in the same position as he would have been in if he had not sustained the wrong for which he is now gaining his compensation or reparation.*[74]

In *Horn* v. *Sunderland Corporation* (1941), the court again affirmed that "the principle of equivalence … is at the root of statutory compensation which lays it down that the owner shall be paid neither less nor more than his loss."[75]

More elaborately, an 1868 decision based on the 1845 Act was delivered in Penny v. Penny, which culminates the indemnity principle as follows:

> *It is not the interest which has been acquired by the (acquiring authority) that has to be estimated, but the value of the interest taken from the person with whom the (acquiring authority) deals.*[76]

4.2 Compensation Level

The forgoing discussion reveals that the case law and the statutes have urged the use of a method of measurement that accounts for more than market value, or the value of the land to the owner, to determine the compensation amount in the event of compulsory purchase. The 1961 Land Compensation Act set out market value as the measurement for compensation. Section 5 of this Act specifically stresses that no additional allowance will be paid because of the compulsory act, and that "[t]he value of land shall … be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize." Thus the willing seller and willing buyer standard was introduced to determine property's market price.

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[74] Id., p. 195.
[75] Id., p. 196.
[76] Denyer-Green, *supra* note 10, p. 198.

Further, valuators are expected to consider "the hope value" or "highest and best use" of the land during their valuation. The idea is that if the highest and best use of the land is, for example, urban housing, then the valuation must be based on the value of urban housing development, even if the land is currently undeveloped. This modality of valuation pays the owner the potential value of his land.

In England, this principle was adopted as early as 1867, when the court decided that, "when the land has prospective value, say for building purposes, this could be taken into consideration, for otherwise the expropriated owner would not be compensated for his full loss—the value of land to him."[77] The court approved this, finding that if the land had an adventitious value beyond its mere agricultural or existing use value, and this value was marketable in the sense that a higher price could be obtained for it, then the valuator could take this into account.

4.3 Compensable Interests

4.3.1 Land

Under English law the taking of the land or an interest in the land is compensable. Land is understood under section 205(1)(ix) of the English Property Act of 1925 as including the ground, fixtures on the ground, minerals and intangible rights:

> *... land of any tenure, and mines and minerals... buildings or parts of buildings and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal*

[77] Id., p. 199.

> *hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land.*[78]

The above interests, which constitute "land," are compensable as stated in the 1965 Compulsory Purchase Act. Section seven of the Act states:

> *In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the compensation value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.*

The owner of land or interest thereon who lost such interest by compulsory purchase is entitled to the value of the land taken. Details of the techniques of valuation of all assets and interests are beyond the scope of this study. But it suffices to note that it is the responsibility of the real property valuator to use the best method applied in the profession to determine the market value of the expropriated property. Courts do not usually specify a particular valuation method to be used for this highly technical determination.

4.3.2 Severance and Injurious Affection

The second clause of section seven of the Compulsory Purchase Act, cited above, mentions injurious affection related to partial compensation of land. The idea is that during valuation, assessors should consider not only the land taken, "*but also the damage ... to be sustained by the owner of the land*

[78] GOO, S. 2002. *A Source Book on Land Law*. London: Cavendish, p. 27.

by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land…"[79]

Severance occurs where the land acquired from the claimant contributes to the value of the retained land, so that when severed from it, the retained land loses value. Injurious affection is the depreciation in value of retained land as a result of the compulsory acquisition and the proposed use of all the land acquired by the acquiring authority. Severance can be said to be one cause of injurious affection.[80] In both cases, what is important is that the land taken and retained must have been interrelated and the severance (taking) of part of the land must cause harm to the retained portion. The harm could be a total loss of value or a depreciation or reduction in market value.

Severance may injuriously affect retained land because the loss of the part acquired depreciates the value of the retained, or because the claimant´s land is severed into two or more parts, such as a farm intercepted by a motorway, with the severed parts reduced in value because of the increased cost of working.[81]

One aspect of injurious affection is that the use or execution of the land taken for the intended purpose causes depreciation in the value of the retained land. Thus, if the land taken is used for road or railway construction, the undesirable effects of noise, dust and access blockage that causes the reduction in the value of the retained property are compensable.

[79] English Compulsory Purchase Act (1965). Sec. 7.
[80] Denyer-Green, *supra* note 10, p. 288.
[81] Id., p. 292.

There are two methods for determining the loss to an expropriated owner in cases of severance. The first is to value the land that is taken and add to this the decrease in value of the retained land. The second is the "before and after" method, in which the expropriated owner´s entire interest is valued before severance and then the value of the land he retains is assessed afterwards and deducted from the original value.

4.3.3 Disturbance and Other Matters

Disturbance compensation is associated with the costs the owner incurs as a result of his moving and re-establishing himself in another place. Such costs include loss of good will, loss of profit, trade loss, relocation and resettlement expenses, legal costs and personal time expenses.[82] The source of this compensation modality under UK law is Rule 6 of section 5 of the Land Compensation Act of 1961, which provides:

> *The provision of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land.*[83]

The justification for the inclusion of this compensation package is that it makes the compensation equivalent to the loss sustained. In other words, the expropriated person would not have incurred extra costs for the above type of disturbances had he not been forced to do so by the compulsory purchase procedure.

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[82] See Id., pp. 340-353.

[83] English Land Compensation Act (1961). Available at: http://www.legislation.gov.uk/ukpga/1961/33/pdfs/ukpga_19610033_en.pdf.

The test for determining the eligibility of claims for compensation for disturbance and other matters are summarized in the case of *Director of Building and Lands* v. *Shun Fung Ironworks Ltd.* (1999):

a. Causation: the loss must be caused by the compulsory acquisition,

b. Remoteness: the loss must not be too remote,

c. Duty to mitigate: the claimant must act reasonably in seeking to mitigate his loss.[84]

4.3.4 Additional Compensation

As already mentioned, the value to the owner has been replaced by the principle of market value. But there seem to be reservations about the fairness of the market value. Therefore the law devises various mechanisms to give additional compensation to the owner of the lost property. A case in point is the housing loss payment recognized by the Land Compensation Act of 1973. A reading of section 29-33 reveals that an additional percentage of compensation may be provided to those who are displaced from their homes by compulsory purchase procedure.

The mechanism increases the compensation by a percentage over the market value assessed by the valuator. In addition to the fair market value for the property, home owners get 10 percent of the value of the home, subject to

[84] Denyer-Green, *supra* note 10, p. 353.

a minimum of £4,000 and a maximum of £40,000; for businesses, the amount is 7.5 percent, up to a maximum of £75,000.[85]

5. Compensation in Ethiopia

5.1 Compensation Principle

The compensation principle in Ethiopia is not clear. But it is evident that it does not fit with the indemnity principle, which provides an amount of compensation to the owner of expropriated property that matches or at least approximates his loss. The wide range of compensation forms provided in the English law, as discussed above, are good evidence that the state is concerned about the wellbeing of its citizens.

The Ethiopian Civil Code section on expropriation provides something that looks like an indemnity principle. Article 1474 (1) of the Civil Code says that the amount of compensation or the value of the land that may be given to replace the expropriated property shall be “equal to the amount of the actual damage caused by expropriation.” Yet this does not cover potential damages such as the future, highest and best use of land values. The Civil Code is concerned only with actual and real damages caused when the land was expropriated.

The current FDRE Constitution under sub-article 8 of Article 40 provides for advance payment of a “commensurate” amount of compensation for the loss of private property. But the Constitution does not recognize land as private property. What is considered to be private property in the

[85] ALLEN 2008, *supra* note 19, p. 84; see also the British English Land Compensation Act (1973). ss 29-30, 33.

Constitution is any other property planted or erected on the land by the skill, labor or capital of the person (sub-article 1). Therefore, the objects of compensation under the present legal regime are buildings, plants and other similar things, save the ground or land itself. This means that the compensation valuation does not consider, among other things, the value of location, and this significantly reduces the amount of compensation payable to the owner. Rather, in the opinion of the author, the principle followed today in Ethiopia is the "taker's gain" principle which stresses that the compensation paid must consider the original purpose of use of the land, rather than its future potential. This is especially true with regard to the expropriation of peri-urban land.

5.2 Compensable Interests in Ethiopia

A general reading of the Expropriation Proclamation and the Compensation Regulation reveals that the following interests are compensable:

- A property situated on the land
- Permanent improvements to the land
- Loss of land
- Relocation of property
- Lost income, in case of temporary loss of land

A brief explanation is provided as follows.

5.2.1 Private properties (Properties and Improvements on and to the Land)

As mentioned above, the FDRE Constitution recognizes all property situated on the land as private property. And according to Article 7(1) of the Expropriation Proclamation, "A landholder whose holding has been expropriated shall be entitled to payment of compensation for his property situated on the land and for permanent improvements he made to such land." While *property situated on the land* refers to buildings, structures or plants of any kind that have value, *improvement to the land* refers to any work on the land that increases its value, productivity or fertility.[86]

In urban areas, *properties situated on the land* include buildings (residential, commercial and industrial), fences, utility lines, religious buildings, burial structures, trees, plants, and other structures. In rural areas, residential houses, farmhouses, storage structures, livestock sheds and shelters, fences, trees, crops and grass are considered to be properties situated on the land. This can be inferred from the Federal Compensation Regulation 135/2007.

When one looks into *improvements to the land*, based on the above definition, facilities (water and sewerage, roads, etc.) and area beautification may be considered in the case of urban areas. In rural areas, land terracing, clearance and leveling, irrigation canals and ducts, and water wells and reservoirs are examples of improvements to the land.

[86] These definitions are given based on the type and nature of properties mentioned in the Expropriation Proclamation (455/2005) and Federal Compensation Regulation (135/2007).

5.2.2 Displacement Compensation

The other property interest subject to compensation in Ethiopia is the loss of the land itself. This is especially visible in cases involving the loss of rural land. Under Article 8, the Expropriation Proclamation provides that "displacement compensation" should be paid in the event of complete loss of farmland via expropriation. This means that in the absence of replacement land in the locality, the holder of the land shall receive *displacement compensation*. The question here is the nature of displacement compensation. Is it compensation in its proper sense? Or is it meant to be a kind of rehabilitation support? Determining its nature helps us to judge the fairness of the compensation provided for the complete loss of a landholding.

One may wrongly conceive of *displacement compensation* as compensation similar to that which is paid for the loss of private property. But this author argues that displacement compensation differs from this conception for the reasons discussed below.

As already explained, the Ethiopian Constitution recognizes any property on the land as private property, but not the land itself. Owners of property on the land are guaranteed *commensurate* compensation for the loss of their private property in the event of expropriation.[87] The Constitution does not say anything about the loss of land. In other words, the government is not supposed to pay commensurate compensation for loss of land. "Compensation" is defined in the Expropriation Proclamation as "payment to

[87] Constitution of the Federal Demecratic Republic of Ethiopia, Proclamation No. 1/1995. *Negarit Gazeta*. Year 1, No.1. (Hereinafter cited as FDRE Constitution.) Article 40(8).

be made in cash or in kind or in both to a person for his property situated on his expropriated landholding" (Art. 2.1). Further, Article 7(1) of the same proclamation adds *improvement to the land* (besides the property on the land) as interests subject to commensurate compensation.

So the true subject of commensurate compensation is private property (property situated on the land and improvement to the land) but not the land itself. The modality of compensation for complete loss of rural land is "replacement of land" or "displacement compensation," a monetary compensation equivalent to ten years' income. From the terminology, it is easy to infer that what is given to the peasant for loss of land is not compensation for lost of private property (as land cannot be owned privately), but compensation to assist a displaced person to rehabilitate against the loss of the perpetual use rights of land required for a different type of lifestyle. Although the assessment of ten years' value of produce has no constitutional basis, it is believed that this amount of money is enough to enable a farmer to start a new way of life.

This argument is strengthened by looking at the Chinese Land Administration Law (LAL) of 1987, which is considered to be a source of the Ethiopian expropriation law. Article 47 of the Chinese LAL provides for three types of compensations in the event of expropriation of cultivated land: *compensation for land*, *resettlement subsidies*, and *compensation for attachments and young crops on the requisitioned land*.[88]

[88] The People's Republic of China Land Administration Law. Art. 47.

The Ethiopian expropriation proclamation adapts the last two types of compensation, i.e., resettlement subsidies and compensation for plants, while dropping the first type of compensation for the loss of the land itself.

5.2.3 Relocation of Properties

The Compensation Regulation allows the payment of relocation compensation for the costs associated with removing, transferring, transporting and installing property. For this, there are three categories: utilities,[89] relocated properties[90] and graves.[91] Where demolition occurs, relocation of a house entails the relocation of the salvaged remains of the building and furniture. In some cases, the house can be reinstalled and continue its service as before.

5.3 Compensation Level in Ethiopia

In Ethiopia, the amount of compensation is determined not by employing the types of valuation techniques which are found to be appropriate by the valuator. As a matter of principle, the law sanctions the cost replacement approach as the only technique to be employed in the valuation of buildings, the most important type of assets. Article 7(2) of the Expropriation Proclamation says:

> *The amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property.*[92]

[89] Federal Compensation Regulation, Art. 3.2.b.
[90] Id., Art. 10.
[91] Id., Art. 12.
[92] Expropriation Proclamation, Article 7.

According to the present constitutional arrangement, ownership of land is vested in the people and the state.[93] All rural farmers and pastoralists are guaranteed a plot of land free of charge.[94] This right (holding right) endures for a lifetime and beyond, as it can be used and leased, but also may be donated to and inherited by family members. Farmers and pastoralists cannot be evicted arbitrarily from their holdings without compensation when the need arises. The constitution guarantees an advance commensurate amount of compensation for private property on the land in the event of expropriation.[95] As already mentioned, this does not include compensation for the loss of the land itself.

On this basis, the Expropriation Proclamation provides compensation, valued based on the replacement cost for structures in urban and rural areas. For instance, if an urban property is expropriated, the compensation shall be calculated by taking into consideration the replacement cost of a similar building. Valuators consider the current price of construction materials and labor. Then they reduce this amount to account for depreciation. But they do not consider the value of land or location during the estimation. For this reason, the compensation estimated is usually lower than the market value of the property. If owners were allowed to sell the property on their own, they could collect not only the value of the property on the land, but also the value of the land as well, which would give them a hundred times more value.

Unlike the UK, Ethiopia does not deem severance and injurious damages compensable. If part of a building is demolished and renders the

[93] FDRE Constitution, Article 40(3).
[94] Id., Article 40 (4 and 5).
[95] Id., Article 40 (8).

remaining part useless for the purpose for which it was intended, or if the owner wishes to surrender the rest of the land, then compensation shall be paid for the whole property (Art. 3.3). If, however, the owner prefers to keep the remaining part, compensation will be paid only for the demolished portion (Art. 3.4). No compensation shall be paid for the part of land taken; the law only applies to buildings and other property. In other words, there is no "severance" or "injurious affection" compensation paid for the depreciation in value of retained land caused as a result of loss of a part of the land.

Similarly, there is no compensation as such for depreciation of property or lost income as a result of government project works, such as road constructions. Even if road construction is prolonged for as long as three to four years, business closures and lost income are not compensable.

In case of agricultural land expropriation, one year's compensation is provided for the loss of plants on the land. Besides this, ten years' compensation is paid as displacement compensation, which is calculated using the average income of the past five years. If replacement land is available, the ten years' compensation is not necessary. The law provides no compensation for loss of land and no consideration for its future or potential use.

6. Observations and Conclusion

The UK and Ethiopia have achieved different levels of economic and social development. Indeed, their legal systems and ideologies are also different. But there is one fundamental premise upon which both agree that land belongs to the crown or the state. Of course, this may be largely symbolic for the English and more formal for Ethiopia. In England, even if it is the crown, in principle, that owns all land and people are given some form of land use rights (such as freehold), holders of the land have the exclusive right to benefit from it. But in Ethiopia, even if the people are said to be joint owners of the land, they are denied adequate compensation for their properties in the event of expropriation.

The basic difference lies in the fact that Ethiopian legislation does not give value to the land. Land cannot be sold, and hence no value is assessed during expropriation or mortgage procedures. In contrast, the English compulsory purchase acts require, compensation for all damages caused to the expropriated. Based on international practice and consensus, market value is taken as the measure of fair compensation. Various laws provide for a variety of types of compensation packages. These go farther than market value, as UK law provides an additional percentage of the market value to the expropriated.

In contrast, the compensation principle in Ethiopia does not, in fact, give full compensation to the expropriated. Although the term "replacement cost" may suggest otherwise, compensation in Ethiopia does not equal what has been taken. As a matter of fact, people are often impoverished by expropriation, as the process either diminishes their livelihood or completely destroys it. Only the state benefits when land is expropriated and transferred to others at profit.

By way of recommendation, within the existing framework of state and public ownership of land, the author proposes that Ethiopia borrow and make use of the law and practice of the UK. One possibility is that Ethiopia starts giving value to urban land during valuation for expropriation and narrows the gap between the market value of the property and its expropriation compensation amount. It may be difficult to give the whole land value increment/profit to the expropriated individual, but it is possible to share the profit between the government and the holder of the land.

Furthermore, many non-compensable damages are caused during expropriation. Severance or injurious affection is only the most common. People often lose part of their land for road construction, but they are not compensated for the land taking. Others are relocated from their original places to the periphery, and they are not compensated for the inconvenience. Rather they are exposed to more hardship and transport expense. This too can and should be compensated by the Ethiopian government, in the interest of guaranteeing that citizens are not irreparably harmed in the interest of the common good.

Legal Protections Accorded to Persons with Disabilities under Ethiopian Law

Belayneh Admasu♣

Abstract

Persons with disabilities are marginalized members of society who do not fully and effectively participate in socio-economic activities on an equal basis with others due to various barriers in the environment. Taking this into account, the United Nations has promulgated the Convention on the Rights of Persons with Disabilities, which complements general human rights instruments and gives particular emphasis to respect and protection of the rights of persons with disabilities. As a member state, Ethiopia ratified the convention and enacted other domestic laws to ensure equality before the law and benefits for persons with disabilities. This article appraises these laws in order to examine the level of protection accorded to persons with disabilities in Ethiopia. For this purpose, the article gives emphasis to the rights to: equality and non-discrimination, access to the environment, information and communication, employment and tertiary education.

Key words: Access, Disability, Environmental Barriers, Equality and Discrimination, Persons with Disabilities, Tertiary Education

Introduction

Persons with disabilities (PWDs) are defined in various ways. The definition originates from different views or models developed over time. The models are charity, medicine, social values and human rights. The first two models reflect the traditional views that consider PWDs to be object of charity and patients respectively. The others define them based on social and human elements. The latter models

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have been included in the modern and currently applicable legislation of Ethiopia.

The definition of PWDs which is accepted and currently in use is that of UN Convention on the Rights of Persons with Disabilities (CRPD). Accordingly, “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

This definition denotes that PWDs are marginalized people who do not fully and effectively participate in a range of social and economic activities due to various barriers in the environments in which they live. They are usually deprived of equal enjoyment of rights because of their disabilities. They are exposed to social and economic problems.

Bearing this in mind, the international community believes that special laws are important to give due consideration to the respect and protection of rights of PWDs. Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, separate international legal documents have been endorsed in order to protect the rights of PWDs. These legal documents do not provide special rights to PWDs; rather they complement the human rights enshrined in other international legal instruments. They provide the same rights with particular emphasis on PWDs. The main objective of these legal instruments is to ensure equality of PWDs and eliminate all forms of discrimination against them based on their disabilities.

Therefore, the international legal instruments giving particular emphasis to respect and protection of PWDs have been accepted by UN member states. Ethiopia ratified the CRPD through Proclamation No. 676/2008. Furthermore, it has enacted domestic laws separately and mainstreamed disability issues in various pieces of legislation in order to respect and protect the rights of PWDs. Legislation related to the rights of accessibility, equality and non-discrimination, employment and tertiary education has been given particular attention in this article. The laws have been analyzed in order to assess the level of protection accorded to PWDs under the legal framework of Ethiopia. The analysis in this article does not include the practical problems of PWDs since no empirical research has been conducted in this study.

To address the issues related to legal protection of PWDs, the article has been structured as follows. The first part is dedicated for explaining the notion of PWDs in the context of Ethiopian law, including international legal instruments. The second part addresses the significance of special laws on the rights of PWDs. It discusses why and how the legal regime dealing with the rights of PWDs developed. The third part assesses the relevant international legal documents and domestic laws of Ethiopia in order to show the extent to which the rights to equality and non-discrimination, accessibility employment and tertiary education are protected under international legal instruments and Ethiopian domestic law.

1. Definition and concept of persons with disabilities (PWDs)

Prior to discussing the rights of PWDS, it is crucial to look at the definitions of the term "persons with disabilities" used in different international legal instruments and domestic laws of Ethiopia. Both international legal instruments and domestic laws provide definitions of the term based on the purpose for which they were enacted. Owing to this, the definition given in the legislation is not always the same, and it is difficult to find a definition which is universally accepted and consistently applied.

Four perspectives on disability have evolved over time. These are charity, medicine, social values and human rights.[1] The charity model considers PWDs to be a dependent and helpless segment of society. They are considered as objects of charity, persons who are unable to do fend for themselves, inherently needy and dependent on the charity of others for survival. This is the model related to cultural and religious beliefs and practices.[2]

The second model is related to the principles of medicine. According to this model, PWDs are considered to suffer from medical problems that require medical solutions. Any difficulties are connected to the individual's

[1] Ministry of Labour and Social Affairs of the Federal Democratic Republic of Ethiopia, "" National Plan of Action of Persons with Disabilities, 2012-2021", Addis Ababa, published by the Labour and Social Affairs. pp. 4-5, available at: http://www..molsa.gov.et. [accessed on November, 2013].

[2] Ibid.

impairment. Owing to this, PWDs are perceived as patients who need treatment.[3]

The third model is the social model. This model understands persons with disabilities as being disabled not by their impairment but by society's reaction. The problem rests not with the individual but with society. Society creates barriers that hinder PWDs. These may be legal or physical, related to factors that include information, communication and attitude. These hindrances are created in the environments PWDs live in. Due to these factors, the environment is not favourable for disabled persons. Therefore society has a responsibility to solve these problems by making PWDs' interaction with society and the environment more convenient and comfortable. To this end, society has a duty to make the environment inclusive, to remove barriers and eliminate discrimination.[4] In short, society must create an environment that can embrace disability as one of many forms of diversity among human beings.

The fourth model is the human rights model. This is the most relevant model for the legal definition of PWDs, as the ideas have been incorporated into numerous currently applicable international legal instruments and domestic laws. The human rights model complements the social model, buttressing the argument that all human beings are inherently equal and entitled to equal enjoyment of all human rights without distinction of any

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[3] Grant Carson, "The Social Model of Disability", Scottish Accessible Information Forum, 2009, available at: www.saifscotland.org.uk [accessed December 2013].

[4] Dr. Raymond Lang, "The Social Model of Disability: The Development and Critique of the Social Model of Disability," Cheshire Disability and Inclusive Development Centre, 2007, available at: http://www.Ucl.ac.uk/Ic-ccr/center publications/ working papers.

kind, including disability. This rationale has been used to support PWDs' claims to equal access to services and opportunities.[5]

These models have served as a basis for the definition of disability and PWDs in international legal instruments and pertinent domestic law. Both international legal instruments and domestic laws enacted before the UN CRPD used the traditional charity and medical models for this purpose, but, those that have been passed since the CPRD's enactment apply the social and human rights models in combination. For this reason, the definition varies depending on the purpose of international and domestic legislation, as well as its timeframe. To show this, it is important to look at international legal instruments and Ethiopian domestic laws.

The UN General Assembly has promulgated a number of declarations and conventions concerning PWDS since the UDHR. International agreements related to the rights of persons with disabilities (RPWDs) have been drafted with a view to ensuring equality in general and in employment in particular. Some are concerned with particular types of disabilities; others deal more broadly with RPWDs. The details will be discussed in the subsequent sections. These facts are raised here in order to show that the definition may vary accordingly.

The UN Declaration on the Rights of Disabled Persons (1975) provides the following definition for the term "disabled person": "Disabled person means any person unable to ensure by himself or herself, wholly or partially, the necessities of a normal individual and or social life, as a result of

[5] See *Supra* note 1.

deficiency, congenital or not, in his or her physical, or mental capabilities."[6] From this provision, it is possible to understand that the definition includes persons with various disabilities since the declaration aims at ensuring all aspects of PWDs' equality. The provision does not specify any particular disability. Rather, the term "any person" in this provision seems to incorporate those with all types of disabilities. But this does not mean that the definition has no limitations in this regard.

The provision contains the clause "unable to ensure by himself or herself, wholly or partially, the necessities of a normal individual and or social life".[7] This clause of the provision denotes that the definition relies on the ability of an individual to survive alone. In this context, a person with any kind of disability is no longer considered to be disabled if he or she is able to ensure his or her own necessities at all. The clause excludes disabled persons who may be able to take care of themselves to some extent.

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities similarly defines "disability" based on the incapacity to perform daily activities. The term "disability" means a physical, mental or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and

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[6] Declaration on the Rights of Disabled Persons, proclaimed by UN General Assembly Resolution 3447 (XXX) of December 1975, No. 1.

[7] Ibid.

social environment.[8] The incapacity of a person to perform is the key element defining the disabled person here, although this is not stated directly and clearly. A disabled person is someone who is unable to perform at least one essential daily activity. This does not account for situations in which a disabled person is capable of performing many essential activities. Hence, it is also not free from deficiencies.

Another international instrument that provides a general definition of the term "disability" is the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules). The UN General Assembly adopted this document in 1993. Like the Inter-American Convention, it does not define the disabled person directly. It simply defines the term "disability". Accordingly, "disability includes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature."[9]

A purpose-specific definition of PWDs has been provided in the International Labour Organization Vocational Rehabilitation and Employment (Disabled Persons) Convention, adopted by the UN General Assembly in 1983. According to Article 1 (1) of this convention, "disabled person means an individual whose prospects of securing, retaining and

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[8] Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities,: adopted in Guatemala City, Guatemala, at the twenty-ninth regular session of the General Assembly of OAS, held on 7 June 1999.

[9] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, 85th plenary meeting, 20 December 1993, No. 17.

advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment."[10]

This definition encompasses persons whose employment rights cannot be equally exercised due to duly recognized physical or mental impairments. It does not include someone unless his or her opportunity for employment is considerably affected as a result of his or her physical and mental impairment. Hence, this definition has its own limitations.

The UN Convention on the Rights of Persons with Disabilities (CRPD) provides the most recent and best definition yet. This convention says: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others"[11]

This definition reflects the latest understanding of the concept of PWDs. Unlike some the definitions we have discussed above, it includes persons with all kinds of disabilities. Physical, mental, intellectual or sensory impairments are specified in order to ensure that the definition is as inclusive as possible.

However, the definition is not all-inclusive. Disability must be permanent in order to qualify a person as disabled. In addition, the impairment must affect the person's participation in society on an equal basis with others. In fact, the physical, mental, intellectual or sensory impairment must prevent his or her full and effective participation in all aspects of life.

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[10] International Labour Organization, Vocational Rehabilitation and Employment (Disabled Persons) Convention 159, 1983.

[11] Convention on the Rights of Persons with Disabilities and Optional Protocol, United Nations, 2006.

The CRPD provides the best definition of PWD to date. This definition has also been incorporated into the national legislation of Ethiopia. But prior to the drafting of this definition, the term "disabled person" was conceptualized in various ways under Ethiopian law, much as it was in international legal instruments.

Before the introduction of this latest understanding of the concept of disability as a notion related to and consistent with the entitlements and obligations of social and human rights, the prevailing definition of disability was that of the medical and traditional conception of physical limitation and ill health and the consequent inability to earn a living.[12] Disability was formally defined for the first time in Ethiopia in 1971 under an imperial order issued to establish an agency on disability.[13] Emperor Haile Selassie I gave Order No. 70/1971 to provide for the establishment of the Rehabilitation Agency for the Disabled. This imperial order defines a person with a disability as "any person who, because of limitations of physical or mental health, is unable to earn his livelihood and does not have anyone to support him and shall include any person who is unable to earn his livelihood because of young or old age."[14]

This definition represents an approach that identifies disability with ill health and the resulting inability to earn a living and absence of support. By virtue of this definition, PWDs were considered to be people with no capacity to make a life, people who require the support of others. Since the definition

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[12] Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) Initial Report, December 2012, Addis Ababa.
[13] An Imperial Order to Provide Establishment of Rehabilitation Agency for Disabled Persons, No. 70/1971.
[14] Ibid.

focuses purely on the failure to earn a living, it was extended to cover those who need support due to youth or old age. In addition, it overlooks persons with physical or mental impairments who are able to earn a living nonetheless. By this definition, none of these people are considered to be PWDs.

Disability was defined again in another piece of legislation issued in 1994. This was the Proclamation concerning the Rights of Disabled People to Employment (No. 101/1994). This proclamation slightly modified the traditional definition given under the imperial order of 1971. But again, PWDs were presented in terms of their physical, mental and sensory incapacities, with little association with external barriers. According to the 1994 proclamation, a PWD is “a person who is unable to see, to hear, to speak or suffering from injuries to his limbs or from mental retardation, due to natural or manmade causes; providing however, the term does not include persons, who are alcoholic, drug addicts and those with psychological problems due to socially deviant behaviours.”[15]

The definition of PWDs provided in this proclamation differs from that of the imperial order primarily insofar as it does not rely on inability to earn a living. The definition is given depending on physical and mental incapacity, excluding impairment resulting from alcohol and drug use, or from “deviant behaviour” which may be caused by social or psychological problems.

[15] A Proclamation concerning the Rights of Disabled People to Employment, No 101/1994, Art 2.

Although the presentation here is slightly different, making the 1994 definition more functional as it makes no reference to the question of ability to support oneself, the definition is still based on the individual model of understanding disability, which focuses simply on impairments or physical features. This approach still does not consider the social or human rights element of the concept of disability.[16]

Imperial Order No. 70/1971 and Proclamation No. 101/1994 have both been repealed. The definition of PWD found in this legislation has been discussed merely to show how the concept has evolved in Ethiopian legal history.

One of the relevant and currently applicable authorities on the definition of disability in Ethiopia is Proclamation No. 568/2008 on the Right to Employment for Persons with Disability. The definition in this proclamation reads: "Person with disability means an individual whose equal employment opportunity is reduced as a result of his physical, mental or sensory impairments in relation with social, economic and cultural discrimination."[17]

Even in this piece of legislation, we see that the term disability has not been clearly defined. Instead of directly addressing the term "disability", the legislator seems to have decided to define a person with a disability. This is more or less the approach adopted by the UN CRPD.

The Federal Civil Servants Proclamation No. 515/2007 adopted the same approach in the previous year. Article 13 (4) provides that "[t]he

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[16] *Supra* note 12.
[17] Employment Right Proclamation No. 568/2008, Art 2(1).

definition of disability applicable in the appropriate law relating to disability shall also apply for the purpose of this article".[18] The difficulty to be noted here may be that Proclamation No. 515/2007 was issued before the employment right proclamation, and so any reference made in the former legislation cannot be interpreted to imply the later proclamation.

The recent and legally valid definition of the concept of disability in the Ethiopian context is that of the UN CRPD, and it has been included in the National Plan of Action of Persons with Disabilities (2012-2021). In this document, the general definition of disability is in conformity with the CRPD: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[19]

We therefore find that as is the case globally, at present, Ethiopia has adopted the social or human right perspective of disability by incorporating the definition given by the UN convention in its totality. It should be noted, however, that there is a need to develop contextual and formal definitions of disability in order to address all issues and cases.[20]

2. Overview on the international legal instruments concerning RPWDs: Why and how are they introduced?

Since PWDs are human beings, they are entitled to any right that originates in humanity. The UDHR, the International Covenant on Civil and

[18] Federal Civil Servants Proclamation No. 515/2007.
[19] See *Supra* note 1, p. 1.
[20] *Supra* note 12.

Political Right (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) set out the rights of all human beings. The international human rights instruments that were adopted after the UDHR, ICESCR, and ICCPR clarified the steps that states must take in order to ensure that these rights are respected in particular situations.[21]

If states are taking these steps, it is possible to infer that PWDs may exercise their rights as human beings. The CRPD complements the other international human rights treaties. It does not recognize any new human rights for PWDs, but rather clarifies states' obligations to respect and ensure the equal enjoyment of these human rights by PWDs.[22] Some of the UN's member states raised this point in order to contend that adoption of the CRPD was not important. They argued that the existing international human rights instruments guarantee PWDs the same rights as other members of their societies.[23] Owing to this, member states could not reach a consensus about the significance of the CRPD during the forty-second and forty-fourth regular sessions of the UN General Assembly. The draft outline of convention, prepared by Italy and further elaborated by Sweden, could not be accepted during these sessions.[24]

Although these initial attempts to adopt the convention failed, through the efforts of the UN's Social and Economic Council, the member states eventually reached a consensus regarding the significance of a special law concerning PWDs. The significance relates to the social, economic and legal

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[21] Andrew Byrnes et al, "From Exclusion to Equality: Realizing the Rights of Persons with Disabilities", Handbook for Parliamentarians, No 14-2007, PP 21-22.
[22] Ibid. p.20.
[23] *Supra* note 9.
[24] Ibid.

problems that PWDs encounter in their daily lives. Despite an increasing number of PWDs, they were not benefiting from education and health services on an equal basis with others. In every region and country in the world, PWDs generally live on the margins of society. They have little hope of going to school, getting a job, having their own homes, creating families and raising their children, enjoying a social life or voting. For the vast majority of the world's PWDs, shops, public facilities and transport, health centres, and even information are largely out of reach.[25]

Most PWDs are also poor. They do not have equal opportunities to participate in economic activities. The fact that PWDs are more likely to live in poverty is often the result of ignorance. This problem is reinforced in various governmental development policies and programs that ignore, exclude, or fail to support the right of PWDs to be included in the socio-economic life of their countries.

In contrast, in the few developed and developing countries that have passed comprehensive legislation aimed at promoting and protecting the basic rights of PWDs, they live fulfilling and independent lives as students, workers, family members and citizens. They are able to do so because society has removed the physical and social barriers that had previously hindered their full participation in society.

It is with these advances in mind that the international community united to reaffirm the dignity and worth of every person with a disability, and to

[25] Andrew, *Supra* note 22, p. 1.

provide states with an effective legal tool to end the injustice, discrimination and violation of rights that confront most PWDs.[26]

The Standard Rules were developed on the basis of the experience gained during the UN Decade of Disabled Persons (1983-1992). The International Bill of Human Rights, comprising the UDHR, the ICESCR and the ICCPR, in addition to the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as the World Program of Action concerning Disabled Persons, constitute the political and moral foundation of the Standard rules. Although the Standard Rules were not compulsory, until the CRPD was adopted they were applied by a great number of states with the intention of respecting international law. The Standard Rules imply a state's strong moral and political commitment to taking action for the equalization of opportunities for PWDs. They indicate important principles for responsibility, action and cooperation, and point out areas of decisive importance for PWDs' quality of life and for their achievement of full participation and equality.

The purpose of the Standard Rules is to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and fulfil the same obligations as others. In all societies there remain obstacles preventing PWDs from exercising their rights and freedoms and making it difficult for them to participate fully in various activities. It is the responsibility of states to take appropriate action to mitigate and remove such obstacles.

So as to enable the state parties to achieve this purpose by taking the

[26] Ibid., p. 2.

necessary measures, the Standard Rules point out the areas, which require state action. Furthermore, the Rules specify the rights of PWDs which cannot be exercised unless states take the appropriate administrative and legal measures. The document contains about 22 rules; twelve of these are concerned with PWDs' substantive rights.

These are:

- Awareness-raising
- Medical care
- Rehabilitation
- Support services
- Accessibility
- Education
- Employment
- Income maintenance and social security
- Family life and personal integrity
- Culture
- Recreation and sports
- Religion

PWDs face various obstacles in order to implement these fundamental rights fully and effectively. Thus they do not always exercise them on an equal basis with others, regardless of government's appropriate interference. For this reason, the document contains some 10 rules regarding implementation procedure. The rules that regulate the implementation of the substantial rights were applied from 1993 until the CRPD was adopted in 2006.

However, the Standard Rules were not effectively implemented during that time because the rules were not legally binding. This fact compelled the stakeholders to move on towards enactment of an international legal instrument. Efforts made during the UN Decade of Disabled Persons were unsuccessful. However, the efforts considerably contributed to the adoption of the CRPD in 2006. The purpose of the convention is similar to that of the Standard Rules. It was enacted with a view towards promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all PWDs. It also promotes respect for the inherent dignity of PWDs. These are the two important purposes of the convention, but implementation requires much more state effort.

As history shows, disability is a factor that hinders disabled persons' full and equal enjoyment of all human rights. Human rights are by nature universal, inherent, indispensible, inalienable and inviolable, originating from the nature of human beings.[27] Nevertheless disability has been a basis for discrimination, and even the inherent dignity of PWDs is considerably affected in interactions with the environment in which they live.

Considering this, the UN General Assembly adopted the CRPD with a view to promoting, protecting and ensuring full and equal enjoyment of all human rights in general and respect for the inherent dignity of PWDs in particular. In order to achieve this purpose, the convention sets out the relevant rights anew and provides enforcement mechanisms.

The CRPD has about 50 provisions. These provisions deal with the

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[27] "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." See the Preamble of the UN Universal Declaration of Human Rights, 1948.

general principle of equal opportunity of PWDs (Articles 1-9); fundamental human rights and freedoms (Articles 10-23); and economic, social and cultural rights (Articles 24-30). The provisions dealing with fundamental human rights and freedoms and economic, social and cultural rights are derived from the ICCPR and the ICESCR. The rationale for incorporating these rights into the CRPD is to give particular emphasis to full and effective participation of PWDs in exercising these rights on an equal basis with others.

The remaining provisions of the CRPD provide the enforcement mechanisms for these rights. These provisions direct state parties to:

- Collect statistics and data (Article 31)
- Create international cooperation (Article 32)
- Design national implementation and monitoring mechanisms (Article 33)
- Establish a Committee on the Rights of Persons with Disabilities (Article 34)
- Submit reports about the implementation within two years from the entrance into force (Article 35)
- Create cooperation among the stakeholders for effective implementation of rights enshrined in the convention.

In general, the convention provides the fundamental rights and lays out the mechanisms by which they may be enforced by state parties.

For more effective enforcement of these rights, the UN has prepared a supplementary "Optional Protocol to the Convention on the Rights of Persons with Disabilities" and submitted it to the state parties for signature. This protocol provides procedural safeguards for the substantial rights of PWDs.

According to Article 1(1) of the protocol, the international committee established via Article 34 of the convention is empowered to "receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State party of the provisions of the convention". In accordance with this provision, the state parties are obliged to recognize the competence of this committee to examine any allegation as to violations of rights of PWDs. When an examination takes place, the state parties have the duty to cooperate with the committee to facilitate its function as per Article 6 of the optional protocol. Based on the result of the inquiry, the committee may forward its suggestions and recommendations, if any, to the state party concerned and to the petitioner.

The convention and its protocol have been signed and ratified by many state parties, including Ethiopia. Besides this, the House of Peoples' Representatives ratified it via a ratification proclamation promulgated on 1 June 2010. In effect, the convention has become a part of Ethiopian domestic law. In addition, the proclamation empowers the FDRE Ministry of Labour and Social Affairs to undertake the acts necessary to implement the rights of PWDs enshrined in the convention, and much legislation has been enacted in order to ensure full and effective participation of PWDs on an equal basis with others. The next section will analyze the pertinent legislations in order to assess the legal protection of PWDs in selected areas.

3. The rights of PWDs under Ethiopian law

As previously discussed, the Standard Rules, the CRPD and other international conventions, covenants and declarations adopted by the UN

General Assembly provide for PWDs' fundamental human rights and freedoms, including economic, social and cultural rights. Among these rights, those that are closely connected to the economic and social activities of PWDs will be discussed briefly below.

3.1 The right to equality and non-discrimination

The right to equality and non-discrimination is enshrined in several international legal instruments. These instruments ensure that every person is equally entitled to all human rights. As stated in the UDHR, distinctions such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status shall not be grounds to deny any person rights on an equal basis with others.[28] All human beings must have the opportunity to exercise their legal rights on an equal basis.

The ICESCR and the ICCPR also stipulate that all human beings are entitled to equal enjoyment of all rights. The ICESCR says: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[29] The ICCPR provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction

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[28] See *Supra* note 27, Art 2.

[29] International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, Art 2(2).

of any kind…"[30] These provisions underpin equal enjoyment of all rights. Both covenants plainly intend that all individuals should be able to exercise their rights.

The important point here is the possible discriminatory factors mentioned in the UDHR and the two covenants. These international legal instruments indicate race, colour, sex, religion, language, nationality, social origin, political opinion and other statuses, but disability is not included in the list. Thus some have argued that the provisions do not provide protection to disabled persons. However, it is important to note that "all individuals" as specified in these international legal instruments include disabled persons. Moreover, the list is not exhaustive but rather illustrative. The term "any other status" indicates that other factors not explicitly mentioned in the list, including disability, are also included.

Other international legal instruments demonstrate more explicitly the international community's concern for the rights of PWDs. The Convention on the Rights of the Child (CRC) states: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[31] This provision includes the term disability in the list of discriminatory factors. Pursuant to this provision, disabled children should

[30] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, Art 2(1).

[31] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, Art 2(1).

not be excluded from equal enjoyment of all rights. They should fully and effectively participate in social, economic and political activities on an equal basis with others.

The CRC expressly imposes an obligation on the state to take appropriate measures to eliminate any form of discrimination against children, including those with disabilities. The relevant provision states: “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”[32] This provision is designed to protect children against all forms of discrimination, and recognizes disability as a discriminatory factor that impedes PWDs’ experience of equal rights.

The same holds true for adults. Thus we may infer that the international instruments focusing on general human rights are also applicable to PWDs. Furthermore, having agreed on the significance of special laws to ensure PWDs’ equal enjoyment of rights, the UN General Assembly promulgated various international legal instruments which are specifically intended to promote, protect and ensure the rights of PWDs and enable them to exercise these rights on an equal basis with others.

These instruments are the Declaration on the Rights of Disabled Persons (1975), the Standard Rules (1993), and the UN CRPD (2006). These legal documents aim at achieving equalization of opportunities for PWDs. For this purpose, the Standard Rules define the term “equalization” as follows:

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[32] Ibid., Art 2(2).

“'Equalization of opportunities' means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities.”[33] The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for societal planning, and that all resources must be employed in such a way as to ensure that every individual has an equal opportunity for participation.

As the Declaration on the Rights of Disabled Persons says:

> *Disabled persons shall enjoy all the rights set forth in this Declaration. These rights shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family.*[34]

This provision provides for the PWDs’ equal enjoyment of all rights set forth in this declaration. Any distinction among disabled persons cannot be considered as a basis for discrimination in the protection and enjoyment of rights provided in other international legal instruments. Like other people, PWDs are each differently situated in terms of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth, etc. Irrespective of these differences, all individuals with disabilities shall enjoy all rights.

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[33] “'Equalization of opportunities' means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities.” See *Supra* note 9.

[34] See *Supra* note 6.

In equal measure, this protection also applies to the family members of PWDs. The provision quoted above indicates that the family members of disabled persons may also face discrimination on the basis of this status. Hence, the declaration also specifies that the families of disabled persons shall not be subject to discrimination on the basis of their relationship with PWDs. This protection has been enshrined in the CRPD in more detail.

The CRPD imposes an obligation on state parties to recognize the equality of all person under and before the law and their entitlement to the equal protection and benefits of the law. The convention ensures the right to equality for all persons without distinction. No distinction shall be a ground for discrimination. Discrimination on the basis of disability is, hence, prohibited.

In addition to recognizing equality, state parties have a duty to prohibit all discrimination on the basis of disability. State parties shall guarantee PWDs equal and effective legal protection against discrimination on all grounds. Reasonable accommodation should be made to ensure PWDs' full and effective participation in society on an equal basis with others.[35] This means that any factors which may hinder equal enjoyment of all rights on the basis of disability must be eliminated to promote equality. For instance, laws and administrative measures should be employed to require modification of the physical environment in order to ensure accessibility. State parties have a responsibility to create a more conducive atmosphere for PWDs in order to promote equality and eliminate discrimination.

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[35] See supra note 11, Art 5 (1)-(4).

Many nations have become state parties by signing the CRPD. Ethiopia has signed and ratified the convention. Furthermore, Ethiopia has incorporated the provision promoting equality and eliminating all forms of discrimination in its latest constitution.[36] This provision, like that of the international legal instruments which have been discussed above, ensures equal protection and the benefits of law and imposes an obligation on the state to combat all forms of discrimination on the basis of distinction of any kind, including disability, which is incorporated via the phrase “any other status”.[37]

3.2 **The right to access the physical environment, information and communication**

The right to accessibility is a precondition for proper implementation of the other rights of PWDs. Accessibility to suitable or conducive environments, information and communication is essential for PWDs, as it allows them to live independently and participate fully and effectively in all aspects of life.[38]

Persons with physical, mental, intellectual and sensory impairments have trouble adjusting to and navigating their environments because the environment is full of barriers. For PWDs in both rural and urban locales, the physical environment may be challenging, if not impossible to traverse. Information may be inaccessible, while communication is not always easy or comfortable.[39] These issues keep PWDs from full and effective participation

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[36] Constitution of the Federal Democratic Republic of Ethiopia, 8 December 1994, Art 25.
[37] Ibid.
[38] See supra note 9, Art5 sub. 1.
[39] See *Supra* note 11, Art 1.

in society. In his book entitled *From Exclusion to Equality: Realizing the rights of persons with disabilities*, Andrew Byrnes highlights the following:

> *The principle of accessibility aims to dismantle the barriers that hinder the enjoyment of rights by persons with disabilities. The issue concerns not just physical access to places, but also access to information, technologies, such as the Internet, communication, and economic and social life. The provision of ramps, sufficiently large and unblocked corridors and doors, the placement of door handles, the availability of information in Braille and easy-to-read formats, the use of sign interpretation/interpreters, and the availability of assistance and support can ensure that a person with a disability has access to a workplace, a place of entertainment, a voting booth, transport, a court of law, etc.*[40]

Without access to information or the ability to move freely, other rights are also restricted. The identification and elimination of obstacles and barriers to accessibility requires government attention in order to facilitate PWDs' full and effective participation in all aspects of life. Thus the international legal instruments recognize PWDs' right of access in order to enable them to participate on an equal basis with others. The Standard Rules states: "States should recognize the overall importance of accessibility in the process of the equalization of opportunities in all spheres of society. For persons with disabilities of any kind, States should introduce programs of action to make the physical environment accessible, and undertake measures to provide access to information and communication."[41] This quotation denotes that the physical environment, information and communication should be accessible

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[40] "Thus, the principle of accessibility aims to dismantle the barriers that hinder the enjoyment of rights by persons with disabilities. The issue concerns not just physical access to places, but also access to information, technologies, such as the Internet, communication, and economic and social life." See *Supra* note 22, p. 17.

[41] See *Supra* note 9, Rule 5.

and suitable for physically challenged persons, and stipulates that state parties have a responsibility to take appropriate steps to remove hindrances.

The UN's CRPD also includes a provision dealing with the accessibility of the physical environment, information and communication.[42] It too explicitly states that state parties must take appropriate measures to ensure the right to accessibility for PWDs.

This provision of the CRPD has specified this right in order to enable PWDs to live independently and participate fully in all aspects of life on an equal basis with others. This approach may be effective only if the appropriate measures are taken. Thus state parties shall take measures:

- To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
- To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
- To provide training for stakeholders on accessibility issues facing persons with disabilities;
- To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
- To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

[42] See supra note 11, Art9.

- To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
- To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
- To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.[43]

These international legal instruments impose obligations on state parties to take the above mentioned measures to ensure PWDs' right of access to the physical environment, information and communication. Governments are obliged to enact laws in conformity with these obligations, and to take the other steps indicated in the convention. As a state party to the convention, Ethiopia has put such legislation in place.

One of the laws enacted with a view to achieving this purpose is the FDRE Building Proclamation No. 624/2009. This proclamation states:

> *1. Any public building shall have a means of access suitable for use by physically impaired persons, including those who are obliged to use wheelchairs and those who are able to walk but unable to negotiate steps.*
> *2. Where toilet facilities are required in any building, an adequate number of such facilities shall be made suitable for use by physically impaired persons and shall be accessible to them.*[44]

[43] See supra note 11, Art9 sub. 2, A-H.

[44] Federal Democratic Republic of Ethiopia Building Proclamation no 624/2009, Art36 sub. 1 and 2.

According to this provision, any building constructed in Ethiopia shall have facilities which may be used by physically impaired persons. Persons who are compelled to use a wheelchair or crutches to move about must have alternatives to stairs. Even persons who are able to walk must have alternative access to public buildings in case they are unable to negotiate steps.

Public building also must provide PWDs access to sanitation facilities. PWDs must be able to use sanitation facilities without any distinctions. For this reason, the sanitation facilities in every public building must be suitable for persons who are physically impaired.

The law seems to have imposed such obligations only on the states. It says that public buildings shall have facilities for PWDs. The term "public"[45] is here used to limit these requirements to buildings that belong to the state. It excludes private buildings. Those who want to enter private buildings do not have a legal right to access the services rendered in such buildings. And so this law does not make PWDs' right of access complete. If, for example, a public authority rents an office in a private building, persons who are unable to move without any extraneous assistance (a wheelchair or crutches) and those who are able to walk but incapable of negotiating steps may not be able to access those public services. For this reason, this issue requires further attention.

The Ethiopian government has provided additional specific legislation in a further attempt to address the issue of accessibility. Regulations and directives support proper implementation of the right enshrined in this proclamation. To be more specific, let us have a look at the directive. The

[45] Ibid.

directive of the Ministry of Urban Industry and Development stipulates that steps, ramps, lifts, gates, doors, toilets, parking lots and other areas shall be suitably constructed for PWDs.[46]

As a state party to the CRPD, Ethiopia has taken appropriate legal measures to ensure the right to access of PWDs. Public institutions such as universities are responsible for making all of their buildings—classrooms, libraries, dormitories and offices—accessible. Article 40(3) of Higher Education Institutions Proclamation No. 650/2009 strengthens this idea. It clearly states that "building designs, campus physical landscape, computers and other infrastructures of institutions shall take into account the interests of physically challenged students." According to this provision, campus buildings must be designed to accommodate the interests of PWDs before construction begins. Unless the design includes the necessary facilities and accommodations for PWDs, the building cannot be constructed. The campus landscape and other infrastructure should be accessible and suitable for physically challenged persons. Otherwise, PWDs may be prevented from enjoying various services in the institution on an equal basis with others. The computers that are available in the institution should also accommodate PWDs. They should be user-friendly and accessible for physically challenged persons. The Building Proclamation previously quoted makes Ethiopian higher education institutions responsible for making sure that their buildings; campus landscape, computers and other infrastructure are all suitable and

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[46] Directive of the Ministry of Urban Industry and Development No. 5/2011, Art 33.

accessible for PWDs. This ensures that PWDs can realize their right to access the physical environment, information and communication.

3.3. **The right to employment of persons with disabilities**

The international instruments we have discussed in the foregoing sections contain provisions dealing with the right to employment.

The Standard Rules and the CRPD memorialize this right in Articles 7 and 27, respectively. According to these provisions, PWDs are entitled to equal enjoyment of the right to employment. This includes the opportunity to be employed or accepted in the labour market and to work in an open, inclusive and accessible work environment.[47] For a start, PWDs must be given opportunities to obtain employment. They should not be excluded from recruitment or employment. After employment, the environment in which PWDs work must be suitable for them. It should be equipped with appropriate facilities and free from physical barriers which hinder their full and effective participating in the work. Otherwise, the work environment cannot be deemed inclusive.

State parties to the UN convention are responsible for effective implementation of this right. They must safeguard and promote realization of the right to work of PWDs. State parties are required to take the appropriate steps to ensure the equal enjoyment of this right.[48]

One of the most important measures that the state parties should take is prohibiting all forms of discrimination against PWDs. Discrimination on the basis of disability pertaining to all forms of employment must be

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[47] *Supra* note 11, Art 27 (1).
[48] Ibid.

eliminated. The conditions of recruitment, hiring and employment, continuance of employment, carrier advancement and other related matters are to be free from any kind of discrimination on the basis of disability. The state has an obligation to create safe and healthy working conditions for all workers, including PWDs.[49]

The state is also responsible for protecting PWDs' right to just and favourable work conditions. According to this provision, state parties are responsible for ensuring equal opportunities and equal remuneration for work of equal value, as well as safe and healthy working conditions. State parties are also responsible for redressing grievances. Ethiopia recognizes these rights and has enacted legislation for their more effective realization from 1994 onwards. The FDRE constitution provides the right to employment to every citizen. When the CRPD is read in conjunction with Article 41 (5) of the constitution, it becomes clearer that PWDs are entitled to this right.

In addition to this, much legislation has been enacted regarding PWDs' right to employment. To show this, it is sufficient to look at the two currently applicable laws in the area. These are the Federal Civil Servants Proclamation No. 515/2007 and the Right to Employment of Persons with Disabilities Proclamation No. 568/2008. The Civil Servants Proclamation provides not only recognition of this right but also gives priority to employment of PWDs so long as the person who applies for the vacancy meets the minimum requirements set for the job.[50] Despite the fact that the

[49] Ibid.
[50] See Supra note 18, Art13 sub. 3.

minimum requirement standard is not elucidated, the provision strongly encourages employers to give priority to applicants with disabilities.

Since this is insufficient to protect the right to employment of PWDs, a separate proclamation on the Right to Employment of Persons with Disabilities is scheduled to be promulgated in the coming year (2008 E.C.). This proclamation gives particular emphasis to the implementation and protection of this right to employment, because it has been noted that many people are not convinced of PWDs' capacity to work. This view was reflected in earlier laws on PWDs' right to employment. Proclamation No. 101/1994, for instance, did not create equal opportunities for the employment of PWDs. Rather it restricted their employment by deeming them objects of charity.[51] This proclamation and Imperial Order No. 70/1971 did not adequately protect the rights of PWDs. The legislation currently in force repealed Proclamation No. 101/1994 and aimed to enhance equal employment opportunities and eliminate all forms of discrimination against PWDs.

The new proclamation provides not only equal employment opportunities but also an enforcement mechanism. Various entities are responsible for the implementation of this right, while administrative responsibility has been shared by a council of ministers from the Ministry of Civil Service, the Ministry of Labour and Social Affairs and other governmental and non-governmental organizations, including the Association of Persons with Disabilities.[52]

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[51] See supra note 15, Preamble.
[52] See supra note 17, Art9.

The courts will also have a key role in implementing this right. Any violation of this right can be submitted to court in the form of an action. When the person with a disability whose right to employment has been violated brings an action to court, he or she has no duty to prove the allegation.[53] The burden of proof has been shifted to the employer who is being sued for violation of this right. Instituting an action presupposes the fact that the defendant has the responsibility to defend the case. If he or she is incapable of defending him- or herself against the charge, the decision should be passed in favour of the plaintiff (person with disability).

Furthermore, the courts have a responsibility to ensure speedy trials. They are required to decide cases filed regarding the right to employment of PWDs within 60 days.[54]

In sum, both administrative and judicial organs are responsible for taking the appropriate measures for proper implementation of this right. One of the hopes is that respecting and protecting this right will encourage students with disabilities in higher education institutions to exert maximum effort for academic achievement.

3.4. Legal protection for the right to education of students with disabilities in the higher education institutions of Ethiopia

In this section, we will assess the international legal instruments that Ethiopia has ratified and other domestic legislation, including the Senate legislation of selected universities, in order to evaluate the extent to which PWDs' right to education has been included. Both international and national

[53] Ibid., Art 7.
[54] Ibid., Art 10 sub. 2.

laws reveal the fact that education is a very important tool of human development. Development can be achieved through educated manpower. It contributes to the protection of and respect for human rights and freedoms. Education helps to nurture tolerance among individuals and diverse groups. It creates mutual understanding, friendship and goodwill. Considering this, the UDHR and the ICESCR recognize the right to education under Articles 26 and 13 respectively. These documents recognize the importance of education for the development of character, respect for human rights and freedoms, tolerance, understanding and maintenance of peace. The UDHR states: "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace."[55]

This provision explicitly indicates that education is of great use for a peaceful and harmonized society. Different nations, racial and religious groups can live together so long as they are able to understand, respect and tolerate to each other. This can be achieved through education. This proposition is also found in the ICESCR. Article 13 of this covenant states:

> *Education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and*

[55] See *Supra* note 27, Art 26 sub. 2.

> *further the activities of the United Nations for the maintenance of peace.*[56]

This provision, like that of the UDHR, affirms that education is advantageous for individuals and for society as a whole.

These documents recognize that all human beings have a right to education in order to achieve the purposes discussed above. Both the UDHR and the ICESCR state that everyone has the right to education and state parties of the covenants have agreed to recognize it. Accordingly, education shall be available for all. Particularly, primary education shall be free and compulsory for all citizens. Secondary and tertiary education should also be provided to all citizens without distinction and on an equal basis, although these are not free or compulsory. Education at the tertiary level must be based on merit or capacity. Those who are competent to engage in higher education must have access to it.[57]

The right to education enshrined in these international legal instruments has been formulated so as to include every person. Everyone shall be entitled to education without any distinction. However, the UN General Assembly has promulgated other legal instruments on the rights of PWDs in order to give particular emphasis. The transition to higher education and success in tertiary education is not easy for students with disabilities as there are a significant number of new challenges to overcome in order to fully and effectively participate in academic activities at this level on an equal basis with other students.

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[56] See supra note 29.
[57] See *Supra* note 27, Art 26 (1) and *Supra* note 29, Art 13 (2) (A)-(E).

Despite the progress made, students with disabilities generally have a bumpier transition to tertiary education than other students. Those with sensory, motor or mental impairments or psychological problems face particular challenges. Their pathways to tertiary education are also less straightforward and there may be breaks or forced changes of direction along the way.

Students with disabilities are also less likely than their non-disabled peers to complete their upper secondary studies successfully. This happens particularly when students have a specific learning difficulty, behavioural difficulties or psychological problems. Transition policies have significantly expanded opportunities for access to, and success in, tertiary education for students with disabilities. But these policies do not address all of the obstacles that students face, and they do not do enough to facilitate a continuous and coherent pathway to tertiary education.

Successful transition still depends too much on the resources and the resourcefulness of the individuals concerned and their families. Students with sensory or mental impairments and those from less fortunate socio-economic backgrounds may be more vulnerable as a result. Successfully completing tertiary studies is a further challenge for disabled students who may encounter additional obstacles during their studies. Moreover, the additional resources allocated to institutions and to students with disabilities are not sufficiently linked to preparing these students for future social and professional inclusion.

As a result, students with disabilities may remain unemployed or underemployed in spite of easier access to higher education.[58]

For all of these reasons, the CRPD expresses particular concern for the right to education of PWDs. Article 24 sub 1 of this convention provides that PWDs are entitled to the right of education. In order to realize these rights, state parties must ensure an inclusive education system at all levels. Inclusive education must be directed towards:

- The full development of human potential, sense of dignity and self-worth;
- The strengthening of respect for human rights, fundamental freedoms and human diversity;
- The development by persons with disabilities of their personality, talents and creativity, mental and physical abilities, to the fullest potential of persons with disabilities; and
- Enabling persons with disabilities to participate effectively in a free society.[59]

To achieve these results, the system of education shall fulfil the following important requirements, which are required of state parties to the convention. They must design the education system in such a way that PWDs are treated on an equal basis with other members of the community.[60] PWDs shall not be excluded from the general education system on the basis of disability. They

[58] OECD (2011), Inclusion of Students with Disabilities in Tertiary Education and Employment, Education and Training Policy, OECD Publishing, available at: http://dx.doi.org/10.1787/9789264097650-en.
[59] See *Supra* note 11, Art 24 (1) (A)-(C).
[60] Ibid.

must have an equal opportunity to enjoy free and compulsory primary and secondary education.

The general education system is expected to provide PWDs with inclusive, free, high-quality primary and secondary education on an equal basis with others in their community. To ensure inclusiveness and quality of education, the system must reasonably accommodate the special needs of PWDs. The support required within the general education system to facilitate effective education must be provided. This support must be delivered in order to maximize the academic and social development of PWDs, consistent with the goal of full inclusion.[61]

The support must enable PWDs to learn life and social development skills. This helps to facilitate full and equal participation in the general education system. To ensure that these obligations are being met, state parties are obliged to take appropriate measures, such as:

- Facilitating learning of Braille, alternative script, other modes and means of communications, mobility skills, and other supports;
- Facilitating learning of sign language and promotion of linguistic identity in the deaf community; and
- Ensuring the education of persons who are blind, deaf, or deaf-blind by facilitating the most appropriate language, modes and means of communications which maximize academic and social development.[62]

The availability and accessibility of the above mentioned services shall not be taken as sufficient and final measures for full and effective

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[61] Ibid.
[62] Ibid.

participation of PWDs in education. In addition to this, the nations that adopted this convention must be careful in appointment of professionals, and particularly teachers. Appropriate measures must be taken when teachers are appointed and assigned. They must be trained in sign language and Braille. The training should include disability awareness and use of appropriate augmentative and alternative means and modes of communication.[63]

The provision also states that teachers with disabilities should be involved in the education system. Teachers with disabilities make a great contribution to effective implementation of inclusive education. They may be capable of using Braille, sign language and other means and modes of communication as their own disability requires. They are also aware of the limitations of PWDs. Therefore, involving teachers with disabilities in the education system may contribute to its full inclusion and effectiveness.[64]

As previously indicated the UN CRPD provides for PWDs' right to education and specifies particular measures which should be taken by state parties in order to enable disabled persons to participate in the education system fully and effectively on an equal basis with others. States parties are obliged to take appropriate measures for PWDs' full and effective participation in all aspects of life.

To ensure that PWDs can exercise their rights, Ethiopia has legislated in conformity with the UN convention. Legislation has been enacted in the educations sphere. This legislation has mainstreamed the right to tertiary education for PWDs. Higher Education Proclamation No. 650/2009 addresses

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[63] Ibid.
[64] Ibid.

this right, announcing that the higher education system should be inclusive and must provide the necessary facilities. It stipulates that higher education institutions shall make their facilities and programs amenable to physically challenged students.[65] These institutions should create suitable facilities and develop academic programs to accommodate the special needs of students with disabilities.

The Higher Education Proclamation requires that tertiary education be made accessible and suitable for students with disabilities, and it indicates the measures that higher education institutions should take in order to enable students with disabilities to participate fully and effectively in tertiary education on an equal basis with others. These measures include: relocating classes, developing alternative testing procedures, and providing auxiliary educational aids for students with physical challenges.[66] They must also consider building design, campus physical landscape, and computers suitable for the use of PWDs.[67] Academic assistance, including tutorial sessions, exam time extensions and deadline extensions should be provided so as to permit physically challenged pupils to compete with others.[68] These are the measures that the higher education institutions of Ethiopia must take in order to ensure the right to tertiary education of physically challenged students in this country.

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[65] Higher Education Proclamation No 650/2009, Art 40 (1).
[66] Ibid., sub. Art 2.
[67] Ibid., sub. Art 3.
[68] Ibid., sub. Art 4.

But, the measures are general contingent on the institution's circumstances, which may vary depending on school resources and other factors.[69] Hence, more targeted legislation is needed to further clarify the measures particular institutions may take for protection of disabled students' right to tertiary education.

Select university Senate legislation reflects the interests of students with disabilities. Here, the Senate legislation of Addis Ababa, Gondar and Bahir Dar Universities are taken as examples. The Senate legislation of AAU establishes a structure called the Office for Diversity and Equal Opportunity, providing a mechanism for the systematic treatment of PWDs.[70] This office is tasked with ensuring the equality of disadvantaged groups including disabled persons. With regard to PWDs, the office combats discrimination. Disability should not be a discriminatory factor in the university.

To combat this problem, the office makes sure that fair treatment of PWDs is enshrined in the policies and rules of the university. It is responsible for following up on the implementation of these policies and rules, taking affirmative action and establishing a resource centre for PWDs. The office generally manages all matters pertaining to diversity, gender, disability and affirmative action.[71] For this reason, AAU's Senate legislation protects the right to tertiary education of PWDs relatively well, although not sufficiently.

The harmonized Senate legislation of Gondar University also includes a provision dealing with the issue of PWDs in conjunction with other forms of

[69] Ibid., sub. Art 1.
[70] Senate Legislation of Addis Ababa University, 2007, Art 157 (7).
[71] Ibid., Art157 (3), (5)and (10).

diversity. Article 154 provides the functions of the office of gender, HIV/AIDS and special needs.[72] The office is responsible for protecting the rights of marginalized groups of society in the university. It combats “discrimination and violations of the human rights of women, persons with disability and members of marginalized groups”.[73] This provision states that the university establishes an office responsible for protecting the special needs of PWDs, women, persons living with HIV/AIDS and others. It does not separately discuss disability issues. It simply indicates that protecting the special needs of PWDs is one of the office’s functions. Furthermore, the specific functions that the office must carry out in order to protect the rights of PWDs are not specified. The words “discrimination and violation of human rights” in the above quotation are too general and insufficient to indicate what the office should do to protect the rights of PWDs. Therefore, it is difficult to conclude that Gondar University’s Senate legislation gives due concern to the rights of PWDs.

The 2005 Senate Legislation of Bahir Dar University does not contain any provision regarding disability issues. Even the 2011 draft legislation of the university fails to mention the rights of PWDs. Of course, Article 130 (1) of the draft Senate legislation provides for affirmative action in the special admission of female students, disabled students and other disadvantaged groups. However, this does not mean that the rights of PWDs are memorialized. The rights of PWDs beyond admission are not addressed. Thus, the author believes that the Senate legislation’s amendment process

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[72] Senate Legislation of Gondar University, 2013.
[73] Ibid., Art154 (2), no 2.

presents a good opportunity to discuss this problem and point out the gap to the drafters and concerned decision makers.

4. Findings and recommendations

This article has assessed the international legal instruments and domestic laws of Ethiopia with regard to the level of legal protection accorded to PWDs to ensure their effective and full participation in social and economic activities on an equal basis with others.

In this legal analysis, it is possible to understand that international human rights instruments such as the UDHR, ICCPR, ICESCR and others recognize inherent human rights to which all human beings are entitled. The UN has promulgated additional international legal instruments concerning PWDs in order to complement these general human rights instruments and give particular emphasis to the respect and protection of their rights. The CRPD and its optional protocol are among these international legal instruments. They have recently been adopted and are now valid law.

Many member states have accepted these international legal instruments and committed to the enforcement of the rights enshrined therein. As a member state, Ethiopia has accepted and ratified the CRPD with its optional protocol via proclamation No. 676/2010. Consequently, Ethiopia is taking measures to enhance the protection of the rights of PWDs. As part of this effort, Ethiopia has been enacting various domestic laws. Separate legislation deals with particular rights, such as the right to employment.

Ethiopia is also attempting to mainstream disability issues in domestic laws. The laws that include PWDs’ right to equality and non-discrimination, accessibility, employment and tertiary education have been discussed in the foregoing sections. The Civil Servants Proclamation includes the right to employment of PWDs and indicates that PWDs should benefit from affirmative action in employment opportunities. Two proclamations ensure that PWDs are entitled to priority right of employment so long as they meet the minimum standards required for the post. However, this legislation does not specify how minimum standards should be assessed, and it is still unclear whether these standards must be met or merely approximated.

FDRE Building Proclamation No. 624/2009 also mainstreams the rights of PWDs. As discussed previously, this proclamation deals with the standards and quality of public buildings. It advances the provision addressing PWDs' right to accessibility. Article 36 of this proclamation stipulates that public buildings and their facilities should be accessible and conducive to use by PWDs. The directive which was issued to implement the proclamation further elaborates on how the buildings and their facilities should be designed and constructed. However, the author hesitates to argue that the right to accessibility has been addressed well in the spirit expressed in the CRPD. This is because the proclamation applies only to public buildings. In addition, to the best of the author's knowledge, there is no specific legislation addressing disabled persons' right to accessibility of information and communication.

The FDRE Higher Education Proclamation No. 650/2009 also considers the disability issue. Article 40 of the proclamation addresses various issues related to the right to tertiary education of physically challenged students. This provision stipulates that the programs, buildings and facilities, campus landscape, computers and other aspects of the institution should be conducive to their use and accessible. Moreover, it specifies the forms of academic assistance that should be provided to disabled students. But, the provision is too general and conditional. Institutions' capacities to implement the general mandate may be limited by their resources and context. For these reasons, the ways in which different universities support their disabled students varies. The Senate legislations of Addis Ababa and Gondar Universities, unlike that of Bahir Dar University, address disability issues, but these provisions are not specific and sufficient. In fact, Article 40 of the Higher Education Proclamation is more specific and clear than the provisions of the universities' own Senate legislation.

In sum, although mainstreaming disability issues in domestic law is a good approach, it is difficult to find provisions dealing specifically with disability issues. This is because they are dispersed in different laws, and much more effort is required to locate the relevant provisions. But the provisions' scattered placement is not the sole shortcoming here. The provisions are also insufficiently formulated, simply touching upon disability issues without going much further. They may serve as a guide but they are not sufficient to fully and effectively protect the rights of PWDs.

By way of recommendations, the author suggests the following possible solutions. Specific and detailed laws are required to fill the gaps in the areas assessed in this study. Regulations and directives should be issued in order to avoid ambiguity and vagueness in the FDRE Civil Servant Proclamation No.

515/2007 and Proclamation No. 568/2008 on the Right to Employment of PWDs.

- ❖ Additional laws are required to ensure the right to access of the physical environment, information, and communication since FDRE Building Proclamation No. 624/2009 limits the obligation to make buildings conducive and accessible to public building only.
- ❖ Senate legislation and other directives play a pivotal role in ensuring full protection of PWDs' right to tertiary education, as enshrined in Article 40 of the FDRE Higher Education Proclamation No. 624/2009. Therefore the Ministry of Education should take the initiative to develop a uniformly applicable directive concerning the support of disabled students in Ethiopia's higher education institutions.
- ❖ Finally, the author believes that mainstreaming disability issues haphazardly in various pieces of legislation makes the applicable laws inaccessible and legal protection inadequate. Comprehensive legislation which specifically and separately deals with disability issues should be enacted in addition to the general provisions that may be mainstreamed in other legislation. This will contribute considerably to better legal protection for PWDs and accessibility of the relevant laws.

Review of Judgments under the Ethiopian Civil Procedure Code: Where Should Litigation Stop?

Beza Dessalegn♣

Abstract

Review of judgments in civil litigation offers litigants a chance to have their cases re-examined either by the court of rendition or by a court found at a higher hierarchy than the court which rendered the judgment first hand. This undertaking tries to strike a delicate balance between the search for truth and the need to bring litigation to an end. In engaging in any kind of interpretation concerning review of judgments, courts are required to balance these competing interests. This article is a critical examination of the law on review of judgments against the various interpretations of the Cassation Division. Although the Cassation Division offers a novel approach in its efforts to bring consistency to our legal system, it has however overstepped its authority from a law interpreting organ to one of a law-making body in the binding interpretation it gave on review of judgments based on newly discovered evidence.

Key Terms: Review of judgments, Cassation power, Ethiopian Civil Procedure, newly discovered evidence

1. Introduction

It has now been almost half a century since the Civil Procedure Code of Ethiopia was promulgated and put to public use.[1] However, there is little scholarly work available concerning civil litigation in general. With the exception of the pioneering work on Ethiopian Civil Procedure by Robert Allen Sedler, academic contributions on the subject remain scarce. Having a

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[1] Civil Procedure Code, 1965, Decree 52/1965, *Neg. Gaz*. (Gazette Extraordinary), year 25, no. 3.

strong impetus, to the contrary, our courts have actively engaged in expanding the meaning, scope and dimensions of application of the various provisions of the Civil Procedure Code. However, this has been undertaken with little consistency and coherence at various levels of the judicial structure.

This development has brought about a lack of uniformity in the decisions of our courts that has undermined public reliance on the judiciary. This article is a modest attempt to shed light on the review of judgments in the area of civil litigation and, at the same time, to present an appraisal on the current stance of the Ethiopian Federal Supreme Court (FSC) on some aspects of this issue. The author engages the theoretical foundations of review of judgments as well as the practical application exhibited in binding interpretations of the FSC Cassation division.

The Ethiopian judicial system has taken a novel step towards bringing consistency and uniformity to judgments by making the interpretations of law rendered by five judges at the Cassation level of the FSC binding on the court rendering the initial decision and, subsequently, on all subordinate courts.[1] To date, the FSC has tackled the arduous task of publishing and distributing hundreds of binding decisions in fourteen volumes. These decisions have settled controversies and divisions that have long bedeviled the judiciary, providing long overdue resolution to many debates. Cognizant of the fact that certain binding interpretation might be found unsuitable at a later point in time, legislators of the proclamation empowering the Cassation Division to give binding interpretations of law has also empowered the same to make

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[1] A Proclamation to Re-amend the Federal Courts Proclamation 25/1996, 2005, Article 2(4), Proc. No. 454/2005, *Fed. Neg. Gaz.*, year 11, no. 42.

changes whenever it feels that the previous decision is tainted with errors.[1] Thus the Cassation Division has the power to reverse its own previous decisions and make new binding interpretations of law.

Review of judgments in civil litigation is one of the rare areas where the FSC Cassation Division has used its power to make changes to its own previous decisions. However, such a reversal of a binding interpretation of law should exhibit conclusiveness which would not warrant further re-reversal. This is simply because such an undertaking unduly erodes public confidence in the judicial system. In making such reversals, the bench should always take into account its role as a law-interpreting organ as opposed to a law-making one.

In spite of the criticism directed towards decisions rendered by the FSC Cassation division,[2] the bench has further blurred the separation of powers enshrined in the Constitution between the judiciary and the legislature. The Cassation Division brought this about in its decision knocking down its previous stand on the interpretation of Article 6 of the Civil Procedure Code (C.P.C.). As will be highlighted in the coming sections of this article, the court has overstepped its jurisdiction as a law-interpreting organ. It did so by visibly deviating from the clear words of the law in permitting a party to seek review of a judgment even after exercising the right of appeal under Article 6 of the C.P.C.

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[1] Ibid.

[2] See, e.g., the following case comments: Mehari Redae, Dissolution of Marriage by Disuse: A Legal Myth, *Journal of Ethiopian Law*, vol. 22, no. 1, December 2008, pp. 37-45; Beza Dessalegn, ቅን ልቦና ከቤተሰብ ህጉ አንፃር, *Mizan Law Review*, vol. 6, no. 1, June 2012, pp. 157-162.

This article is organized as follows. The next section provides preliminary notes on review of judgments in civil litigation in order to highlight the conjectural foundations of the principle. In doing so, it explains the differences between the various modes of reviewing judgments. The hierarchy of courts in which review of judgments are exercised is then elucidated. Afterwards, the discussion is narrowed to ~~a~~ review of ~~the~~ judgments undertaken by courts of rendition in the event of newly discovered evidence in which the stance of the FSC is examined. A case brief of the decisions and an analysis of the same are made in the context of examining the impact of the pronouncement in balancing the competing objectives of ensuring a speedy trial, uncovering the truth and bringing litigation to an end. Finally, the discussion is summarized and the piece ends with brief concluding remarks.

2. Review of Judgments: Understood and Distinguished

Review of judgment in civil litigation refers to situations in which a decision rendered is re-considered, inspected or re-examined and afterwards the reviewing body may affirm, reverse or modify the preceding decision.[3] Such a review may be sought at different levels of the judicial hierarchy. As per the C.P.C., review of a judgment may be made before the appellate courts, based on their appellate jurisdiction;~~,~~ before benches of Cassation, based on their power of Cassation; and before the court that rendered the first judgment.[4]

[3] Bryan Garner (ed.), *Black's Law Dictionary*, 7th ed., St. Paul, Minnl, 1999, p. 1320.

[4] See Robert A. Sedler, *Ethiopian Civil Procedure*, Haile Selassie I University and Oxford University Press, 1968, p. 212. It should be noted here that Sedler refers to His Imperial Majesty's *Chilot* in Lieu of the Cassation benches. However, it should be noted that this

From here on, review of judgments in the Ethiopian discourse relates to reviews undertaken at all the three levels mentioned above. However, one should not be confused by the C.P.C.'s use of the term 'review of judgment' only in Article 6. Whether a certain action undertaken by a court is review of judgment or not is to be determined by whether that court has made a re-examination of the decision it handed down earlier, and not by the nomenclature alone. To this end, the C.P.C. has inculcated various provisions which pave the way for courts to review what they have earlier stated in their decisions.

Under the current court structure, High Courts and Supreme Courts at both the federal and state levels may exercise power of review based on their appellate jurisdiction, while Cassation benches organized at both the federal and state levels may exercise power of review only in the exceptional circumstance of a fundamental error of law. Although the outcome of review by Cassation benches strongly resembles that of appellate courts, the Cassation Division should not be construed as a court of appeal. This is because they are organized as one division of the Supreme Court, within the same hierarchy but different in the sense that they are the proper venue for review undertaken where there is a fundamental infringement of law as opposed to a need for evidentiary scrutiny. What is more, unlike appellate courts, Cassation divisions may dismiss a case offhand where they find no fundamental error relating to the interpretation of law.

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hierarchy of court structure only existed under the Imperial Regime, and that the current structure of the judiciary differs from the imperial set-up.

Another important distinction between the two is the timing for submission of a petition or application for review. Under normal circumstances, an appeal must be lodged within 60 days. But a Cassation application may be submitted up to 90 days after a decision is handed down.[5] It is also interesting to note the effect of review when it is made by a state Cassation bench to the FSC Cassation bench, otherwise known as Cassation over Cassation. It will suffice to mention here that such an undertaking makes the distinction between review by appeal of the appellate courts and the power of review of the Cassation benches even more indistinct.[6]

Review of judgment in civil litigation tries to strike a balance between the search for truth and the need to end litigation.[7] Undue emphasis on either one of the two priorities would undoubtedly keep justice from being served. These competing interests are best explained by the expressions: "Justice delayed is justice denied" and "justice rushed is justice crushed". The search for truth has to be made and concluded within a reasonable period of time so that litigants can enjoy the fruits of the court's decision. An unduly prolonged search for truth and a system which allows review after review would only become inundated in a vicious cycle of litigation, without succeeding in delivering justice in due time. In addition, litigation which simply focuses on putting an end to the case at the earliest possible moment risks defeating the purpose of justice by overlooking the necessary evidence and arguments, and

[5] Federal Courts Proclamation, 1996, Article 22(4), Proc. No. 25/1996, *Fed. Neg. Gaz.*, year 2, no. 13. Cassation divisions at the regional level have also endorsed the 90-day time limit adopted by the FSC Cassation division.

[6] For an analysis of the distinction between review by appellate courts and review by Cassation divisions, see infra, sections 2.1 and 2.2.

[7] See Sedler, *Ethiopian Civil Procedure*, supra note 6, p. 214.

thereby crushing justice in favor of a speedy outcome. The final sections of this article focus on review of judgment undertaken by the court of rendition in light of decisions of the Cassation division. But for the purpose of clarity, let us now proceed with a succinct discussion of review by courts of appeal and benches of Cassation, sequentially.

2.1. Review by Courts of Appeal based on the Power of Appellate Jurisdiction

Review upon appeal is a mechanism for re-examining a decision rendered by a court[8] found at a lower level by a court of appeal placed at a higher level in the judicial hierarchy. This may involve the decision of a first instance court reviewed by a higher court in a situation of first appeal, or the decision of one appellate court reviewed by another appellate court (from the High Court to the Supreme Court) in circumstances of second appeal. Review by appeal is not the re-trial of a decided case by an appellate court; rather it is the review of a case based on the grounds of appeal, which may relate to errors of law or fact committed by subordinate courts.[9] It is important to note here that appeal only lies based on a final judgment rendered by a court, and not on interlocutory matters.[10] This extends to precluding an aggrieved party lodging an appeal where an appeal lies if a remedy is available in the court which

[8] It should however be noted here that review upon appeal may also come from a decision rendered by an arbitration tribunal against the arbitral award it has delivered to the parties. See the provisions of C.P.C. Articles 314-319.

[9] Sedler, *Ethiopian Civil Procedure*, supra note 6, p. 218. The power of review of an appellate court is also the same for cross-objections, commonly known by practitioners as cross-appeals, as per C.P.C. Article 340.

[10] Article 320(3) of the C.P.C.

gave the judgment or order. In such scenarios, no appeal may be submitted unless all other remedies have been exhausted.[11]

When an appeal has been lodged, the appellate court has the power to confirm, vary or reverse the decree or order upon reviewing the decision of the subordinate court.[12] In exceptional circumstances, the appellate court also has the power to remand the case back to the lower court. Cases may be remanded in two situations: where the court from which an appeal is made has disposed of the suit based on a preliminary objection and the decree or order has been reversed upon appeal; and where the court from which an appeal is sought has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate court essential to the proper decision of the suit upon the merits, and the appellate court has reframed the issue.[13]

The appellate court, upon review, also has the power to dismiss the appeal without calling on the respondent if it sees fit and agrees with the judgment appealed from and where the appellant has stated in his memorandum of appeal that he bases his appeal entirely on the record of the original hearing and does not apply for permission to submit additional evidence.[14]

2.2. Review based on Power of Cassation

[11] See C.P.C. Article 320(2). This has also been confirmed by the FSC Cassation division in the case between Wazema Cloth and Garment PLC vs. School of Tomorrow S.C., File No. 17352, Hamle 28, 1997 E.C. The court reiterated that where procedural irregularities exist, an aggrieved party shall not be permitted to seek appeal before it has made a request to the court of rendition to correct the mistake.

[12] Article 348(1) of the C.P.C.

[13] Article 341(1) cumulative Article 343(1) of the C.P.C.

[14] Article 337 of the C.P.C.

Power of Cassation is exercised by both federal and state courts. However, the FDRE Constitution has elevated the status of the FSC Cassation Division to exercise power of Cassation over final decisions of both federal and state courts when these decisions contain basic errors of law.[15] From the vantage point of parties to litigation, this elevates the status of review based on power of Cassation to a fundamental Constitutional right, as it is stipulated by the FDRE Constitution. The reference the Constitution makes to "final decisions" indicates that review by Cassation may only be sought after all rights of appeal are exhausted. However, in exceptional circumstances a Cassation over Cassation may be sought from state Cassation to federal Cassation without it being recognized as exhausting an appeal, although, such an undertaking has been a bone of contention among scholars.[16] A review of Cassation may also be sought over matters which are non-appealable when such are final decisions over that particular matter.[17]

Two points must be considered in seeking review by Cassation: the existence of fundamental errors of law and the finality of the decision over which Cassation appraisal is sought. Ascertaining whether a decision by the court is final is relatively easy, as this only requires a factual determination of

[15] A Proclamation to pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 80 (3) (a) Fed. Proc. 1/1995, *Fed. Neg. Gaz.*, year 1, no. 1.

[16] See generally, Muradu Abdo, Review of Decision of State Courts over State Matters by the Federal Supreme Court, *Mizan Law Review*, vol. 1, no. 1, 2007, pp. 60-74.

[17] This could happen, for example, in circumstances where the court rejects an application for leave to appeal out of time. Decisions about such applications to regular courts are not appealable once the court rejects the plea as per Article 326(3). However, if there appears to be a fundamental error of law in dismissing the application, though the matter is non-appealable, it can be submitted for review to the Cassation division as it is a final decision of a court.

exhaustion of appeal or a legal ascertainment as to the non-appealability of the matter. However, whether or not a decision contains a basic error of law is a tricky determination to make, as there is no legal or working definition that helps to resolve this issue to date.

Pushing the issue further, it can be argued that the essence of fundamental error of law can be understood as varying in magnitude. For instance, a party seeking review in the Cassation Division could argue that the lower courts have not weighed the evidence as the law requires. It may be argued that weighing evidence is a task to be completed by subordinate courts reviewing a case based on either their appellate or first instance jurisdiction; this is not the job of the Cassation division. However, from another vantage point, it can also be argued that prima facie dismissal of such petitions overlooks situations in which the courts' weighing of evidence clearly contradicts the law, thereby constituting a fundamental breach of the law.

For instance, in the case of W/o Yergaleme Kebede vs. W/o Tsige Michael et al,[18] the FSC Cassation bench had to examine the presented evidence before affirming the lower court's decision. The issue involved a petition for review in the Cassation Division against a decision rendered by a federal first instance court rejecting an application for review as per Article 6 of the C.P.C. The petitioner alleged that the decision of the first instance court was based on a compromise agreement related to criminal activity and should be set aside. However, in validating the first instance court's judgment rejecting review, the Cassation Division stated that the compromise

[18] W/o Yergaleme Kebede vs. W/o Tsige Michael (et al.), File No. 45839, FSC Cassation division, Miazia 5, 2002 E.C.

agreement did not mention any fraudulent activity and could not be included within the meaning of Article 6 of the C.P.C. This is the place the Ethiopian judicial system is worst at ensuring the predictability of judicial outcomes.

2.3. Review by the Court of Rendition[19]

The Code of Civil Procedure has put forward a number of mechanisms which allow the court of rendition to once again review its own judgment. Review by the court of rendition may be warranted on a number of occasions. There may be instances where procedural irregularities exist, after which no appeal may be lodged before petitioning the same court to correct it.[20] And there may be instances where a party files opposition to setting aside a decree rendered ex-parte,[21] or where a party who was not a party to the suit is affected by the judgment nonetheless and seeks review of the decision.[22] There may also be circumstances of newly discovered evidence.[23]

2.3.1. Review on the basis of Procedural Irregularities

This is a scheme that allows the court to set aside its own judgment because of non-compliance with procedural requirements set forth in the code, where such irregularities have substantially affected the disposition of

[19] Review by the court of rendition is unique to civil litigation. In criminal litigation, the court of rendition does not have any procedural mechanism entrenched in the Criminal Procedure Code to review its own judgment if after declaring the ruling, the court subsequently discovers a mistake or a mistake is brought to its attention and it appears that the verdict relied on fraudulent evidence or improper conduct.

[20] See Articles 207, 209 and 211 of the C.P.C.

[21] Article 78 of the C.P.C.

[22] Article 358 of the C.P.C.

[23] Article 6 of the C.P.C.

the case to the detriment of one of the parties.[24] Such an irregularity may be remedied in two ways. If it has occurred prior to the taking of preliminary objections or during the course of the proceeding, the court may review it at that time upon the objection of the party affected by the irregularity.[25] Where the irregularity has occurred subsequently, the court may also refuse to give judgment, or if it has already rendered judgment, it may set the judgment aside.[26]

As stated above, the provisions of C.P.C. Articles 207 and 209 provide a remedy for the occurrence of procedural irregularities in two situations. The first situation involves irregularities occasioned during the course of the proceeding, before a judgment has been handed down. In the second situation, a judgment has been rendered but the judgment is marred by procedural irregularities. The first scenario is used to set right procedural irregularities that have occurred during the proceeding, such as undue denial of a request for adjournment, erroneous settlement of preliminary objections and non-payment of court fees. However, it is important to recall that where the error is of a nature such that it does not substantially affect the merits of the case, the proceeding may not be rectified even though procedural irregularities may exist.[27]

[24] Sedler, *Ethiopian Civil Procedure*, supra note 6, p. 212. The FSC Cassation division in the case of Wazema Cloth and Garment PLC vs. School of Tomorrow S.C., File No. 17352, Hamle 28, 1997 E.C., gave a binding interpretation of the scope of application of the provisions of Articles 207 and 209 of the C.P.C.

[25] Ibid. See also, Article 209(3) of the C.P.C.

[26] Ibid.

[27] Sedler, *Ethiopian Civil Procedure*, supra note 6, pp. 212-213.

Setting right such irregularities cannot objectively be termed a review of judgment, because the irregularities are corrected before a judgment is rendered. However, in circumstance where a judgment has been handed down but it is later discovered that the judgment suffers from procedural irregularities, then the court which rendered the judgment can subject the judgment to review.[28]

Where irregularities arise from non-compliance with procedural rules, the court may, *sua sponte,* or upon the application of either party, set aside the proceedings in whole or in part as irregular, amend~~s~~ them, or make another order as may be appropriate.[29] A procedural irregularity is distinct from a clerical or arithmetic error made by the court.[30] However, where the irregularity does not substantially affect the decision of the case on the merits, the proceedings may not be set aside. Moreover, where an application is made to the trial court to set aside the proceedings on grounds of irregularity, the

[28] Article 207 of the C.P.C. See also the case of Wazema Cloth and Garment PLC vs. School of Tomorrow S.C., File No. 17352, Hamle 28, 1997 E.C. In this matter the Cassation bench quashed the decision of both the Federal Supreme Court and the High Court which refused to give judgment to the plaintiff concerning arrears while entitling the plaintiff to the principal claim of the debt. The courts reasoned that as the plaintiff only paid court fees for the principal claim and not for the arrears, the plaintiff will not be entitled to the arrears and will only be awarded the principal claim. However, the Cassation bench opined that the court of rendition could have used the provisions of Articles 207 and 209 of the C.P.C. to review its own judgment as non-payment of court fee amounts only to a procedural irregularity that could have been rectified by the same.

[29] Articles 207 and 209(1) of the C.P.C.

[30] Article 208 of the C.P.C. states what constitutes a mistake as opposed to a procedural irregularity. The FSC Cassation division in the case of A.C.D.I Ethiopia vs. Hider Ali (et al.), File No. 37303, Tire 26, 2001, underscored the point that after judgment has been rendered the court cannot amend its own ruling as per Article 208 unless the mistake relates to clerical or arithmetic error or unintentional and unprecedented omission of words. Otherwise, the court cannot use this provision to amend the judgment, which substantially alters the issue in which judgment has been delivered upon.

occurrence of the irregularity may not be considered as grounds for appeal. It should also be emphasized that any irregularity is deemed to have been validated where no appeal is taken from the judgment or where the judgment is confirmed by the appellate court.[31] It is not difficult to understand the purpose of the law in barring review after an appeal has been entertained. The aim is to bring litigation to finality, by giving the parties space to exercise their freedom of choice, but not without limitations.

2.3.2. Review over Decisions rendered ex parte and on Absent Parties

The second type of review is available where one of the parties files a petition to set aside a judgment rendered ex parte, or a petition is filed by a party that was not a party to the suit but is affected by the judgment. These two situations are best served by Articles 78 and 358 of the C.P.C. respectively.

In the first state of affairs, a defendant against whom a decree is passed or order made ex-parte or in default of pleading may, within one month of the day when he became aware of such decree or order, apply to the court that passed the decree or made the order to set it aside.[32] In order to receive an order setting aside the decree or order rendered ex parte, the defendant must satisfy the court that either the summons were not duly served or that he was prevented by any sufficient cause from filing his defense or reply or from appearing when the suit was called for hearing.[33]

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[31] Article 212 of the C.P.C.
[32] Article 78(1) of the C.P.C.
[33] Article 78(2) of the C.P.C.

This covers situations where the court has handed down a judgment against the defendant without his presence during the proceedings of the litigation. This implies that the defendant presented no arguments to counter the allegations made against him by the plaintiff. However, in order for the court to permit review of judgment in such instances, the defendant must prove to the court that his failure to appear and offer defense and arguments during the course of litigation was due to the fact that summons were not duly served or for any other cause deemed sufficient and acceptable by the court.

A point worth considering here is what happens to a party whose application for a review of judgment as per Article 78 is rejected by the court for lack of sufficient cause. Is the defendant entitled to lodge an appeal on the whole judgment or only on the part of the decision that rejected an application for review? The FSC Cassation Division has given a binding interpretation on this matter, stating that the party is at liberty to choose whether to lodge an appeal on the whole judgment or to seek rendition to the court for review.[34] If the party chooses to appeal the whole judgment, his right of appeal will be much narrower in this situation than under the normal circumstances of appeal. In this situation, the appellant in the appeal process is precluded from raising new arguments which have not been raised before the court which rendered the judgment.[35] However, the appellant can raise issues in which the court would have raised on its own motion even without the presence of a

[34] Tesfahune Wagnewe vs. Begyak Agro Commercial Enterprise, File No. 36412, FSC Cassation division, Tekemet 13, 2001 E.C.
[35] Article 329 of the C.P.C.

litigating party. These issues include relevance, admissibility, and the weighing of evidence for the proper disposition of the case.

The second variation on the above arrangement is addressed by article 358 of the C.P.C., which may be put into effect by a person who was not a party to the suit but is affected by the outcome of the judgment. There are three important preconditions for filing an opposition application. The applicant could or should have been made a party to the suit, his interests are affected by the judgment, and the application is filed prior to execution of the decree.[36] Here, a distinction should be made between opposition filed as per Article 358 and objection filed as per Article 418 of the C.P.C.[37] Although it may be argued that both mechanisms arrive at a similar remedy for the aggrieved party, the former is a review mechanism that can be exercised by a party before the judgment reaches the stage of execution, while the latter is to be exercised by a party as matter of last resort by petitioning the court of execution. In addition, the purpose of an objection filed as per Article 418 is

[36] Article 358 of the C.P.C. It is interesting to consider whether a person may file an opposition to the Cassation assuming he fulfills the requirements set forth in Article 358. The FSC Cassation division in the case of W/o Emebet Mekonenn vs. Woreda 20 Kebele 29 Administration office, File No. 31264, Hidar 6, 2004 E.C., rejected a petition from Ato Ayenadis Gedamu to file an opposition to be considered by the bench. In its argument, the Cassation division stated that considering an opposition as per Article 358 requires the court of rendition to examine evidence, and as the Cassation bench has no mandate to scrutinize evidence, except insofar as this is necessary in order to rectify fundamental errors of law. Hence, it stated, the petition to file an opposition could not be accepted.

[37] See Articles 358 and 418 of the C.P.C. See also, the binding interpretation given by the FSC Cassation division in the case of Ato Abera Hundae vs. Finfine Forestry Agency, File No. 67127, Sene 8, 2004 E.C.

to keep property from being the subject of execution without affecting the validity of the original judgment. Nonetheless, the outcome may be similar.[38]

2.3.3. Review on the basis of Newly Discovered Evidence

Review based on newly discovered evidence is the court of rendition's third mechanism for re-examining judgments. Article 6 of the C.P.C. stipulates clear tripartite preconditions for an aggrieved party seeking review.[39] First, no appeal should have been taken from the judgment or no appeal lies at all. Second, subsequent to the issuance of the judgment, the party seeking review discovers a new and important matter such as forgery,

[38] This could happen, for instance, in a situation where Mr. A sued Mr. B for a petitory action in which A alleges B has unlawfully occupied his house. If the court orders B to hand over the house to A, and upon A pursuing execution on B to recover the house, a litigant named Mr. C appears before the execution court and files an opposition as per Article 418 and succeeds in proving that he is the lawful owner of the house. In such a situation, the court has no option but to stop the order of execution. This in effect has the repercussion of implicitly overturning the original judgment in which execution is sought. However, if the suit between A and B was for a simple recovery of money, and after receiving a judgment in his favor A attaches the house of B with the aim of executing the judgment he has received, and later on C appears and alleges that the house belongs to him, the original judgment still remains valid. However, A is precluded from executing the judgment he received on the same house. To the contrary, he will only be required to find another property of B in order to execute the original judgment. This leaves the judgment intact, even though there is a successful objection as per Article 418.

[39] The relevant part of the provision is reproduced here so that the reader may appreciate the clear expression of the law. Art. 6. - *Review of judgments*

(1) Notwithstanding the provisions of Art. 5, any party considering himself aggrieved by a decree or order from which an appeal lies, but from which *no appeal has been preferred*, or by a decree or order from which no appeal lies, may, on payment of the prescribed court fee, apply for a review of judgment to the court which gave it where:

(a) *Subsequently to the judgment he discovers new and important matter, such as forgery, perjury or bribery*. Which after the exercise of due diligence, was not within his knowledge at the time of the giving of the judgment; and

(b) *Had such matter been known at the time of the giving of the judgment, it would have materially affected the substance of the decree or order the review of which is sought*…..(emphasis added) perjury or bribery, which, after the exercise of due diligence, was not known to him at the time the judgment was given and warrants review. Third, had such matter been known at the time the judgment was given, it would have materially affected the substance of the decree or order for which review is sought.[40]

It is possible to gather from these prerequisites that review of judgment on the basis of newly discovered evidence is only permitted in a tightly controlled environment. Simple discovery of new evidence that is not a result of improper conduct, however relevant it might be, is not enough to merit review by the court of rendition. The FSC Cassation division, in the case of W/o Abebech Bejega vs. Dr. Tesfaye Akalu et al,[41] stated that even if there is conclusive proof that a certain document which has been submitted as evidence in litigation has been found to be fraudulent, that by itself is not enough to warrant review and reversal of a judgment already rendered. Rather, the document alleged to be a result of improper conduct must have the power to substantially affect the merits of the case. In this case the court stated that, as the contention was resolved based on issues of law and not issues of fact (evidence), the presence of a forged document was unlikely to affect the merits of the judgment. Therefore review would not be granted based on Article 6 of the C.P.C. Sedler underscores that the notion that litigation must at some point come to an end is the very purpose behind such a requirement.[42]

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[40] Article 6(1) of the C.P.C.
[41] W/o Abebech Bejega vs. Dr. Tesfaye Akalu (et al.), File No. 08751, FSC Cassation division, Ginbot 26, 2000 E.C.
[42] Sedler, *Ethiopian Civil Procedure*, supra note 6, p. 214.

The conviction that litigation should come to an end may also be deduced from the beginning statement of C.P.C. Article 6: "notwithstanding the provisions of Article 5…." This provision emphasizes that review is considered an exception to the rule of *res judicata,* which bars further litigation on matters that have already been made a subject of deliberation. This rule will only be superseded under exceptional circumstances. In such cases, the court of rendition will review on the basis of newly discovered evidence, upon the fulfillment of the requirements set forth in Article 6. With the link between the requirements and their practical application clearly established, there can be no illusion that exceptions shall be interpreted narrowly so that they will not erode or compromise the general principle.

Thus, two competing interests must be balanced in interpreting Article 6 of the C.P.C., namely the need to bring litigation to an end and the underlying search for truth. As stated earlier, an over-emphasis on either of the two will lead to the destruction of one by the other. Moreover, an interpretation giving primacy to one of the purposes of the provision alone would not represent the intention of the legislator.

In the simplest of terms, Article 6 is a case "where the law is clear". So one is tempted to ask why the Cassation Division has decided to re-interpret this provision and make a court of rendition's review tolerable even after appeal has been exercised. The next sections analyze the current stance of the FSC Cassation Division in an attempt to shed light on accepted conventions of interpretation relevant to the case at hand and scrutinize the standpoint of the Cassation division.

3. The Position of the FSC Cassation Division on Review based on Newly Discovered Evidence

As outlined above, the crux of the matter which warranted a reversal of interpretation by the FSC Cassation Division involved Article 6 of the C.P.C., which is implicated in two rulings. The first decision was given on Tikimit 18, 1998 E.C. in File No. 16624,[43] while the reversal was rendered on Tir 5, 2002 E.C. in File No. 43821.[44] In the first decision,[45] the Cassation Division ruled that a review of judgment requested by a party per Article 6 of the C.P.C. shall be made before an appeal has been sought on the same. Here, the case involved a petition by W/t Ejegayehu Teshome (petitioner) in which she argued that a 'will' which has been made the core of the court's decision and had also been a subject of dispute at the first instance level should allow her to seek review as she alleged that the document was a result of forgery. While the respondent insisted that the petitioner had lodged an appeal to the High court before seeking review by the court of rendition. Thus, he insisted that the petitioner could not seek review within the meaning of Article 6 of the C.P.C.

In its reasoning, the court outlined the final verdict and stated that a petition for review of judgment under Article 6 of the C.P.C. could not be

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[43] W/t Ejegayehu Teshome vs. The guardian of Etenesh Bekele-W/o Etagne Zenebe, File No. 16624, Tikimit 18, 1998 E.C. The full version of the FSC Cassation decision is found in የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች፣ ቅጽ 2, ገጽ 51-57, ኅዳር 1998.

[44] W/o Terehase Fissehayae vs. W/o Zenebech Berihune, File No. 43821, Tir 5, 2002 E.C. The full version of the FSC Cassation decision is found in የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች፣ ቅጽ 9, ገጽ 295-300, ኅዳር 2003.

[45] The author will argue that the first decision is the one which is consistent with the words as well as spirit of the law. See *infra*, section 5.

requested, since the petitioner had lodged an appeal from the decision of the first instance court. As the court further elaborated, a petition for review in such circumstances cannot be lodged after an appeal has been made. In concluding, the court advanced its stance that the submission of a memorandum of appeal to the appellate court is sufficient to bar a petition for review. This is irrespective of the outcome of the decision of the appellate court.

However, the Cassation Division adhered to a different line of interpretation in the decision it rendered on Tir 5, 2002 E.C. as it is entitled to do under proclamation 454/97, Article 2(1). Simply stated, the court reversed its decision, clearly stating that a review of judgment based on Article 6 of the C.P.C. can be submitted to the court of rendition irrespective of whether an appeal has been preferred or not. Before embarking on an examination of the ruling, it is worth noting the successive arguments the bench has put forward to validate its reversal.

The facts of the case involved a petition for review by the court of rendition filed by W/o Tirhase Fissehayae (petitioner) after she had lodged an appeal that was rejected by the appellate courts.[46] In explaining its ruling, the

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[46] The facts of the case involved an issue relating to the ascertainment of paternity, and the court has refrained from stating the facts in detail. It has also failed to state the type of fraudulent evidence that was presented to the lower courts, whereas its previous ruling stated which document was the subject of contention and why. One can only speculate from this that the FSC Cassation division has avoided an undertaking that might involve an examination of evidence that would obviously be outside its mandate. However, it is also worth noting that the bench has time and again stressed the need to get to the truth, which seems to suggest that the bench was convinced that reconsideration of the document would change the outcome of the case. Nevertheless, it remanded the case back to the lower court without any explicit statement to this effect.

Cassation Division reiterated that Article 6 of the C.P.C. is not a mechanism by which a fresh suit is to be entertained. Rather, it is a means by which retrial may be conducted under certain specific conditions. In mentioning those specific conditions, the court stated that the search for truth is the major and ultimate purpose of Article 6. It further consolidated its argument by stating that the search for truth can only be successfully accomplished if the path is supported by the necessary evidence. It noted that Articles 264, 137, 256 and 345 of the C.P.C. set out several procedures for gathering evidence that deviate from the normal rules of submission as per Articles 223 and 234 of the C.P.C. This, the court stated in its analysis, demonstrates a commitment to finding the truth in any civil case.

The court asserted that an argument that bars review of judgment on the sole ground that the judgment has been appealed ignores the law's interest in uncovering the truth. The court stated that there are two approaches to the problem. One approach follows the letter of the law, rejecting a request for review prima facie, as Article 6 does not allow for review once a judgment has been appealed, whether or not new evidence is likely to change the outcome of the case. Strict adherence to the positive law can be presumed to bring about a result that is congruent with the law.

The court opined that the phrase "before an appeal has been preferred" in Article 6(1) leads one to conclude that review of judgment will only be permitted before an appeal has been sought. Nonetheless, the court decided that the provision shall be interpreted cumulatively with Article 6(1) (a) and (b) as well as the purpose behind the provision. It stated that precluding review after appeal has been preferred might prevent the unnecessary expenditure of time, money and energy, and might also avoid complicating the case in the judicial system. Yet, the court concluded that it is unwise to assert that the law precludes review of judgment if it is necessary after appeal has been preferred. This is because Article 6 (1) (a) of the C.P.C. indicates that the purpose of uncovering the truth shall be given primacy.

Article 6 from now on shall be interpreted in such a way that meaningful outcomes result, by entrenching a mechanism whereby a decision based on fraudulent and criminal acts can be put on hold. This can be achieved by allowing the provisions of Article 6 which permit review of judgments based on forgery, perjury and bribery to apply whether an appeal has been filed or not. By the power vested by proclamation 454/97 Article 2(1), the court reversed the previous binding interpretation given in File No. 16624.

The conviction of the Cassation Division triggers an inquiry into why the bench resorted to this line of interpretation and whether it is in line with settled principles and rules of interpretation of law.

4. When do we need to Interpret Laws?

Even though it is difficult to determine which tools of interpretation the FSC Cassation Division adhered to in reversing its previous decision on Article 6 of the C.P.C., it is helpful to analyze the ruling with settled rules and principles of statute interpretation in order to test the validity of what the Cassation Division did set as a precedent. As Daniel A. Farber rightly pointed out, when statutory language and legislative intent are unambiguous, courts may not take actions to the contrary. In other words, when legislation clearly embodies a collective legislative understanding, the court must give way, even if its own view of public policy is quite different.[47]

When exercising the power of statutory interpretation, the notion of legislative supremacy dictates that, courts are subordinate to the legislature.[48] As clear and sound this may seem, it is quite difficult to pin down the notion of legislative supremacy in statutory interpretations and the exact nature of the relationship between the judiciary's role of interpretation and the legislature's role of law-making. As Michael Herz notes,

> Separating interpretation from law making is both easy and impossible. The two ought to be different: law making is the process of devising and promulgating the rules; interpretation involves figuring out just what the rules mean, often as applied to particular circumstances. Yet under almost any theory of statutory interpretation, the two overlap.[49]

However, one of the grounds that legislative supremacy rests on is that "judges must be honest agents of the political branches. They carry out decisions they do not make".[50] Hence, the judges' role is to decipher and enforce the statute. Ignoring the legislator's understanding of statutes burdens the process of enactment with additional uncertainties. This in turn makes the process even more cumbersome and difficult.[51] Moreover, the legislator's

[47] Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, *Geo. L.J.*, vol. 78, 1989-1990, p. 292.
[48] Id., p. 283.
[49] Michael Herz, Deference Running Riot: Separating Interpretation and Law Making Under Chevron, *Admin. L.J. Am. U.*, vol. 6, 1992-1993, p. 190.
[50] Frank Easterbrook, Foreword, The Court and the Economic System, *Harv.L.Rev.*, vol. 98, no. 4, 60 (1984), cited in Id, p. 284.
[51] Herz, *Deference Running Riot*, supra note 51, p. 291.

directives are entitled to the force of law because of their origins. To construe the text in a manner that is contrary to the collective understanding of the legislature weakens the judiciary's claim to legitimacy.[52]

Any violation of the notion of legislative supremacy by the judiciary under the guise of interpretation can only be construed as an assault on the social norm of democratic self-government, checks and balances, and the Constitutional structure itself.[53] However, this should not be understood as precluding courts from engaging in interpretation of laws when there are gaps in legislation. But this should only be done in areas where the legislator has left a certain law ambiguous, warranting judicial intervention. Under normal circumstances, the judiciary shall not over-reach and engulf the legislature.

It is a well-established principle of interpretation that if the meaning of a statute is plain, resort to extrinsic aids to construction, such as legislative history, should be avoided and the court should as much as possible interpret~~s~~ a statute in such a way as to promote the legislature's goals.[54] This is profoundly ascribed to another settled rule of interpretation, 'original intent'. Judges should look for and enforce the intent of the law maker.[55] Courts should also assume that legislatures use words in their ordinary, common senses unless the legislature expressly states otherwise.[56] This is also stated in

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[52] Ibid.
[53] Ibid.
[54] Richard Posner, Legislation and Its Interpretation: A Primer, *Nebraska Law Review*, vol. 68, 1989, p. 442.
[55] Frank Easterbrook, Text, History, and Structure in Statutory Interpretation, *Harv.J.L. & Pub. Pol'y.*, vol. 17, 1994, p. 64.
[56] Geoffrey Miller, Pragmatics and Maxims of Interpretation, *Wis. L. Rev.*, 1990, pp. 1221-1222.

the ‘plain meaning’ maxim which expresses a strong preference for literal or conventional interpretations where the law is clear and unambiguous.[57] The court is also obliged to give effect, if possible, to every word used by the legislature.[58] The implication here is that all words used by a legislature are there for a reason and the judiciary shall take cognizance of such fact and should make those words have effect as much as possible.

In his evaluation of the rules of statutory interpretation, Quintin Johnstone points out basic objectives of statutory interpretation. He reiterates that courts should, first of all, recognize limitations on their powers. In interpreting statutes they should consider the distribution of power and responsibility between them and the legislature.[59] This is premised on the argument that courts should realize that the legislature is often better equipped than the courts to gather data and hear conflicting arguments on policy matters, especially when the rules that are being advocated involve persons quite differently situated from the litigants before the courts.

Creation of certainty in the law is a noteworthy objective of interpretation.[60] Certainty in the law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and prevents the unbridled discretion of the judiciary.

5. Insight into the Decisions

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[57] Ibid.

[58] Id., p. 1224.

[59] Quintin Johnstone, An Evaluation of the Rules of Statutory Interpretation, *U.Kan. L. Rev*., vol. 3, pp. 7-9.

[60] Ibid.

Let us now once again return to the case at hand and scrutinize the decision of the Cassation Division in conjunction with the purpose behind Article 6 and the various interpretation techniques introduced in the preceding section. In validating its decision to reverse its earlier stand, the Cassation Division reiterated that the purpose behind Article 6 is uncovering the truth above any other priority. However, we have seen that the same provision is carved out by the legislator to serve two competing purposes, uncovering the truth and putting an end to litigation. As per the intention of the legislator, these two purposes shall be balanced, without one encroaching upon the other. The legislator makes sure of this by stating explicitly that review by a court of rendition shall not be sought after an appeal has been preferred, advocating for finality to litigation and allowing for a review of judgment under a limited set of conditions to be sought before the court of rendition in order to satisfy the need to uncover the truth.

Thus, one can see that the Cassation Division has given an interpretation that was never intended by the legislature. It is also not comprehensible from the decision why they opted to deviate from the plain meaning of the provision, which specifically states that review in such circumstances cannot be sought after an appeal has been preferred. Where the law is clear there is no need for interpretation. The law here cannot be any clearer. The Cassation Division has not justified its decision to interpret the plain language of the law to arrive at a conclusion that is neither written nor implied in the provision of the law. Mere expression in its judgment that this is the 'spirit and purpose' of the law does not make it so, nor does it rationalize an action at the level of a final court of review. It is a pity that the Cassation Division reversed the decision simply by stating that the purpose of the law warrants such a reversal. The court here also bypasses the maxim that the judiciary shall give effect to every word the legislature has stated, as much as possible. What we witness is an intentional oversight by the judiciary.

One might be tempted to say that even though the interpretation is not in line with the law, it has brought about a desirable outcome in which the truth will triumph at last. However, such an argument is only wishful thinking and will not satisfy anyone besides the single litigant receiving the verdict. The decision has far more negative repercussions than its positive outcomes. This is because the decision keeps litigation from ending. This simply means that at any point of time, even after years of exhausting appeals, a litigant might reappear and open the litigation afresh under the guise of review of judgment.

It is obvious that Article 6 permits the application or petition for review of judgment without any period of limitation.[61] The timeline of one month provided under Article 6(2) shall only be applicable and start to run after the applicant's discovery of his grounds of application for review. This is not a limitation on the timeframe in which grounds for application of review might be discovered. This leads to an inextricable and vicious cycle in which both parties to the litigation can use review in their favor to re-open a dead file

[61] The FSC Cassation division in the case of W/o Abebech Begega vs. Dr. Tesfaye Akalu (et al.), File No. 08751, Ginbot 26, 2000 E.C. has given a binding interpretation in which it underscored that there is no period of limitation for discovering the evidence which could warrant review of judgment. However, after the discovery of the new evidence warranting review, a period of limitation of one month starts to run against a party wishing to seek review in the court of rendition.

time and again without ever reaching closure.[62] As stated earlier, this is not the interest Article 6 is trying to serve, nor is this the aim of any judicial remedy. This makes people lose confidence in the judicial system, as a decision simply opens the door to a never-ending legal battle, which might re-open at any time, even after the issue has been settled by the final court of the country. As a result, the judiciary may be perceived as an unreliable and unpredictable institution.

Some may still sympathize with the decision of the Cassation division, reasoning that what we want is the truth and the decision is at least morally correct. But it should be emphasized here that if what we aspire to is setting aside the positive law, we should have kept the *Zufan Chilot* of the imperial regime running. In presiding over the *Zufan Chilot*, the emperor is not bound by existing positive laws in reviewing the judgment of courts, because he is considered to be the fountain of justice and his decision supersedes that of any court.[63] However, we now have a system in which judicial decisions are

[62] Nevertheless, Article 6(4) of the C.P.C. states that *"no appeal shall lie from any decision of the court granting or rejecting an application for review."* As this provision indicates, review of judgment is an exception to the general rule, and as much as possible litigation should come to an end. Thus parties are precluded from exercising their right of appeal where a judgment is rendered based on review by the court of rendition. However, the existence of cassation benches dilutes the purpose behind this assertion, as parties can seek review of the already reviewed judgment in cassation benches because they are not structured as courts of appeal. Especially in circumstances of cassation over cassation, the task becomes so tedious that timely disposition of cases under review by the court of rendition is still extended. The FSC Cassation division in the case of Former Woreda 07 Kebele 32 Administration Office vs. W/o Joro Wakjera, File No. 42871, Tir 12, 2002 E.C. further affirmed that even though Article 6(4) of the C.P.C. precludes appeal once a decision on granting or rejecting review has been reversed. But this is no bar to seeking re-review of the judgment by courts of cassation if a fundamental error of law exists.

[63] See, Sedler, *Ethiopian Civil Procedure*, supra note 6, pp. 12-18.

valued in terms of their legal validity and compatibility with the positive law and not on the basis of individual moral standards. It is obvious that nobody wants the FSC Cassation Division to act as the modern *Zufan Chilot*.

Another drawback to the judgment permitting review after an appeal has been sought is that the decision does not in any way indicate which techniques of interpretation the court used or where they derived the purpose of the law stated in their conclusion from. Especially when setting a new precedent, judicial pronouncements require a great deal of doctrinal and non-doctrinal research to assess both the legal compatibility of the ruling and its impact upon society. However, our courts do not meet this standard, and they are yet to win the hearts of every litigant and public confidence in general.[64]

Nevertheless, it should be stated here that if the preclusion Article 6 makes in seeking review of judgment for those who have sought an appeal is not in the interest of justice then such a matter shall be a subject of deliberation by the legislature. It is no wonder that our Civil Procedure Code needs various amendments after nearly half a century to make it compatible with the current circumstances. This being the case, Article 6 could be taken as one area needing amendment. But rather than going through the normal procedure of law making, the judiciary shall not put together laws for society under the guise of interpretation.

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[64] At times one is left to wonder whether the FSC sets the precedent first and then amends mistakes after looking at the public's reaction. This was the case in the binding interpretation it gave on Article 1723 and the various amendments it made later to the same ruling without overturning the first judgment as invalid, but instead eroding it to the farthest possible extent and making it inapplicable. See, Yoseph Aemero, የፍትሐብሔር ክርክሮች ሂደት፡ፈተናዎች እና ተስፋው, in Yazachew Belew (ed.), *The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Adjudication*? Ethiopian Business Law Series, vol. V, December 2012, pp. 15-18.

Without having the mandate to make laws, the FSC Cassation Division has overstepped its authority and undermined the power of the legislature in lawmaking. The interpretation it gave on Tikimit 18, 1998 E.C., File No. 16624, was in accordance with the spirit and purpose of the law as it was interpreted based on the clear wording of the statute. But the decision it rendered on Tir 5, 2002 E.C., File No. 43821, was not in line with the law, to say the least, and has further eroded public confidence in the division itself and in the judicial system as a whole by encroaching on the supremacy of the legislator in law making.

Concluding Remarks

The incorporation of review of judgments by the Code of Civil Procedure, whether through the court of rendition, courts of appeal or cassation benches, targets the parallel purposes of uncovering the truth and bringing litigation to closure. Litigants get a second chance and freedom of choice to have their cases reviewed by the same court or by a court found at a higher level on the hierarchy than the court that rendered the judgment. At the same time, mechanisms are entrenched that ensure review will not be applied viciously and indefinitely, even for the purpose of uncovering the truth.

The FSC Cassation Division's binding decision on Article 6 of the C.P.C., which permits a party to seek review of judgment in the court of rendition even after exhausting appeal, opens a door for litigants to live in a constant state of fear. This is because even litigation closed by the final court of the state might be re-opened if a review is sought as per Article 6. This line of interpretation not only keeps parties in a steady state of tension but also undermines the purpose of speedy justice and finality of litigation, as it allows litigants to continue to battle in the courts of law indefinitely.

The foregoing discussions have explained that judges in the FSC Cassation Division should be constrained by statutory language and legislative intent. It is not controversial to state that judges are always subordinate when it comes to the making of laws. Judges who interpret statutes should at the same time refrain from implementing their own notions of public policy under the guise of interpretation.

In interpreting the clear language of Article 6 of the C.P.C., the Cassation Division has arrived at a conclusion that was neither intended nor set as a goal by the law maker. This undertaking is far from the accepted principles of interpretation, and it undermines the separation of powers that exists between the judiciary and the legislature.

Nonetheless, one thing is worth noting and commending. The Cassation Division has demonstrated that it is not rigidly averse to amending erroneous previous interpretations, nor is it unduly attached to its own binding precedent. However, only to show its conviction on an interpretation which does not need amends.

CASE COMMENT

Power of Taxation over Income of Employees of Public Enterprises Owned by the Federal Government of Ethiopia: A Case Comment

Aschalew Ashagre*

Key Terms: Power of taxation, division of power of taxation, Ethiopian federal system

I. Introduction

A federal system is characterized, *inter alia*, by fiscal decentralization.[1] One of the most important aspects of fiscal decentralization is division of power of taxation between the federating units and the federal government, taking into account the general division of power between these tiers of government.[2] This is so because unless there is proper and well considered

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[1] See Ronald L. Watts, *Comparing Federal Systems*, 3rd ed., McGill University Press, 2008, pp. 95-112; see also Kibre Moges, 'The Conceptual Framework for Fiscal Decentralization', in Eshetu Chole (ed.), *Fiscal Decentralization in Ethiopia*, Addis Ababa University Printing Press, pp. 1-16, Taddese Lencho, 'Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About", *Mizan Law Review*, vol. 4, no. 1, 2010.

[2] Solomon Nigussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Wolf Legal Publishers, 2006, p. 115 Bekele Haileselassie, *Ethiopia: The Constitutional Law of Taxation and its Implication for Federal-State Relations* (LLM thesis, University of Wisconsin Law School, unpublished, 1999).

division of power of taxation, the presence of a federal system by itself does not guarantee that the political and economic goals of such a system will be achieved.[1] That is why, as a matter of principle, we find such a division of power of taxation between the two tiers of government in all of the federal countries of the world.[2]

The Ethiopian federal system is no exception. Thus the FDRE Constitution, the supreme law of the country,[3] contains relatively detailed provisions dealing with the division of the power of taxation between the National Regional States and the Federal Government. When we go through the Constitution's specific provisions, we see that there are exclusive powers of taxation accorded to the federal government,[4] exclusive powers of taxation given to the regional states,[5] concurrent powers of taxation given to the two tiers of government,[6] and undesignated powers of taxation.[7]

According to the Amharic version of Article 96(3) of the FDRE Constitution,[8] the Federal Government of Ethiopia has the power to levy and collect income tax on employees of the public enterprises it owns. Despite this, there are sometimes misunderstandings regarding the message conveyed

[1] Richard A. Musgrave and Peggy B. Musgrave, Public Finance in Theory and Practice, 4th ed., Tata McGrow Hill Publishing, 2005, pp. 457 and following.
[2] Ibid.
[3] See Art 9(1) of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1, 1995, *Federal Negarit Gazeta*, Year 1, No. 1.
[4] Id., see Art 96 of the Constitution.
[5] Id., see Art 97 of the Constitution. See also, Solomon Nigussie, *Supra* note 2, pp. 125-135.
[6] Id., see Art 98 of the FDRE Constitution; see also Solomon Nigussie, *Supra* note 2, pp. 135-140.
[7] Id., see Art 99 of the FDRE Constitution; see also Berhanu Assefa, *Undesignated Powers of Taxation in the Distribution of Fiscal Powers between Central and State Governments under the FDRE Constitution* (Senior Thesis, unpublished, Faculty of Law, AAU, 2006).
[8] There is discrepancy between the Amharic and the English versions of this provision of the Constitution, as personal income tax (የሥራ ግብር) is missing in the English version of the provision.

by this article, probably due to the fact that there is no parity between the Amharic and the English versions of this provision. Such a misunderstanding manifested itself in a case which cropped up between Fidelitu Woreda Finance, Economic Development and Revenue Office, Liben Zone, Somali Regional State[9] (hereinafter cited as the respondent) and the Federal Water Works Construction Enterprise (a public enterprise hereinafter cited as the applicant), owned by the Federal Government of Ethiopia. In this case, courts of all levels[10] in the Somali Region decided that income tax collected from the employees of this enterprise belonged to the Somali National Regional State. The case was finally submitted to the Cassation Division of the Federal Supreme Court of Ethiopia (hereinafter cited as the Cassation Division), which reversed the decisions of the regional courts. As we will see below, the Cassation Division handed down a correct and acceptable decision, supported by the relevant provisions of the FDRE Constitution.

The Cassation Division also cited a provision of Proclamation No. 33/1992,[11] which was issued by the Transitional Government of Ethiopia in order to regulate sharing of revenues between the then-regions and the Central Government of the country. The question, however, is whether it is possible

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[9] By virtue of Art 47 of the FDRE Constitution, the Somali Region is one of the Federating Units of Federal Ethiopia.

[10] Under the Ethiopian legal system, we find three tiers of courts both in the regional states and the Federal Government. The three tiers of courts of the Federal Government are First Instance Courts, High Courts and the Supreme Court. The FDRE Constitution also declares that each regional state should establish three tiers of courts: First Instance Courts, Zonal (High) Courts and Regional Supreme Court.

[11] A Proclamation to Define the Sharing of Revenue between the Central Government and the National/Regional Self-Governments, Proclamation No. 33/1992, *Negarit Gazeta*, 22nd Year, No. 7. This proclamation was made by the Council of Representatives of the Transitional Government of Ethiopia.

to apply the provisions of that proclamation in order to resolve a dispute involving the division of the power of taxation between the Federal Government and the federating units after the adoption of the FDRE Constitution. In other words, is the proclamation under consideration still good law? Why should we cite the provisions of a law made during the transitional period to serve interim purposes when we now have the provisions of the supreme law of the land, the FDRE Constitution, which are meant to regulate the division of expenditure powers and the division of powers of taxation between the Federal Government and the regions?

This short case comment is, therefore, aimed at examining and analyzing whether it is appropriate to apply the provisions of the transitional period Proclamation to regulate the division of powers of taxation between the two tiers of government in Ethiopia today, and in the future, under the FDRE Constitution. In this case comment, the author argues that the Cassation Division has no concrete legal grounds that justify the application of the provisions of Proclamation No. 33/1992 as the FDRE Constitution repealed and replaced the provisions of this legislation by implication. Nonetheless, the author of this case comment does not lose sight of the fact that there are other individuals who vehemently argue that the provisions of this proclamation are still applicable insofar as they are consistent with the provisions of the Constitution. In spite of this, it is the author's firm belief that the proclamation under discussion was meant to regulate revenue sharing only until a constitution, an enduring document, could be promulgated and put in place, because when a federal system of government is created, issues surrounding fiscal relations between the Federal Government and the federating units extend far beyond the issue of revenue sharing.

This case comment is not meant to bring those with different opinions to a consensus. Instead, it is aimed at provoking thought among legal scholars debating the applicability – or otherwise – of the proclamation after the FDRE Constitution's promulgation. The piece is organized as follows. In the second part, I will summarize the facts of the case and the courts' holdings, including the decision of the Cassation Bench of the Federal Supreme Court. In the third part, I will analyze the decisions of the courts and comment on them, with particular emphasis on the decision of the Cassation Division.

II. Summary of the Facts of the Case and Holdings of the Courts

The Federal Water Works Construction Enterprise – a public enterprise owned by the Federal Government of Ethiopia – was engaged in water construction works in Fidelitu Woreda, Liben Zone of Somali National Regional State. The enterprise was constructing water works that were financed by the Regional Government for the benefit of the people of the Woreda. While the enterprise was performing its tasks, it employed Somali language speakers living in the Woreda. Because these employees were compelled by law to pay taxes on their income, the employer, as a withholding agent of income tax, deducted the income tax and transferred the money to the Woreda Finance, Economic Development and Revenues Office, believing that this tax revenue would fall within the Regional Government's power of taxation.

Later, however, the Federal Inland Revenue Authority (which has now been subsumed by the Ethiopian Customs and Revenue Authority established in 2008),[12] realized that the Federal Water Works Construction Enterprise was paying the income tax collected from its employees to the Regional State, which is not entitled to this sort of income tax. The Federal Inland Revenue Authority wrote letters to the Water Works Construction Enterprise, making it clear that it was not lawful to pay income tax withheld from the enterprise's employees to the Regional Government. Thereafter, the Water Works Construction Enterprise stopped paying the withheld income tax to the Woreda, understanding that this money should be paid to the Federal Inland Revenue Authority instead.

Following the Water Works Construction Enterprise's refusal to pay withheld taxes to the respondent, the Fidelitu Woreda Finance Economic Development and Revenue office brought suit in the Liben Zone High Court, claiming that the applicant should pay income tax collected from its employees amounting to 183,744 Birr.[13] In its statement of claim, the respondent alleged that because the applicant was not voluntary to pay the afore-mentioned sum to the respondent, it occasioned obstacles to the developmental endeavors of the Woreda. Along with its statement of claim, the respondent annexed certain documents to prove that the applicant had been paying the income tax revenue to it. The applicant responded that though it had been paying the income tax in question to the respondent, it could not be obliged to continue paying as the Federal Inland Revenue Authority had

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[12] The Ethiopian Revenues and Customs Authority Establishment Proclamation, Proclamation No. 587/2008, *Federal Negarit Gazeta*, Year14, No. 44.

[13] *Fidelittu Woreda Finance, Economic Development and Revenues Office v. Federal Water Works Construction Enterprise*, File No. m105/02/07/99, unpublished, Liben Zone High Court, Somali Regional State, 26 June 2007.

instructed it (the applicant) to pay such income tax to the Federal Government. The applicant also produced documents to establish that it was instructed to pay the income tax to the Federal Government, as the applicant was owned by the Federal Government of Ethiopia.

The Regional High Court, to which the case was brought, decided that the applicant should pay the 183,744 Birr to the respondent, since the source of the income tax was the Woreda. As the applicant was dissatisfied with the decision of the Regional High Court, it lodged an appeal to the Regional Supreme Court.[14] However, the Regional Supreme Court confirmed the decision of the lower court. The Supreme Court of Somali Region reasoned that because employees of the applicant were '*indigenous people'* of the Region, because the source of the money was the region, and because the place of work was in the Somali Region, the income tax collected from the employees of the applicant should be paid to the Regional Government, not to the Federal Inland Revenue Authority.

As the applicant was aggrieved by the decision of the Regional Supreme Court, it filed an application to the Cassation Division of the Federal Supreme Court on Sene 20, 2000 E.C. (June 27, 2008 G.C.). In its application, the applicant made it clear that it was a federal profit-making public enterprise by virtue of Regulation No. 109/1996 and argued that the decision of the courts of Somali Region, which compelled it to pay the income tax to the region,

[14] *Fidelittu Woreda Finance, Economic Development and Revenues Office v. Federal Water Works Construction Enterprise*, file no. 145/99, unpublished, Somali Region Supreme Court, Somali Regional State, June 4, 2008.

were contrary to Article 96(3) of the FDRE Constitution and Article 5(2(c)) of Proclamation No. 33/1992,[15] and thus contained fundamental errors of law.

The Cassation Division of the Federal Supreme Court accepted the application and summoned the respondent, Fidelittu Woreda Finance, Economic Development and Revenue Office. The hearing was held on Ginbot 13, 2001 E.C. (May 21, 2009 G.C.). In addition, the respondent submitted a written reply on Ginbot 14, 2001 E.C. (May 22, 2009 G.C.), upon the order of the Cassation Bench. In its statement of reply, the respondent argued that the regional courts did not distort the content and spirit of Article 96(3) of the FDRE Constitution, and that by virtue of Article 97(1), such income tax is payable to regional governments. The respondent also argued that the Constitution, Proclamation No. 33/1993 and other directives[16] make clear that income taxes collected from such employees are within the competence of the Regional Government. It further argued that because the financial bases of the region are income taxes collected there, the directives given by the Federal Inland Revenue Authority did not have any constitutional basis under Article 100(1)[17] of the FDRE Constitution and Proclamation No. 33/1992, both of which are meant to enhance regional autonomy and self-administration.

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[15] Bear in mind that the applicant did not confine its arguments to the provisions of the FDRE Constitution, but rather made reference to the proclamation that was in force during the transitional period.

[16] To the knowledge of this author, to date there have been no directives defining the division of the powers of taxation between the Federal Government and the Regional States in Ethiopia.

[17] Note that the respondent inappropriately cited this article to sway the Cassation Bench of the Federal Supreme Court. Art 100 (1) of the Constitution does not talk about division of the power of taxation; rather, this provision provides the general principle of taxation as it stipulates that in exercising their powers of taxation, states and the Federal Government shall

Having entertained the above arguments of the litigants, the Cassation Division of the Federal Supreme Court framed two appropriate issues. These were: *whether or not the applicant was a public enterprise owned by the Federal Government*, and *which tier of government (the Regional Government or the Federal Government) is constitutionally empowered to levy and collect the income tax under discussion*. The Cassation Division decided in favor of the applicant and reasoned that because the applicant was a public enterprise owned by the Federal Government by virtue of Regulation No. 109/1996, such income tax should be paid to the Federal Inland Revenue Authority. The Cassation Division supported its decision by citing Article 96(3) of the FDRE Constitution and Article 5(2(c)) of Proclamation No. 33/1992.[18] As a matter of law, the decision of the Cassation Division is correct. Nevertheless, the question at the heart of the matter is whether a dispute involving division of the power of taxation between the Federal Government and the Regions can be resolved by a law issued during the transition period. In other words, is Proclamation No. 33/1992, which regulated sharing of revenues between the then Regional/Self-Governments and the Central Government, still functional?

III. Case Analysis and Comments

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ensure that any tax is related to the source of revenue taxed and that this is determined with proper consideration. It is thus clear that Art 96 (3) of the Constitution is more specific than Art 100 (1) with regard to the division of the power of taxation over the present tax sources concerned.

[18] *Fidelittu Woreda Finance, Economic Development and Revenues Office v. Federal Water Works Construction Enterprise*, Cassation File No. 40133, Federal Supreme Court, 8 July 2009. This case has been published in Cassation Decisions of the Federal Supreme Court, Vol. 9, pp. 191-194.

As explained above, the applicant was paying income tax collected from its employees to the Regional Government until it was ordered by the Federal Inland Revenue Authority to pay this money to the Federal Government instead. This demonstrates that the applicant was not aware of the division of the power of taxation between regional states and the Federal Government under the FDRE Constitution, which has been the supreme law of Ethiopia since August 21, 1995.[19] It is also possible to infer that the respondent was not cognizant of the fact that the income tax in dispute was to be paid to the Federal Inland Revenue Authority, part of the executive organ of the Federal Government of Ethiopia.

Conversely, the courts of the Somali Region at all levels did not have the slightest doubt that the power to levy and collect such income tax is vested in the Federal Government of Ethiopia. Consequently, their analysis and reasoning was grossly erroneous. Instead of analyzing the spirit of Articles 96(3) and 97 of the FDRE Constitution, they depended on the proclamation[20] made during the transitional period. In addition, they reasoned that because the employees' '*origins*' were in the region and because the water construction project was financed by the region, income tax collected from the employees of the applicant should be paid to the region.

Thus the courts of the regions depended on erroneous and irrelevant facts to make their decisions. For one thing, although the applicant was a public enterprise owned by the Federal Government of Ethiopia, it could

[19] The FDRE Constitution entered into force on this date, although it was approved by the Constitutional Assembly on 8 December 1994.
[20] This is the proclamation cited at note 13.

employ individuals residing in the region irrespective of their religion, language, race or any other differences[21] so long as they could meet the specific criteria set forth by the employer. Because of this, the applicant employed inhabitants of the Woreda who speak the Somali language. But this does not entitle the regional government to levy and collect income tax from these persons, as doing so is beyond its constitutional competence. Secondly, although the regional government financed the project, it did so for its own benefit. The relationship between the Woreda and the applicant was contractual, as the former was the service recipient and the latter the service provider. This contractual agreement between these two entities could not entitle the respondent to levy and collect income tax from the employees of the applicant as the latter is a public enterprise established and owned by the Federal Government of Ethiopia.

The regional courts could have critically examined the provisions of the FDRE Constitution dealing with division of the power of taxation between the regional states and the Federal Government. In addition to carefully examining the contents of Article 96 of the Constitution, they should have thoroughly gone through Article 97, which declares:

> … regional states have the power to levy and collect income taxes on employees of the state and of private enterprises, taxes on incomes of private farmers and farms incorporated in cooperative associations, profit and sales taxes on individual traders carrying out a business within their territory, incomes from transport services rendered on waters within their

[21] Equality before the law is clearly provided in Art 25 of the FDRE Constitution and the relevant provisions of the UDHR and the ICCPR, which serve as guiding principles to interpret the human rights provisions of the FDRE Constitution.

territory, profit, sales, excise and personal income taxes on income of enterprises owned by the states.

Juxtaposing Arts 96(3) and 97 of the Constitution, it becomes evident that levying and collecting income tax on employees of public enterprises of the Federal Government is not within the regional states' constitutional power of taxation. Therefore, all levels of the Somali Regional State courts gave decisions which violated what was clearly provided in the FDRE Constitution.

The Cassation Division of the Federal Supreme Court reversed the decisions of the Somali Region courts and held that the income tax in question is to be levied and collected by the Federal Inland Revenue Authority. The Bench based its decision on Art 96 (3) of the FDRE Constitution and Art 5(2) (c) of Proclamation No. 33/1992.[22] If we confine ourselves to the English version of Art 96(3) of the Constitution, we may conclude that the court did not have the appropriate legal authority, since this provision does not clearly stipulate the power of taxation of income of employees of public enterprises belonging to the Federal Government. This is because the English version of this provision provides that Federal Government shall levy and collect income,[23] profit,

[22] The proclamation is cited above at note 13.

[23] The word "income" here seems to indicate income tax to be collected from the employees of the public enterprise owned by the Federal Government. However, the word income encompasses far more than employment income, as can be gathered from statutory definitions and definitions provided in the literature. For instance, in Ethiopia income is defined *as any sort of economic benefit including non-recurring gains in cash or in kind, from whatever source derived and in whatever form paid, credited or received*. When we look to the body of the Income Tax Proclamation of Ethiopia, we see that the word income covers employment income, rental income, business incomes of various sorts, income on royalties, income on casual rental of property, income on interest, income on capital gains and the like. See the

sales, and excise taxes on enterprises owned by the Federal Government, which conveys the message that the Federal Government has the power to levy and collect direct as well as indirect taxes on the public enterprises it owns. It does not, however, clearly tell us that the Federal Government of Ethiopia is constitutionally empowered to levy and collect income tax on employees of its public enterprises.

Nonetheless, the Amharic version of this provision makes it crystal clear that the Federal Government of Ethiopia has this power. The Amharic version of this provision provides: [የፌዴራል *መንግሥት*] በፌዴራል *መንግሥት* ባለቤትነት *ሥር* በሆኑ የልማት ድርጅቶች ላይ የንግድ ትርፍ ግብር፣ *የሥራ ግብር፣* የሽያጭና የኤክሳይዝ *ታክስ* ይጥላል፣ ይሰበስባል፡፡ This could be translated as: The Federal Government can levy and collect business income tax, ***personal income tax***, sales tax and excise tax from the public enterprises owned by itself. And because the Amharic version of the constitution has final and binding legal authority,[24] the issue under consideration is to be dealt with in accordance with the Amharic version of the provision mentioned above. Therefore the decision of the Cassation Division of the Federal Supreme Court made on the basis of the Amharic version of Art 96 (3) of the constitution is correct.

However, the Cassation Division of the Federal Supreme Court should not have made reference to Art 5 (2) (c) of Proclamation No. 33/1992, which was meant to regulate the sharing of revenues between the then-regions and the Central Government of Ethiopia. As we know, following the downfall of

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Income Tax Proclamation of the Federal Government of Ethiopia, Proclamation No. 286/2002 (as amended), *Federal Negarit Gazeta*, Year 8, No. 34.

[24] See Art 96 (3) of the FDRE Constitution (author's translation).

the *Derg* Regime in 1991, a transitional period charter[25] was adopted and a transitional government was established in Ethiopia. During the transitional period, a federal form of state structure was created by the charter although a federal form of government was not expressly proclaimed. Hence, we can say that during the transitional period there was a *de facto* federal state structure,[26] since there was a division of power between the Central Government and the national/regional self-governments. Because of this division of power, there was a strong need to regulate the sharing of revenues between the Central Government and the regions. Therefore Proclamation No. 33/1992 dealing with sharing of revenues[27] was put in place.[28]

The body of this proclamation contains various articles dealing with the objectives of revenue sharing,[29] the basis for revenue sharing,[30] categorization of revenues,[31] revenues that belonged to the Centre and the

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[25] The Transitional Period Charter of Ethiopia, Proclamation No. 1/ 1991, *Negarit Gazeta*, Year 50, No. 1.

[26] See Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia*: *A Comparative Study*, Wolf Legal Publishers, 2006, pp. 44-51. See also, Solomon Nigussie, S*upra* note 2, pp. 22-24.

[27] The proclamation cited above at note 13.

[28] Id. The preamble of the proclamation provides that whereas the Transitional Government of Ethiopia is currently undertaking measures that brought radical changes in the political, economic and administrative life of the country; whereas, of these measures, the most important being the promulgation of National/Regional Self-Governments establishment, Proclamation No. 7/1992 providing for the reorganization of the country in a manner that enables it to put into practice the right of nations/nationalities and peoples to administer their own affairs as had been insured by the charter; whereas this proclamation stipulates the shares and coordination between the Central Transitional Governments regarding the collection and utilization of revenue shall be determined by law.

[29] Id. See Art 3.

[30] Id. See Art 4.

[31] Id., p. 5.

regions,[32] concurrent revenues[33] and the like. Needless to say, the transitional government was not meant to persist indefinitely. The Federal Constitution was drafted and finally adopted by the Constitutional Assembly on December 8, 1994;[34] it entered into force on August 21, 1995.[35] The Constitution declared, in black and white, that Ethiopia is a federal state. It created nine regional states and the Federal Government,[36] and it also apportioned powers between the Federal Government and the regions.[37] The Constitution specifically allocated the powers of taxation between the Federal Government and the regions.[38]

From the date when the FDRE Constitution entered into force, the operation of the Transitional Period Charter ceased. The transition period ended after the promulgation of the Constitution. By the same token, the issues of sharing revenues and powers of taxation regulated by Proclamation No. 33/1992 were taken over by the relevant provisions of the FDRE Constitution, and by implication the proclamation was repealed. The proclamation no longer served any purpose. Therefore, there is no constitutional foundation for applying any provision of the proclamation after August 1995.

However, some people argue that insofar as the provisions of the proclamation are consistent with the provisions of the FDRE Constitution, the

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[32] Ibid.
[33] Ibid.
[34] See the preamble of the FDRE Constitution.
[35] See the page of the FDRE Constitution preceding the preamble.
[36] See Arts 46 and 47 of the FDRE Constitution.
[37] See Arts 51 and 52 of the FDRE Constitution.
[38] See, once again, Arts 95-100 of the FDRE Constitution.

applicability of the former remain intact. This argument is bolstered by the fact that there are proclamations that are still functional although they were made during the transition period. These provisions remain in effect so long as they are consonant with the ideals of the FDRE Constitution and have a purpose to serve. This argument is cogent and hence acceptable.

Nonetheless, it is important to remember that such laws must have enduring importance owing to the nature of the subject matter they regulate. In this regard, one of the most typical examples (from the catalogue of laws made during the transitional period) is the Patent Proclamation. This proclamation is still functional, and will probably remain functional into the future, because it was not meant to address problems that arose during the transition period. Rather, the Patent Proclamation deals with intellectual property rights, which were relevant at that time and continue to be relevant.

In contrast to the mission of the Patent Proclamation, the Revenue Sharing Proclamation that is the subject of this case comment had a significantly different nature and purpose. The Revenue Sharing Proclamation was not intended to provide lasting and permanent solutions to the multifaceted issues of fiscal federalism, divisions of expenditure responsibilities, division of powers of taxation, horizontal and vertical fiscal imbalance, tax harmonization and the like. Rather, it was intended to serve as an interim panacea for the problems of sharing of revenues between the Central Government and the National/Regional Self-Governments of the day at a formative stage of the new Ethiopian federal experiment. In sum, the Proclamation was to provide service until the advent of the FDRE

Constitution, a document taken to be a supreme covenant in Ethiopia. Therefore, with due respect to the arguments of others, the author firmly believes that the 1992 Revenue Sharing Proclamation was impliedly repealed concomitant to the promulgation of the FDRE Constitution, as no further purpose would be served by this proclamation, which had served its purpose during the transition period.

Other legal scholars share the views of this author. Bekele Haileselassie, for instance, once wrote that it is not possible to argue that the provisions of the proclamation are operative after the adoption of the FDRE Constitution.[39] In addition, Taddese Lencho has written:

> The 1992 Law [the law regulating revenue sharing, i.e., Proclamation No. 33/1992] is abrogated by the Constitution, but it has thrown many a light over matters that were left unsaid or said ambiguously by the constitution (although this is not publicly acknowledged).[40]

On the basis of the discussion and the analysis above, it is possible to conclude that the 1992 Revenue Sharing Proclamation had no value and no use immediately following the promulgation of the FDRE Constitution. This is because the provisions enshrined in the proclamation were replaced by the provisions of the Constitution. It is significant to note that the provisions of the proclamation were only meant to deal with revenue sharing, whereas the fiscal provisions of the FDRE Constitution include provisions dealing with division of the powers of taxation and have gone far beyond the regulation of revenue sharing.[41] Therefore, when disputes arise in Ethiopia regarding the

[39] Bekele Haileselassie, *Supra* note 2, pp. 107-110.
[40] Taddese Lencho, *Supra* note 1, p. 42.
[41] It must be clear that one of the most important issues in a federal system of government is the assignment of expenditure responsibility and power of taxation, since mere division of

power to levy and collect a specific tax, the law to be consulted is the FDRE Constitution, not the dead proclamation which survived from 1992 to August 1995.

This being so, deciding a court case on the basis of this proclamation is a fundamental error of law. Consequently, though the decision of the Cassation Bench of the Federal Supreme Court on the merits of the case was correct, its legal citation is incorrect. Since the decisions of the Cassation Bench serve as precedent, binding on all courts of Ethiopia,[42] the Bench should have based its decision solely on the relevant provisions of the FDRE Constitution. It should not have made reference to a law which is no longer in force.

If the Cassation Bench encounters similar cases in the future, it is the author's sincere belief that it should disregard the decision cited in this case comment and depend on the relevant provisions of the FDRE Constitution, which have full force over any matters pertaining to division of the power of taxation between the federating units and the Federal Government of Ethiopia.

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political power does not create a viable federal system. Hence, in a federal system, revenue sharing is one of the elements of fiscal federalism. See Amedeo Fossati and Giorgio Panella (eds.), *Fiscal Federalism in the European Union*, Routledge Studies in the European Economy, 1999. See also, Nuria Bosch and Jose M. Duran (eds.), Fiscal Federalism and Political Decentralization: Lessons from Spain, Germany and Canada, 2008.

[42] Federal Courts Proclamation, Re-amendment Proclamation No. 454/2005, *Federal Negarit Gazeta*, Year 11, No. 42, Art 2 (1). As far as the power of the Cassation Division of the Federal Supreme Court is concerned, see Kalkidan Aberra, "Precedent in the Ethiopian Legal System," *Ethiopian Journal of Legal Education*, Vol. 2, No. 1, January 2009, pp. 23-42. See also, Muradu Abdo, "Review of Decisions of State Courts over State Matters by the Federal Supreme Court," *Mizan Law Review*, Vol. 1, No. 1, June 2007, pp. 60-74. See also, Yohannes Heroui, "ስለሰበር ሥልጣንና ሥርዓቱ ጥቂት ማስታዎሻዎች," *Ethiopian Bar Review*, Vol. 3, No. 1, March 2009, pp. 131-148.

REFLECTION QUARTER

The Place of Crimes against Humanity under the Ethiopian Legal System: A Reflection

Messay Asgedom*

Introduction

Crimes against humanity are among the most heinous forms of international crimes that shock the conscience of mankind. The international community has sporadically prosecuted perpetrators of these crimes since the aftermath of World War II and then after. Apart from international prosecutions, different countries have enacted laws that penalize the commission of such crimes. Some others have applied customary international law to prosecute perpetrators of these crimes. Some years back, Ethiopia has prosecuted former *Derg* officials for their alleged commission of crimes against humanity. This author intends to explore the place of crimes against humanity under the Ethiopian legal system. The paper begins with the exposition of the concept of crimes against humanity and its constitutive elements under customary international law. It then proceeds to specifically explore the place of crimes against humanity under the Ethiopian legal system. Finally the paper draws conclusion.

1. The Concept of Crimes against Humanity

1.1. Evolution and Definition of the Concept

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The traditional bases of crimes against humanity lie in the laws of war. The notion of *law of humanity* entered into an international treaty in *Martin Clause* of the Hague Convention in 1907.[1] The first official employment of the term '*crime against humanity'* was made in 1915, in the joint declaration of the governments of Great Britain, France and Russia in describing the Turkish massacres of Armenians as crimes against humanity and civilization.[2]

Crimes against humanity re-emerged after World War I in 1919 at the Paris Peace Conference which was held and proposed to prosecute those who were alleged to be guilty of offenses against the laws and customs of war or the laws of humanity.[3] The proposal was ultimately rejected for various reasons. After the end of World War II, in 1945 crimes against humanity were incorporated in the Charter of the International Military Tribunal for the Trial of the Major War Criminals (Nuremberg Charter). The Nuremberg Charter was the first positive international law that recognized the prohibition of crimes against humanity. Art 6(c) of the Charter defined crimes against humanity as:

> *murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime*

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[1] The Martens Clause states that; in cases not otherwise covered by the convention (Hague convention), the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*, and the dictates of the public conscience. See Hague Convention IV Respecting the Laws and Customs of War on Land, 18 Oct. 1907

[2] They proposed a declaration which makes all members of the Turkish Government responsible together with its agents implicated in the massacres. See Antonio Cassese. International criminal law, 2nd ed. Oxford University Press, New York, 2008, p. 101

[3] Ibid 102

> *within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*

The main reason to incorporate crimes against humanity in the Nuremberg Charter was to fill-in gaps that used to exist in positive international law. The law of war protected civilians in times of war but it did not protect atrocities committed by states against their own citizens. This lacuna dictated the drafters of the Charter to incorporate crimes against humanity. However, the Charter failed to provide a principal distinction between war crimes and crimes against humanity. Crimes against humanity were simply viewed as an extension of the scope of humanitarian law. The Nuremberg Charter represented the first ever attempt to define crimes against humanity and it has really served as a model for subsequent formulation of these category of crimes.[4]

The Control Council Law (CCL) No. 10[5] was the second international instrument that contained a provision which dealt with crimes against humanity. This law added imprisonment, torture and rape to the list of inhuman acts and it further eliminated the requirement of the act and war

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[4] See Margaret M. Guzman. "The Road from Rome: The Developing Law of Crimes against Humanity". Human Rights Quarterly, Vol. 22, 2000, 335–403, p. 347 [hereafter in Guzman, The Road from Rome]

[5] This law was enacted in 1945 to provide a uniform legal basis for prosecution in the allied power occupied zones of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal. American, French, and Soviet tribunals applied CCL No. 10 in their respective zones of occupation. Art 2 (1(c)) of the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, CCL No. 10, 20 Dec. 1945 defined crime against humanity as:

> *Atrocities or offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.*

nexus. After the CCL No. 10 till the establishment of the two *ad hoc* international criminal tribunals in the 1990s there were some developments related to crimes against humanity.[6]

The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)[7] and the International Criminal Tribunal for Rwanda (ICTR)[8] are the second milestone for the development of the law of crimes against humanity. They represent important recent codifications of the law of crimes against humanity. The list of illegal acts that constitute crimes against humanity under the ICTY and ICTR Statutes remain the same with that of the CCL No.10.[9]

The ICTY Statute clarifies that discriminatory intent is required only for persecution and not for other inhumane acts of crimes against humanity. This Statute further recognized the nexus between enumerated acts and armed conflict of international or internal character. The ICTR Statute did not conform completely to the ICTY definition. While the lists of illegal acts remain the same, the ICTR Statute requires that these acts be committed as

[6] The 1948 Genocide Convention and the 1954, 1991 and 1996 Drafted Codes of Crimes against the Peace and Security of Mankind of the International Law Commission have some provisions that deal with crimes against humanity.

[7]Art 5 of the ICTY statute provides crimes against humanity: *The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:(a)murder;(b) extermination;(c)enslavement; (d)deportation; (e)imprisonment; (f)torture; (g)rape; (h)persecutions on political, racial and religious grounds;(i) other inhumane acts*.

[8] Art 3 of the ICTR statute provides Crime Against Humanity: *The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes a)Murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape; h) Persecutions on political, racial and religious grounds; i) Other inhumane acts when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds*.

[9] See, Art 2(1(c)) of CCL No. 10, Art 5 of the ICTY Statute and Art 3 of the ICTR Statute

part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious ground. Under this Statute, not only persecution, but all inhumane acts must be committed on discriminatory grounds in order to qualify as crimes against humanity. As Guzman notes this requirement of discriminatory intent represents a significant regression in the development of the concept.[10] In one respect, however, the ICTR definition is more progressive than the ICTY definition. The ICTR definition did not make any mention of armed conflict; it de-linked crimes against humanity entirely from war, whether internal or international.[11]

Recently crimes against humanity have been incorporated in the Rome Statute. The elements of the definition of crimes against humanity were among the contested issues during the negotiation of the Rome Statute. The debate among other things included: whether a nexus with armed conflict should be required; whether the definition should require discrimination generally or only for persecution and whether the contextual elements of "widespread" and "systematic" attack should be conjunctive or disjunctive.[12] After a lengthy debate the Statute came with a number of political compromises[13] under Art 7 and it specifically stipulated about crimes against humanity as one of the crimes that fall within the jurisdiction of the International Criminal Court (ICC).[14] The Statute has enlarged the list of

[10] See Guzman, The Road from Rome, *supra note* 4, p. 351
[11] Ibid
[12] See Margaret M. Guzman. *Crimes against Humanity*, Research handbook on international criminal law, p. 7 [here after in Guzman, Crimes against Humanity]
[13] Id, p. 3
[14] Art 7 of the Rome Statute Provides Crimes against Humanity: .... *"Crime against humanity" means any of the following acts when committed as part of a widespread or*

inhumane acts by incorporating all forms of grave sexual violence, enforced disappearance and apartheid. Further, the Statute has expanded the grounds upon which persecution could be committed. Moreover, the Statute settled two long disputed aspects of the definition of crimes against humanity. First, crimes against humanity no longer contain any nexus with armed conflict, whether international or non-international nature. Second, the Statute limited discriminatory ground /intent/ only to an act of persecution like that of ICTY. That is though the ICTR Statute required discriminatory intent or ground for the commission of crimes against humanity; under customary international law neither discriminatory ground nor intent is a required element of crimes against humanity except for ‘persecution.’

1.2. Elements of Crimes against Humanity

Identifying the elements of crimes against humanity provides a moral basis for labeling a particular inhuman act as constituting a crime against humanity and justifies an exercise of international jurisdiction. As highlighted above, the objective elements (*chapeau*) of crimes against humanity substantially varied in various international instruments. Therefore, it remains important to establish the elements of the crime in customary international

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systematic attack directed against any civilian population, with knowledge of the attack: (a)Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ……. (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

law. The elements of crimes against humanity are contextual (chapeau) and mental.

1.2.1. Chapeau (Objective) Elements of Crimes Against Humanity

A. Widespread or Systematic Attack

This is an essential element that distinguishes crimes against humanity from domestic crimes. It is this element that turns these crimes into attacks against humanity rather than isolated violations of the rights of particular individuals. The ICTR Statute and the Rome Statute are binding international instruments that incorporated this element of crimes against humanity. However, some writers argue that this element has been widely viewed as implicit in all definitions of crimes against humanity, beginning with the Nuremberg Charter.[15] It has four sub-elements: definition of the concept of widespread or systematic, attack, policy and nexus requirements.

Widespread or systematic: As stipulated in the ICTR and Rome Statute the term "widespread" and/or "systematic" are alternative requirements not cumulative ones. However, neither the ICTR nor the Rome Statute defines the term widespread or systematic. "Widespread" refers to the number of victims whereas "systematic" refers to the existence of policy or plan.[16] In *Prosecutor v. Akayesu case*, the ICTR Trial Chamber I define the concept of "widespread" as 'massive, frequent, large scale action, carried out collectively with the considerable seriousness and directed against a multiplicity of

[15] See Guzman, The Road from Rome, *supra note* 4 p, 375

[16] Simon Chesterman. An Altogether Different Order: Defining the elements of Crimes Against Humanity, Duke Journal of Comparative and International Law, Vol. 10 No. 307, 2000, P. 307-343 [Chesterman, An Altogether Different Order]

victims.'[17] The Chamber further defines the term "systematic" as 'thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.'[18] Moreover, the ICTR Trial Chamber II defines the concept of systematic as 'an act which carried out pursuant to a preconceived policy or plan.'[19]

Attack: In the Nuremberg Charter and the ICTY Statute an attack bears necessary relation with aggressive war or armed conflict. However, the Control Council law No. 10 and the ICTR Statute, define crimes against humanity without reference to armed conflict. This issue was a point of contention in the debate regarding crimes against humanity at the Rome Conference. Finally the Rome Statute excluded the nexus to armed conflict; this is persuasive evidence that such a nexus may no longer be required under customary international law. Therefore the term attack refers to committing one or more enumerated act or acts of Art 3(a)-(i) of the ICTR Statute and Art 7 (1(a-k)) of the Rome Statute.

The Policy Requirement: The ICC Statute is the first international legal instrument to include the requirement of state or organizational policy in the definition of crimes against humanity.[20] Whether the attack is widespread, systematic or both, the relevant act or acts must be connected to some form of policy. There is no requirement that the policy comes from central government; the policy may be that of an organization or private group. This

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[17] The ICTR Chamber I, Prosecutor v Akayesu, case no. ICTR-96-4-T, September 2, 1998, P.580, as cited by Chesterman, An Altogether Different Order p, 315

[18] Ibid

[19] The ICTR Chamber II, Prosecutor v Kayishema, case no. ICTR-95-1-T, May 21, 1999, P.123, Chesterman, An Altogether Different Order p, 315

[20] Rome Statute Art 7(2)

policy requirement essentially reiterates the position that isolated and random acts cannot amount to crimes against humanity. That is crimes against humanity shock the conscience of mankind and warrant intervention by the international community because they are not isolated, random acts of individuals but result from a deliberate attempt to target a civilian population.

The nexus requirement: To constitute a crime against humanity, an individual act must be part of a widespread or systematic attack. This requirement comprises objective and subjective components. First, the alleged crimes were related to the attack on a civilian population. This objective component does not require that the act was committed in the midst of the attack. A crime can be part of an attack even if it is geographically or temporally distant from the attack as long as it is connected in some manner.[21] Second, the subjective or mental element of crimes against humanity requires that the perpetrator act with knowledge that his act is part of a widespread or systematic attack against a civilian population.[22] Actual or constructive knowledge is enough. This test appears to reflect customary international law and is consistent with the provisions of the Rome statute.

B. Directed against any Civilian Population

All codified definitions of crimes against humanity have included the requirement that the enumerated acts be directed against civilian population.[23] The civilian population requirement includes two elements; the constitute acts must be directed against non-combatants

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[21] Guzman, Crimes against Humanity, *supra note* 12, p. 16
[22] Ibid
[23] See Art 6(c) IMT Charter, Art 2 (1) (c) CCL No. 10, Art 5 ICTY Statute, Art 3 ICTR Statute and Art 7(1)Rome statute

and a large number of victims must be targeted.[24] This means that the victims or intended victims must be civilians. In cases of *Akayseu, Kayishema* of ICTR and *Tadic* of ICTY the Trial Chambers adopted the definition of civilian in the context of armed conflict. They interpreted the term “civilian” in a wider sense. In *Akayaseu* case, the Trial Chamber stated that “where there are certain individuals within the civilian population who do not come with the definition of civilians this does not deprive the population of its civilian status.” [25] “Population” could be interpreted simply to imply broad based victimization, excluding small scale crimes against humanity. It is not necessary that the whole population of a specific geographic area be attacked, but rather there must be a number of victims and some connection among them.

1.2.2. The Mental Element of Crimes against Humanity

The *mens rea* of crimes against humanity is not explicitly codified in any of the relevant pre-Rome international instruments.[26] The mental element of crimes against humanity as stipulated in Art 7 of the Rome Statute is knowledge of the attack. The inclusion of the knowledge standard (general intent) in the Rome Statute represents significant advancement in the law of crimes against humanity.[27] Art 7 of the Rome Statute not only controls ICC’s

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[24] See Guzman, The Road from Rome, *supra note* 4 p, 361

[25] See the ICTR chamber I, Prosecutor v. Akayesu, case No. ICTR-96-4-T, September 2, 1998, P.580

[26] See Guzman, The Road from Rome, *supra note* 4 p, 377

[27] The adoption of the Rome Statute contributed significantly to the development of international law with respect to the *mens rea* of crimes against humanity. Article 7 of the Statute explicitly adopts a knowledge standard. The *mens rea* language in the definition of

application of the law but serves as an expression of the state of customary international law. The mental element of crimes against humanity under customary international law consists of a requirement that the perpetrator has knowledge of the nexus between his or her act and a widespread or systematic attack against civilians.[28] Put simply, the perpetrator's knowledge of his/her act is part of a widespread or systematic attack is sufficient to establish the *mens rea* of crimes against humanity under customary international law.

2. Crimes against Humanity under the Ethiopian Legal System

When a state ratifies a convention or when a norm gets the status of customary international law, it is an obligation of states under international law to implement it. As part of customary international law prohibitions of crimes against humanity have binding effect on the entire globe, including Ethiopia – Ethiopia bears an obligation to give effect to this prohibition. To fulfill this obligation the country is expected to domesticate the customary norm of crimes against humanity to its national laws.

2.1. Crimes against Humanity in the Penal Code of 1957

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crimes against humanity (art 7) must be read in conjunction with Article 30 of the Statute regarding the "mental element." This Article stipulates that "*unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge*." This requirement of intent and knowledge, of course, does not apply to the chapeau elements of crimes against humanity since the chapeau states that knowledge alone suffices. Article 30 provides an additional indication that knowledge is sufficient for the circumstantial elements of the chapeau by defining intent only in relation to "conduct" and "consequence," while defining knowledge in relation to circumstances. See Guzman, The Road from Rome, *supra note* 4, p. 380

[28] See Guzman, The Road from Rome, *supra note* 4 p, 377- 402.

The title of Art 281[29] of the Penal Code of 1957 contained crimes against humanity and genocide together. Looking at the title of this provision, it reveals that the Penal Code provides both genocide and crimes against humanity as a single offence. However, when read closely the whole provision, it is more or less similar to Art 2 of the Genocide Convention except the inclusion of political group as one protected group in the Penal Code. All the elements listed in this provision are the constituting elements of the genocide crime as stipulated under Art 2 of the Genocide Convention. Art 281 provides special intent. Its scope of protection is limited to specific groups, and the material acts (modes of committing the offence) are also restricted in the same manner as the Genocide Convention.

The Genocide Convention governs genocide crime, not crimes against humanity. Genocide and crimes against humanity are two distinct international crimes. The definition and the constitutive elements of the two crimes are different. Crimes against humanity are directed at any civilian population whereas genocide is against specific groups. Moreover, the required mental element for crimes against humanity is general intent whereas for genocide it is specific intent. A broad interpretation of crimes against

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[29] Art 281. Genocide; Crimes against Humanity
Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace:

a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or
b) Measures to prevent the propagation or continued survival of its members or their progeny; or
c) The compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

humanity may include many ranges of criminal activities including genocide crimes.[30] The definition of crimes against humanity transcends the definition of genocide in terms of the scope of protection and the material acts constituting the crime. Therefore, the attempt to interpret Art 281 of the Penal Code as including crimes against humanity entails the following legal problems.

First, it narrows down the definition of crimes against humanity only to include groups and acts listed in the provision. It makes crimes against humanity similar to genocide which is distinct under international criminal law. Second, the attempt to include protected groups and enumerated acts other than mentioned in Art 281 of the Penal Code by way of reference to other international instruments or customary international law is not in line with the principle of legality. It may be taken as amount to the creation of new crimes i.e. crimes against humanity by analogy.

To sum up, even though the title of Art 281 of the Penal Code of 1957 seems to comprise, crimes against humanity, as a co-title to genocide in semicolon, strictly speaking, crimes against humanity was not recognized as independent crime in the Penal Code.

2.2.Crimes against Humanity in the Criminal Code of 2004

The 2004 Criminal Code does not have any provision that deals with crimes against humanity. It incorporates genocide and war crimes as crimes in

[30] See Patricia M. Wald. Genocide and Crimes against Humanity, Washington University Global Studies Law Review, Vol. 6, 2007, p. 621 - 633; Major Haile Meles et al. v Special Prosecutor, Amhara Regional National State Supreme Court, 1999, Criminal Case No.21/90, p. 15 [Unpublished]

violation of international law.[31] As stated above crimes against humanity and genocide are two separate crimes that have different contextual and mental elements. In addition to genocide the Criminal Code provides war crimes as crimes in violation to international law specifically laws of armed conflict. War crimes require the nexus between an act and the existence of armed conflict (warfare). However, the nexus between an act and armed conflict was not a requirement for crimes against humanity under customary international law as well as in the ICTR and Rome Statutes. Therefore, like to the 1957 Penal Code, the 2004 Criminal Code does not have prohibition of crimes against humanity.

2.3. Crimes Against Humanity in the FDRE Constitution and Other Laws

Art 28[32] of the FDRE constitution is titled as 'crimes against humanity.' Dissecting of sub-article one of this article is vital to understand what are contained in it.

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[31] Part II Book III Title II, Chapter I of the criminal code provides; crimes in violation of international law as fundamental crimes; art 269 provides for genocide crimes and articles 270-280 provides for war crimes. See the Federal Democratic Republic of Ethiopia Criminal Code Proclamation No.414/2004, art 269-280

[32] Article 28: Crimes against Humanity

1. Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.
2. In the case of persons convicted of any crime stated in sub-Article 1 of this Article and sentenced with the death penalty, the Head of State may, without prejudice to the provisions hereinabove, commute the punishment to life imprisonment (Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995)

1. ……………… crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia….

There is no any convention dealing with crimes against humanity. Unlike genocide and war crimes, crimes against humanity have evolved through customary international law. Further, in the Ethiopian legal framework there is no law which governs crimes against humanity. Therefore, the reference of the Constitution to international agreements ratified by Ethiopia and other laws of Ethiopia is far from clear. The only multilateral treaty that deals with crimes against humanity is the Rome Statute. The FDRE Constitution was promulgated three years before the adoption of the Rome Statute. Furthermore, during the adoption of the Rome Statute in 1998, the Ethiopian government remains abstained.

2. …such as genocide, summary executions, forcible disappearances or torture………..

This sub-article makes crimes against humanity as a collection of genocide, summary executions, forcible disappearances or torture. The lists aren't exhaustive. However, as repeatedly mentioned above crimes against humanity are different from genocide, summary execution, forcible disappearance or torture. However, this doesn't mean that crimes against humanity don't have similarity with these crimes. The latter two crimes (forcible disappearance or torture) if they committed by fulfilling elements of crimes against humanity stated above, they could amount to crimes against humanity. However, the intention of the legislature in Art 28 of the Constitution seems not to provide elements of crimes against humanity. Rather the intention is to provide the effect of “crimes against humanity” [the listed out crimes] under the Ethiopian legal system.[33] It appears that crimes against humanity are treated as an agglomeration of all serious violation of human rights. However, though crime against humanity is serious violation of human rights, it is not the collection of genocide, war crimes, summary execution, forcible disappearance or torture.

Now the question is if crimes against humanity aren’t incorporated in the FDRE constitution, or in the Criminal Code, or other proclamations how can Ethiopian courts apply the prohibitions of crimes against humanity? There is a legal lacuna in this regard. Where a legal lacuna happens judges have a mandate to fill-in gaps by referring to customary law. That is customary international law becomes topical in the domestic context in areas where international treaty norms are missing or not binding on the state or have become obsolete or when the issue isn’t incorporated to domestic legal framework.[34] How international customary norms in particular those concerning crimes against humanity can be domesticated to the Ethiopian laws which judges could take due notice? This is a crucial issue that is worthy of investigation.

The FDRE constitution has two provisions (Art 9(4) and 55 (12)) which deal with the incorporation of international treaties in to the domestic

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[33] Accordingly, the genocide crime, summary execution, forcible disappearance and torture shall not be barred by statute of limitation. Moreover, such offences may not be commuted by amnesty or pardon of the legislature or any other state organ. See Art 28(2) of the FDRE constitution

[34] Hannes Vallikivi, Domestic Applicability of Customary International Law in Estonia, Juridica international, Vol. 7, 2002, p. 28

legal system.[35]However, the Constitution remains silent about the domestication of customary international law. Yet we know that customary international law is one of the basic sources of international law. It is appropriate, in the interest of Ethiopia as a state, and individuals within Ethiopia, that this part of international law is enforceable within the country. For the state, it will portray Ethiopia in good light when international customary law is enforced; and for individuals, rights guaranteed by international law will ensure the application of international standards in the dealings of government with individuals.

The FDRE Constitution and Proclamation No. 321/2003 (A Proclamation to Amend the Federal Courts Proclamation No. 25/1996) recognized custom as one source of law under the Ethiopian legal system. Art 9(1) of the Constitution provides … *any law, customary practice or a decision of an organ of state ... which contravenes this Constitution shall be of no effect*. This article gives recognition to customary practices as one source of law. [36]

Art 2(2) of Proclamation No. 321/2003 reads as …*without prejudice to international diplomatic law and custom as well as other international*

[35] The Ethiopian legal system follows a dualist approach in transforming international treaties in to domestic law. The executive organ has the mandate to conclude and sign international treaties and the legislative organ has power to domesticate the signed treaties through legislative act usually through proclamations. See art 55 (2) of the FDRE Constitution; If international standards are incorporated into national legislation, it is easier for domestic courts and legal operators to apply them. Incorporation (domestication) should mean that the provisions of the convention can be directly invoked before the domestic courts and applied by national authorities.

[36] As the phrase 'any law' includes proclamations, regulations and directives enacted by the domestic law maker and international treaties ratified by Ethiopian; the term 'customary practice' may also refer to national and international customary practices.

agreements to which Ethiopia is a party... This article enables Ethiopian courts to take due notice of customary international law. Customary international law on its part is unwritten and derives from the actual practices of nations over time. To be accepted as law, the custom must be long-standing, widespread and practiced in a uniform and consistent way among nations. That is customary international law becomes binding on all states if it fulfills two elements- general state practice and o*pinio juri*.[37] At the apex of customary international law there are peremptory norms (*Jus cogens*). *Jus cogens* are at the peak of all sources of international law (treaties, ordinary customary international law, general principles of international law, judicial decisions, workings of scholars etc.).

International core crimes[38] in general, crimes against humanity in particular have the status of *jus cogens. Jus cogens* constitute an *obligatio erga omnes* – obligation owed to the international community. These obligations are inderogable.[39] The legal obligations which arise from crimes against humanity includes the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunity *ratione materiea or ratione personea* up to and including Heads of State, the non-applicability of the defense of obedience to superior orders, the universal application of these obligations whether in time of peace or war, the obligation is not derogable under states of emergency, and

[37]Malcolm N. Shaw, International Law, 5th ed., Cambridge University Press, Cambridge, United Kingdom, 2003, p. 68-84

38 Art 5(1) of the Rome Statute of the International Criminal Court of 1998, which is an evidence of customary international law provides; crime of genocide; Crimes against humanity; War crimes; crime of aggression as core international crimes.

[39] Cherif Bassiouni, International Crimes, Jus Cogens and Obligatio Erga Omnes, p.265 – 277

universal jurisdiction over perpetrators of such crimes.[40] Art 28 (1) of the FDRE Constitution provides a few among these obligations; however this article lacks inclusiveness and exhaustiveness. Therefore, the Ethiopian government has an *erga omnes* obligation to give effect to the prohibitions of crimes against humanity in its domestic sphere.

Although there is no constitutional provision which deals with the domestication of customary norm, the Ethiopian courts have the mandate to fill-in gaps of prohibition of crimes against humanity by applying customary international law pursuant to Art 2(2) of Proclamation No. 321/2003. However, the prevailing experience shows that Ethiopian courts are very reluctant to cite international human rights instruments ratified by Ethiopia. Though recently in the Ethiopian Federal Supreme Court there are good beginnings using of international instruments in providing decisions, in other federal and regional courts the trend of using international law in rendering decisions is very minimal or almost none. Ethiopian courts have not the culture to apply international treaties ratified by Ethiopia let alone un-codified customary international law.

However, application of customary international law relating to crimes against humanity has its shortcomings. First determining the scope of crimes against humanity in customary international law remains difficult.[41] Second the ambiguities inherent in defining and using customary international law have sparked heated debates regarding its use, particularly in international

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[40] Ibid

[41] See Kathleen M. Kedian, Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana, William and Mary Law Review, Vol. 40 Issue 4 Article 6, 1999, p. 1396 & 1397

crimes claims in domestic courts.[42] Some argue that the ambiguities of customary international law are too great, and domestic courts lack the authority to find customary international law, and allowing them to do so offend the principle of separation of powers.[43] Further, some critics assert that customary international law is unenforceable in domestic courts without an explicit legislative authorization.[44] As we have seen above in Ethiopia there are some points of reference to use customary law; however, these references are neither precise nor sufficient. Rather than mentioning custom as one source of law, the Constitution and the Proclamation don't have detailed rules on, how courts apply customary laws. Moreover, establishing customary norms requires time, because it needs reading international and other state court's decisions. As we usually hear from judges and observe the practice, Ethiopian judges don't have sufficient time to write a lengthy judgment let alone to establish customary international norms.

Sometimes, applying customary law may be against the very purpose of the Criminal Code. Pursuant to Art 1 of the Criminal Code, the purpose of the Criminal Code is to ensure order, peace and security of the state, its peoples and inhabitants for the public good. It aims at prevention of crimes *by giving due notice of the crimes and penalties prescribed by law* …. Customary international law does not give due notice of crimes and penalties of crimes in a clear manner.

Moreover, using customary international law may override the principles of criminal law and fundamental rights and freedoms of

[42] Ibid
[43] Ibid P. 1398
[44] Ibid

individuals. Though Art 15(2) of the International Covenant on Civil and Political Right provides the possibility of application of customary norm as an exception to the principle of legality, application of customary norm may not strictly observe the principle of legality and non-retroactivity of criminal law.

Finally, in an already crowded judicial system, cases based on unidentified customary norms, to be decided by judges lacking expertise in international law, poses inherent dangers to the legal system in general and the fundamental rights of suspected individuals in particular. Presumably, without clarity on how to assess the validity of customary international law claims adequately, stability and predictability of judicial decision evaporates, injecting confusion into courtrooms and fostering arbitrary decision-making. Courts in other countries, such as Canada and Great Britain, almost never allow to apply customary international law in human rights litigations.[45] So the Ethiopian law making body should have taken a lesson from these countries and should have come up with a law which prohibits crimes against humanity.

3. Conclusion and Recommendation

Generally, the Statutes of international tribunals have significant difference regarding the concept of crimes against humanity. The Nuremberg Charter and the Statute of the ICTY require that crimes against humanity be committed in the context of an armed conflict, while the Statute of the ICTR requires no nexus with armed conflict but require an element of discrimination that is lacking in the other definitions. The Rome Statute

[45] Ibid p. 1414

restricts the discrimination requirement to acts of persecution only. Furthermore, the evolution of the definition of crimes against humanity in these international instruments has not been entirely linear: later definitions are sometimes more broader and sometimes narrower than their predecessors. As a result, the content of the norm prohibiting crimes against humanity remains subject to greater controversy than the norms prescribing genocide and war crimes. These differences between the statutes illustrate some of the remaining uncertainties within the international community regarding the elements of crimes against humanity.

Under customary international law crimes against humanity have objective and subjective elements. The objective elements include the widespread or systematic attack and an attack directed against civilian population. The term “widespread” or “systematic” is an essential requirement which turns crimes against humanity to an international crime. The subjective element of crimes against humanity is general intent or knowledge of an act is part of a widespread or systematic attack.

Under the Ethiopian legal system crimes against humanity aren’t recognized as crimes in violation of international law. Based on this the writer forwards the following suggestions.

- To fill-in the legal lacuna the lawmaker should domesticate prohibition of crimes against humanity that exists under customary international law. That is the legislature is in a better position to domesticate crimes against humanity than courts. Or

- The lawmaker or the Federal Supreme Court should come up with general guidelines on how to apply customary law in general, crimes against humanity in particular to fill-in the existing legal-lacuna.

የተመረጡ ፍርዶች

(በቤተሰብ ህግ ላይ ያተኮሩ)

የሰ/መ/ቁ. 43988

መስከረም 24 ቀን 2003 ዓ.ም

ዳኞች፡- ተገኔ ጌታነህ

ሐጎስ ወልዱ

ብርሃኑ አመነው

ዓልማው ወሌ

ዓሊ መሐመድ

አመልካች፡- ወ/ሮ ሰኒያ ሼኅ ተማም - የቀረበ የለም

ተጠሪ፡- 1. ወ/ሮ በላይነሽ ማቴቦ

2. አቶ ሽሪፊ አህመድ የቀረበ የለም

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ጉዳዩ አንድ ወንድ ከሁለት ሴቶች ጋር ጋብቻ ፈጽሞ ሲኖር ከቆየ በሁዋላ ከአንደኛዋ ጋር በፍቺ ሲለይ የንብረት ክፍፍል ጥያቄ የሚያስተናግድበትን አግባብ የሚመለከት ሲሆን ክርክር የተጀመረው የአሁኗ 1ኛ ተጠሪ በአሁኑ 2ኛ ተጠሪ ላይ ለጉራጌ ዞን መስቃን ወረዳ ፍርድ ቤት በመሠረቱት ክስ መነሻ ነው፡፡ 1ኛ ተጠሪ በ2ኛ ተጠሪ ላይ የመሰረቱት ክስ ይዘት ባጭሩ ሲታይ ከ2ኛ ተጠሪ ጋር ሲኖሩ በእንሲኖ ከተማ ውስጥ አንድ ክፍል ቆርቆሮ ቤት ማፍራታቸውንና የገጠር መሬት አራት ጥማድ የነበራቸው መሆኑን ገልፀው እነዚህን ንብረቶች 2ኛ ተጠሪ እንዲያካፍላቸ ይወሰንላቸው ዘንድ ዳኝነት መጠየቃቸውን የሚያሳይ ነው፡፡ የአሁኑ 2ኛ ተጠሪ ለክሱ በሠጡት መልስም 1ኛ ተጠሪ ጋር የተጋቡት በ1998 ዓ.ም ሆኖ እስከ 1990 ዓ.ም ድረስ ቆይታ መሄዷንና በ1994 ዓ.ም ሌላ ጋብቻ አለኝ በማለቷ ከ2ኛ ተጠሪ ጋር ፈጽማ የነበረው ጋብቻ እንዲፈርስ መወሰኑን በጋራ ያፈሩት ንብረት አለመኖሩን ንብረቶቹ የተፈሩት ከአሁኗ አመልካች ጋር መሆኑን ገልፀው ክሱ ውድቅ ሊሆን ይገባል ሲሉ ተከራክረዋል፡፡ ከዚህም በኋላ የአሁኗ አመልካች ወደ ክርክሩ በጣልቃ ገብነት ለመግባት ማመልከቻ አቅርበውና የስር ፍርድ ቤት ፈቅዶላቸው ባቀረቡት ክርክር ከ2ኛ ተጠሪ ጋር ሕጋዊ ጋብቻ ፈጽመው ለክርክሩ ምክንያት የሆኑትን ንብረቶች ያፈሩት አመልካች እንጂ የአሁኗ 1ኛ

ተጠሪ ያለመሆናቸውን ገልፀው ክሱ ውድቅ ሊሆን ይገባል ሲሉ ተከራክረዋል፡፡ ጉዳዩ በዚህ መልኩ የቀረበለት ፍርድ ቤትም የግራ ቀኙን ክርክርና ማስረጃ በመስማት ጉዳዩን ከመረመረ በኋላ የገጠር

መሬትን በተመለከተ የጋራ ባለሀብቶች የአሁኗ አመልካችና 2ኛ ተጠሪ መሆናቸውን የቆርቆሮ ቤቱን በተመለከተ ግን የጋራ ባለሀብቶች ተጠሪዎች ስለሆኑ እኩል ሊካፈሉ የሚገባቸው መሆኑን ገልፆ ወስኗል፡፡ በዚሁ የቆርቆሮ ቤቱን በተመለከተ በተሰጠው የውሳኔ ክፍል አመልካች ቅር በመሰኘት በየደረጃው ላሉት ፍ/ቤቶች ይግባኝና የሰበር አቤቱታ ቢያቀርቡም ተቀባይነት አላገኘም፡፡ የአሁኑ የሰበር አቤቱታ የቀረበውም በዚህ ባለመስማማት ለማስለወጥ ነው፡፡

አመልካች የካቲት 27 ቀን 2001 ዓ.ም በፃፉት ሁለት ገጽ የሰበር አቤቱታ በበታች ፍርድ ቤቶች ውሳኔ መሠረታዊ የሆነ የሕግ ስህተት ተፈጽሟል የሚሉበትን ምክንያት ዘርዝረው አቅርበዋል፡፡ ይዘቱም ባጭሩ ከ2ኛ ተጠሪ ጋር ሕጋዊ ጋብቻ በ1980 ዓ.ም በመመስረት አከራካሪውን ቤት ስለማፍራታቸው ማስረጃ አቅረበውና አረጋግጠው ባለበት ሁኔታ ንብረቱ የተጠሪዎቹ የጋራ ንብረት ነው ተብሎ መወሰኑ ያላግባብ ስለሆነ ሊታረም ይገባል በማለት መከራከራቸውን የሚያሳይ ነው፡፡ አቤቱታቸው ተመርምሮም የአመልካችና 2ኛ ተጠሪ ጋብቻ ፀንቶ ባለበት ጊዜ በእንሲኖ ከተማ ውስጥ ያለው ቤት የተሰራ መሆኑን የሚያመለክት ማስረጃ እንዳለ የስር ፍርድ ቤት ውሳኔ ያሣያል፡፡ ስለሆነም ቤቱ በአመልካችና በ2ኛ ተጠሪ መካከል ጋብቻ ፀንቶ እያለ የተሰራ መሆኑ ተረጋግጦ እያለ ንብረቱ የተጠሪዎች የጋራ ንብረት ነው ተብሎ መወሰኑ ባግባቡ መሆን ያለመሆኑን ለመመርመር ሲባል ጉዳዩ ለሰበር ችሎት እንዲቀርብ ተደርጎ የግራ ቀኙ የቃል ክርክር መጋቢት 30 ቀን 2001 ዓ.ም በዋለው ችሎት ተሰምቷል፡፡

የጉዳዩ አመጣጥ አጠር አጠር ባለመልኩ ከላይ የተገለፀው ሲሆን ይህ ችሎትም የግራ ቀኙን ክርክር ለሰበር አቤቱታው መነሻ ከሆነው ውሳኔ እና አግባብነት ካላቸው ድንጋጌዎች ጋር በመገናዘብ ጉዳዩ ለሰበር ችሎት ሲቀርብ ከተያዘው ጭብጥ አንፃር በሚከተለው መልኩ መርምሮታል፡፡

ከክርክሩ ሂደት መገንዘብ የተቻለው የአሁኗ አመልካችና የአሁኑ 2ኛ ተጠሪ ሕጋዊ ጋብቻ በ1980 ዓ.ም መሥርተው እስካሁንም አንድ ላይ ያሉ መሆኑን፣ የአሁኑ 2ኛ ተጠሪ ከአሁኗ 1ኛ ተጠሪ ጋር በ1988 ዓ.ም ጋብቻ መስርተው እስከ 1990 ዓ.ም ድረስ ከኖሩ በኋላ 1ኛ ተጠሪ ጥላው በመሄድ በሌላ ቦታ ቆይተው በ 1994 ዓ.ም የፍች ጥያቄ አቅርበው መለያየታቸውን፣ በእንሴኖ ከተማ ውስጥ ይገኛል በተባለው ቦታ ቀድሞውንም የሳር ቤት የነበረና ይህ ቤት ፈርሶ 2ኛ ተጠሪና አመልካች አንድ ላይ ሆነው ለክርክሩ ምክንያት የሆነውን ቤት መስራታቸው በማስረጃ መረጋገጡን፣ የስር ፍርድ ቤት አመልካች ለክርክሩ ምክንያት የሆነውን ንብረት አይገባቸውም በማለት ሊወስን የቻለው ቤቱ የተሰራበትን ቦታ የያዙበትን መንገድና መቼ እንደያዙ እንዲሁም 1ኛ ተጠሪ በንብረቱ ላይ መብት

የሌላቸው መሆኑን አላስረዱም፣ ንብረቱ ከ2ኛ ተጠሪ ጋር የጋራ ስለማድረጋቸውም የሚያሳይና በፍርድ ቤት የተመዘገበ የፅሑፍ ማስረጃ አላቀረቡም በሚል ምክንያት መሆኑን ነው፡፡

በመሰረቱ አንድ ከሣሽ ክስ ሊመሰረትበት የሚገባው ለክሱ ምክንያት በሆነው ንብረት ላይ መብት ወይም ጥቅም ያለው ስለመሆኑ በማረጋገጥ ስለመሆኑ ከፍ/ብ/ሥ/ሥ/ሕ/ቁ. 33 ድንጋጌ ይዘትና መንፈስ የምንገነዘበው ጉዳይ ነው፡፡ ለክሱ ምክንያት በሆነው ነገር ላይ ከሣሹ መብት ወይም ጥቅም ያለው መሆኑን የማስረዳት ግዴታ የከሣሽ እንጂ የተከሳሽ ሊሆን አይገባም፡፡

ወደተያዘው ጉዳይ ስንመለስ አመልካች ለክርክሩ ምክንያት በሆነው ቤት መብት የላቸውም ተብሎ በበታች ፍርድ ቤቶች የተወሰነው 1ኛ ተጠሪ በቤቱ ላይ መብት የሌላቸው ስለመሆኑ በአመልካችና በ2ኛ ተጠሪ ምስክሮች አልተመሰከረም በሚል ነው፡፡ የሥር ፍርድ ቤት ቤቱ የተሰራው አመልካችና 2ኛ ተጠሪ በጋብቻ ፀንተው በነበሩበት ጊዜ ስለመሆኑ በፍሬ ነገር ደረጃ ያረጋገጠው ጉዳይ ሲሆን የአመልካችን ክርክር ውድቅ ሊያደርግ የቻለው ቦታው በምን መልኩ እንደተያዘና መቼ እንደተያዘ እንዲሁም ቤቱ ከ2ኛ ተጠሪ ጋር የጋራ ስለመደረጉ በፍርድ ቤት የተመዘገበ ማስረጃ አላቀረቡም በሚል ነው፡፡ ይሁን እንጂ ባዶ ቦታ ባለቤትነቱ የኢትዮጵያ መንግስትና ሕዝቦች ስለመሆኑ በኢ.ፌ.ዲ.ሪፐብሊክ ሕገመንግስትና በሌሎች አግባብነት ባለቸው ሕጎች የተረጋገጠ ሲሆን አንድ ሰው በሕጉ ጥበቃ የሚደረግለት በህጉ አግባብ በተሠጠው የባለይዞታነት መብት ነው፡፡ ይህ የሚሆነው በተገቢው መንገድ ባለይዞታነቱን ሲያረጋግጥ ነው፡፡ በተያዘው ጉዳይ 1ኛ ተጠሪ ከ2ኛ ተጠሪ ጋር ጋብቻ የነበራቸው ስለመሆኑ በስር ፍር ቤት የተረጋገጠ ሲሆን አከራካሪው ንብረት ግን በአመልካችና በ2ኛ ተጠሪ የተሰራ እንጂ በ1ኛ ተጠሪና በ2ኛ ተጠሪ የተሰራ ስለመሆኑ አልተረጋገጠም፡፡ ይልቁንም 1ኛ ተጠሪ ከ2ኛ ተጠሪ ጋር ከ1983 ዓ.ም ጀምሮ ጋብቻ የነበራቸው ቢሆንም ጋብቻቸውን በ1990 ዓ.ም ትተው መሄዳቸውንና አከራካሪው ቤትም በዚሁ ወቅት ስለመሰራቱ መረጋገጡን የስር ፍርድ ቤት የውሳኔ ግልባጭ ያሣያል፡፡ 1ኛ ተጠሪ ጋብቻቸውን በተገቢው መንገድ ከ2ኛ ተጠሪ ጋር ያፈረሱት በ1994 ዓ.ም ቢሆንም ለአከራካሪው ቤት መሰራት ግን ያደረጉት አስተዋጽኦ ስለመኖሩ አልተረጋገጠም፡፡ በእርግጥ ጋብቻው በሕጉ አግባብ ሣይፈርስ የተፈራ ንብረት የባልና ሚስት የጋራ ስለመሆኑ ሕጉ ግምት የሚወስድበት ነጥብ ነው፡፡ ሆኖም ጋብቻው በተገቢው መንገድ ሣይፈርስ ጋብቻውን ትቶ የሄደ ተጋቢ ጋብቻውን ትቶ በሄደበት ወቅት ሌላው ተጋቢ ያፈራውን ንብረት የጋብቻ ውጤት ነው በማለት የክፍያ ጥያቄ ሲያቀርብ ንብረቱ የጋራ ነው የሚለውን የሕግ ግምት ተጠቃሚ ሊሆን አይገባም፡፡ ለንብረቱ መፈራት ምክንያት የሆነው ተጋቢ የንብረቱ የግል ባለሀበት ይሆናል እንጂ ምንም አስተዋጽኦ

ያላደረገ ተጋቢ እንዲካፈል ማድረግ በኢ.ፌ.ዲ.ሪፐብሊክ ሕገ መንግስት አንቀጽ 40/1/ ስር የተቀመጠውን የንብረት ባለቤትነት መብት የሚጥስና የህግ መሠረት የሌለው ነው፡፡ የቤተሰብ ሕጉ በጋብቻ ጊዜ የተፈራ ንብረት የጋራ ነው የሚል ሕጋዊ ግምት የወሰደውም ተጋቢዎች ለንብረቱ መፍራት የየራሳቸውን አስተዋጽኦ እንደሚያደርጉ ታሣቢ በማድረግ ነው ተብሎም ይገመታል፡፡ ይህ ግምት ግን በተቃራኒ ማስረጃ የማይስተባበልበት ምክንያት የለም፡፡ በመሆኑም ምንም እንኳ ጋብቻ በሕጉ አግባብ ሣይፍርስ አንደኛው ተጋቢ ጋብቻውን ትቶ በሄደበት ወቅት ቀሪው ተጋቢ ሌላ ሰው አግብቶ ንብረቱን ማፍራቱ በሚገባ እስከተረጋገጠ ድረስ ጋብቻውን ትቶ የሄደ ተጋቢ በሌላ ጊዜ በመምጣት በሌለበት የተፈራውን ንብረት ልካፍል በማለት የሚያቀርበው ጥያቄ በሕገ መንግስቱ ስለንብረት ማፍራት መብት የተደረገውን ጥያቄ እና በቤተሰብ ሕጉም ስለባልና ሚስት የጋራ ንብረት የተዘረዘሩትን ድንጋጌዎች ይዘትና መንፈስ መሠረት ያደረገ ነው ሊባል የሚችል አይደለም፡፡ በዚህም ምክንያት የበታች ፍርድ ቤቶች አመልካች አከራካሪውን ንብረት ከ2ኛ ተጠሪ ጋር በጋራ ያፈሩት ሁኖ እያለ ድርሻ የላቸውም የተባለው ያላግባብ በመሆኑ በዚህ ረገድ የተሰጠው ውሳኔ መሠረታዊ የሆነ የሕግ ስህተት የተፈፀመበት ሆኖ አግኝተናል፡፡ በዚህም መሠረት ተከታዩን ወስነናል፡፡

ው ሳ ኔ

1. የበታች ፍርድ ቤቶች በእንሴኖ ከተማ ውስጥ የሚገኘውን ቆርቆሮ ቤት እኩል ሊካፈሉ የሚገባቸው ተጠሪዎች ናቸው በማለት የሰጡት ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 348/1/ መሠረት ተሽሯል፡፡
2. ለክርክሩ ምክንያት በሆነው ቤት ላይ ከ2ኛ ተጠሪ ጋር እኩል መብት ያላቸው አመልካች እንጂ የአሁኗ 1ኛ ተጠሪ (ወ/ሮ በላይነሽ ማተቦ) አይደሉም ብለናል፡፡
3. በዚህ ችሎት ለተደረገው ክርክር የወጣውን ወጪና ኪሣራ ግራ ቀኙ የየራሣቸውን ይቻሉ ብለናል፡፡ መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

የሰ/መ/ቁ. 67924

መጋቢት 26 ቀን 2004 ዓ.ም

ዳኞች፡-ሓጎስ ወልዱ

ተሻገር ገ/ስላሴ

ዓሊ መሐመድ

ነጋ ዱፍሣ

አዳነ ንጉሴ

አመልካች፡- ወ/ሮ ምንያ ገ/ስላሴ - አልቀረቡም

ተጠሪዎች፡- ወ/ሪት መሠረት ዓለማየሁ - አልቀረቡም

መዝገቡ የተቀጠረው ለምርምረ ሲሆን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

ይህ የሰበር ጉዳይ የቀረበው በጋብቻ ተሳስረው የነበሩት ተጋቢዎች ለረዥም ጊዜ ተለያይተው በመኖራቸው ምክንያት ይህ የትዳር ግንኙነት ተቋርጧል የሚባለው እንዴት ነው? የሚለውን አከራካሪ ነጥብ አስመልክቶ የአ/አበባ ከተማ ፍ/ቤት ሰበር ሰሚ ችሎት ይህንኑ የህግ ጥያቄ አስመልክቶ ከሰጠው ትርጉም ጋር በማገናዘብ አግባብነቱን ለመመልከት በሚል ነው፡፡

የጉዳዩም መነሻ የአሁን አመልካች በአ/አበባ ከተማ የመጀመሪያ ደረጃ ፍ/ቤት ሚስትነታቸውን የሚያረጋግጥ ውሳኔ ካገኙ በኋላ የአሁን ተጠሪ የሟች ልጅ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 358 መሰረት ይኸው ውሳኔ መብታቸውን እንደሚነካ በማስረዳት የክርክር ተካፋይ ከሆኑ በኃላ አመልካችና ሟች አባቴ በህግ በታወቀ የጋብቻ ሥርዓት ግንኙነት አልመሰረቱም፤ ጋብቻ አለ እንኳ ቢባል አመልካች ከአስር ዓመታት በላይ ኑሯቸውን ውጭ አገር አድርገው ተለያይተው የኖሩ በመሆኑ ጋብቻው ፈራሽ ነው፡፡ በመሆኑም የተሠጠው የሚስትነት ማረጋገጫ ውሳኔ ይሰረዝልኝ በማለት ተከራክረዋል፡፡

ፍ/ቤቱም ጉዳዩን እንደገና አንቀሳቅሶ የግራ ቀኙን ማስረጃ ከሰማ በኋላ በአመልካችና በሟች መካካል የጋብቻ ግንኙነት ስለመኖሩ በሁኔታ ተረጋግጧል፡፡ ምንም እንኳን አመልካችና ሟች ጋብቻቸው ባለበት ጊዜ በተለያየ ሀገር ተለያይተው መኖራቸው ቢታወቅም ጋብቻቸውን ቀሪ አያደርገውም፡፡ ምክንያቱም በፌዴራል የቤተሰብ ህግ አዋጅ አንቀጽ 55 እንደተመለከተው ተጋቢዎች በስምምነት ለተወሰነ ወይም ላልተወሰ ጊዜ ተለያይተው መኖር እንደሚችሉና

መብታቸው ስለመሆኑ ተመልክቷል፡፡ ስለሆነም የአሁን አመልካች የሟች ሚስት ናቸው በማለት የተሰጠው የሚስትነት ማረጋገጫ ውሳኔ ሊሰረዝ የሚችል አይደለም በማለት ወስኗል፡፡ የአ/አበባ ከተማ ይግባኝ ሰሚው ፍ/ቤት የአሁን አመልካችና ሟች የጋብቻ ግንኙነት የነበራቸው ስለመሆኑ በማስረጃ መረጋገጡን ተቀብሎ፤ ነገር ግን ሁለቱም ለ18 ዓመታት ያህል ተለያይተው በመኖራቸው ምክንያት የቀጠለ የትዳር ግንኙነት እንዳልነበረ መረዳት ይቻላል፡፡ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁ 31891 ለረዥም ጊዜ ተለያይተው ከኖሩ፤ በዚህም ጊዜ ውስጥ የባልና ሚስት ዓይነት ግንኙነት ያልነበራቸው ሰዎች ሚስትነት ወይም ባልነት ተረጋግጦ ማስረጃ ሊሰጣቸው እንደማይችል ያመለከተ ሲሆን በሌሎች የሰበር ሰሚ ችሎት መዝገቦችም ተመሳሳይ የህግ ትርጉም ተሰጥቶበታል፡፡ በመሆኑም የስር ፍ/ቤት ሟችና የአሁን አመልካች ለ18 ዓመት ተለያይተው የኖሩና በዚህም ጊዜ ውስጥ የትዳር ግንኙነታቸው ባቋረጡበት ሁኔታ የአሁን አመልካች ሚስት ናቸው በማለት የሰጠው ውሳኔ አግባብ ሆኖ አልተገኘም በሚለው ትችት መነሻ የሥር ፍ/ቤትን ውሳኔ ሽሮታል፡፡ የአ/አበባ ከተማ ሰበር ሰሚ ችሎትም ይኸው የይግባኝ ሰሚው ፍ/ቤት ውሳኔ የህግ ስህተት የተፈፀመበት ሆኖ አልተገኘም በማለት የአሁኑ ተጠሪን አስቀርቦ ሳያከራክር መዝገቡን ዘግቶታል፡፡

የጉዳዩ አመጣጥ ባጭሩ ይህን ሲመስል ግራ ቀኙ ከዚህ ቀደም በስር ፍ/ቤቶች በየደረጃው ያቀረቡትን ክርክር በማጠናከር በሰበር ደረጃ የፁሁፍ ክርክራቸውን አቅርበዋል፡፡

እኛም ጉዳዩን እንደሚከተለው መርምረናል፡፡ እንደመረመርነውም የአሁን አመልካችና የተጠሪ አባት ሟች የጋብቻ ግንኙነት የነበራቸው ስለመሆኑ በስር ፍ/ቤቶች በተሠጡት ዳኝነቶች የተረጋገጠ ጉዳይ ሲሆን አከራካሪ ነጥብ ሆኖ የተገኘው ይህ የጋብቻ ግንኙነታቸው ሁለቱም ተለያይተው በመኖራቸው ምክንያት ተቋረጧል ወይም አልተቋረጠም በሚለው ጭብጥ ስር የተሰጠው የይግባኝ ሰሚው እና የሰበር ችሎት ውሳኔዎች ይህ ሰበር ሰሚ ችሎት በዚህ አከራካሪ ነጥብ ስር በሌሎች ወገኖች ክርክር መነሻ የሰጠውን ትርጉም መሰረት ያደረገ ነው ወይስ አይደለም? የሚለው ነው፡፡

የአ/አበባ ከተማ የመጀመሪያ ደረጃ ፍ/ቤት ምንም እንኳ የአሁን አመልካችና ሟች በተለያየ ሀገር በመኖራቸው በኑሮ የተለያዩ ቢሆኑም የጋብቻ ግንኙነታቸው ግን ሳይቋረጥ የዘለቀ መሆኑ ተረጋግጧል የሚል ውሳኔ የሰጠው በአሁን አመልካች በኩል የቀረቡትን የሰው እና የተለያዩ የሰነድና ገላጭ ማስረጃዎችን መሰረት በማደረግ ነው፡፡ በአኳያው ይግባኝ ሰሚው ፍ/ቤት በሁለቱ ተጋቢዎች መካከል የነበረው የጋብቻ ግንኙነት መቋረጡን አረጋግጫለሁ ያለው በአመልካች በኩል በቀረበው የሰነድ እና ገላጭ ማስረጃዎች ሆኖ የቀረበውን በቪዲዮ የተቀረፀውን ምስል ብቻ ምርኩዝ አድርጎ የማስረዳት ብቃቱን በመመዘን እንደሆነ የውሰኔው ግልባጭ አስረጂ ነው፡፡ ይኸውም የሥር

የመጀመሪያ ደረጃ ፍ/ቤት አቅርቦ ከተመለከተውና ለውሳኔው መነሻ አድርጎ ከያዘው ማስረጃ መካከል በአመልካች አማካኝነት የቀረቡት የደብዳቤ ልውውጦችና ፎቶግራፎች ተጠሪዋ የአሁን አመልካች በውጭ ሀገር በነበረችበት ጊዜ ከሟች ጋር የነበራት ግንኙነት አለመቋረጡን ያመለክታል፤ የወረዳ 19 መረዳጃ እድር የቀረበው መግለጫ ሟች እና የአሁን አመልካች በባልና ሚስት መመዝገባቸውን አረጋግጦ በመላኩ የቀረበውም የቪዲዮ ፊልም የአሁን አመልካች ከውጭ ሀገር ለሟች በምትልከው ገንዘብ ሟች ቤቱን እየሰሩ መሆኑን በማረጋገጥ የደረሰበትን ውጤት ለባለቤታቸው ለአሁ አመልካች ለመግለፅ መልዕክቱን ለመላክ የተቀረፀ ሲሆን ከዚሁ ምስል ሟች ከአሁን አመልካች ጋር የትዳር ግንኙነትታቸው ያልተቋረጠ መሆኑን ለመገንዘብ ተችሏል በሚል የማስረጃውን አግባብነትና ሚዛን የመረመረበትን ክፍል ይግባኝ ሰሚው ከፍተኛ ፍ/ቤት ከዕድር የመጣው ማስረጃ የዕድሩ ማህተምም ሆነ ቁጥር የሌለው በመሆኑ ተአማኒነት ያለው ነው ብሎ ለመቀበል የሚቻልበት አይደለም፤ የግል ደብዳቤዎችና ፍ/ቤቱ የተመለከተው የቪዲዮ ማስረጃ የትዳር ግንኙነት ስለመቀጠሉ የሚያመለክት ነገር የሌላቸውና እምነት የሚጣልባቸው ማስረጃዎች አይደሉም፡፡ ለሟች 40 ቀን መታሰቢያ የታተመው የጥሪ ወረቀትም በማንኛውም ጊዜ ሊታተም የሚችል በመሆኑ ታማኝነት ያለው አይደለም የሚለውን ትችት በመስጠት ከጋብቻ የመነጨው ግንኙነት ስለመቀጠሉ በማስረጃ አልተረጋገጠም ከሚል መደምደሚያ ላይ ደርሷል፡፡

በእርግጥ ይህ በፍሬ ነገርና ፍሬ ነገርን ለማስረዳት የቀረበውን ማስረጃ ታማኝነት የመመርመርና የማስረዳት አቅሙን የመመዘን ሥልጣኑ የይግባኝ ሰሚ ፍ/ቤት እንጂ ለዚሁ የሰበር ችሎት በህግ የተሰጠው ሥልጣል ባለመሆኑ በዚህ በይግባኝ ሰሚው ፍ/ቤት በማስረጃ አመዛዘን ረገድ የሰጠውን ዳኝነት እንደገና ለመመርመርና አግባብነቱን ለማየት የሚቻል አይደለም፡፡

ይሁን እንጂ በአሁን አመልካችና በሟች መካከል የነበረውን የጋብቻ ግንኙነት በመኖሪያ ቦታ መለያየት የተነሳ ሳይቋረጥ ግንኙነት እንዳለ እንደቀጠለ ነበር በማለት የአሁን አመልካች ያቀረቡት ማስረጃ እና የመጀመሪያው ደረጃ ፍ/ቤት ለሰጠው ውሳኔ ምርኩዝ አድርጎ የያዘው ማስረጃ ይግባኝ ሰሚው ፍ/ቤት በይግባኝ ሰሚነት ስልጣኑ ትችት ባሳረፈበት የሰነድ እና ገላጭ ማስረጃዎች ላይ ብቻ የተገደበ አይደለም፡፡ የሟች እህት የሆኑትን እና የሟች ጐረቤትን የምስክርነት ቃል ሁሉ የያዘ ነው፡፡ ለጉዳዩ አግባብነት ካለው የምስክርነት ቃል ውስጥ ሁለቱም በአካባቢው በእድር፣ እና በቤት ስራ ማህበር በባልና ሚስትነት እንደሚታወቁ፤ ሟች ሥራ ስላልነበራቸው ተጠሪዋ የቤተሰባቸውን ኑሮ ለመለወጥ ከባለቤታቸው ጋር ባደረጉት ስምምነት ወደ ውጭ አገር ሄደው ሥራ በመስራት በሚልኩት ገንዘብ ቤት መስራታቸውን፣ ሟችም ሲታመም ገንዘብ በመላክ ታስታምመው

እንደነበር፣ እስከ ሟች ዕለተ-ሞት በትዳር ሁኔታ ውስጥ እንደነበሩ በመግለጽ ያረጋገጡበት ይገኙበታል፡፡

ስለዚህ የሰው ማስረጃ ይግባኝ ሰሚው ፍ/ቤት ያለው የለም፡፡ ክርክርን ለማስረዳት የቀረበን ማስረጃ ከማስረጃው አግባብነት፣ ተቀባይነት እና የማሳመን ብቃት አንጻር በማየት የማይቀበለው ሆኖ በመገኘቱ ምክንያት ሳይመለከተው የቀረ ካልሆነ በቀር ክርክርን ለማስረዳት የቀረበን የተከራካሪ ወገን ማስረጃ በዘፈቀደ ውድቅ ማድረግ እንደማይቻል ስለማስረጃ አቀባባል በተደነገጉት የፍ/ብ/ሥ/ሥ/ሕ/ቁ 257 ፣ 258 እና 259 ተመልክቷል፡፡ ይህም የተከራካሪ ወገንን የመደመጥ መብት ለማስከበር ሲባል የተዘረጋ ሥርዓት ነው፡፡ እንዲሁም የበታች ፍ/ቤት ወይም ይግባኝ ሰሚው ፍ/ቤት በክርክርና ክርክርን ለማስረዳት የቀረበን፤ የተሰማን ማስረጃ አንድ በአንድ በማገናዘብ በመተቸት፤ የሚቀበለውንና የማይቀበለውን በመለየት ዳኝነት መሥጠት እንደሚገባ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 181 እና 182 በተመለከተው የፍርድ አፃፃፍ ሥርዓት ተደንግጓል፡፡ የበላይ ፍርድ ቤትም ይህ ዳኝነት የፍርድ አፃፃፍ ስህተት የማስረጃ አቀባበል ስርዓት ጉድለት መፈፀሙን የሥር ፍ/ቤቶች የመዝገብ ግልባጭ የሚያስረዳና ሳይመረመርና ሳይታይ የታለፈው የማስረጃ ይዘት በመዝገቡ ላይ ሰፍሮ ከተገኘ በፍ/ብ/ሥ/ሥ/ሕ/ቁ.242 መሰረት በዚሁ የመዝገብ ግልባጭ ላይ በመመርኮዝ አስፈላጊውን ዳኝነት መስጠት እንደሚቻልም ተመልክቷል፡፡

ስለሆነም የአሁን አመልካችና የሟች የጋብቻ ግንኙነት ሳይቋረጥ እስከ ሟች ዕለተ ሞት ድረስ ግንኙነት የቀጠለ ስለመሆኑ የሥር የአ/አበባ የመጀመሪያ ደረጃ ፍ/ቤት በሰው ማስረጃ ያረጋገጠው የፍሬ ነገር ጉዳይ ስለመሆኑ ተገንዝበናል፡፡ ይህም ከሆነ በሀገሪቱ ወጥ የሆነ የህግ አተረጓጎምና አፈጻጸም ማስፈን ይቻል ዘንድ እንደ አንድ ስልት ተቆጥሮ በወጣው በአዋጅ ቁጥር 454/97 ድንጋጌ መሰረት የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ከአምስት ያላነሱ ዳኞች ተሰይመው የሰጡት የህግ ትርጉም በበታች ፍ/ቤቶች የአስገዳጅነት ኃይል ወይም ባህርይ የሚኖረው ትርጉም በተሰጠበት የተነሳው እና ዳኝነት እንዲሰጥበት በቀረበው ጉዳዮች መካከል የፍሬ ነገርና የህግ ጥያቄ የተመሳሰለ ሆኖ ከተገኘ ብቻ ነው፡፡

ይግባኝ ሰሚው ፍ/ቤት በዚህ አዋጅ መሰረት የተጠቀሰውንና አስቀድሞ ትርጉም የተሰጠበትን በሰበር መ/ቁ 31891 የተሰጠውን ውሳኔ ማየት እንደሚቻለው ሁለቱም ለ12 ዓመታት ተለያይተው እንደኖሩ፣ ተጠሪም በውጭ ሀገር በመኖር ላይ እንዳለች ሌላ ባል አግብታ ትኖር እነደነበር በክርክር ደረጃ የቀረበው ሳይጣራ የተሰጠ ውሳኔ ስለሆነ እንደገና ተጣርቶ ሊወሰን ይገባል በማለት ለሰጠው ዳኝነት እንዲሁም ይግባኝ ሰሚው ፍ/ቤት በደፈናው የፌዴራል ሰበር ሰሚ ችሎት ትርጉም በሰጠባቸው “ሌሎች መዝገቦች“ የሚለው አገላለጽ በሰበር መ/ቁ 14290፤20938 የተሰጠውን

ለመጥቀስ ፈልጐ ከሆነም ተለያይተው የኖሩ ተጋቢዎች በየፊናቸው የየራሳቸውን ህይወት ስለመጀመራቸው፣ ሟች ሌላ ሚስት አግብተው ስለመኖራቸው ተረጋግጦ መሆኑ ሁሉ ታይቶ ትርጉም የተሰጠበት ስለሆነ በፍሬ ነገር ረገድ በአሁኑ አመልካች በምንያ ገ/ስላሴ እና ተጠሪ ወ/ሪት መሰረት ዓለማየሁ መካከል ከተነሳው ክርክር ጋር የሚመሳሰል አይደለም፡፡ የሚመሳሰል ባለመሆኑም በአዋጅ ቁጥር 454/97 መሰረት ታይቶ ሊወሰን የሚችል አይደለም፡፡

በመሆኑም የአዲስ አበባ ከተማ ይግባኝ ሰሚው ፍ/ቤት እና የከተማው ሰበር ሰሚ ችሎት የሰጡት ውሳኔ ከማስረጃ አቀባበል ሥርዓትና ከአዋጅ ቁጥር 454/97 አፈጻጸም (ረገድ) አንጻር ሲታይ የሰጡት ውሳኔ መሰረታዊ የህግ ስህተት የተፈፀመበት ሆኖ አግኝተነዋል፡፡በመሆኑም የሚከተለውን ውሳኔ ሰጥተናል፡፡

ው ሳ ኔ

1. የአዲስ አበባ ከተማ ይግባኝ ሰሚው ፍ/ቤት በመ/ቁ 14194 በ26/2/2003 ዓ.ም. የሰጠው ፍርድ፤ በአ/አበባ ከተማ ፍ/ቤቶች የሰበር ሰሚ ችሎት በመ/ቁ 14801 በ20/7/03 ዓ.ም በአብላጫ ድምፅ የሰጠው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 348(1) መሰረት ተሽሯል፡፡
2. የአ/አበባ ከተማ የመጀመሪያ ደረጃ ፍ/ቤት በመ/ቁ 1706/00 በቀን 6/11/2002 ዓ.ም የሰጠው ፍርድ ፀንቷል፡፡

ይህ የሰበር ክርክር ስላስከተለው ወጭና ኪሳራ ግራ ቀኙ ይቻቻሉ፡፡

መዝገቡ ተዘግቷል፤

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

የሰ/መ/ቁ 75562

ሰኔ 18 ቀን 2004 ዓ.ም

ዳኞች፡- ተገኔ ጌታነህ

አልማው ወሌ

ዓሊ መሀመድ

ነጋ ዱፍሳ

አዳነ ንጉሴ

አመልካች፡- ወ/ሮ ሶፊያ መሐመድ - ቀረቡ

ተጠሪ፡- አቶ መሐመድ ይመር - ቀረቡ

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ይህ የሰበር አቤቱታ ሊቀርብ የቻለው አመልካችና ተጠሪ ጋብቻቸው ጸንቶ ባለበት ጊዜ በተጠሪ ስም እጣ የደረሰው ቢሆንም ቅድመ ክፍያ ጋብቻው በፍርድ ቤት ውሳኔ መፍረስ በኋላ የተከፈለበት ኮንዶሚኒየም ቤት የጋራ ነው ተብሎ የሥር ፍ/ቤቶች የሠጡት ውሳኔ ተገቢ መሆን ያለመሆኑን ለመመርመር ተብሎ ነው፡፡ አመልካች ታህሳስ 24 ቀን 2004 ዓ.ም በጻፉት የሰበር ማመልከቻ አከራካሪው የኮንዶሚኒየም ቤት በጋብቻ ጊዜ በስማቸው የደረሰ ቢሆንም እጣው ሊደርስ የቻለው መንግስት ለሴቶች የተለየ የእጣ እድል ስርዓት በመዘርጋቱ በመሆኑ እና እጣው ከደረሰ በኋላም ጋብቻው በፍርድ ቤት ውሳኔ ፈርሶ ለቤቱ የቅድመ ክፍያ ገንዘብ የተከፈለ መሆኑ ተረጋግጦ እያለ ቤቱ በጋብቻ ጊዜ የተፈራ የጋራ ንብረት ነው ተብሎ መወሰኑ ያላግባብ ነው የሚሉትን የቅሬታ ነጥቦች ጠቅሰዋል፡፡

የጉዳዩ አመጣጥ ሲታይ በግራ ቀኙ መካከል የነበረው ጋብቻ በፍቺ ከፈረሰ በኋላ ተጠሪ የጋራ ንብረቶች ናቸው የሚሏቸውን አይነታቸውንና ብዛታቸውን በመግለፅ ዳኝነት መጠየቃቸውን የስር ፍርድ ቤት የውሳኔ ግልባጭ ያሳያል፡፡ በዚህ ዝርዝር ውስጥም እስከዚህ ሰበር ሰሚ ችሎት የሚከራከሩበት በሰሚት ሳይት የሚገኝ ሕንፃ ቁጥር 148/11 ባለ ሁለት መኝታ በተጠሪ ስም የተመዘገበ የኮንዶሚኒየም ቤት እጣው ጋብቻው ጸንቶ ባለበት ጊዜ የወጣ በመሆኑ በትዳር ጊዜ የተፈራ የጋራ ንብረት ስለሆነ ልንካፈል ይገባል የሚል የዳኝነት ጥያቄ ይገኝበታል፡፡ ከዚህም በተጨማሪ ተጠሪ ከአመልካች ጋር በጋብቻ ተሳስረው በነበሩበት ጊዜ በአቃቂ ቃሊቲ ክፍለ ከተማ ቀበሌ 10/11 ውስጥ በ350 ካ.ሜትር ቦታ ላይ የሰፈረና በአመልካች ስም የተመዘገበ መኖሪያ ቤት፣ የተለያዩ የቤት ቁሳቁሶች መኖራቸውን ገልፀው ክፍፍሉ እንዲደረግ ዳኝነት ጠይቀዋል፡፡ የአሁኗ

አመልካች ለተጠሪ የንብረት ክፍፍል ጥያቄ በሰጡት መልስም በአቃቂ ቃሊቲ ክፍለ ከተማ ቀበሌ 10/11 ውስጥ በ350 ካ.ሜ ቦታ ላይ የሰፈረና በአመልካች ስም የተመዘገበ መኖሪያ ቤት የተለያዩ የቤት ቁሳቁሶች መኖራቸውን ሳይክዱ ክፍፍሉ ቢደረግ ተቃውሞ የሌላቸው መሆኑን የገለፁ ሲሆን የኮንዶሚኒየም ቤቱን በተመለከተ ግን የጋራ ስላልሆነ ተጠሪ ሊጠይቁ አይችሉም ሲሉ ተከራክረዋል፡፡

የንብረት ክርክሩ በዚህ መልኩ የቀረበለት የፌዴራሉ መጀመሪያ ደረጃ ፍ/ቤቱም ተገቢውን ማጣራት ከአደረገ በኋላ የኮንዶሚኒየም ቤቱ የጋራ መሆኑን ማረጋገጡን ገልጾ አመልካች ለቅድመ ክፍያ ከፈልኩ የሚሉትን የብር 32,048.40(ሰላሳ ሁለት ሺህ አርባ ስምንት ብር ከአርባ ሳንቲም) ግማሽ ብር 16,024.20(አስራ ስድስት ሺህ ሃያ አራት ብር ከሃያ ሳንቲም) ተጠሪ እንዲተኩላቸው፣ ቤቱ ከነቀሪው እዳው ግን የጋራ ነው፣ በማለትና የታመኑትን ንብረቶች በሕጉ አግባብ ሊከፋፈሉ የሚችሉበትን መንገድ በመዘርዘር ውሳኔ ሰጥቷል፡፡ የኮንዶሚኒየም ቤቱን በተመለከተ በስር ፍርድ ቤት በተሰጠው ውሳኔ አመልካች ቅሬታ አድሮባቸው ይግባኛቸውን ለፌዴራሉ ከፍተኛ ፍርድ ቤት ቢያቀርቡም በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 337 መሰረት ተሰርዞባቸዋል፡፡ የአሁኑ የሰበር አቤቱታ የቀረበውም ይህንኑ ውሳኔ በመቃወም ለማስለወጥ ነው፡፡ አቤቱታው ተመርምሮም የኮንዶሚኒየም ቤቱ የጋራ ነው ተብሎ መወሰኑ ባግባቡ መሆን ያለመሆኑ ሊጣራ የሚገባው ነጥብ ሆኖ በመገኘቱ ጉዳዩ ለሰበር ችሎት እንዲቀርብ የተደረገ ሲሆን ለተጠሪም ጥሪ ተደርጎላቸው ግራ ቀኙ በፅሁፍ እንዲከራከሩ ተደርጓል፡፡

የጉዳዩ አመጣጥ አጠር ባለመልኩ ከላይ የተገለፀው ሲሆን ይህ ችሎትም የግራ ቀኙን ክርክር ለሰበር አቤቱታ መሰረት ከሆነው ውሳኔ እና አግባብነት ካላቸው ድንጋጌዎች ጋር በማገናዘብ ጉዳዩ ለሰበር ችሎት ሲቀርብ ከተያዘው ጭብጥ አንፃር ከሕጉ አኳያ እንደሚከተለው ተመርምሯል፡፡

ከክርከሩ ሂደት መገንዘብ የተቻለው የአሁኗ አመልካችና ተጠሪ ጋብቻቸው ጸንቶ ባለበት ጊዜ ሚያዚያ ወር 2002 ላይ አከራካሪው የኮንዶሚኒየም ቤት በተጠሪ ስም የደረሳቸው መሆኑን ፣ ሰኔ 02 ቀን 2002 ዓ.ም. ደግሞ ጋብቻቸው በፍርድ ቤት ውሳኔ መፍረሱን፣ ከዚህም በኋላ የጋብቻ ውጤት የሆነው የንብረት ክርክር ባልተካሄደበት ሁኔታ ነሐሴ 17 ቀን 2002 ዓ.ም አመልካች ለኮንዶሚኒየም ቤቱ ቅድመ ክፍያ የከፈሉ መሆኑንና ጳጉሜ 04 ቀን 2002 ዓ.ም. ላይ ከሚመለከተው አስተዳደር አካል ጋር የኮንዶሚኒየም ቤቱን በተመለከተ ውል የተዋዋሉ መሆኑ በፍሬ ነገር ደረጃ የተረጋገጡ ጉዳዮች መሆናቸውን ነው፡፡ አመልካች አሁን በዚህ ሰበር ደረጃ

አጥብቀው የሚከራከሩት ቤቱ ሴት በመሆናቸው ባገኙት ልዩ ድጋፍ የደረሳቸውና ቅድመ ክፍያውንም ከጋብቻ መፍረስ በኋላ የከፈሉ በመሆኑ የጋራ ሊሆን አይችልም በሚል ምክንያት ነው፡ ፡ ተጠሪ ደግሞ አመልካች ለእጣው እንዲመዘገቡ የተደረገው ተጠሪ ካላቸው የስራ ባህርይ አንፃር አመልካች በቋሚነት አዲስ አበባ ስለሚኖሩ ጉዳዩን ለመከታተል እንዲቻል ስለመሆኑና እጣውም ሴት በመሆናቸው በተለየ መንገድ ያላገኙት መሆኑን ጠቅሰው በጉዳዩ ላይ የተሰጠው ውሳኔ የቤተሰብ ሕጉን ያገናዘበ በመሆኑ ሊጸና ይገባል ሲሉ ተከራክረዋል፡፡

በመሰረቱ በስር ፍርድ ቤት ያልቀረበ አዲስ የፍሬ ነገር ክርክር በበላይ ፍርድ ቤት ሊነሳ እንደማይችል የፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 329(1) ድንጋጌ ያሳያል፡፡ ይህ ሰበር ችሎት የሚመራው በ1958ቱ የፍትሓ ብሔር ስነ ስርዓት ሕጋችን በመሆኑ ከላይ የተጠቀሰው ድንጋጌ ለዚህ ችሎትም ተፈጻሚነት ያለው ነው፡፡ በመሆኑም በበታች ፍርድ ቤቶች ያልተነሳ የፍሬ ነገር ክርክር በሰበር ችሎት የሚነሳበት አግባብ የለም፡፡

ወደተያዘው ጉዳይ ስንመለስ አመልካች የኮንዶሚኒየም ቤት እጣ በጋብቻ ውስጥ የደረሳቸው መሆኑን ሳይክዱ እጣው በሴትነታቸው የደረሳቸው መሆኑን ጠቅሰው ተጠሪ በቤቱ ላይ መብት የላቸውም በማለት በዚህ ሰበር ሰሚ ችሎት ተከራክረዋል፡፡ ይሁን እንጂ የቤቱ ዕጣ በጋብቻ ውስጥ ግራ ቀኙ እያሉ የደረሰ መሆኑ እንደተጠበቀ ሆኖ አመልካች እጣውን በሴትነት ያገኙት ነው በማለት እዚህ ሰበር ሰሚ ችሎት የሚያቀርቡት የፍሬ ነገር ክርክር ስርዓቱን ጠብቆ የቀረበ ባለመሆኑ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 329(1) መሰረት ተቀባይነት የሌለው ነው፡፡ አመልካች እጣው የደረሰው በጋብቻ ውስጥ መሆኑን ሳይክዱ ለቤቱ ቅድመ ክፍያ ከጋብቻ መፍረስ በኋላ በስማቸው ወይም ከግል ገንዘባቸው መክፈላቸውና ዉሉንም ከአስተዳደሩ ጋር ማድረጋቸው በጋብቻ ጊዜ የደረሰውን እጣ ውጤቱን የሚቀይረው ሊሆን የሚችልበት ሕጋዊ አግባብ የለም፡፡ የኮንደሚኒየም ቤት ለህብረተሰቡ የሚሰጥበትን አግባብ የሚገዙ ሕጎችም ከምዝገባ ጀምሮ የተለያዩ ሂደቶች ያሉ ስለመሆኑ የሚያሳዩ ሲሆን በትዳር ውስጥ የሚገኙ ባልና ሚስት ለእጣው ሲመዘገቡ ሁለቱም ሊመዘገቡ እንደማይችሉ የሚታወቅ ነው፡፡ በመሆኑም አንዱ ተጋቢ በጋብቻ ጊዜ ስሙ ከተመዘገበና እጣው ጋብቻው ጸንቶ ባለበት ጊዜ ከደረሰ በቤቱ ላይ የሚገኘው መብትና ግዴታ የተጋቢዎች የጋራ ነው ከሚባል በስተቀር የቅድሚያ ክፍያ ጋብቻው ከፈረሰ በኋላ በአጭር ጊዜ ወይም ወዲያውኑ በመከፈሉና ዉሉም የተዋዋለው ተጋቢ የግል ንብረት ነው የሚባልበት ህጋዊ አግባብ የለም፡፡ በመሆኑም አመልካች የኮንዶሚኒየም ቤቱ የግሌ ነው በማለት ያቀረቡት ክርክር ስርዓቱ ጠብቆ ያልቀረበና ሕጋዊ መሰረት የሌለው ሆኖ ስለተገኘ ነው በጉዳዩ ላይ የበታች ፍርድ ቤቶች የሰጡት

ውሳኔ መሰረታዊ የሆነ የሕግ ስህተት ያለበት ነው ለማለት አልተቻለም፡፡በዚህ ምክንያት ተከታዩን ወስነናል፡፡

<u>ው ሳ ኔ</u>

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2. የኮንደሚኒየም ቤቱ እጣ የደረሰው ጋብቻ ፀንቶ ባለበት ጊዜ ስለሆነና አመልካች ለቤቱ ቅድመ ክፍያ በመክፍል ውሉን ከአስተዳደር አካሉ አደረግሁ የሚሉት ጊዜ ጋብቻው በፍርድ ቤት ውሳኔ ከፈረሰ በአጭር ጊዜ ውስጥና የንብረት ክፍፍሉ ባለተደረገበት ሁኔታ በመሆኑ ቤቱን የአመልካች የግል ንብረት ነው ለማለት የሚያስቸል ሕጋዊ አግባብ የለም ብለናል፡፡
3. በዚህ ችሎት ለተደረገው ክርክር የወጣው ወጭና ኪሳራ ግራ ቀኙ የየራሳአውን ይቻሉ ብለናል፡፡

መዝገቡ ተዘግቷል፤ ወደ መ/ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት