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About the Law School

The Law School commenced its academic work on the 19th of December 2002 as the Faculty of Law of Jimma University. For the first year, it accepted 158 advanced diploma students who graduated three years later. Then, the School has been accepting and teaching students in four first degree programs, namely, in the regular, evening, summer, and distance programs. Thus far, it has graduated thousands of students in the first three programs while the students in the distance program are yet to graduate for the first time.

Moreover, the Law School has commenced an LL.M program in **Commercial and Investment Law** in 2012/2013 (2005 E.C.). At the moment, it has 17 students in the program. This LL.M program is a two years program. Indeed, the School is now conducting a feasibility study to open new postgraduate programs.

In addition to its teaching jobs, the Law School has been publishing its law journal called **Jimma University Journal of Law**. It is a journal published at least once in a year. Besides, there are research works that the academic members of the School conduct although they are usually not published.

Finally, the Law School is making its presence in the community felt by rendering legal services to the indigent and the vulnerable parts of the society

(such as children, women, persons with disabilities, persons with HIV/AIDS, and old persons) in Jimma town and Jimma Zone through its Legal Aid Center. Currently, the Center has six branches and they are all doing great jobs to facilitate the enjoyment of the right of access to justice for the indigent and the vulnerable groups. Of course, the other main aim of the Center is enabling our students to acquire practical legal skill before they graduate from the School.

Immediate Appealability of A Court Order against Arbitration: It Should Be Allowed and Even Made Compulsory

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Abstract

If we look at Article 320 of the Civil Procedure Code, it reveals the non-immediate appealability of a court order against arbitration agreement. In this work, I argue that the provision must be amended and immediate appeal from a court order declining the enforcement of arbitration agreement must be allowed and even made compulsory.

Introduction

One of the preliminary objections a party can invoke to discontinue litigation is the existence of an agreement to arbitrate over the dispute submitted to the court.[1] The opponent party seeking the litigation over arbitration may challenge the defendant's objection by claiming one or more of such grounds as : there is no arbitration agreement at all, the arbitration agreement does not cover the subject matter of the dispute submitted to the court, the subject – matter of the dispute is *not arbitrable*[2] or the arbitration agreement is *invalid*[3]

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[1] See Civ.Proc.C,1965, Art.244(2)(g).

[2] For example, a party, on the basis of Art. 315(2),Civ.Proc.C, may argue that the dispute, as it emanates from administrative contract, is not arbitrable.

[3] Arbitration agreement can be challenged as invalid for, for instance, non-fulfillment of the formality requirements or lack of parties' consent or its bias in favoring one party over the other in the appointment of arbitrators (Art. 3335, Civ. C).

or thus not enforceable or *has lapsed,*[4] or some preconditions such as a time–limit on initiating arbitration are not fulfilled.

The court which is supposed to give an order on preliminary objection before it goes into hearings on the merit of the case[5] evaluates the claims of the parties and may give an order in favor of the party favoring litigation, that is, against the arbitration.[6] A look at Art.320(3),Civ.Proc.C, reveals that an immediate appeal of this order about which the pro arbitration party believes erroneous is not allowed. The party needs to defer her appeal on the order until the courts look into the merit and give final judgment over the dispute which she really wanted to be kept out of the court and resolved via arbitration. So the question is; should an immediate appeal against a court order which is against arbitration be allowed and even made compulsory? This work is up to addressing this question. In this work, it is argued that it should be allowed and made even compulsory for such reasons that sticking

[4] To see circumstances where arbitration agreements lapse, see Civ.C. Arts. 3337, 3344(1) .
[5] Civ.Proc.C,1965, Art.245
[6] In France, where negative kompetenze-kompetenz is at work, courts, at this stage, may not look themselves at such jurisdictional challenges based on the scope, validity or existence of the arbitration agreement. They simply refer the questions to arbitrators unless the arbitration agreement is manifestly null. They examine the questions of validity, existence or scope of the arbitration agreement after an award is given and a claim for setting aside or refusal of enforcement arise. In this regard Art. 1448 of the French Code of Civ.Proc.C. goes:

> *When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.*
>
> *A court may not decline jurisdiction on its own motion.*
>
> *Any stipulation contrary to the present article shall be deemed not written.*

However in Ethiopia let alone the negative Kompetenze –kompetenze, even the positive concept of Kompetenze –kompetenze is not fully adopted as arbitrators cannot decide on the validity of the arbitration agreement (see Art 3330(3), CV.C). So Ethiopian courts are not expected to refer such issues to arbitrators rather they need to handle it themselves and give a ruling over them.

to the final judgment rule with regard to courts order against arbitration contradicts the premise of the rule itself; it leads to absurd solutions, it defeats arbitration's role of easing court's congestion and it opens a room for abuse.

This paper is divided in to VI sections. Section I exposes the law at force with regard to the appealability of court order against arbitration. In sections II, III, IV, and V four reasons which show the need to drop the final judgment rule regarding the appealability of court order against arbitration are forwarded and explained. The last section concludes the discussion with a recommendation to amend the Civ. Proc. Code.

I. The Current Appealability Rule on Court Order against Arbitration-The Final Judgment Rule (FJR)

The Ethiopian arbitration laws *(*Arts.3325-3346 Civ. C.; Arts.315-319;350-357 and Art.244(2)(g) Civ.Proc.C)[7] does not consist of a rule on the appealability of court orders against arbitration. Thus, the applicable rule is what is provided under Art.320(3),Civ.P.C. This article reads:

> No appeal shall lie from any decision or order of any court on interlocutory matters, such as a decision or order on adjournments, *preliminary objections*, the admissibility or inadmissibility of oral or documentary evidence or permission to sue as a pauper, but any such decision or order may be raised as a ground of appeal when an appeal is made against the final judgment. (emphasis added)

[7] Note that Ethiopia, as a federal state, can have multiple arbitration laws enacted by individual states forming the federation. As things stand now, however, the sources of arbitration law of both the federal government and all the 9 states (forming the federation) are the Civ.C. and the Civ.Proc.C.That is why I boldly use the phrase Ethiopian arbitration law to simply refer to those provisions of the C.C and Civ.Proc.C.

As provided under Art.244(2)(g), Civ.Proc. C. a challenge against court's jurisdiction based on the existence of an arbitration agreement is a preliminary objection and court's order on this challenge is an order on preliminary objections and thus not immediately appealable. A party feeling aggrieved by erroneous court order against arbitration must defer her appeal until the final judgment.[8]

The final judgment rule as embodied in Art.320(3), Civ.Proc.C must have been adopted by the legislator for its far-reaching importance. To see the rationale of the rule which the legislator must have noted in adopting it, let us borrow a couple of paragraphs on the importance of the rule from one writer:

> One of the basic rationales behind the rule … is the conservation of judicial resources. Repeated interruption of trial court proceedings to review every contested ruling would consume vast amounts of court time and needlessly delay trials. Moreover, the finality requirement avoids unnecessary appeals from rulings that ultimately become moot, either because the party who lost the ruling prevails on the merits, or because the disputed ruling fails to affect the final result in a manner requiring reversal.
>
> Of even greater concern … is the danger excessive interlocutory appeals pose to the relationship between appellate and trial courts. Appellate court intrusion into the jurisdiction and discretionary decision-making of the district courts arguably weakens both the

[8] Note that there are exceptions to the final judgment rule for those matters enumerated under Art.320(4),Civ.Proc.C. According to this provision, an immediate appeal is allowed only on such orders directing the arrest or detention of any person, the transfer of property from the hands of one party into the hands of the other or refusing to grant an application for habeas corpus.

> authority of the trial judge and the efficient operation of the judicial system…. Repeated appeals also would permit relatively wealthy parties to harass or financially exhaust their opponents. Moreover, the greater the opportunity for delay in trial, the greater the likelihood that crucial evidence will grow stale or vanish altogether, or that the trial court's familiarity with the facts of the case will weaken. Finally, the final judgment rule forces consolidation of all potential appeal issues into one appeal. As a result, the rule minimizes the burden on the appellate courts and enables the reviewing court to consider the trial court's action in light of the entire proceedings below.[9]

However, despite the above policy goals behind the rule in Art.320(3),Civ.Proc.C, it does not make sense to apply it to court orders against arbitration. Because sticking to FJR regarding such orders is nonsense for various reasons such as: it contradicts the underlying premise of FJR; it leads to absurd solutions, it defeats arbitration's role of easing court's congestion and it opens a room for abuse.

II. The Immediate Non-Appealability of the Court Order against Arbitration Contradicts the underlying Premise of FJR- Reparability

We need to insist upon the FJR as long as it serves its purpose or is compatible with its underlying premise or does not cause injustice to the parties. The rule is on the premise that the damage done by an erroneous order on interlocutory matters must be reparable even if the appeal is lodged

[9] Randall J. Turk, Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292, 67 *Georgetown. Law Journal*, 1025 (1978-1979).

not immediately after the order but upon a final judgment. Of course, the correction of the damage could come, in individual cases, at a higher cost than it could if an immediate appeal was allowed. However, since the potential policy consideration behind FJR outweighs the potential damage a party could suffer from an order, the rule is upheld. For example, if a court orders that the action is not barred by period of a limitation and proceeds to trial and later an appellate court, which reviews the court order upon final judgment, finds the order erroneous (that is, if it finds that the action is actually barred by a period of limitation), the trial held in the lower court will become simply a wastage.[10] This means, the party is made to go through unnecessary trial just because he has to wait until final judgment is given to get the order corrected. However, this possible ordeal of the party, as it is by the time the order is given, does not outweigh the possibility that the order may not be found erroneous by the appellate court, the party can use immediate appeal to harass the opponent or he may prevail in the merit and thus he may not need the appeal ultimately, to name a few.[11] So, the FJR is on the premise that the cost to fix the damage of an erroneous order could be higher whenever the erroneous order is corrected upon final judgment than immediately after it is given, but still the damage by the order must still be reparable to make it appealable only upon final judgment. In other words, the rule applies only if the damage by an erroneous order is reparable by appeal upon final judgment.

The above analysis, *a contrario* reading, states that if the damage by an erroneous order is not reparable by appeal upon final judgment, then the order should not be subjected to FJR. It does not make sense to stick to FJR

[10] Note that trial is in most cases the most expensive part of a proceeding as, for example, a party must bear the cost of transportation and other expenses of her witnesses.
11 See supra note 9 and the accompanying text.

and extend its applicability to any case which does not even fit into its underlying premise, which is damages caused by erroneous orders are reparable even though appeal from the order is allowed only upon final judgment. Accordingly, the adherence to the rule does not make sense regarding the appealability of a court order which goes against the referral of the dispute to arbitration because the damage from an erroneous order against arbitration is irreparable unless immediate appeal is allowed.

A party enters into an arbitration agreement as a preference to litigation to prevent herself from delay, high cost and publicity which is usually associated with court trial. If immediate appeal is not allowed from an erroneous court order against arbitration and if the pro arbitration party is compelled to wait until the court goes into the merit and finally gives judgment, then she will be exposed to the very features associated with trials and which she wants to shield herself from by entering into the arbitration agreement in the first place. This damage can never be made good thereafter.[12] Therefore, the FJR extending to orders against arbitration as provided in Art.320(3) Civ. Proc. C. must not be left to stand as it is because that goes contrary to the underlying premise of FJR- erroneous court orders are reparable upon final judgment- as the damage from an erroneous court orders against arbitration can never be made good without an immediate appeal.

[12] For example, how can a party recover from the publicity the dispute causes if it once undergoes a court trial which is held publicly? The very purpose of referring disputes to arbitration will be lost for good if the dispute is once made to undergo a public trial.

III. The Immediate Non- Appeal ability of Court Orders against Arbitration Leads to Absurdity

The first absurdity is that if an erroneous court order against arbitration is to be corrected after the lower court gives final judgment, the only way it can be done is by the nullification of the lower court's judgment and mandating the parties to submit the outstanding dispute to arbitration.[13] However, appellate courts need not nullify the judgment unless the lower court is inherently incompetent to handle the dispute but gives judgment on it[14] or the judgment is deeply flawed.[15] In other situations, appellate courts are supposed not to nullify the judgment rather to scrutinize it and either to confirm, or modify or reverse it.[16]

So the question is: Is a court, which erroneously ignores the arbitration agreement and entertains the dispute and gives a judgment inherently incompetent or is its judgment deeply flawed? A court can never be considered inherently incompetent (naturally unfit) to handle a dispute which it would competently handle in normal circumstances, just because it handles it despite the presence of arbitration agreement. Despite the court's error in ignoring or wrong understanding of the arbitration agreement over the dispute, the judgment given on the merit of the dispute cannot be taken as

[13] Note that, in section II, it was shown that referring a dispute to arbitration after a judgment on the merit is given by the lower court achieves nothing of the very objective of parties referring of disputes to arbitration that is to save themselves from costly, time-taking and public trial. Even if we hold that it achieves something, as we will see in this section, it still leads to absurdity.

[14] For example, if the court lacks material jurisdiction to handle a dispute, then it can be taken as inherently incompetent regarding it. See ,Civ.Proc.C,Arts.9,211,

[15] If a judgment is given without observing fundamental principles of justice and procedures such as the right to be heard, the right to be tried by an impartial forum, then it can be taken as fundamentally flawed.

[16] Courts need to do this because the objectives of procedural laws such as fostering the judicial economy and efficiency dictate this, because the nullification of judgments and then ordering of fresh proceeding for every kind of error is very costly and illogical.

deeply flawed, either. In other words, a judgment by such a court on the merit of the dispute can never be taken as deeply lacking the observance of fundamental principles which are designed to ensure that the judgment-givers arrive at fair and just result, just because it is on the dispute subjected to arbitration. Therefore, it is absurd to stick to FJR regarding court orders against arbitration as it compels appellate courts to an absurd solution of nullifying first the lower court's judgment which is neither inherently flawed nor given by an inherently incompetent body. If the judgment is not to be nullified and simply the parties are referred to arbitration, then the defense of *res judicata* can be invoked to bar the arbitration.[17] So, a court order against arbitration should not be subjected to the FJR to avoid such absurdity.

The second absurdity is that nullifying the lower court's judgment and referring the outstanding dispute, as the result of the nullification, to arbitration sends philosophically unpalatable message that disputes submitted to arbitration are only arbitrable, no more in any way suitable for court litigation. The fact that a dispute is referred to arbitration does not imply that it is naturally unfit to be handled by courts. If that was the case, courts would not be given the role to exercise some degree of control over arbitration.[18] Rather, submission of disputes to arbitration implies that parties want the dispute to be resolved quickly, less costly and privately than it would be if litigation were preferred. Therefore, nullifying a court's judgment so as to refer the outstanding dispute to arbitration, despite the fact that the arbitration no more benefits the parties in terms of time, money and

[17] Note also that a judgment given by a lower court in the presence of a valid judgment cannot be held void.

[18] Note that courts have the power to supervise arbitration by such procedures as appeal (Arts. 350-354, Civ. Proc. C.), setting aside (Arts.355-357, Civ. Proc.C) and refusal (Art.319(2)), Civ. Proc. C, the court can refuse the enforcement of arbitral awards).

confidentiality sends a wrong message that disputes submitted to arbitration are naturally unsuitable for litigation.[19]

IV. The Immediate Non-Appealability of Court Orders against Arbitration Defeats Arbitration's Role of Reducing Court's Caseloads

Ethiopian arbitration law is the part the Civil Code and Civil Procedure Code.[20] And it is possible to assume that Ethiopian arbitration law has the objectives of ensuring the enforceability of arbitration agreements[21] and bringing efficiency in the resolution of disputes which include by easing courts' congestion. In Ethiopia, there is no way that the arbitration law cannot be not intended, among other things, to ease court congestion as courts in Ethiopia are overcrowded with cases.[22] However, if a court's erroneous order against arbitration is to be corrected after the court goes to trial and finally gives judgment on the merit of the dispute, arbitration's purpose of easing court congestion can never be achieved. The purpose can be achieved if the court order which erroneously keeps the dispute in the court gets corrected in time and the dispute is referred to arbitration before it undergoes a trial and judgment stages. This is made possible when an immediate appeal from a court order against arbitration is allowed.

[19] Note that parties may prefer arbitration to be arbitrated by a person of high expertise on the subject matter of the dispute. But this is not the essential reason for a legal system to design a legal framework for arbitration alongside litigation

[20] See note 7 and the accompanying text

[21] See,Art.Civ.Proc.C, Art.244(2)(g).

[22] But remember that the nullification itself is an absurd solution as discussed in section III.

V. The Immediate Non- Appealability of Court Orders against Arbitration Could Lead to Abuse by a Party with a Bad Faith

If an immediate appeal of a court order against arbitration is not allowed or even made compulsory, then the losing party can exploit the FJR to prolong the settlement of the dispute to the point of frustrating the other party. A party whose case is weak may not want to take an immediate appeal from erroneous court order against arbitration as the appellate court may refer the dispute to arbitration and it may get decided by arbitrators more quickly than it does in the court. Rather, such a party wants to take her time until the lower court goes to trial and gives judgment. If her fear realizes and the court's judgment goes against her favor, then she files an appeal from the order against arbitration to get the whole proceeding in the lower court nullified and then the resulting outstanding dispute referred to arbitration.[23] To avoid such possible abuse by a party with a weak case and in bad faith, an immediate appeal from court orders against arbitration must be allowed and even made compulsory.

VI. Conclusion and Recommendation

A glance at Art.320(3), Civ. Proc. C. reveals that a court order against an objection for the termination of litigation which rests on the ground of the existence of arbitration agreement over the dispute is not appealable until final judgment is obtained. However, there are plenty of reasons to hold that the rule in the article is not suitable for the appelability of such order. The rule in the article makes sense if the court order fits into its premise that the damages the order causes are reparable even if the appeal lies from it upon final judgment; if it does not lead to absurd solutions such as nullifying

[23] But remember that the nullification itself is an absurd solution as discussed in section III.

lower court's judgment for no fundamental problem; if it does not send a wrong message that only arbitration is the inherent mechanism for the resolution of a dispute subjected to an arbitration agreement; if it creates a judicial economy by not keeping erroneously in the court disputes that must be kept outside the court for settlement via arbitration and if it forecloses the possible room for abuse by a party in bad faith.

As sticking to the FJR with regard to a court order against arbitration leads to the irreparability of the damage arising from the order, absurd results, defeating the arbitration's role of easing court's caseload, and opening a room for abuse by a party in bad faith, there is no reason to maintain Art.320(2),Civ. Proc. C as it is. It must be amended to exclude its FJR from being applicable to orders against arbitration and an immediate appeal from the order must be made compulsory, meaning, if a party fails to take an appeal immediately, then she cannot do it later. That can be done by inserting a provision in the Ethiopian arbitration law a provision which is similar to the following one:

> A court order against the preliminary objection challenging its jurisdiction, on the basis of the existence of a valid arbitration agreement, of handling the dispute submitted to it shall be appealable immediately after it is issued. The appeal shall be lodged within ---- days of the issuance of the order. If the appeal is lodged in bad faith, the appellate court may award damage for the other party.

Introducing a New Scheme: Incorporating Suppression of Identity Clause as a Limitation to the Principle of Open Justice in Ethiopian Procedural Laws

Bisrat Teklu Hailemichael[♣]

Abstract

The principle of open justice requires all court proceeding to be held in open court. Among other things, it requires the disclosure of the identity of the parties to the public. However, under certain circumstances, the disclosure of the name and address of a party to litigation defeats justice. There are times where the disclosure of litigant's identity may expose a party to discrimination, evasion of fundamental private interest, or even deny the right to access to justice. For these reasons, several countries introduced the tool of suppression of identity clause: a mechanism that enables parties to litigate a case in pseudonym and anonymous address. Nevertheless, in Ethiopia, this procedural mechanism is not recognized. Even though the country recognized several limitations to the principle of open justice, including, trial in camera, gag order, and prior restraint of non-publication on media, the Country has not recognized the tool of suppression of identity clause as a limitation to this principle. Even if there are Constitutional rights and principles that justify the incorporation of this scheme, the Country has no rules to implement this tool in its regular courts. Therefore, this article argues for the

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necessity of incorporating the tool of suppression of identity clause into Ethiopian laws.

Introduction

Have you ever thought of litigating through a pseudonym and anonymous address? Being Mr. /Mrs. X with an address XXX? Of course not, for many Ethiopians. Nevertheless, its necessity as a limitation to the principle of open justice is not questioned in many jurisdictions.

The principle of open justice incorporates a wide notion ranging from the right to public trial to the public's right to access trial documents, so that the public can scrutinize the function of courts.[1]It requires the administration of justice to be done in public. However, this does not mean the principle is absolute. The principle has several limitations, including, trial in camera, gag order, suppression of identity clause and prior restraint of non-publication on the media.

In Ethiopia, the latter limitations, except the tool of suppression of identity clause, are recognized as limitations to the principle of open justice. This article, therefore, argue for the incorporation of the tool of suppression of identity clause under Ethiopian procedural laws. It propounds, constitutionally guaranteed rights and principles call for the incorporation of this limitation. The article briefly discusses the meaning, justifications and limitations of the principle in Ethiopian courts.

[1] The principle of open justice is not restricted to court functioning. Rather, it requires all justice machineries, including, the police, quasi-judicial authorities and other law enforcement agencies to administer their function openly. However, in this article the discussion is restricted to court functioning's. *See* FDRE Constitution, Article 12.

The article consists of three sections. Section I surveys the legal landscape of open justice and its limitations under Ethiopian laws. Section II explains the meaning of suppression of identity clause and its necessity to incorporate it in Ethiopian laws. Following, section III pinpoints some notable experiences of countries and provide for hypothetical scenario to cement the argument for the incorporation. Lastly, there will be a conclusion.

I. The Principle of Open Justice and Its Limitations in Ethiopian Laws

The principle of open justice is central to the principle of rule of law[2] and a requirement of due process[3] that require the administration of justice to be made in public.[4] The concept entrusts the public and the media with the right to attend all court hearings and report proceedings fully and contemporaneously.[5] Indeed, a range of rights and freedoms under the FDRE Constitution supports this principle. Among these is the right to fair trial,[6] the freedom of expression[7] and the principle of rule of law.[8]

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[2] Judicial Studies Board, et al, Reporting Restrictions in the Criminal Courts at 6 (unpublished, 2009), online at<www.jsboard.co.uk.> (visited Aug 5, 2011).

[3] J. Jacob, *Civil Justice in the Age of Human Rights* at 6 (Ashgate Publishing Company 2007).

[4] S. Bradford, et al, Providing Anonymity to those Accused of Rape: An assessment of evidence at 3 (unpublished) online at <www.justice.gov.uk/publications/research.htm> (visited Aug 3, 2011).

[5] Human Rights Committee, *General Comment No.32*, 19th Session, at ¶29, CCPR/C/GC/32 (2007).

[6] The right to public trial, one of the multifaceted entitlements under the right to fair trial is recognized among other laws, under Article 20(1) of the FDRE Constitution, the Civil Procedure Code and Federal Courts Proclamation No. 25/1996. Note that, under Civil Procedure Code also Articles 180 and 264 that require a judgment to be rendered in an open court and witnesses to be heard in an open court respectively are indications for the recognition of the right to public trial on civil cases.

[7] The right to freedom of expression under Article 29(1) of the FDRE Constitution promotes open justice. The right gives individuals and the media the right to access information held by government organs, *including courts* (emphasis added). The Constitution further affords freedom of press and mass media under Article 29(3) with a view to ensure access to

Nevertheless, the principle has its own limitations, which are the outcomes of yet equally fundamental principles that their chief objective is to secure justice. Open justice can be restricted where the need for limitation is convincingly established; that is, where limitation is necessary, proportional and does not affect the essence of the principle. In this regard, in Ethiopia, open justice is restricted for reasons of public order, privacy, public morality and the interest of justice.[9] The devices Ethiopian laws employ to limit open justice include, trial in camera, gag order and prior restraint of non-publication on the media.

A. Trial in Camera

Trial in camera is a limitation to open justice. It is a limitation that refers to conducting proceedings in exclusion of all or part of the public from attending a hearing.[10] Note that trial in camera is justified only at times where a hearing of a case in public would frustrate or made impracticable the administration of justice.[11]

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information to the public. Moreover, the right to freedom of expression entitles individuals and the media the right to impart information gathered from courts. Courts also have no justification to restrict individuals and journalists right to impart information they gathered from courts while the law allows access to trial facts. The public has the right to receive information as the corollary function of journalists that access trial facts. In other words, if the government restricts the right to impart information in such a way, it is not only the right of the imparter (attendant) of the information that is to be violated, but also the right of all others to receive the information.

[8] FDRE Constitution, preamble at ¶ 1. The principle of open justice is a requirement of due process. It is proved to be a central component of the principle of rule of law. In this regard, the principle of rule of law is a central component in the foundation of the Constitution.

[9] See FDRE Constitution: Article 20(1); Federal Courts Proclamation: Article 26(2).

[10] Bryan A. Garner, ed, *Black's Law Dictionary* (West Publishing Co. 2006).

[11] Judicial Studies Board, et al, at 7 (cited in note 2).

In Ethiopia, the FDRE Constitution,[12]Federal Courts Proclamation[13] and the ICCPR[14] recognized trial in camera as a limitation to the principle of open justice. Article 20(1) of the FDRE Constitution recognizes it in lucid terms by providing:

> *"In criminal trials a court may hear cases in a closed session with a view to protecting the right to privacy of parties concerned, public morals and national security."*

Note that, the Constitution expressly recognizes conducting trials in camera only in criminal proceedings.[15] Nevertheless, this does not mean that the FDRE Constitution does not recognize trial in camera in civil matters. A closer look into Article 37(1) of the Constitution further ensures the recognition of trial in camera in civil proceedings. The provision guarantees everyone the right to bring a justiciable matter to a court of law and get an effective remedy. In this regard, the African Commission on Humans and People's Right on *Dawda Jawara v. The Gambia* held that, the right to effective remedy requires the provision of an effective procedural guarantee to institute a court proceeding.[16] Among those is a procedure that guarantees the protection of the right to privacy[17] and access to justice. Where a case affects a fundamental private interest of a party or if fair trial is going to be jeopardized when a proceeding is held out of camera, the right to get an effective remedy requires a proceeding to be held in camera. This is because,

[12] FDRE Constitution, Article 20(1).
[13] Federal Courts Proclamation, Article 26(2).
[14] ICCPR, Article 14.
[15] Trial in camera is explicitly referred under the Constitution only under Article 20 that deals with criminal matters.
[16] *Dawda Jawara v The Gambia*, Comm. Nos. 147/95 and 149/96, 2000 ACHPR ¶35 (May 11, 2000).
[17] Normally all trials affect the right to privacy of litigants. But, this does not mean that all trials must be held in camera for the protection of the right to privacy. Fundamental concepts of justice such as fair trial overcome holding trial in camera. In other words, such fundamental rights advocate for open justice. However, when the private interest at stake is a more fundamental the principle of open justice itself advocate for trial in camera.

first, if trial in camera is denied, individuals may restrain from vindicating their rights in a court of law for fear of evasion of their fundamental private interest.[18] This will in turn drastically affect the right to access to justice. Second, under some circumstances, publicity of trials may impair honest provision of evidence and create bias.[19] This will then affect the right to access to justice that stands for the right to get an effective remedy. Accordingly, the interpretation of Article 37(1) of the FDRE Constitution makes it clear that incorporation of trial in camera in civil trials.

In general, Ethiopian laws recognize the exclusion of all or part of the public from attending a hearing of a case, both in civil and criminal trials where the interest of justice requires so.[20]

B. Gag order on Trial Participants

Gag order is another limitation to the principle of open justice; a restraint that prohibits parties from releasing information they gather in trial. It is a restrain on lawyers, witnesses, court personnel and others directly involved with the trial from making any extrajudicial statements outside the court setting, including the press.[21]

[18] J. Morris, *The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases*, 44: 3 Boston College Law Review, 923 (2003).
[19] See id.
[20] In addition to the Constitution, Article 26(2) of the Federal Courts Proclamation recognized trial in camera both in civil and criminal trials. It allows a trial to be held in camera, for public safety, state security and public decency. Moreover, several international human rights instruments ratified by Ethiopia, such as the ICCPR and the Banjul Charter recognized trial in camera as a limitation to open justice.
[21] Morris, 44: 3 Boston College Law Review at 907(cited in note 18).

In Ethiopia, the procedural rules in force are silent about the incorporation of gag order. However, the Criminal Code[22] pinpoints the incorporation of this concept in the legal system. The Criminal Code under Article 450 punishes a person for disclosing facts that come to his/her knowledge in the course of proceeding, where such information is declared secret by a court.[23]In other words, the latter provision deals with gag order. It forbids all parties involved in the case from discussing any aspect of the case with, both the media and the member of the public. This shows the incorporation of gag order on trial attendants, where the court believes the secrecy of a fact is necessary.

Nevertheless, gag order may not prohibit a party from disclosing the name and the compliant or the defense made, or for witnesses from disclosing the name and the title of the suit. This is because the construction of the procedural codes does not give any room for such restriction. First, the Codes require a party to institute a claim indicating the name and address of the parties to litigation.[24] In addition to this, a critical provision under the Civil Procedure Code is that, it requires the defendant to appear in the first hearing with his statement of defense after s/he receives the compliant made against him/her. Through all these stages, the Codes never set a procedure to call parties and witnesses, and order them to keep the secrecy of any fact in a case. At the same time, it is obvious that the parties disclose such information to others. This makes the name of the parties, and the allegations a public knowledge. The only exception left, therefore, is the hearing of evidence. Therefore, gag order under Article 450(1) of the Criminal Code looks to be effective only in the hearing of evidences.

[22] The Criminal Code of the Federal Democratic Republic of Ethiopia (2004), Federal Negarit Gazeta, 9th of May, 2005, Addis Ababa (hereinafter Criminal Code).
[23] Criminal Code, Article 450(1).
[24] Civil Procedure Code, Article 80.

C. Prior Restraints of Publication on the Media

Prior restraint of non-publication on the media refers to the prohibition of declaring or announcing information to the public using any mass media communication.[25] Such restrictions could be either statutory or discretionary in nature.[26] Moreover, such restrain of publication on media could be either short term or long term.

In Ethiopia, prior restraint of non-publication on the media is provided under Article 451(2) of the Criminal Code.[27] The cumulative reading of Articles 451(2) and 435 of the Criminal Code punishes a person that publishes any information or court document, including the contents of a judgment that is forbidden by law or by the order of the court not to be published.[28] This provision is furthermore in line with the FDRE Constitution and Mass Media Proclamation.[29] Moreover, the Code is open in granting a court the power to

[25] Garner (cited in note 9).

[26] Bradford, et al (cited in note 4). Statutory reporting restrictions are those restrictions that explicitly restrict non-publication under certain circumstances. They are absolute and do not give any discretionary room for the court to allow publication. On the other hand, discretionary restrictions give a court or any competent authority to decide on the prohibition of non-publicity. In general, both types of restrains are designed to serve one of the following purposes: (1) to protect children, victims and vulnerable witnesses, and (2) to ensure that media coverage does not create a risk of serious prejudice to a case by unduly influencing judges. As Justice Black expounded it, "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." Therefore, at times the court may lose fairness following publications a restrain must be made on publication. *See also* High Profile Criminal Cases, Cornell Law Review at 2.

[27] Criminal Code, Article 451.

[28] The English version of Article 451(1) uses the word "publishes" instead of "publicizes" or "communicates". This seems the provision is restricted to print media. However, under the law the word "publish" is used to represent the word "communicate". This is further supported by the Amharic version of the Code. The Amharic version provides ' ''**በሕግ ወይም በፍርድ ቤት የተከለከለ ጉዳይን መግለጽ...**'' The phrase "**መግለጽ"** or its equivalent "*communicate/discloses to another*" extend the application of the provision to medias other than the print media. *See also* Garner, (cited on note 9).

[29] FDRE Constitution, Article 29(6); Freedom of Mass Media and Access to Information Proclamation (2008), Federal Negarit Gazeta, 4th of December 2008, Addis Ababa.

restrict either short term or long-term media reporting on trial facts, orders and decisions. Relying on Article 435 of the Criminal Code, a court can prohibit the publication of a trial fact after a case has been disposed.[30] The reading of this provision gives the impression that a court may prohibit the publication of a trial fact after a case has been disposed.[31]

II. Filling the Gap: Incorporating the Tool of Suppression of Identity Clause

In the previous section, I have illustrated the non-incorporation of the tool of suppression of identity clause under Ethiopian laws. However, a deep insight into the recognized limitations to the concept of open justice necessitates the incorporation of this tool. The limitations incorporated as a limitation to the latter principle have their own peculiar drawbacks that incapacitated them from protecting the rights of litigants in, a high profile criminal case, under the threat of discrimination and victims of a sexual offence. The rights of such litigants can be effectively protected if the tool of suppression of identity clause is incorporated under Ethiopian laws. This section, therefore, illustrates the meaning, justification and importance of suppression of identity clause as a limitation to the principle of open justice.

(Hereinafter Freedom of Mass Media and Access to Information Proclamation), Articles 4(2) and 12(1).

[30] Article 541(2) of the Criminal Code makes a cross reference to Article 436 of the same Code.

[31] Article 451(2) of the Criminal Code provides "publication forbidden- by the order of the court is punishable…"

A. Anonymity/Suppression of Identity Clause: General Overview

In ordinary parlance, anonymity refers being not named or identified.[32] Under procedural laws, also the meaning of anonymity is similar. Under procedural rules, anonymity or its related term pseudonym refers to a tool used to suppress the identity of a person; it is a tool where a person presents itself before law enforcement agencies with a fictitious name and anonymous address.[33] In other words, where a party presents before a court anonymously, no one can identify him/her. He will have a fictitious name and address where no one can track him/her with his/her name or address. It is only the organ that gave such name and address or another organ entrusted to the coded information of the party that can identify and track the real identity of the party to litigation. This is what we call anonymity or suppression of identity clause.

The procedural rules of various countries allow parties to engage in litigation anonymously under exceptional circumstance.[34]While doing so, they conduct the trial in a closed session, and oblige trial attendants, including, witnesses, parties to litigation and the judge from disclosing the name and address of the anonymous party.[35]Through this, the tool secures the confidentiality of the identity of a party allowed to litigate through fictitious name and anonymous address. This has a special importance if a party to litigation may

[32] ----------(1986), *Webster's Ninth New Collage Dictionary*, Merriam-Webster INC., Massachusetts.

[33] W. Matheson and A. Smith, *Becoming Jane or John Doe: Can Civil Litigants Use a Pseudonym to Protect Their Privacy?*, 7:7 Canadian Privacy Law Review, 81 (2010)

[34] Morris, 44: 3 Boston College Law Review at 923(cited in note 18).Witnesses and accusers are also rarely allowed to engage in the system with a pseudonym or anonymously. However, the scope of the article is limited to parties to litigation. Therefore, the writer will not focus on accuser and witness anonymous participation in litigation. For the latter *See* Criminal Procedure Code, Article 14 and Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010.

[35] Bradford, et al, at 4 (cited in note 4).

suffer an irreparable harm if s/he litigates through his/her genuine name and address.[36]

Now it is important to note that, the writer is not saying that the adverse party in the litigation should not be aware of the identity of the anonymous party. It is obvious that the adverse party cannot properly vindicate its right without knowing the proper identity of the other party. The adverse party's knowhow is necessary for the proper implementation of the due process clause under the Constitution. For this reason, the adverse party knows the real identity of the anonymous party to litigation. However, this adds another obligation on the adverse party. S/He will be obliged to keep the name and address of the anonymous party secret. If s/he discloses the name or address of the anonymous party, s/he will face both civil and criminal liability.[37]Even more, where the disclosure of his/her own identity may certainly cause jigsaw identification of the anonymous party, the adverse party will in addition be obliged not to disclose its own identity.[38]

Furthermore, the anonymous party may be compelled to disclose his/her identity to witnesses. This is because most testimonies are ineffective if the witness is not aware of the identity of the parties to litigation. Therefore, the identity of the anonymous party may be disclosed to witnesses where the

[36] The Canadian legal system employs a three tire test before allowing a party to vindicate its right anonymously. These are; (1) whether there is a serious issue to be tried; (2) the likely hood of irreparable harm; and (3) the balance of convenience.
[37] Bradford, et al, at 4 (cited in note 4).
[38] Jigsaw identification refers to a situation whereby the identity of a person protected by suppression of identity clause can inadvertently disclosed because of the disclosure of the name and/or address of the other party to litigation without any breach of law. For example, if a case refers to the name of a defendant, a father that rapes his daughter. The victim will be identifiable to the public, without any violation of the law. This is what we call jigsaw identification.

disclosure of the identity of the litigant is necessary for giving a proper testimony.[39]

Again, a witness that is aware of the identity of the anonymous party for the interest of justice will be obliged to protect the secrecy of the identity of the suppressed party. Moreover, where the disclosure of the name of any other participant of the litigation, including, witnesses may cause a jigsaw identification of the anonymous party, courts are obliged to order participants in the litigation to engage in a suit through a pseudonym and anonymous address.

From what is illustrated above, one can easily understand that suppression of identity clause has its own unique features that distinguish it from gag order and trial in camera. While the rest of the limitations does not limit trial attendants from disclosing the identity of a party, including, the name and address of a party to litigation, suppression of identity clause keeps the name and address of the party confidential. Through this, it aids justice by keeping the identity of parties to litigation secret where the interest of justice so requires.

B. The Non-Incorporation of Suppression of Identity Clause under Ethiopian Laws

Both the Civil Procedure Code and the Criminal Procedure Codes of Ethiopia do not incorporate the tool of suppression of identity clause. This can be explained from different angles. Among those, the rules related to the

[39] In some instances, the identity of the anonymous party might not be necessary for properly testifying. For instance where the testimony relating a defense of *alabi* is given to a party whose identity is disclosed mostly disclosing the identity of the litigant has no use.

institution of proceedings and the rules which govern what follow can best explain the non-incorporation of the tool of suppression of identity clause.

In the Civil Procedure Code, the names and full addresses of the plaintiff and the defendants are required to be explicitly mentioned in pleadings.[40] The model formats of pleading included in the first schedule of the Code also require the same.[41] Moreover, the Code provides no exception to this rule. Failure to incorporate the full name and address of a party to litigation in a statement of claim, or defense will result automatic rejection of the pleading for technical insufficiency.[42] Due to this, the Code gives no room for the incorporation of the tool of suppression of identity clause, even through interpretation.

The same is true for the Criminal Procedure Code. Article 111(1)(a) of the Criminal Procedure Code requires every criminal charge to contain the name of the accused.[43] Furthermore, this rule is strengthened in the forms of charge provided in the schedule contained at the back of the Code that require the name and address of the accused to be incorporated in a charge.[44] The same

[40] Civil Procedure Code, Article 222(1)(c) and Article 241(1). *See also* R. Sedler (1968), *Ethiopian Civil Procedure* at 171 (Haile Sellasie I University, Addis Ababa). The same is true at the first hearing of the suit. At this stage the court is required to examine the identity of the parties pursuant to the information provided in the pleadings before it proceed to the merits of the allegations.

[41] Civil Procedure Code, Article 80(2). Note that, the Civil Procedure Code requires a pleading to be written in a form nearly as possible found in the first schedule.

[42] Civil Procedure Code, Article 229(a) and 238(1).

[43] In Ethiopia, petty offences can be prosecuted without a charge. Nevertheless, this does not mean parties engaged in petty offence litigation can suppress their identity. The principle of open justice, which is the core component in judicial proceedings, requires parties to petty offence litigation to present themselves in an open court through their name and address. Furthermore, if one sees both the gravity of the offence and the intensity of the interest involved in petty offences there is no strong justification to conduct petty offence trials through a pseudonym and anonymous address.

[44] Note that, the forms of charge shall comply with the requirements at schedule two of the Criminal Procedure Code.

holds true at times of private prosecution also. This all shows the absence of any exception to the rule of disclosure to the parties name and address in Ethiopian Courts. In other words, the tool of suppression of identity clause is given no place in Ethiopian procedural laws.

C. Constitutional Rights and Principles that require the Incorporation of Suppression of Identity Clause under Ethiopian Laws

Previously, it was indicated that Ethiopian procedural laws have no room for litigating through a pseudonym and anonymous address. This makes our procedural rules short of a necessary limitation essential to enforce various constitutional rights and principles, such as the right to access to justice, the right to privacy and the principle of the best interest of the child.

1. The right to access to justice

The first constitutional right that requires the incorporation of the tool of suppression of identity clause for its effective enforcement is the right to access to justice. This right entitles everyone the right to bring a justiciable matter before a court of law, and obtain a decision or judgment.[45]It entrusts every person the right to bring a justiciable matter before a court of law and access an effective remedy.[46] For this, it necessitates the presence of a procedural mechanism that enables individual's access to a trial court[47]without any fear of discrimination or publicity of their confidential information.[48] At times, where litigating a right in an open court exposes a

[45] FDRE Constitution, Article 37(1).
[46] *Dawda Jawara v The Gambia*, Comm. Nos. 147/95 and 149/96, 2000 ACHPR ¶35 (May 11, 2000).
[47] See id.
[48] UNAIDS, *HIV Related Stigma, Discrimination and Human Rights Violations: Case Studies of Successful Programmes* at 63, UNAIDS/05.05E (2005).

party to discrimination or discloses its confidential medical record, a victim may restrain from taking its case to a court of law.[49] This makes individuals forfeit justice for core values of living with the society. For this reason, the right to an effective remedy requires a procedural mechanism that enable such persons vindicate their right anonymously or through a pseudonym, so that they can effectively access justice. In other words, the right to access to justice under Article 37(1) of the Constitution calls for the introduction of suppression of identity clause under Ethiopian law.

2. **The right to privacy**

The right to privacy is a fundamental right recognized in the FDRE Constitution.[50] The right normally incorporates both entitlement and freedom.[51] The entitlement component of the right incorporates the right to keep one's private matters confidential.[52] On the other hand, this component imposes a duty to confidentiality on organizations and persons that have access to the confidential information of a person.[53]

Normally, when a person sues or is sued in a court of law, his privacy is always affected regarding the concern under dispute.[54] However, this does not mean all trials shall be confidential and secret.[55] This is because, under normal circumstances, the principle of open justice overweighs the right to privacy for the effective enforcement of the right to fair trial and due process

[49] See id.
[50] FDRE Constitution, Article 26.
[51] UN Committee on ICESCR (2000), *General Comment 14 on the Right to Health* ¶8 (UN Doc E/12/20000/4).
[52] Canadian AIDS Society (2004), *Disclosure of HIV Status after Currier: Resources for Community Based AIDS Organizations* at 7-3 (Canada).
[53] See id.
[54] Matheson and Smith, 7:7 Canadian Privacy Law Review at 81 (cited in note 32).
[55] M. Sepulveda, et al, *Universal and Regional Human Rights Protection: Cases and Commentaries* at 319 (University for Peace 2004).

of law.[56] Nevertheless, under exceptional circumstances, a special private interest may overweigh the principle of openness, so that it requires a proceeding to be held without disclosing the identity of a party to litigation.[57] Especially, where a suit relates to sexual offences between family members, breach of medical records, such as, records that show a party's positive HIV/AIDS status and medical malpractice, the right to privacy may overweigh the right to openness.[58] This is because most of the times the disclosure of the parties' identity in such suits, in addition to the evasion of the parties privacy, fuel stigma, discrimination and stress on vulnerable groups, including, children and persons living with HIV/AIDS (hereinafter PLHIV).

3. **Best interest of the child**

Article 36(2) of the FDRE Constitution requires all court actions concerning children to primarily take into consideration the best interest of the child.[59]Consequently, the best interest of the child requires the adoption of special measures to protect children.[60] According to this principle, a child's welfare is a paramount consideration when everything else is weighed in a court of law.[61] The interest of the child is a trump card in every decision of a court. In addition, anything that fundamentally affects the child's wellbeing requires a careful consideration in any court process. Therefore, according to

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[56] See id.
[57] Morris, 44: 3 Boston College Law Review at 923(cited in note 18).
[58] See id.
[59] *See also* African Charter on the Welfare of the Child, Article 4.
[60] Office of the United Nations High Commissioner for Human Rights, *CCPR General Comment No. 16 on the Right to Privacy*, 32nd Session at ¶ 1, 04/07/1989 (1989).
[61]K. Schilling and M. Fisher, Privacy and Open Justice in the Family Courts – Part 2 at 2 (unpublished), online at <http://nt4992.vs.netbene fit.com/resources/pdf/Privacy_in_the_Family_Courts_Part_2.pdf> (visited Oct 12, 2011).

this principle, where disclosing the identity of a child in litigation would frustrate the future upbringing and personality of a child it requires courts to allow a child to engage in the system anonymously through his/her legal representative. Even, sometimes, if disclosing the identity of his/her legal representative or the opposite party may certainly make known the identity of the child, the principle requires the suppression of the identity of the minor's representative or the identity of other parties to the litigation. Otherwise, compelling the child or his representative to vindicate a right through his/her real name and address at times, where such order would have a violent effect on the upbringing of the child would be denying a child his right under Article 36(2) of the Constitution. Therefore, impliedly, Article 36 of the FDRE Constitution requires the incorporation of suppression of identity clause under the Country's procedural rules.

III. Suppression of Identity Clause in Action: Experiences of Foreign Jurisdictions

Countries recognized the tool of suppression of identity clause for the prevention of harm and the protection of the innocent. They allow a party to litigate in a pseudonym if they find out that he might face an irreparable harm if he litigates in his real name and/or address. Following, in this section, I will examine some of the practical applications of the tool of suppression of identity clause. In doing so, this section navigates the experiences of other countries with a special emphasis on discrimination-related suits. Moreover, the necessity of the tool from the perspective of crimes of transmitting a disease is analyzed from the perspective of Ethiopia. This will help one understand the practical significance of the tool in the Ethiopian legal system.

A. HIV/AIDS Related Discrimination: the Indian Experience

Suppression of identity clause is one mechanism for protecting litigants from discrimination. At times where instituting a proceeding by exposing the real identity of a person to the public may expose him/her to discrimination countries can effectively use the tool of suppression of identity clause to protect him/her. For instance, if one sees the Indian experience, persons discriminated against on the account of their HIV positive status can vindicate their right through a pseudonym and anonymous address.[62] Experiences also show that, in India, workers who have been discriminated against and lost their jobs on account of their HIV positive status vindicate their right using the tool of suppression of identity clause.[63] This is because Indian courts take into account that numerous studies which have proved that people living with HIV/AIDS are often afraid to go to court to vindicate their rights for fear of their HIV status will be disclosed to the public at large, and that they will suffer discrimination.[64]

It is for this reason, the UNAIDS also recommended countries to enact a law that enable PLHIV and those vulnerable to HIV infection claim their rights through a pseudonym and anonymous address.[65]The same is true in England.[66] In *X v. Y* the English Court of Appeal held that preserving confidentiality of hospital records overweigh the public interest in *open justice* (emphasis added), because people living with HIV must not be

[62] S. Metha and K. Sodhi, *Understanding AIDS: Myths, Efforts and Achievements* at 142 (A.P.H Publishing Corporation 2004).
[63] UNAIDS, at 63 (cited in note 48).
[64] See id at 64.
[65] Metha and Sodhi, at 142 (cited in note 62).
[66] Courts and Justice in the Era of HIV/AIDS: Introduction to the Workshop, Judiciary of Zambia, Zarain, Lukasa, Za mbia, *12, (unpublished, 2007), online at <www.hcourt.gov.au/assets/publications/...justices/kirbyj/kirb yj 15feb07.pdf> (visited July10, 2011).

deterred from seeking appropriate testing and treatment.[67] Through this, India and England are able to protect PLHIV from discrimination and ensure their right to bring violations before a court of law. Lastly, it is not hard to concede that the tool of suppression of identity clause may also have an enormous contribution to protect the right of persons vulnerable to discrimination and ensure justice in Ethiopian courts.

B. Suits that may entail Discrimination: the US Experience

An important case that employs the tool of suppression of identity clause is the *Doe v. Stegall* case before the United States Fifth Circuit Court of Appeal.[68] In the case, the plaintiff, a mother of two minor children obliged to practice a daily religious observance in the county's public schools against their interest, brought the case on behalf of her minor children.[69] In the case, fearing the harassment and violence directed against her family, following the institution of the suit, the mother sought the court to keep the proceeding anonymously.[70] In other words, she prayed the court to proceed through a fictitious name and anonymous address. Following this, the court holds, suppressing the identity of the mother and her children does not obstruct the public's view of the issues involved in the case or the court's process of resolving the dispute.[71] That the fairness of the proceeding is not lost when one party is involved in the lawsuit under a fictitious name under exceptional circumstances and allow the proceeding to proceed anonymously for the protection of the family from violence and discrimination.[72] It allows the mother to litigate on the name "Doe" which is anonymous.

[67] See id.
[68] Morris, at 922(cited in note 18).
[69] See id.
[70] See id.
[71] See id.
[72] See id.

This case precisely shows the importance of suppression of identity clause at times where discrimination is inevitable if the identity of a party to litigation is disclosed.

C. Crimes relating to the Transmission of Diseases

The right to privacy of individuals requires the medical records of individuals, including, victims, witnesses and defendants to be kept confidential. Recent practices also show laws in some jurisdictions employ the mechanisms of suppression of identity clause on crimes related to transmission of a disease.[73] Even, the Ethiopian Criminal justice system allows reporting of crimes anonymously under exceptional circumstances.[74] However, the Code neither recognizes anonymous parties to litigation. Of course, anonymous prosecutor is not imaginable in the Ethiopian Criminal Justice System.[75] Nevertheless, the writer believes, anonymous defendants should be there, especially, where a case concerns transmission of a disease.

As far as my belief is concerned medical records of persons, accused of transmitting a disease shall be kept confidential unless they are found guilty. This is because a suspect accused of transmitting a disease is presumed

[73] In England the name and address of a victim of a sexual offence is not disclosed to the general public except at times where the victim consents for the disclosure. This measure is taken by taking in to consideration the harm and distress caused by publicity could discourage complaints from reporting sexual offences and anonymity could help ensure perpetrators doesn't escape prosecution.

[74] Criminal Procedure Code, Article 12.

[75] In the Ethiopian criminal justice, the government represents the victim in litigation. Therefore, the recognition of anonymous Prosecutor has no significance. Even, if we see private prosecution, it is allowed under exceptional circumstances. It is recognized for non-serious crimes. This shows the minimal importance of the concern and the unnecessary challenge to recognize suppression of identity clause for the protection of Private Prosecutors.

innocent until proven guilty.[76] Where, he should not suffer by the disclosure of his medical record before he is found guilty of the crime s/he is accused of. Therefore, this can only be achieved through, the tool of suppression of identity clause.

If the tool of suppression of identity clause is not enforced in Ethiopia courts, it is hard to secure the confidentiality of medical records of a victim before conviction. The existing procedural devices under Ethiopian law cannot protect the confidentiality of the defendants' medical records. Both trial in camera and gag order does not keep the medical records of the accused confidential. This is because, first, these limitations do not exclude the media and the public's right to access trial documents after the case is once disposed. Moreover, these limitations does not prohibit the attendants of the litigation, i.e., witnesses, judges, the adverse party and other court officials from disclosing the name of the parties and the title of the suit. By the same token, the Media can report the latter facts while the case is pending. Therefore, both of the mechanisms in the Ethiopian justice system are not solutions for the confidentiality of medical records of criminal defendant. Therefore, the necessity of suppression of identity clause in trials related to transmission of a disease is hardly inescapable for the protection of the innocent.

Conclusion

The principle of open justice and its exceptions, such as, trial in camera and gag order are recognized and enforced in Ethiopia. However, one crucial limitation to the principle, suppression of identity clause, is not incorporated in the Ethiopian legal system. In many jurisdictions, suppression of identity

[76] FDRE Constitution, Article 20(1).

clause is an effective means to secure individual's right to access justice. Where a party's right to access to justice (due to, for example, fear of harassment, discrimination or stigmatization, or fundamental private matter) is to be undermined by open justice, an exception which allows a party to litigate in a pseudonym and an anonymous address is needed. However, under Ethiopian law this crucial procedural tool, which is an exception to the principle of open justice, is missing. For instance, take persons whose confidential medical rerecord is breached, those unlawfully dismissed of their work merely due to their HIV positive status where no one around them knows about their medical record. They all need suppression of identity clause for the proper enforcement of their right. Therefore, Ethiopia indubitably needs to incorporate the tool of suppression of identity clause for the protection of the rights of its subjects.

The Relevance of Hobbesian Principles of Punishment in Today's World in Light of the Ethiopian Criminal System

Dejene Girma Janka (PhD)[♣]

Abstract

Needless to tell that Thomas Hobbes is one of the greatest political philosophers ever. He is a 17thc political philosopher. In his book *Leviathan*, he discussed a number of issues among which criminal punishment is one. Here, he explained what punishment means, why we punish wrongdoers, who can punish (administer punishment), what condition is needed before a wrongdoer is punished, and the kinds of punishments to inflict on wrongdoers. At the moment, while some of these explanations are relevant, others have become defunct. In this article, I will explore which of these explanations are still relevant and which have become defunct, by emphasising the rationale for punishment and the types of punishments Hobbes advocated, by using the Ethiopian Criminal Code as a case in point for a modern criminal system. As far as its significance is concerned, this article will be helpful to anyone who wants to have a better understanding of criminal punishment. In particular, it will be relevant to students of criminal law and jurisprudence as it deals with important issues pertaining to the institution of punishment.

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I. Introduction to Punishment

The institution of criminal law is perhaps one of the few primordial institutions one can find in every society. This is so because criminal law, unlike some other laws, aims at the prevention of undesirable conducts and thus protects the various interests of the society.[1] Such undesirable conduct may be positive or negative. In other words, criminal law orders the performance of certain activities thereby preventing *inaction* or prohibits the doing of other activities thereby preventing *action*. If a person does not comply with such stipulations, he will be punished because by refusing to comply with the law, he will hinder the protection of the interests of the society. That is why, nowadays, it is generally argued that the use of *punishment* for non-compliance with criminal law is one of the more important mechanisms through which society attempts to achieve its societal goals.[2]

If punishment is important in helping the achievement of societal goals, then, the point worth considering becomes the meaning of *punishment* itself. To begin with, Hobbes defines punishment as *an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience*.[3] H. L. A. Hart also defines punishment as a measure that involves pain or other consequences normally

[1] Wayne R. LaFave and Austin W. Scott, *Handbook on Criminal Law*, St Paul, Minn, West Publishing CO, 1972, p 21.

[2] See John Hogarth, *Sentencing As A Human Process*, University of Toronto, Canada, 1972, p 3-4. Of course, there are some scholars who do not accept the use of punishment. For that matter, they view punishment as the survival of barbarism, bereft of rational foundation, supported only by inertia of the wish to have vengeance on criminals. See for example, Edmund L. Pincoffs, *The Rationale of Legal Punishment*, Humanities Press, New York, 1966, p 1.

[3] Thomas Hobbes, Leviathan, (edited by J.C.A. Gaskin), Oxford University Press, New York, 1996, p 205.

considered unpleasant and that is intentionally imposed by authority on actual or supposed offender for an offence against legal rules.[4] Although the two scholars do not seem to converge on the purpose of punishment, they both tell us that punishment is an unlikeable measure imposed on a person by an authority for the violation of law. So, the fact that Hart, as one of the contemporary political philosophers, shares some points on the definition of punishment with Hobbes conveys the message that some of the elements of Hobbes's definition are still relevant. In the Ethiopian criminal system, the concept *punishment* is not defined although its justifications, as we will consider later on, are mentioned.

Hobbes, after defining punishment, tells us that the right to punish emanates from one's act of giving away the right to punish a wrongdoer (save oneself) and voluntary assumption of the duty to assist in punishing such person.[5] Then, the government punishes a wrongdoer for the preservation of all the subjects.[6] According to John Locke, in a state of nature, everyone has by nature the right to punish those who violate the law of nature with a view to preserving the life, liberty, health, limbs or goods of his own or of another; but this right is given away when individuals form a society through their

[4] H.L.A Hart, *Punishment and Responsibility: Essays in the philosophy of Law*, 2nd ed, Oxford University Press, New York, 1968, p 4-5.

[5] At this juncture, it should be noted that Hobbes is of the opinion that a guilty person has the right to resist punishment. This recognition of Hobbes, it is argued, about the right of the guilty person to resist being punished by a lawful sovereign, who also has the right to punish, precipitates a crisis in his political theory because these two rights cannot co-exist within the same conceptual and political system. Thus, Hobbes needs to rescind his declaration of the right of a guilty person to resist punishment. For more on this issue, see THOMAS S. SCHROCK, *THE RIGHTS TO PUNISH AND RESIST PUNISHMENT IN HOBBES'SS LEVIATHAN*, The Western Political Quarterly, Vol. 44, No. 4, University of Utah, Dec., 1991, p 853-854.

[6] Thomas Hobbes, supra note 3, p 205-206.

consents.[7] Thus, similar to Hobbes, Locke's position is that the government's right to punish emanates from the agreement forging it (or, to be more specific, a society). In Ethiopia, although the source of the right to punish is not mentioned clearly, it is recognized that a crime is a wrong against the public and the ultimate goal of punishment is, therefore, the promotion and protection of public goods.[8]

Hobbes, even if he says there is a right to punish by the commonwealth (sovereign), places one fundamental limitation on the exercise of this right. He argues that punishment should follow public condemnation; that is, punishment should be preceded by public hearing and condemnation.[9] Thus, in the absence of public hearing and conviction, there will not be any acceptable punishment. In the case of Ethiopia, too, no one can be punished before he is convicted by an appropriate judicial organ.[10] Therefore, Hobbes's principle of *prior public condemnation to punish* is still relevant in the 21st century criminal system. For that matter, this principle is one of the fundamental principles that are embedded in international and regional human rights instruments.[11]

II. Rationales behind criminal punishment

Now, according to Hobbes, we know what punishment means, where the right to punish comes from, and the basic condition to punish. However, we still need to know why we punish an offender. The answer to this inquiry is

[7] See John Locke, *Second Treatise of Government*, Edited by C.B. Macpherson, Hackett Publishing Company, Indianapolis, Cambridge, 1980, Canada, p 9-14, 52-53.
[8] See for example, article 1 of the Criminal Code.
[9] Thomas Hobbes, supra note 3, p 206.
[10] See articles 15, 17(2), 19(5), 20 (1 and 2) of the FDRE Constitution.
[11] See for example, the stipulations of article 14 of the International Covenant on Civil and Political Rights (ICCPR) (1966), and article 7 of the African Charter on Human and Peoples' Rights (1981).

seemingly very easy because, as stated before, we punish an offender because punishment is designed to meet one or more of the basic goals of the criminal justice system. There is, however, disagreement on what these goals actually are, although, generally speaking, retribution, deterrence, incapacitation, and rehabilitation are mentioned as some of them. *Retribution*, one of the oldest goals of punishment, is an idea that the criminal must pay for the wrong he has done and punishment should fit the crime committed. *Deterrence* refers to the idea that punishment aims at preventing further crimes. *Incapacitation* refers to the idea that punishment prevents a criminal from committing another crime by denying him the chance to commit a crime. *Rehabilitation*, the latest and perhaps the loftiest goal of punishment, refers to the idea that a criminal can be reformed so that he can function in a civil society without resorting to a criminal behaviour.[12]

If we know some of the goals punishment is capable of serving, the question becomes: *which of them should be used as either a sole or a predominant justification to punish a particular criminal?* There is disagreement among political philosophers on the answer to this question and we will consider, in the following few paragraphs, the answers some of them offer.[13]

According to Hobbes, the purpose of punishment seems *deterrence*. Firstly, Hobbes argues that the aim of punishment is *terror*, not revenge.[14] Secondly,

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[12] See John Hogarth, supra note 2, p 3-4, and John M. Scheb and John M. Scheb II, *Criminal Law and Procedure*, 4th ed, Wadsworth, USA, Australia, Canada, and others, 2002, p 21, and Terance D. Miethe and Hong Lu, *Punishment: a comparative historical perspective*, 2005, p 15-24, available at http://books.google.com/books?id=o2ovr4ZzIXsC&printsec=frontcover, accessed on 22 June 2009.

[13] See, for example, the discussion by John M. Scheb and John M. Scheb II, supra note 12, p 21.

[14] Thomas Hobbes, supra note 3, p 207 (emphasis added).

when we see his stipulation on the extent of punishment, he says, punishment that is not enough to *deter* people from their wrongful acts is an 'invitement' to it because people naturally calculate the benefits of their injustice and the harms of their punishment and choose the one that appears best for themselves.[15] So, the two terms-*terror* and *deter*-clearly show that Hobbes believes that the primary purpose of punishment is deterrence.[16]

Nietzsche says that one of the primary achievements of punishment "is to breed an animal with the right to make promises", that is, to induce in us a sense of responsibility, a desire and an ability to take and properly discharge our responsibilities.[17] As we tried to see before, rehabilitation favours making a person responsible than threatening him to punishment if he commits another crime. So, according to Nietzsche, since punishment can

[15] Id., p 195 (emphasis added).

[16] Indeed, some people say that Hobbes's definition of punishment shows that punishment is *preventive* and *reformatory* because he states that punishment is inflicted "to the end that the will of men may thereby the better be disposed to obedience". See Jacob Adler, *The Urgings of Conscience: A Theory of Punishment*, 1992, p 60, Available at http://books.google.com/books?id=OKvomqp1aL0C&pg=PA60&dq=hobbesian+principles+of+punishment, accessed on 22 June 2009. Cattaneo also argues that 'while Hobbes rejects the theory of retribution as an expression of one of the baser feelings, that of vainglory as the fruit of a desire for revenge, he accepts the theory of correction and the theory of prevention…' M. Cattaneo, '*Hobbes's Theory of Punishment' in Hobbes Studies* ed. K. C. Brown, Oxford: Blackwell, 1965, p 288-289 mentioned in Alan Norrie, *Thomas Hobbes and the Philosophy of Punishment, Law and Philosophy*, Vol. 3, No. 2, Springer, 1984, p 313. However, since Hobbes explicitly says that the aim of punishment is *terror*, it may be difficult to argue how we can *reform* criminals through terror than through curing. Moreover, he clear states that punishment should be capable of deterring a person from committing further crimes. Alan Norrie, advances a different line of argument in this regard by claiming that Hobbes's theory of punishment is hybrid: deterrence and retribution-the two great theories of punishment. For Norrie, retribution is justified not only on the basis of revenge, which Hobbes clearly rejects, but also on the basis of individual consent. See Alan Norrie, *Thomas Hobbes and the Philosophy of Punishment, Law and Philosophy*, Vol. 3, No. 2, Springer, 1984, p 314-316.

[17] See for example, Austin Sarat (Editor), *The Killing State: Capital Punishment in Law, Politics, and Culture*, Oxford: Oxford University Press, 1999), P 226 Available at http://books.google.com/books?id=GfuM5vu_4MUC&pg=PA226&dq=nietzsche+on+punishment, accessed on 10 July 2009.

provoke in people a sense of responsibility, a desire and an ability to take and properly discharge responsibilities, it can serve a rehabilitative goal.

Emmanuel Kant favours retribution, the oldest principle of punishment, as a supreme value of punishment. According to him, punishment is imposed on a criminal not to promote any good with regard to the criminal himself or the society but because he has committed a crime.[18] Kant has a convincing reason in his own right for holding his retributivist position. According to him, punishing a person not for the crime he committed but to serve a different purpose is not conformable to the sentence of pure and strict justice.[19] Therefore, for Kant, the only reason to punish a person is that he has committed a crime and the only acceptable punishment is that which is "equal" to the crime he has committed.[20] Hence, Kant rejects the outcomes of punishment and focuses only on the past. His firm position on retribution is clearly discernable from his example of the dissolving society where it has to kill the last killer before it disperses because the killer deserves it.[21]This means, unlike Nietzsche and Hobbes who are forward looking, Kant is backward looking; that is, he emphasizes what was done for the purpose of punishment than what should be done to avert further crimes. Moreover, unlike the two scholars who do not consider proportionality to guilt, Kant tenaciously holds that punishment should be equal to crime; that is, what a criminal deserves is what is proportional to what he did.[22]

[18] Edmund L. Pincoffs, supra note 2, p 2-3.
[19] Id., p 3.
[20] Id., p 4.
[21] Id., p 4.
[22] Nevertheless, it has to be borne in mind that it is sometimes impossible to impose proportional punishment on a criminal. For example, how can a person who has committed genocide be given proportional punishment? How can a person who has taken three lives be killed three times? How can we cause harm to a person who has destroyed others' property if he does not have any property. Moreover, sometimes, Kant's proportionality principle

Like Kant, Hegel is also retributivist. According to him, punishment is justified because it is a means of showing a criminal that what he has done is wrong and he violated other's right which is binding on him. Hegel holds the position that a criminal should be punished because failure to do so would amount to validating his wrong deed, which is in conflict with justice. So, according to Hegel, punishment makes a person recognize the law he rejected and repent for the harm he has done, not frightened and cease to do it again.[23]

As opposed to the retributive theory of punishment, the utilitarian theory of punishment is still popular.[24] In this regard, scholars like William Paley and Bentham can be mentioned. According to William Paley, the proper end of human punishment is not the satisfaction of justice but the prevention of crimes. Thus, since the sole purpose of punishment is the prevention of crimes, punishment must be proportional to prevention, not to guilt.[25] Jeremy Bentham, who extends Paley's theory, holds that punishment is one of the tools in the hands of the legislator to augment the total happiness of the community. Thus, if punishment is not greater than the happiness it brings about, Bentham does not support its use because punishment by itself will be evil.[26]

In any case, for the utilitarian theorists, punishment has the purpose of preventing future crimes either by the criminal himself or by other members

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may lead us to unacceptable conclusion. For example, should a person who rapes a woman be raped? If so, by whom?

[23] Edmund L. Pincoffs, supra note 2, p 11.

[24] Ibid.

[25] Id., p 17-18.

[26] Id., p 20.

of the community.[27] Accordingly, they support that punishment should necessarily be proportional to prevention. Thus, their principle of proportionality is different from the principle of proportionality of retributivist scholars. For the latter, proportionality pertains to the crime committed (the guilt of a criminal) whereas for the former it pertains to the prevention of further crimes, which means, punishment which is greater or less than, as the case may be, the harm caused can be imposed. Note that, according to Utilitarians, if lenient punishment can effectively prevent the commission of further crime, it should be preferred to severe punishment as it will cause less hardship to the criminal and less cost to the society.[28]

At this juncture, it is important to note that Hobbes is one of the utilitarian theorists in relation to the theory of punishment because his formulation is that we punish people to deter them from committing further crimes and punishment should correspond to what is necessary to deter the commission of further crimes.[29] Incidentally, it should be raised that those theorists who support rehabilitation as a justification for punishment can also be utilitarian because they focus on the consequences of punishment than looking backward like retributivist theorists.

It should be noted, at this point in time, that the utilitarian theory of punishment is not free from criticism. It is argued that, at times, it may be

[27] Id., p 21.

[28] For more on this, see generally, Milton Goldinger (Editor), Punishment and Human Rights, Schenkman Books Inc, Rochester, Vermont, 1991, p 3.

[29] Of course, some argue that Hobbes is a forerunner of later philosophers. For example, Cattaneo writes; 'Hobbes's conception contains in essence the basic principles of a utilitarian theory of punishment, principles that were later developed and elaborated by Beccaria and Bentham'. M. Cattaneo, '*Hobbes's Theory of Punishment' in Hobbes Studies* ed. K. C. Brown (Oxford: Blackwell, 1965), p. 289 mentioned in Alan Norrie, supra note 16, p. 299.

violative of the fundamental human rights. For instance, in as long as it is beneficial to the greater number, it may be possible for an authority to punish an innocent person (say sentencing him to death) by framing up evidence.[30] It should also be noted that such punishment is morally wrong. But, punishment based on evidence that is framed is not acceptable to people like Hobbes because when Hobbes requires prior public condemnation to punish a person, he means condemnation based on genuine evidence, not the one based on forged evidence.

Finally, regardless of the different justifications scholars offer to justify the use of punishment, reliance on any single principle is no more acceptable. For example, Hart argues that nowadays the old belief that there is just one supreme value or objective in terms of which all questions pertaining to the justification of punishment can be answered is no more acceptable; instead, what is acceptable is realizing that different principles can be used to justify punishment under different circumstances.[31] There are also other scholars who argue, in accord with Hart, that reducing *punishment* to a single meaning or purpose is not tenable.[32] What this, in effect, means is that what is acceptable in the current world as the best justification for punishment is joining these justifications; hence, the best theory of punishment becomes the *inclusive theory* although the inclusive theory may also suffer from the problem of which rationale should predominate in a particular case.[33]

[30] For more on this, see generally, Milton Goldinger, supra note 28, p 3.
[31] See H.L.A Hart, supra note 4, p 2-3. Of course, one may argue that Hart's definition of punishment itself suggest that there is one supreme value; that is, retribution, punishment is meant to serve although he seems to criticizes the stands taken by scholars like Hobbes.
[32] See David Garland, *Punishment and Modern Society: A Study in Social Theory*, Clarendon Press, Oxford, North America, 1990, p 17.
[33] Wayne R. LaFave and Austin W. Scott, supra note 1, p 21-24.

Coming to Ethiopia, article 1 of the Criminal Code[34] provides for the following stipulations.

> It [criminal law] aims at the prevention of crimes by giving due notice of the crime and penalties prescribed by law and should this be ineffective *by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform…to prevent the commission of further crimes*.[35]

The italicized part of the article shows that punishment serves dual purposes: deterrence and reformation. Accordingly, by punishing a criminal, it is believed that both the criminal and other potential criminals will be deterred from committing crimes in the future. Moreover, it is believed that, to some criminals, punishment offers the chance to be rehabilitated and resume leading normal life in the society. Therefore, the Code, unlike the traditional belief that a single principle can justify the use of punishment, acknowledges that punishment should not be justified on a single principle. Accordingly, in the Ethiopian legal system, *deterrence* should be a justification for punishing a particular criminal, whenever it seems to make more sense. If, however, rehabilitative punishment is more warrantable under a given circumstance, say for under age offenders, then rehabilitation should be given predominance while administering punishment. Therefore, the Ethiopian Criminal System recognizes the *inclusive theory* by recognizing both the deterrence and rehabilitation principles to justify punishment. Therefore, Hobbes' stand that a single principle can justify the institution of punishment is no more relevant. The current stand, as some political philosophers and the Ethiopian Criminal Code advocate, is using eclectic principles to justify punishment.

[34] The current Criminal Code of Ethiopia was enacted in 2004. Any article cited in this writing refers to the provision of this Code unless its context dictates otherwise.
[35] Emphasis added.

Nevertheless, Hobbes is not altogether irrelevant here. The fact that he recognized deterrence as a principle capable of justifying punishment and, as a matter of fact, the recognition of deterrence as one of the rationales behind the institution of punishment in modern world makes him still partly relevant. So, the problem with Hobbes is his reliance on a single principle. Otherwise, his *deterrence* principle is still relevant. For example, in the Ethiopian legal system, *deterrence* is recognized as a sole justification for penalties like capital punishment. In this regard, in paragraph eight, the Preamble to the Criminal Code states that "[a]lthough imprisonment and death are enforced in respect of certain crimes the main objective is temporarily or permanently *to prevent wrongdoers from committing further crimes against society*."[36] [emphasis added]

Moreover, according to the Code, *rehabilitation* should be used, as stated above, as a justification to punish a criminal whenever reformative punishments are more sensible. Thus, for example, a criminal who is likely to be reformed through punishment should be given rehabilitative punishment. But, one should recognize the inherent problems the principle of reformation has. For example, Hart points out that reformation denies us the chance to influence people, through the punishment of offenders, who have not committed crimes, but who may, because it focuses on the criminal.[37] Moreover, Hart says, reformation may lower the efficacy and example of punishment because it does not allow punishment to be used as a threat to maintain conformity to the law but as a treatment to a criminal.[38] Indeed, we

[36] Emphasis added. This expression may also show that *incapacitation* is one of the reasons why death penalty is recognized in the Ethiopian legal system.
[37] H.L.A Hart, supra note 4, p 27.
[38] Ibid.

can also add some more drawbacks of reformative punishment. For example, reformation permits over-detention because the criminal will not be released until he is believed to have gotten rid of his criminal behaviours. Further, it does not tell us how to deal with some incorrigible criminals because it does not allow death penalty. For example, to think of people like members of the Al Qaeda to be reformed seems a wishful thinking. Leaving that as it may, one can safely argue that the problems posed by the principle of *reformation* do not arise in the Ethiopian criminal system because when *reformation* fails our judges can rely on *deterrence* to justify their most effective sentences. Thus, incorrigible criminals can be removed from the society through death penalty based on the principle of deterrence.

In any case, it is easily discernable that in the Ethiopian criminal system, unlike in the Hobbesian criminal system, the institution of punishment is based on the *inclusive theory* because the use of both *deterrence* and *reformation* to justify penalties, as the case may be, is authorized. As we have seen before, the underlying purpose of these two principles is the avoidance or minimization of crimes in the future: they focus on the result of punishment than on the harm caused. This, therefore, makes the Ethiopian criminal system a utilitarian system.

Nevertheless, the Ethiopian Code does not tell us which of the two principles it recognizes should prevail in case they conflict in a particular case. What it rather does is giving the judiciary the discretion to decide which principle to use to fix the sentence of a particular criminal. For example, article 87 of the Code states, "[t]he penalties and measures provided by this Code must be applied in accordance with the spirit of this Code and so as to achieve the purpose it has in view (Art. 1)."

This means, the penalties and measures should be applied in order to serve either the deterrent or reformative purposes of punishment and this does not tell us anything as to which principle should be preferred whenever the two conflict; instead, it implies that judges do have wider discretion to determine which principle to choose to fix sentences for different criminals.[39] Fortunately, a judge in Hobbesian criminal system does not face similar problem obviously because the system justifies punishment based on a single principle: *deterrence*. So, it could be concluded that Hobbes is now relevant, in relation to his justification for punishment, only to the extent that his *deterrence* principle is still relevant. Otherwise, his stand to justify punishment based on a single principle is no more acceptable.

III. Types of punishment

Whatever the purposes of punishment may be, different criminal systems respond to criminal activities by using punishments of different types. For instance, in some criminal systems, bank robbers may be given suspended penalties if they act politely and nicely while in other systems these same persons may be ordered to have their limbs amputated.[40] But, generally,

[39] In practice, however, the deterrence principle seems to predominate. Firstly, every summer, I teach criminal law to hundreds of judges coming from Oromia, one of the regional states in our federal arrangement, and they inform me that their primary consideration in determining sentence is deterrence, not rehabilitation. Secondly, whenever someone looks at the decisions of many of our courts in their sentencing part, they state that they have fixed certain penalties believing that they suffice to stop the criminal from committing further crime and also to be good lessons to others. Therefore, although the law does not seem to make it a predominant principle, it may be said that, *deterrence* is a *de facto* predominant principle of punishment in the Ethiopian system. Of course, this does not mean that our judges disregard rehabilitation all together. Usually, they rely on rehabilitative punishment when they deal with juvenile offenders because these offenders are susceptible to change.

[40] Shane Kilcommins, Ian, O'Donnell, Eoin O'Sullivan, and Barry Vaughan, *Crime, Punishment, and the Search for Order in the Ireland*, Institute of Public Administration, Ireland, 2004, p 1.

criminal laws, it is argued, provide for a variety of criminal punishments including monetary sanctions, incarceration, and death penalty.[41] In Hobbesian criminal system, for example, punishments such as corporal punishment, pecuniary punishment, ignominy, imprisonment, exile, and the mixture of any of them can be used.[42] In the Ethiopian criminal system, too, the Criminal Code has recognized different forms of penalties. Thus, we can use them, as may be appropriate, to serve the purposes the criminal law has in mind; that is, the protection of the society.

At this juncture, it should be noted that although most people agree about the propriety of punishing criminal behaviour, they disagree about the legality, morality and efficacy of certain modes of punishments such as death penalty.[43] We will consider some of these penalties which are no more functional, at least, in some modern criminal systems.

A. Corporal punishment

Corporal punishment refers to punishment that involves death or physical sufferings through the direct application of physical force on the human body.[44] Hobbes says it is a form of punishment that is inflicted on the body of a criminal directly to harm him[45] and it may include death, stripes, wound, chains, or other corporal pains such as castration, mutilations, and flogging.[46] Then, Hobbes endorses the use of these corporal punishments. This means, in Hobbesian criminal system, any corporal punishment could be inflicted on

[41] John M. Scheb and John M. Scheb II, supra note 12, p 552.
[42] Thomas Hobbes, supra note 3, p 208.
[43] John M. Scheb and John M. Scheb II, supra note 12, p 552.
[44] Terance D. Miethe and Hong Lu, supra note 12.
[45] Here, Hobbes is not alluding to retribution but terror as to stop (deter) the criminal from committing another crime.
[46] Thomas Hobbes, supra note 3, p 208.

a convicted criminal. Hereunder, we will see which of these corporal punishments are still in use and which have become defunct.

1. Death Penalty

The death penalty is the severest corporal punishment for the commission of a crime. As one court stated:

> Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights…It leaves nothing except the memory in others of what has been and the property that passes to the deceased's heirs...[47]

In the past, this type of penalty was used for many crimes. Nowadays, however, its use is limited to very few crimes. For example, in the US, it is reserved for the most aggravated form of murder because it is believed that the penalty is deterrent.[48] In the Ethiopian legal system, the death penalty is the only corporal punishment that is recognized and it is relegated to an exceptional penalty by attaching extremely stringent conditions to its use.[49]

Note that the death penalty has remained the single most controversial issue in the realm of criminal punishment. As a result, the 20th century witnessed

[47] *State v Makwanyane*, the Constitutional Court of the Republic of South Africa, Case No. CCT/3/94, paragraph 26.

[48] John M. Scheb and John M. Scheb II, supra note 12, p 21.

[49] These requirements are (1) the crime has to be *completed* and *grave*, (2) the criminal has to be *exceptionally dangerous*, (3) there should exist *no mitigating circumstance*, and (4) the criminal should be *above eighteen years of age*. Regardless of these requirements, however, sometime, judges erroneously sentence criminals to death. For instance, in *Public Prosecutor v Demisew Zerihun and et. el*, the Federal High Court, 3rd Criminal Division, sentenced Ato Demisew Zerihun to death for attempting to kill his girlfriend (Ms Kamilat Mehadin). In accordance with the Code, therefore, the imposition of death penalty on the criminal is wrong because the crime was not completed but attempted. The sentence was appealed against and the Federal Supreme Court rectified the blunder of the Federal High Court, though. But had it not been for the appeal, the criminal would have been executed erroneously. See *Public Prosecutor v Demisew Zerihun and Yacob Hailemariam*, Federal High Court, File No. 54027, Ethiopia, 2008.

its widespread abolition.[50] For example, many countries particularly European countries have abolished death penalty.[51] It is said that, at present, the USA is the only Western democracy that has retained death penalty.[52] In Africa, too, countries like the Republic of South Africa have declared the death penalty cruel, inhuman, and degrading and then abolished it from their criminal system.[53] At the regional level, the African Commission on Human and Peoples' Rights has been encouraging all African states to abolish death penalty, if possible, and minimize its use, if not.[54]

In any case, as far as death penalty is concerned, the stand of Hobbes is still accepted by some modern criminal systems such as that of the USA. In the Ethiopian criminal system, both the Constitution and the Criminal Code recognize death penalty although both of them attached conditions to its use.[55]

2. Other corporal punishments

As stated before, Hobbes allows the use of any kind of corporal punishment in as long as it can serve the purpose of punishment. For example, in the past, the Ethiopian criminal law allowed corporal punishments like flogging

[50] John M. Scheb and John M. Scheb II, supra note 12, p 556.
[51] For example, see article 1 of the Second Protocol to the International Covenant on Civil and Political Rights which obliges states parties to abolished death penalty and the status of ratification of the Protocol.
[52] John M. Scheb and John M. Scheb II, supra note 12, p 556.
[53] The Constitutional Court of the Republic of South Africa stated:

> In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment... It is also an inhuman punishment for it "...involves, by its very nature, a denial of the executed person's humanity"…and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state. See *State v Makwanyane*, supra note 47, paragraphs 11, 26, and others.

[54] See the Resolution of the African Commission on Human and Peoples' Rights on Death Penalty, 1999.
[55] See article 15 of the FDRE Constitution, and article 117 of the Criminal Code.

and mutilations.[56] However, according to the Ethiopian criminal law, those corporal punishments or punishment such as wound, chains, stripes, branding, flogging, and mutilations are disallowed. These are archaic forms of criminal punishment and they are now considered cruel, inhuman, and degrading.[57] Thus, save on death penalty, the Ethiopian criminal system differs from Hobbes's criminal system on the use of corporal punishment. Indeed, other criminal systems have also abandoned corporal punishments. For example, the penal systems of Poland, Slovak Republic, Turkey, Bulgaria, Croatia, and Azerbaijan have outlawed the use corporal punishment at least in relation to children.[58] Therefore, Hobbes is now relevant in relation to corporal punishment only in respect of the death penalty.

B. Punishment Entailing Loss of Liberty

Penalty entailing loss of liberty refers to incarceration or incapacitative sanctions which confine individuals or limit their physical opportunities for unacceptable behaviour.[59] Hobbes defines it as any deprivation, by a public authority, of the liberty of a person who is judicially tried and declared guilty.[60] It is generally believed that incarceration or imprisonment is the only effective way to deal with violent offenders as it protects the society

[56] Aberra Jemebere, *Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws*, Rotterdom, Erasmus University, Leiden, African Studies, 1998, p 193, 199.

[57] Article 18(1) of the FDRE Constitution, and article 87 of the Criminal Code. Ironically, however, we have maintained the cruellest, most inhuman and degrading punishment; that is, the death penalty. Of course, for death penalty, the argument is not based on denial of its being cruel, inhuman, and degrading but on its necessity, as one can understand from the Preamble of the Criminal Code, to deter the commission of further crimes particularly those entailing death penalty.

[58] *Eliminating corporal punishment: a human rights imperative for Europe's children*, by Council of Europe, 205, p 100, 103, 140, 149, and 159.

[59] Terance D. Miethe and Hong Lu, supra note 12, p 25-40.

[60] Thomas Hobbes, supra note 3, p 209.

against dangerous offenders because it incapacitates them although it is rarely rehabilitative.[61] Consequently, the penalty is recognised by all modern criminal systems. In Ethiopia, imprisonment is recognized as one of the principal penalties and it can be imposed as either rigorous or simple imprisonment. Imprisonment becomes *rigorous* when it is imposed for a very serious crime while it is *simple* when it is imposed for a crime of not serious nature.[62]

Hobbes does not classify imprisonment into *rigorous* and *simple*. However, he recognizes that it can take different forms. For example, he says that sanctions like home arrest and confinement to a given place qualify as imprisonment because they involve restraint on motion caused by external obstacle.[63] So, Hobbes recognizes that less serious deprivations of liberty can qualify as imprisonment. As a result, his stipulations on imprisonment are still relevant to the modern criminal system like in the Ethiopian criminal system.

C. **Pecuniary Punishment**

Pecuniary penalties refer to economic penalties that are imposed for wrongdoing.[64] Hobbes defines this punishment as the deprivation of money, land, or any other goods that have pecuniary value.[65] One of the pecuniary

[61] John M. Scheb and John M. Scheb II, supra note12, p 553-554. Actually, the validity of this argument is questionable because; firstly, crimes can be committed in prisons such as against other inmates or prison wards, or prison properties; secondly, prisoners may escape form prisons and commit crimes against the society; and thirdly, in countries where death penalty is maintained, it is death penalty that is the only effective way of dealing with violent offenders thereby according reliable protection to the society against the dangers they pose.
[62] Articles 106 and 108, the Criminal Code.
[63] Thomas Hobbes, supra note 3, p 209.
[64] Terance D. Miethe and Hong Lu, supra note 12.
[65] Thomas Hobbes, supra note 3, p 208.

punishments is fine. Indeed, fine is the most common form of pecuniary punishment.[66] In the Ethiopian criminal system, pecuniary penalties are recognized as one of the principal penalties.[67] As a result, a number of crimes are made to entail fine as either a sole penalty or as an alternative or in addition to imprisonment.

Moreover, the Ethiopian Criminal Code recognizes the confiscation of legally owned property of a criminal when that is expressly provided as a punishment for the crime committed.[68] However, the Code recognizes some exception to this rule. For instance, it is not possible to confiscate domestic articles normally in use, instruments of trade or profession and agricultural instruments, necessary for the livelihood of the criminal and his family, such amount of foodstuff or money that is necessary to support the family of the criminal for at least six months, and goods forming part of a family inheritance which the criminal cannot freely dispose by gift, will or in any other manner. So, confiscation that is allowed is not sweeping; it is rather a qualified one and, more importantly, it is an exceptional one as it could be used only when the law-maker has expressly recognized its use for the crime committed.[69]

[66] John M. Scheb and John M. Scheb II, supra note 12, p 552.
[67] Articles 90 and the following, the Criminal Code.
[68] At this juncture, it is import to bear in mind that, in our legal system, land is owned by the state. So, what individuals have over land is possessory rights (the right to use the land they possess and its fruits), not the right of ownership. See article 40, FDRE Constitution. In any case, they will not be deprived of their possessory rights in the form of penalty. For that matter, even in relation to other pecuniary penalties, such as fine, criminals are allowed to retain the amount they need to subsist on. Hence, their properties cannot be taken away in their entirety. See article 98 of the Criminal Code. Note that our past criminal laws allowed the confiscation of land as a criminal punishment. Yet, in 1908, such type of punishment was disallowed. See Aberra Jemebere, supra note 56, p 191.
[69] For more information, see article 98, the Criminal Code.

Coming to Hobbes, he recognizes the use of all kinds of pecuniary penalties: money, land, or any other goods that have pecuniary value. Hence, unlike the Ethiopian criminal law, he recognizes no exceptions to it. That is, Hobbes advocates the use of any type of pecuniary punishment and all properties can be confiscated. This shows that although part of his pecuniary penalties is still relevant, his stand on the subject-matter is not accepted in the Ethiopian Criminal Code, and hence in modern criminal law, in its totality-only fine and the confiscation of some property is now relevant.

D. Ignominy

By *ignominy*, what Hobbes means is depriving a person of the honour he has obtained from the commonwealth such as degrading him of his badge, title, office or declaring him incapable of the same in the time to come.[70] Interestingly, in the Ethiopian criminal system, these penalties are recognized as *secondary penalties*. As a result, unlike in Hobbes's system, they cannot be imposed except together with the other principal penalties: imprisonment and pecuniary penalties.[71] If it is decided that the use of such penalty is necessary, then it may take the form of deprivation of rights such as the right to vote, the right to be elected, parental rights, the right to be a witness, the right to exercise a profession, and others, or reduction from a rank or dismissal from membership such as from defence force.[72]

Therefore, except for the status attached to them, the types of penalties both Hobbes and the Ethiopian criminal system recognize here are the same. Of course, the Criminal Code does not use the term *ignominy*; rather, it uses the term *secondary punishments* which include the first. The other difference lies

[70] Thomas Hobbes, supra note 3, p 209.
[71] Article 121, the Criminal Code.
[72] Articles 123,127, the Criminal Code.

in the purposes these penalties are meant to serve. For Hobbes, any punishment has deterrent purpose by creating terror. In the Code, however, secondary punishments are used for rehabilitative purposes.[73] So, the types of penalties Hobbes recognized under the designation *ignominy* is still relevant but their status and the purposes they are meant to serve have now changed.

E. **Exile or Banishment**

The other type of criminal punishment Hobbes recognizes is *exile* or *banishment*. He defines it as *the condemnation of a man, for his crime, to depart a dominion of a commonwealth or certain part thereof for some time or forever*. Then, he argues that such measure should be coupled with other punishments such as deprivation of land to qualify as punishment proper. If exile is not coupled with the other punishments, then, we cannot say the criminal is punished but simply made to change air and enjoy the benefit of his crime.[74]

In Ethiopia, the old criminal laws allowed exile to be used as a criminal punishment. However, the exile was only from one's birth place, not from a country.[75] Under the current criminal system, however, exile is not recognized as a form of criminal punishment at all. Thus, no one can be lawfully subjected to banishment, for committing a crime, as a sole or an alternative penalty or in addition to the other punishments. This means, Hobbes is no more relevant here.

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[73] Article 121 states. [*in] deciding the application of secondary penalties, the Court shall be guided by their aim and the result they would achieve on the safety and rehabilitation of the criminal.*

[74] Thomas Hobbes, supra note 3, p 209.

[75] See Aberra Jemebere, supra note 56, p 191, 193.

Nonetheless, the stand of Hobbes on the deprivation of the criminal of his property, in particular, the property he gained by committing a crime is still workable *albeit* his exile is not. In this regard, the Ethiopian criminal system requires ordering the confiscation of any property the criminal has acquired, directly or indirectly, by committing a crime for which he is convicted.[76] Thus, in line with Hobbes' desire, the Ethiopian criminal system does not allow anyone to enjoy the fruits of his wrongdoing.

G. Joint penalties

Finally, it is necessary to note that Hobbes recognizes the use of more than one penalty for a single crime if that is believed necessary to deter the criminal or potential criminals from committing future crimes. Of course, in most criminal systems including the Ethiopian criminal system, joining criminal punishments to serve the purpose of criminal law, whenever possible, is permissible. For example, fine is usually imposed in addition to imprisonment when the criminal has obtained financial benefits from his criminal activities. Moreover, secondary penalties are imposed in addition to principal penalties. Thus, any criminal may be subjected to more than one form of penalty in the interest of serving the purposes of the criminal law. This means, Hobbes's principle of joint penalties is still relevant.

VI. Extent of punishment

On the extent of punishment, Hobbes argues that punishment should not be less than the benefits or contentment that follow a crime since lesser punishment would not dispose a man to obey the law but encourage him to violate it.[77] So, according to Hobbes over-punishment or under-punishment,

[76] See article 98(2), the Criminal Code.
[77] Thomas Hobbes, supra note 3, p 207.

seen in light of the harm caused, is acceptable in as long as it is necessary to make a person obey the law. In other words, as stated before, Hobbes does not require punishment to be *proportional* to the harm caused but to prevention.[78]

In the Ethiopian Criminal Code, the punishment that may be imposed on a person may be either more or less than the benefits or contentment that follows a crime. The extent of penalty hinges upon the purpose the court wants to serve by using punishment. For example, if the purpose the court wishes to serve is rehabilitation, which is usually the case in relation to, say, juvenile offenders, the judge may impose punishment which is less than the benefit that follows a crime. If, on the other hand, the court wishes to achieve deterrence, which is usually the case in relation to habitual offenders, it normally imposes a severe punishment enough to make a person regret his wrongdoing and decide not to repeat it again.[79] Therefore, the Ethiopian Criminal Code, like Hobbes's Code, requires proportionality of punishment to prevention. This shows that Hobbes is still relevant in relation to what ought to guide the determination of the amount of punishment a criminal has to serve.

[78] It is said that the principle of proportionality of punishment to the harm caused has been deeply rooted in the common-law jurisprudence since Magna Carta. According to the principle, in a just society punishment ought to be proportional to the crime committed. This means, punishment should 'fit' or 'match' the crime for which it is assigned. Of course, such principle may sometimes lead to lenient penalty whereas at times it may entail severe punishment than what is necessary in light of the principle of deterrence. See generally Allison Friedly, *Pragmatic and Conceptual Concerns Regarding Proportional Punishment*, Spring 2004, available at http://www.morris.umn.edu/academic/philosophy/friedly/defense.html, accessed on 1 August 2008, and Beccaria, *On Crime and Punishments, available at* http://www.crimetheory.com/ClasPos/proportion.htm accessed on 1 August 2008.

[79] Articles 1 and 87, Criminal Code.

V. Other principles pertaining to punishment

Hobbes favours the use of punishment that is capable of creating terror so as to discourage the commission of future crimes. Nevertheless, he opposes to any increment of punishment that is prescribed in the law after a crime is committed and calls the excess an act of hostility.[80] So, for him, what counts as punishment is what is attached to the law at the time of its violation and the retroactivity of severe penalty is unacceptable. In the Ethiopian legal system, such prohibition is recognized in the Constitution which stipulates that *heavier penalty shall not be imposed on any person than that is applicable at the time the crime was committed.*[81] According to Hobbes, the aim of punishment is terror, not revenge, and thus the use of greater punishment than the one attached to the law to create terror is unknown.[82] But, in the Ethiopian case, the reason why heavier penalty cannot be used is because it is contrary to human dignity; that is, no one can be condemned or severely condemned without being warned by the law preceding a conduct. The excess, that is, the increased punishment after a crime is committed becomes a risk the criminal did not assume while committing the crime.

Moreover, Hobbes argues that no one should be punished for an act that is performed before the law prohibiting it was issued. According to him, any evil inflicted for an act done before a law is issued does not qualify as punishment.[83] Of course, this is one of the cherished principles of modern criminal law. The Ethiopian Criminal Code also follows the same principle. Thus, no penalty can be imposed on any person for a conduct not done by transgressing a law. For that matter, according to the FDRE Constitution, any

[80] Thomas Hobbes, supra note 3, p 207.
[81] Article 22 of the FDRE Constitution.
[82] Thomas Hobbes, supra note 3, p 207.
[83] Ibid.

ex post facto law that provides for penalties or increase penalties is unconstitutional.[84] Therefore, once again, Hobbes's principle of *non-retroactivity* of criminal law is still applicable.

Lastly, Hobbes vehemently holds that the representatives of the *Commonwealth* (monarch or assembly) cannot be punished because it is not subject to any civil law for it is the one making the law itself.[85] In other words, Hobbes does not accept the rule of law or equality of all before the law. However, in the Ethiopian legal system, the representatives of the people (members of the parliament) can be punished. Indeed, the Ethiopian Criminal Code specifically stipulates that criminal law applies to all without discrimination.[86] Thus, unlike Hobbes's representatives who are not subject to his criminal law, the Ethiopian representatives are subject to the Ethiopian criminal law. Of course, the difference lies in the status of the two representatives. In the Ethiopian case, they are not sovereign (nations, nationalities, and peoples are) while Hobbes's representatives are sovereign.

VI. Execution of punishment

If punishment is to serve its intended purposes, it must be executed. The point worth discussing, then, becomes the manner of its execution. On this point, Hobbes is not clear. But we can understand that it can be execute in such a way that it can create terror. Thus, the issue of making execution of punishment *humane* does not seem part of his argument. For example, he argues that capital punishment can be used with or without torment.[87] This means, we can execute death penalty in a manner that is inhuman. Moreover,

[84] Article 22 of the FDRE Constitution.
[85] Thomas Hobbes, supra note 3, p 207, 215,218.
[86] Article 4, the Criminal Code.
[87] Thomas Hobbes, supra note 3, p 208.

he argues that a person can be deprived of all his property in the form of pecuniary penalty. But, depriving a person of everything he has by exposing him to, say, starvation, is now considered inhuman.

In many modern criminal systems, however, the execution of penalty has to be humane.[88] For example, in Ethiopia, it is expressly provided that penalties should be used with due regard for respect for human dignity.[89] With regard to the execution of death penalty, the Ethiopian Criminal Code is vivid and vehement about its stipulations. Firstly, it ordains that death penalty should be executed by a humane means. Second, it stipulates that it should not be executed in public (but in prison precinct) and by using inhuman means such as hanging. Thirdly, it orders the execution of the sentence without any cruelties, mutilations or other physical suffering.

Therefore, on the manner of execution of punishment, particularly capital punishment, the Ethiopian Criminal Code stands in stark contrast with Hobbes's Criminal law. For example, Hobbes's capital punishment with torment is what the Code obstinately proscribes. Of course, the stipulations in the Ethiopian Criminal Code are the result of the development of different human rights principles, an issue that was not topical during Hobbes's time. Thus, Hobbes is traditional in respect of the manner of enforcement of punishments while the Ethiopian Criminal Code has taken the modern path.

[88] Of course, there are controversies on what is *humane* and what is not. For example, in the USA, some states use lethal injection while others use electric chair. Thus, one may wonder whether both are *humane* or neither is or only one is *humane*. Of course, some countries still use hanging. For example, the ex-president of Iraq, Saddam Hussein, was hung.
[89] Article 87, the Criminal Code.

Conclusion

The 17th century political philosopher, Thomas Hobbes, discussed a number of issues in relation to criminal punishment. He recognized that criminal punishment can and should be used for the purpose of deterring the commission of further crimes either by the criminal himself or by the other members of the society. Then, he recognized the different types of punishment an authority can use to serve this purpose. He also discussed many other issues pertaining to the institution of punishment. Interestingly, while some of the principles he formulated or advocated or the explanations he provided for issues relating to criminal punishment have now become defunct, others are still applicable in the field of criminal law thereby making him still relevant. For example, while Hobbes' single justification of punishment, recognition of corporal punishments other than death punishment, and acceptance of the possibility of executing penalties by using cruel (inhuman) means are no more relevant at least in part, his definition of punishment, classification of penalties, guidance on how to determine the amount of penalty, the imposition of punishment by an authority, and non-retroactivity of criminal law are still applicable. That is why the Ethiopian Criminal Code stands in conformity with Hobbes on many principles. Thus, the Hobbesian principles of punishment have not yet become obsolete altogether as some of them are still operational.

Liability of A Federal Hospital for A Doctor's Private Wing Practice in Ethiopia: A Comparative Perspective

Liyusew Solomon[♣]

Abstract

This paper examines whether the doctors practicing in the private wing of a federal hospital should be considered civil servants of the hospital or independent contractors. It identifies the test that distinguishes a civil servant from an independent contractor in the Ethiopian law of liability for others. It argues that the contextual interpretation of Art. 2134 of the Civil Code is a preferred approach over the flexible interpretation of control test to determine the status of the doctor's practice in the private wing. Accordingly, the examination of the totality of the relationship between the doctor practicing in the private wing and the federal hospital unfolds that a doctor should not be considered to be an independent contractor but a civil servant. The use of this approach is in line with the provision's flexibility that ensures responsiveness to new developments in civil servant-independent contractor dichotomy. Its result of making the federal hospital liable for the professional fault of the doctor in the private wing practice is also justified by the underlying policy reasons for the law of liability for others.

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Introduction

In 2009, the Ministry of Health of Ethiopia established private wing in federal hospitals as a way to motivate and retain doctors. Accordingly, federal hospitals designate some of their rooms and equipment for use in the private wing. In this wing, doctors practice beyond the regular working hours of the hospital and charge fees for their services. The net income from this practice is paid to the practicing doctors in accordance with the directives set by the Ministry. The introduction of the private wing has opened a new frontier in Ethiopian hospital law of liability for doctors. The central legal question is whether the doctors practicing in the private wing should be considered civil servants of the federal hospital or independent contractors.

If a doctor in the private wing is considered a civil servant of the federal hospital, according to the cumulative reading of Art. 2126 (2) and Art. 2128 of the Civil Code (CC), the federal hospital is liable for the doctor's professional fault in the private wing. However, if the doctor practicing in the private wing is considered an independent contractor, the federal hospital will not be held liable for the doctor's professional fault; the doctor will bear sole responsibility. This arises from different interpretations of Art. 2134 of the CC which exonerates the federal hospital from liability for the faults of independent contractors.

The foundations of the doctrine of vicarious liability[1] and its application to identify an employee from an independent contractor have been challenging

[1] In this paper, I have used two phrases, liability for others and vicarious liability, to explain the same doctrine. The latter is used in common law countries. Liability for the acts of others is used widely by civil law countries, which Ethiopian law shortens to 'liability for others'. Thus, the phrase 'liability for others' or its derivative (the federal hospital's liability for doctors) is used in Sections 1 and 3 of this article. However, in Section 2 and, to a

to both the common law and civil law systems.[2] In both legal systems, "there is something fundamental about this doctrine"[3] which should be examined to understand its application and underlying rationale. The use of comparative law would provide insights to understand the reasons and application of Ethiopian law of liability for others in the private wing context. Accordingly, the writer has selected Canadian and French legal systems.

In order to identify employee from independent contractor, the Canadian jurisprudence have developed the contextual approach, which is currently the accepted test in the common law courts.[4] Since this approach is developed by the Supreme Court of Canada, it reflects the development of the principle in both Canadian common law provinces and the Quebec civil law system. This shows the applicability of the contextual approach beyond the common law tradition.

Ethiopia's law of hospitals' liability for doctors have structural similarity with the French legal system as well as differences from it in application. Particularly, the evolution from control test to a more flexible interpretation of control test in France to identify an employee from an independent contractor, which practically results in similar conclusions with common law courts,[5] is a relevant experience to explore for Ethiopia.

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limited extent, in Section 3 of this article, the term 'vicarious liability' is used to present the Canadian law in its own context. *See* Paul Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge, Cambridge University Press: 2010) at xlii.

[2] *Ibid* at xli -xlii.

[3] *Ibid* at xlii.

[4] *Ibid* at 73.

[5] *Ibid* at 78.

This article argues that the contextual approach should be preferred over the flexible interpretation of control test to determine the status of the doctors' practice in the private wing. The writer argues that the doctor in the private wing should be considered a civil servant by virtue of a contextual approach to the interpretation of Art. 2134. The use of this approach is in line with the provision's flexibility that ensures responsiveness to new developments in civil servant-independent contractor dichotomy. Consequently, the federal hospital will be liable for the professional fault of the doctor in the private wing practice. This result is also justified by the underlying policy reasons for the law of liability for others in Ethiopia.

The article is organized into three major parts. The first two sections provide the background information upon which the analysis to answer the research question is based. In the first section, a brief overview of the Ethiopian law of civil liability of a hospital and a doctor is presented with special emphasis on the liability of a federal hospital for a doctor's official fault. This part shows how the private wing opens a new frontier in Ethiopian law regarding a federal hospital's liability for its doctor. Section two primarily provides insights from Canadian and French legal systems on the vicarious liability of a hospital for doctors relevant to the research question of this article, and section three answers the research question by arguing that the federal hospital should be liable for the official faults of doctors practising in the private wing.

I. An Overview of Ethiopian Law of Hospitals and Doctors Liability: Special Emphasis on Liability of Federal Hospitals for Doctors

A. Federal Hospital and Private Wing

A federal hospital is defined in the Federal Hospitals Administration Council of Ministers Regulation No. 167/2009 as "a hospital accountable to the Ministry of Health or a health service delivery and teaching hospital under a university."[6] The Ministry of Health currently administers four specialized hospitals under this regulation. The teaching hospitals are governed by their respective universities, which in turn, are accountable to the Ministry of Education. These hospitals are financed by the federal government.[7] Their activities are overseen and supervised by the Governing Board (hereinafter referred to as the Board).[8] Their day to day clinical and administrative services are undertaken by their respective Chief Executive Officer (CEO).[9]

A federal hospital is mandated to "provide regular and emergency medical diagnostic services,"[10] "referral services,"[11] and to "undertake applied research activities to improve the quality of health services."[12] The Board members are designated by the head of the institution to whom they are accountable, *i.e.*, the Minister for Health or the University President.[13] The Board's powers and duties include examination and submission of the

[6] *The Federal Hospitals Administration Council of Ministers Regulation*, Regulation 167/2009, art.2 (1).
[7] *Ibid* art. 13.
[8] *Ibid* art. 7(1).
[9] *Ibid* art. 11(1).
[10] *Ibid* art. 4(1).
[11] *Ibid* art.4(2).
[12] *Ibid* art. 4 (3).
[13] *Ibid* art.6 (1).

hospital's annual work plan, budget, performance and financial reports. It shall also "approve the internal rules of procedures of the hospital and follow-up the implementation of same," and "decide on studies and proposals of the hospital regarding the establishment of private wing health services."[14] The CEO's powers and duties include to "employ and administer the employees of the hospital in accordance with directives to be approved by the Government following the basic principles of the civil service laws."[15] In addition, the CEO shall "effect payments in accordance with the approved budget and work program of the hospital;" [16] "ensure the adequate availability of human and other resources to enable the hospital discharge its activities;"[17] "undertake studies, and submit to the Board, on outsourcing clinical and non-clinical services to improve overall quality of health care, and implement the same upon approval;"[18] "undertake studies, and submit to the Board, on the establishment and operation of private wings, and implement the same upon approval".[19]

The 'private wing' is "a system established within a federal hospital whereby health professionals provide medical and diagnostic services and obtain benefits from fees collected."[20] The primary objective of the private wing is to promote the retention and motivation of health professionals in federal hospitals, thereby reducing the high attrition rate of qualified professionals from the federal hospital to private sector practice.[21] Though this objective

[14] *Ibid* arts. 7 (2), (8), (4) & (6).
[15] *Ibid* arts. 11 (2b).
[16] *Ibid* art. 11 (2d).
[17] *Ibid* art. 11 (2e).
[18] *Ibid* art. 11 (2g).
[19] *Ibid* art. 11 (2h).
[20] *Ibid* art.2 (2).
[21] *Federal Hospitals Private Wing Organization and Function Directive*, Ministry of Health, Ethiopia 2010, no.1, art.2. [Translated by author, original in Amharic]

relates to all health professionals, specialists and general practitioners are its primary targets due to their high attrition to and concentration in the private sector.[22] The other objectives of the private wing include building the capacity of the federal hospitals and improving the quality of health care services by using the income generated by the private wing to satisfy the needs of clients who pay for care provided to them by a doctor of their choice.[23]

The patient in the private wing is charged for the medical and diagnostic services she receives, and this payment is kept in an account that is separate from the federal hospital's account. Fifteen (15) per cent of the net income in this account goes to the federal hospital, while the remaining eighty-five percent is distributed among the health professionals practicing in the private wing [24] in accordance with the recommendation of Private Wing Coordinating Committee (the Committee) and the decision of the CEO. The law, however, cautions that private wing health care services may not prejudice the regular medical and diagnostic services provided by the federal hospital.[25] As a result, the private wing provides outpatient services beyond the regular working hours of the federal hospital (after 5:30 PM – 8:00 AM, Saturdays, Sundays and Public Holidays). In addition, the private wing is not

[22] In Ethiopia, the government health facilities are the major medical service providers in comparison with private sector and charitable organization. However, for instance, during 2006/7, of the total number of 1,806 doctors (for a country of 75 million people at that time) in Ethiopia, about 56 % of specialists and 38 % of general practitioners were practicing not in government health facilities. The primary reason is the attractive income they get in the private and charitable organizations. Federal Ministry of Health, *Human Resource for Health Strategic Plan: Ethiopia 2009-2020* (Draft Document for Consultation, 2010) at 21.
[23] *Supra* note 21 art. 2.
[24] *Ibid* art. 10 (2).
[25] *Supra* note 6 art.12 (2).

allowed to provide emergency services, as the emergency service units of federal hospitals work twenty-four hours every day.[26]

The private wing is accountable to the CEO of the federal hospital through its Head.[27] The Head directs the overall activities of the private wing. In fact, the Committee, which is chaired by the Head of the private wing, follows up the day to day activities of the private wing and supports the Head in the discharge of her responsibility.[28]

B. Ethiopian Law of Hospitals and Doctors Liability

The law of obligations stipulated in Book IV (Obligations) and Book V (Special Contracts) Title XVI (Contracts for the Performance of Services) of the CC provides for civil liability of hospitals and doctors. There is no distinct body of law that governs civil liability of hospitals and doctors constituting what in other jurisdictions is commonly referred to as law of "medical negligence" or "medical malpractice".[29] Neither has case law developed in this regard. The law of obligations deals with contractual and extra-contractual duties (tort); hence, a patient's relationship with a hospital or a doctor is established in contract or, in absence of contract, a hospital or a doctor shall be liable for patients extra-contractually. Art. 2037 (1) of the CC provides that a case having contractual cause of action is not allowed to claim for damages based on extra-contractual cause of action. Therefore, a patient-hospital relationship or a patient–doctor relationship is established

[26] *Supra* note 21 art. 8.
[27] *Ibid* art.3 (1).
[28] *Ibid* art.3 (5).
[29] For example in Canada, the two phrases are commonly used interchangeably. See Bernard Dickens, "Medical Negligence" in Jocelyn Downie, Timothy Caulfield & Colleen M. Flood, *Canadian Health Law and Policy* 4th ed (Markham, LexisNexis Canada Inc.:2011) at 116.

either in contract or tort law. A brief overview and reflection on the liability each of these relationships entails is presented below.

1. Hospital Liability

A hospital's liability to a patient may be either direct or indirect (liability for doctors). Direct liability of a hospital does not arise frequently. It refers to the administrative and equipment deficiencies, power interruption and other related problems which may cause injury to the patient. Direct liability of a hospital may arise in contractual and extra-contractual patient-hospital relationship. On the other hand, liability for doctors refers to the hospital's liability for the professional fault of its employee doctors. In Ethiopian law, the hospital's liability for doctors is determined on the basis of the extra-contractual provisions (Arts. 2126-2128 and.2130-2134) of the CC regardless of whether the patient-hospital relationship is contractual or extra-contractual.

a. Direct Liability of a Hospital

Direct liability of a hospital may arise from a hospital contract or the patient-hospital's extra-contractual relationship. Art. 2641 of the CC defines a hospital contract as "a contract whereby a medical institution undertakes to provide a person with medical care from one or several physicians, in connection with a given illness." Art. 1675 of the CC provides that the general law of contract in Book IV (Obligations) Title XII (Contracts in General) shall be applicable to all contracts without prejudice to Book V (Special Contracts) of the CC, where a hospital contract belongs. Thus, all the requirements which are basically referred to as capacity, consent and object stipulated in general law of contract shall be satisfied to have a valid hospital contract.

An important feature of hospital contracts is their proprietary nature. The obligation of a person receiving medical care is the payment of a service fee. This is a very important criterion defining the nature of the patient-hospital relationship. Private hospitals are established for profits and they provide medical services for service fees. Thus, the relationship a private hospital establishes with a patient is contractual. However, this is not always the case with government hospitals.[30] A segment of the population receives medical services from government hospitals for free as a public good upon presentation of proof for being pauper from her/his local administration. The relationship the government hospital establishes with these patients is extra-contractual. In other cases, government hospitals relationship with patients is contractual.

The direct liability of a hospital in contractual relationship with the patient is mainly established by reference to the terms of the contract. In addition, Art. 2652 of the CC provides for the direct contractual liability of a hospital for its in-patient services of boarding and lodging by assimilating this to the responsibilities of an innkeeper.[31] The main liabilities in this regard are for any damages the patient may suffer on account of the deficiencies in the hospital's accommodation and dietary services.

[30] Prof. Krzeczunwicz implied that patient-public hospitals relationship is generally extra-contractual. However, this has to be examined with the health care system where these hospitals provide medical service for fee or for free. George Krzeczunwicz, *The Ethiopian Law of Extra-Contractual Liability* (Addis Ababa, Faculty of Law, Haile Sellassie I University:1970) at 77.

[31] The provision reads, "[w]here the sick person, for purposes of his treatment, is lodged and fed by the medical institution, such institution shall, as regards its obligations and responsibility arising from that lodging and feeding, be subject to the provisions regarding innkeepers' contracts (Art. 2653-2671)."

The direct liability of a government hospital in extra-contractual relationship with the patient arises from the violation of any law stipulating the standards of hospital administration, health care services and products which cause damage to the patient. Art. 2035 of the CC provides that infringement of any law, ordinance or administrative regulations is a fault. For example, a government is legally bound to provide health care services by fulfilling hygienic standards.[32] An adverse event causing injury to the patient caused as the result of sub-standard hygienic conditions in a hospital may be regarded as a direct fault of the hospital.

b. Liability of a Hospital for Doctors

Liability of a hospital for doctors is determined on extra-contractual principles whether the patient-hospital relationship is contractual or extra-contractual. If the patient-hospital relationship is extra-contractual, it is clear that the indirect liability of the government hospital is established on the tort provisions of the CC (Arts.2126-2128 and Art. 2134).

Where the patient-hospital relationship is contractual, Art. 2651 of the CC provides for the civil liability of a hospital for the fault of their employee physician or auxiliary staff. The civil liability of a person for the fault of other person is stipulated in the extra-contractual provisions of the CC. That is why the doctor's liability for her/his auxiliary or employees is determined on the basis of the tort provisions of Arts.2130-2133. This does not mean the contractual doctor-patient relationship is transformed into extra-contractual relationship. The nature of the doctor-patient relationship remains contractual but liability is established on tort principles. The broader term

[32] *Food, Medicine and Health Care Administration and Control Proclamation*, Ethiopia 2009, no.661, art.43.

"civil liability" in Art. 2651 refers to the use of tort in determining liability in contractual relationship. Contract law uses the same approach with respect to damages assessment by reference to the damages provisions of tort law where the former is found to be inadequate (Art. 1790 of the CC). In the only medical malpractice suit before the Federal Supreme Court Cassation Division, the tort principle of damages assessment on the basis of equity as stipulated in Art.2102 was utilized in a contractual patient-hospital relationship. [33] Therefore, even if the patient-hospital relationship is contractual, it can safely be concluded that the liability of a hospital for its doctors' professional fault will be established in accordance with tort principles.

The liability of a hospital for doctors in accordance with extra-contractual principles is established after showing the professional fault of the doctor. Art. 2031 of the CC on professional fault provides as follows:

> 1. A person practicing a given profession or activity shall, in the practice of such profession or activity, observe the rules governing that practice.
> 2. He is liable where, after due consideration of scientific data or rules recognized by the practitioners of his craft, he appears to be guilty of imprudence or negligence constituting definite disregard of duty.

Art. 2031 is only useful in establishing the fault; i.e., the breach of the standard of care the doctor owes to the plaintiff. The plaintiff has to prove the imprudent or negligent disregard of a duty as elaborated in Art. 2031.

[33] *Marie Stopes International Ethiopia v W/t Senaiet Alemaheyhu*, 2011, Federal Supreme Court Cassation Division, No 64590 (available on www.fsc.gov.et).

Moreover, the plaintiff has to establish the damage she sustained is caused by the professional fault of the doctor as per Art. 2028 of the CC.[34]

Prof. Krzeczunwicz noted that according to Art. 2031, professional fault materializes when a doctor disregards the "rules" or "scientific data" used by the practitioners of her craft.[35] "Rules" may be understood to mean professional obligations stipulated, in a strict sense, by law, or in a loose sense, by standards, ethical codes, clinical guidelines or expert evidence of "the usual conduct" in the profession.[36] In the former case, the plaintiff can also have a claim in accordance with Art. 2035 of the CC, which stipulates that any infringement of a law is fault. But in the latter, by the production of the said documents or expert testimony, the plaintiff can establish the standard of care expected from the professional, the violation of which entailed the professional fault.[37] Moreover, consideration of "scientific data" involves the evaluation of the practice of the practitioner against updated scientific facts and knowledge in her profession.[38] The plaintiff has to prove that the "rules" or "scientific data" are disregarded by imprudence or negligence. The court's decision is based on the "conduct of a reasonable man."[39] For the purpose of Art. 2031, 'reasonable man' refers to a reasonable practitioner belonging to the defendant's profession.

[34] The article provides that "[w]hosoever, by his fault, causes damage to another, shall make it good."
[35] *Supra* note 30 at 78.
[36] *Ibid* at 78-9.
[37] *Ibid* at 79.
[38] *Ibid*.
[39] *Civil Code of Ethiopia* (1960) art. 2030 (2).

We have seen that a government hospital's liability for doctors is determined by the extra-contractual principles. Now, I will briefly explain these extra-contractual principles.

i. Government Hospital Liability for Doctors

A government hospital is a public health facility administered and funded by the Ministry of Health, the Ministry of Education or the Health Bureau of States where they are located. Its governance is structured to ensure the involvement of the community it serves, while formally remaining accountable to the Federal or State government. Most government hospitals are administered by the States. The health professionals providing health care services, including specialists and general practitioners in government hospitals, are civil servants.

In principle, a doctor in a government hospital is liable for her professional fault that causes damage to a patient.[40] However, if the fault is an official fault, the patient may sue the hospital through the State.[41] 'Official fault' is defined as a fault committed by a civil servant believing "in good faith that he acted within the scope of his powers and in the public interest."[42] In other cases, a fault is regarded as a personal fault.[43] In this case, the State will not be answerable for the civil servant's fault. For example, a doctor committing sexual assault against a patient commits a personal fault. Intentional acts constituting faults are likely to be regarded as personal faults though most medical cases arise due to the negligence of a doctor. Therefore, by and large, a civil servant doctor's fault is regarded as an official fault.

[40] Art. 2126(1) CC.
[41] Arts. 2126 (2) *cum* 2128 CC.
[42] Art. 2127 (1) CC.
[43] Arts. 2126 (3) *cum* 2127 (2) CC.

Art. 2134 of the CC provides an exception to the principle that a government hospital is liable for the fault of a civil servant doctor who may, otherwise, be regarded as an independent contractor. It states that "[a] person is not answerable for the faults committed by another person while carrying out work which he has required him to do, where the latter is not subject to the former's authority and is to be considered as having retained his independence." Therefore, a government hospital cannot be held liable for a doctor who is considered as an independent contractor in law. In this case, the patient-doctor relationship is governed by the medical contract provisions of the CC, which will be briefly discussed next.

2. Doctor's Liability

a. Direct Liability

The direct liability of a doctor emanates from a doctor-patient relationship in a medical contract. Art. 2639 of the CC defines a medical contract as "a contract whereby a physician undertakes to provide a person with medical care and to do his best to maintain him in good health or cure him, in consideration of payment of a fee." The application of a medical contract, as can be understood from its definition, is limited to governing the doctor-patient relationship under three scenarios. First, the medical contract governs the doctor-patient relationship in some health care facilities that are owned and fully managed by the doctor treating the patient. In such a circumstance, the doctor enjoys full independence of practice, which is the required element in the definition of a medical contract. Second, a medical contract governs the practice of specialists in private hospitals and clinics when they work part-time as independent contractors, not as employees. The income from this practice is shared between the specialist and the health facility in accordance with the agreement between them. Their clients in this practice

are mostly informed patients looking for contractual relations with them. Third, a new proposal to allow solo practice by doctors will be governed by medical contract.[44] Other than in these three scenarios, where the doctors are employees of the private health facility, the patient concludes a hospital contract with the facility, not a medical contract with the doctor. In this sense, it could be said that the scope of application of medical contract in Ethiopia is limited.

The medical contract law emphasises the personal nature of the obligation the contract imposes on a doctor in Art. 2649 (1) of the CC. The provision reads: "[a] physician who undertakes to treat a person shall carry out his obligations personally." Art. 2647(1) of the CC provides that the doctor shall be liable to the patient or third party for the fault she commits. The fault is determined by reference to the rules of her profession.

B. Liability of a Doctor for Assistants

The law allows the doctor to hire assistants but "under his control on his own responsibility".[45] This does not establish a contractual relationship between the doctor's assistant and the patient. Rather, the doctor-patient relationship remains contractual. However, the liability of the doctor is established based on extra-contractual principles. The law clearly provides that the doctor is

[44] Solo practice is defined as "an independent medical practice where within the limits of his/her respective qualification and in compliance with the standards… a health provider diagnoses and treats acute and/or chronic illnesses, but also provides preventive care through health education and counseling." Ethiopian Food, Medicine and Healthcare Authority, *Minimum Standards for Solo Practice* (Draft Document for Consultation, Addis Ababa: 2010) at sec.1.2 .7. While this paper is submitted for publication, the draft standard for solo practice is approved. Soon, this practice will start upon the implementation of the standards.
[45] Art.2649 (2) CC.

liable for her assistant's fault in tort[46] according to the principle of an employer's liability for employee fault.[47]

C. Contractual or Extra-Contractual Cause of Action: Does it Matter?

Prof. Krzeczunwicz explained the major implications of establishing a cause of action in contract or tort. In establishing the civil liability of a hospital or a doctor, the most compelling reasons to consider the distinction between contractual and tort-based actions are: period of limitation[48] and damages assessment.[49] A contractual legal action against a hospital or a doctor can be brought within ten years from when the patient sustained the damage as a result of the professional fault.[50] In contrast, medical malpractice claims in tort shall be barred after two years from the time the patient sustained the damage.[51] With respect to compensation, the contractual award of damages is an amount that equals the normal damage that the injury caused the patient as assessed in the eyes of a reasonable person.[52] The plaintiff is not expected to produce documentary or other evidence to corroborate a claim for an actual damage. Rather the burden of refuting the reasonable estimate of damages in contract lies with the defendant. If successful, the defendant will pay a lesser damage than the normal damage assessed in the eyes of a reasonable person.[53] However, in tort, the damage awarded to the plaintiff is

[46] Art. 2649 (3) CC.
[47] Arts. 2130-33 CC.
[48] *Supra* note 30 at 122.
[49] *Ibid* at 121-2.
[50] Arts. 1845 *cum* 1846 CC.
[51] Art.2143 CC.
[52] Art.1779 CC.
[53] Art. 1780 CC.

an actual damage.[54] The plaintiff has to prove the actual damages, in contrast to the reasonable man assessment of damage in contract law. In general, the amount of damages is higher in tort, and the burden of proof to establish the amount of damage is lower for claims in contract than in tort. Nonetheless, it is advisable for the plaintiff to sue the defendant hospital or/and doctor in both contract and tort as alternative claims to improve the chance of success in the suit.

For the purpose of establishing the liability of the federal hospital for doctors' professional fault, the nature of the federal hospital-patient relationship is not the defining factor. Both contractual and extra-contractual federal hospital-patient relationship involves the application of tort principles in establishing the liability of the federal hospital for its doctors' professional fault. However, identifying the nature of the relationship is important to determine the period of limitation and the amount of damages.

D. Private wing: A New Frontier for a Federal Hospital's Liability for Doctors

As discussed above, the liability of a federal hospital can be both direct and indirect. The focus of this paper is the latter. In principle, a federal hospital is liable for the official fault of a doctor. This requires, first, establishing the official fault of the doctor, and second, that the federal hospital is liable for this fault. The defendant may raise the defence that the doctor is an independent contractor for whom the federal hospital may not be liable.

[54] Art. 2091 CC.

However, the practice of a civil servant doctor in the private wing opens a new frontier in the liability of a federal hospital for its civil servants. The doctor cannot be simply considered as a civil servant of the federal hospital in the private wing because she is not paid by the hospital for such practice. Neither can a doctor be regarded as an independent contractor for her practice in the private wing by merely considering the fact that she is charging the patients for her service. Therefore, this frontier needs to be examined and a sound approach suggested. In this regard, drawing on insights from other jurisdictions that experience similar or relevant challenges is invaluable. To this end, in the next part of this paper, I will discuss relevant perspectives from Canada and France to ground my analysis and suggestions for the sound interpretation of Ethiopian law to deal with this new frontier.

II. Comparative Perspectives on Vicarious Liability of a Hospital for Doctors

A. Vicarious Liability of a Hospital for Doctors in Canada

Most hospitals in Canada are not-for-profit corporations established by provincial or territorial legislations and significantly financed by the government.[55] Their administration is done by a board of directors or trustees.[56] The composition of the board, mostly consisting of lay persons, reflects community ownership or involvement in the governance of the hospital.[57] The board is assisted in the making of clinical administrative decisions by technical committees, which in most provinces is called a

[55] John J Morris & Cynthia D Clarke, *Law for Canadian Health Care Administrators*, 2nd ed. (Markham, LexisNexis Canada Inc.:2011) at 6.
[56] *Ibid*.
[57] *Ibid*.

Medical Advisory Committee. These committees are largely constituted by staff physicians.[58] Beside the public hospitals, private hospitals, owned and financed by an individual or private organization, are playing an increasing role in the delivery of health care services in Canada. At present, the percentage of their hospital beds is smaller than the total number of beds in public hospitals, though.[59]

Hospitals are liable for the negligence of their employee health professionals on the basis of the common law principle *respondeat superior* ('let the master answer').[60] The classical approach is that a hospital is liable for its employee's negligence committed in the course of employment, but not for an independent contractor practicing on its premise. The following paragraphs from the masterpiece text on Canadian medical malpractice law by Picard and Robertson clearly explains the position of the Canadian law on a hospital's liability for doctors:

> Whether a hospital will be vicariously liable for the negligence of a doctor depends upon the relationship among the hospital, the doctor and the patient. In the great majority of cases, patients engage and pay their doctor … and have the power to dismiss them. The hospital does not employ the physicians nor are they carrying out any of the hospital's duties to the patient. They are granted the privilege of using personnel, facilities and equipment provided by the hospital but this alone does not make them employees. They are independent contractors who are directly liable to their patients, and the hospital is not vicariously liable for their negligence.

[58] *Ibid* at 6 & 12.
[59] *Ibid* at 5.
[60] *Ibid* at 237.

> But with some doctors, the relationship does give rise to vicarious liability on the part of the hospital. The clearest situation is that of doctors employed as house staff (residents or interns) for whom the hospital is vicariously liable. There, the employer-employee arrangement is usually evident from manuals and directives issued by the hospital.
>
> There are doctors whose relationship to the hospital does not fit easily into either of the personal doctor-independent contractor or house staff-employee categories, and in these cases the facts must be carefully analyzed.[61]

Even though the principle that most doctors are independent contractors under Canadian law sharply contradicts the status of doctors in a federal hospital in Ethiopia where they are civil servants, both jurisdictions are challenged by new frontiers in the ever increasing complex relationship among the hospital, the doctor and the patient. Ethiopian hospital liability for doctors is now faced with federal hospital liability for doctors' private wing practice, just like the matter of the vicarious liability of hospitals for doctors practicing in an emergency room of a hospital in Canada raised a legal debate many years back. Indeed, the debate about the vicarious liability of hospitals for doctors' practice in emergency rooms in Canada is yet to be settled. The seminal case on a Canadian hospital's liability for a doctor

[61] Ellen I Picard & Gerald B Robertson, *Legal Liability of Doctors and Hospitals in Canada* 4th ed.(Toronto, Thomson Canada Limited: 2007) at 478-9.

practicing in the emergency room is *Yepremian et al. v Scarborough General Hospital et al*[62] which is discussed below.

1. *Yepremian et al v Scarborough General Hospital et al.*

A patient, Tony Yepremian, who was semi-comatose at the time, was taken to the emergency unit of Scarborough General Hospital. Dr. Chin misdiagnosed the patient's diabetes and prescribed wrong medications which worsened Yepremian's condition. Later on, Yepremian was admitted to the intensive care unit under the care of Dr. Rosen, an internist with visiting privileges in the hospital. Dr. Rosen was on call duty that day. He did not diagnose the diabetes on time and when it was brought to his attention by the nurse, he prescribed an overdose drug. Eventually, Yepremian developed cardiac arrest which caused brain damage. At the trial and appeal, it was decided that Dr. Rosen's negligence was the direct cause of Yepremian's brain damage. The central issue, however, was about the liability of the hospital for Dr. Rosen's negligence.

After extensively analyzing the relevant statutes and jurisprudence, the trial judge, Holland J. of the Ontario Supreme Court, rendered judgment on the liability of the hospital for Dr. Rosen's negligence. First, he set out three conclusions in which a hospital's vicarious liability for the actions of doctors may arise. The three conclusions are:

> Except in exceptional circumstances:
>
> 1. A hospital is not responsible for negligence of a doctor not employed by the hospital when the doctor was personally retained by the patient;

[62] *Yepremian et al. v Scarborough General Hospital et al*, 1978 O.J. No. 5457 (available on Lexis Quicklaw); *Yepremian et al. v Scarborough General Hospital et al*, 1980 O.J. No. 3592 (available on Lexis Quicklaw).

2. A hospital is liable for the negligence of a doctor employed by the hospital;
3. Where a doctor is not an employee of the hospital and is not personally retained by the patient, all of the circumstances must be considered in order to decide whether or not the hospital is under a non-delegable duty of care which imposes liability on the hospital.[63]

Holland J. decided that the third conclusion fits Yepremian case that "the case must be considered from the point of view of the patient, the hospital and the doctor."[64] He set out the nature of these relations as follows:

> In so far as this particular patient was concerned, he was semi-comatose on admission. It was not even his decision to go to the hospital; it was the decision of his parents. Tony Yepremian was taken to the hospital because he was obviously seriously ill and in need of treatment. The public as a whole, and Tony Yepremian and his parents in particular, looked to the hospital for a complete range of medical attention and treatment. In this case there was no freedom of choice. Tony Yepremian was checked into the emergency department by Dr. Chin and not by a doctor of his choice. Dr. Chin was required to work for certain periods of time in the emergency department. When Tony Yepremian was admitted to the intensive care department of the hospital, he was admitted under the care of Dr. Rosen. Tony Yepremian had no choice in the matter. The fact that Dr. Rosen happened to be the internist at the time of admission was the luck of the draw so far as the Yepremians were concerned. They

[63] *Yepremian et al. v Scarborough General Hospital et al*, 1978 O.J. No. 5457 (available on Lexis Quicklaw) at para.55.
[64] *Ibid* para.56.

> really, I suppose, had no concern other than an expectation that this hospital would provide not only a room, but everything else that is required to make sure, so far as is possible, that the patient's ailments are diagnosed and that proper treatment is carried out, whether this is done by an employed doctor, a general practitioner or a specialist. From the point of view of the hospital, the hospital, by virtue of the provisions of the Public Hospitals Act … and as a matter of common sense, has an obligation to provide service to the public and has the opportunity of controlling the quality of medical service. From the point of view of the doctor, through the surrender of some independence by reason of the control that may be exercised over him by the hospital and by making his services available at certain specified times, he attains, by accepting a staff appointment, the privilege of making use of the hospital facilities for his private patients.[65]

Holland J. concluded that "in the circumstances of this case, by accepting this patient, the hospital undertook to him a duty of care that could not be delegated. It may be that the hospital has some right of indemnity against the doctor but …. I have come to the conclusion that the hospital is responsible in law for the negligence of Dr. Rosen."[66]

On appeal to the Ontario Court of Appeal, Arnup, J.A., noted that "[i]mplicit in conclusion 3 is the determination that the principle of *respondeat superior* has nothing to do with this case and the liability cannot be founded upon the

[65] *Ibid*.
[66] *Ibid* paras.56-57.

application of the principle."[67] However, Picard and Robertson think that the final conclusion of the trial judge asserts the vicarious liability of the hospital for Dr. Rosen's fault, despite his status as an independent contractor, and this does not fit with the doctrine of vicarious liability.[68] The applicability of the vicarious liability principle was also considered not necessary in the dissenting opinion of Blair, J.A., who held that the hospital shall be liable on the basis of a non-delegable duty.[69] But the *Yepremian* case has continued to influence case law discussion on the vicarious liability of hospitals for doctors.[70] What is clear is the slippery nature of the principle of non-delegable duty and vicarious liability. Both depend on analyzing the facts in a given case, facts which can constitute a separate claim on either principle. Indeed, the plaintiff can increase her success rate by pleading the application of both as alternatives. Though the scope of this paper is limited to the discussion of the liability of a federal hospital to doctors' practice in the private wing, some of the arguments raised about the existence or non-existence of a non-delegable duty are relevant to argue for or against vicarious liability. In this light, in the following paragraphs, I will briefly highlight important arguments arising from the judgement and a dissenting opinion in the *Yepremian* case on appeal.

The trial judgment was overruled by the majority decision of the Ontario Court of Appeal, but two judges dissented. The primary reasons for denying

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[67] *Yepremian et al. v Scarborough General Hospital et al*, 1980 O.J. No. 3592 (available on Lexis Quicklaw) at para.32.

[68] *Supra* note 61 at 483. Picard & Robertson said that, "[a]lthough this was couched in terms of *direct* liability, that is, liability for breach of the hospital's own non-delegable duty to provide reasonable treatment, in effect the trial decision really imposes a type of vicarious liability- the hospital was held liable for the negligence of the doctor."

[69] *Supra* note 67 at para 173.

[70] *Supra* note 61 at 486.

the claim of a non-delegable duty against the hospital can be summarized as the absence of a statutory duty on the hospital to provide competent medical care, except "to see such care is provided";[71] public expectation from the hospital is no more than getting "a good doctor";[72] the hospital does not control the practice of specialist doctors;[73] and also the issue calls for decision on the allocation of public resources which is a policy matter necessitating legislative intervention.[74]

The dissenting opinion of Blair J.A. heavily relied on the public expectation that hospitals should provide medical services, to hold that they owe a non-delegable duty.[75] Blair J.A. also endorsed the following view of Picard and Robertson on the basic elements necessary to establish the vicarious liability of a hospital for doctors in grey areas.

> [T]here are some factors which can be identified as being common in those cases where a hospital has been found liable for a doctor's negligence. The patient has generally not chosen the doctor; he has been provided by the hospital as part of certain services. There may be a public expectation that such a doctor or service will be provided by the hospital. There is an absence of control by the patient, usually stemming from the fact that the patient was not the one who engaged the doctor. Also, the doctor may not be described as being an integral part of the hospital organization rather than an accessory to it. Most

[71] *Supra* note 67 at para.30
[72] *Ibid* at paras. 35-6.
[73] *Ibid* at para. 38.
[74] *Ibid* at paras. 67 & 108.
[75] *Ibid* at para.171.

> obvious, but not necessarily most important, a stipend or salary received from the hospital is often a factor.[76]

Given the changes in the health system in the last three decades and in particular in the trend towards employment of doctors in hospitals, some commentators suggested a departure from continued adherence by the Canadian courts to the *Yepremian* case. Though the Prichard Report did not suggest an extension of the vicarious liability of hospitals to non-employee doctors, it had called for increased hospital responsibility in the provision of medical treatment.[77] Lorain Hardcastle, in her 2010 publication, reviewed the major health system changes in Canada since the decision in the *Yepremian* case.[78] She argued that the changes in the health system warrant the claim that a hospital should be held vicariously liable for its doctor's negligence.[79] Of these changes, she emphasised "[p]olicy shifts toward tying remuneration to performance, board or management involvement in privileging and shared accountability for quality and clinical decision making."[80] These changes

[76] *Ibid* at para.169; see also *supra* note 61 at 481.

[77] A Report to the Conference of Deputy Ministers of Health of the Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care, *Liability and Compensation in Health Care* (Toronto, University of Toronto Press:1990) (J. Robert S. Prichard, Chairman) at 27. In particular, the report called for increasing preventive measures for medical malpractice including mandatory quality assurance, risk management and peer review. These mechanisms may prove to establish a certain degree of control over doctors; hence, strengthening the argument that the hospitals will owe a patient in emergency a non-delegable duty of care.

[78] Lorain Hardcastle, "Institutional Vicarious Liability for Physicians: have we reached the tipping point?" (2010) 23:3 Health Management Forum 106 at 107-8.

[79] *Ibid* at 108.

[80] Ibid; see also *supra* note 29 at 146-7. Professor Dickens also noted this trend of moving "towards salaried employment by hospitals, being paid by provincial government or by regional health authorities. Provinces often prefer this system of pre-set annual funding to the open-ended principle of fee-for-service billing, in which physicians may, for instance, increase their income 50 percent by requiring patients' follow-up visits at four-, eight- and twelve –month intervals. Salaried employment also allows physicians to undertake teaching responsibilities and unfunded research without loss of income derived from patient care. Legal implications are that the contractual relationship between patients and physicians no

show the increasing role of hospitals in patient care. Moreover, she suggested instrumentalist justifications, i.e., ensuring that an injured patient gets compensation, and that the deterrence effect of vicarious liability law must be promoted by pushing for the vicarious liability of hospitals for doctors' negligence.[81]

Nonetheless, the Supreme Court of Canada has adopted a contextual approach or the totality of the relationship test to identify employee from an independent contractor.[82] The application of this test to hospital vicarious liability to doctors is yet to be seen. However, this decision generally presents the contemporary test used by the common law courts to identify an employee from an independent contractor.[83] In what follows, this approach is discussed.

2. The Contextual Approach

Justice Major, writing the judgment of the Supreme Court of Canada in *6771122 Ontario Ltd v Sagaz Industries Canada Inc*, made a thorough review of the evolution of different tests to identify if a given person is an employee, or acts as an independent contractor. These tests include the control test, entrepreneur test, organization or integration test, modified entrepreneur test, and enterprise risk test. It is beyond the scope of this paper to discuss each of these tests, but it suffices to present the relevant evaluation by Major J. after considering the various tests. The absence of "one

longer exists, perhaps encouraging courts to develop jurisprudence binding physicians to patients through fiduciary duties, and that hospitals may bear vicarious liability for salaried physicians' negligence."

[81] *Supra* note 78 at 108.

[82] *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 S.C.J. No. 61 (available on Lexis Quicklaw).

[83] *Supra* note 1 at 73.

conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor"[84] was underscored. Rather, examining "the total relationship of the parties" is found to be very important.[85] This test, which recognizes the importance of control as one factor to be considered in the determination of employee-independent contractor status, is termed as a "contextual approach."[86] Major J. summarized the basic tenet of this approach in the following two paragraphs:

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provided his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.[87]

[84] *Supra* note 82 at para 46.
[85] *Ibid*.
[86] *Supra* note 78 at 106.
[87] *Supra* note 82 at paras.47-8.

B. A Hospital's Liability for Doctors in France

Like Canada's public health care system, the French public sector plays significant role in the provision of medical services. In France, about 86 percent of the salaried health professionals are working in the public sector.[88] Furthermore, the public hospitals account for 65 percent of hospital beds and 53.6 percent of doctors are employed at public or private hospitals.[89] A hospital liability for doctors may arise under contract, tort, administrative, criminal laws. In all of these cases, the tort principle stipulated in Article 1384 (5) of the French CC is important. It reads that "[m]asters and principals [are liable] for damage caused by their domestics and employees in the functions for which they have been employed."[90] Though the provision does not include the fault of the employee, traditionally courts have interpreted the provision so that the plaintiff has to establish the employee's fault.[91]

Article 2037 of Ethiopia's CC is framed based on the French doctrine of *non-cumul* (non-accumulation of actions).[92] The doctrine requires a plaintiff to have a contractual or tort cause of action, but not both at the same time.[93] This doctrine seems to limit the application of Article 1384 (5) for tort cases. However, courts often apply this tort principle to establish the contractual liability of a hospital to its salaried doctors.[94] This approach is similar with

[88] Florence G'Sell-Macrez, "Medical Malpractice and Compensation in France- Part I: The French Rules of Medical Liability since the Patients' Rights Law of March 4, 2002" 86:3 Chicago-Kent Law Review 1093 at 1093.
[89] *Ibid*.
[90] John H. Crabb, *The French Civil Code*, Rev Ed. (as amended to 1 July 1994) (USA, Fred B. Rothman & Co.:1995).
[91] *Supra* note 1 at 27.
[92] *Supra* note 30 at 144.
[93] *Supra* note 1 at 44.
[94] *Ibid* at 45.

the writer's argument that the application of Art.2652 of Ethiopia's CC calls for the use of tort principles to determine a hospital's liability for its employee doctors.

The concept of *service public* (public service) is the hallmark of French administrative law.[95] It emerged in the late nineteen century after a tribunal ruled that the Civil Code governing private relations cannot be applicable to establish liability of the State in public service delivery.[96] This has established different treatment of the state and public bodies with the private sector.[97] A public body is an institution set up to carry out public service function in the public interest.[98] A public hospital is a public body whose liability for its salaried doctors is governed by administrative law principles.[99] The French administrative law is basically developed by the judge made law, especially by the *Conseil d'Etat*, the highest administrative court.[100] The basic principle of the tort aspect of administrative law distinguishes the *faute de service* (fault in service) and the personal fault of the civil servant.[101] This principle is what the drafters of Ethiopia's CC incorporated in establishing the tort liability of state for its civil servants in Art.2126 (1) and (2).[102] Accordingly, the French public hospital is liable for its salaried doctor's professional fault.

[95] John Bell, Sophie Boyron & Simon Whittaker, *Principles of French Law* 2nd ed. (New York, Oxford University Press: 2008) at 169.
[96] Christian Dadomo & Susan Farran, *French Substantive Law: Key Elements* (London, Sweet & Maxwell Ltd: 1997) at 170.
[97] *Supra* note 95 at 172.
[98] *Ibid*.
[99] *Supra* note 1at 52; *See supra* note 96 at 181.
[100] *Supra* note 1 at 52.
[101] *Ibid*; *See supra* note 88 at 1104.
[102] *Supra* note 30 at 51.

In France, a private hospital is liable for the professional fault of its salaried doctors under contract law.[103] This arises where the patient does not have a contract with doctor but with the private hospital.[104] If the patient has a contract with the doctor, the private hospital will only be responsible for accommodation, food and paramedical services.[105] A visiting doctor in the private hospital is an independent contractor who is directly liable for the patient under contract law.[106] Due to the private hospital's absence of authority or control over doctors for their professional independence, salaried doctors were not regarded as employee as per Article 1384 (5). It was said that "[the hospital] is with regard to surgeons, doctors or interns without authority or control concerning the practice of their professional skills."[107] French courts had been reluctant to consider doctors an employee of the private hospital.[108]

This loyalty to control test in identifying employer/employee relationship has been challenged by the complex employment relationship and its inapplicability to professional practices. As a result, civil law countries have adopted more flexible approach to control test which is responsive to modern employment practices. More recent case law in French shows a flexible approach to control test, most importantly, "one can have authority over a subordinate, despite the absence of technical knowledge."[109]

[103] *Supra* note 1 at 63.
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid* .
[107] This was the translation of the judgment of Parts Court of Appeal in 1950, in *supra* note 1 at 62.
[108] *Ibid* at 62.
[109] *Ibid* at 66.

In 1992, the Criminal chamber of the *Cour de cassation*, in establishing contractual liability of the Red Cross for an anaesthetist hired for brief period, considered the anaesthetist an employee under Article 1384 (5) of the French CC. The court recognized his professional independence but also considered him as an employee. Some view this understanding as a radical abandonment of the principle of independence of doctors. Others view the change "as a recognition that a salaried doctor may be considered part of the hospital staff, and thereby a 'subordinate', without relinquishing his or her professional independence."[110] It is also noted that the court's conception of employee is consistent with the broader definition of employee in French labour law.[111]

Further, some leading authors showed how recent cases show more flexible interpretation of control test by shifting the focus from the power to give instruction, to determining whether the performance of the act was for the employer's purpose or not. [112] Prof. Giliker summarized this flexible interpretation of the control test as follows:

> To speak in terms of 'authority', 'control' and 'subordination' is, therefore, to refer only to general guidance to the question whether the person deemed in authority should be held responsible for the wrongs of another whom he is deemed to control. What is clear is that, despite adherence to the 'authority/subordination' formula, the courts have nevertheless responded to changes in employment practices, even in the traditionally sensitive field of liability for physicians.[113]

[110] *Ibid* at 67.
[111] *Ibid* at 68.
[112] *Ibid* at 68.
[113] *Ibid.*

C. Lessons for Ethiopia

There is a major difference between the status of doctors practicing in hospitals under French and Ethiopian law. French law has for long been considered a salaried doctor in the public and private hospitals neither as an independent contractor nor employee. Rather, the salaried doctor was considered professionally independent who is not subject to the authority and control of the hospital. However, the public hospital is liable for the fault in service of the salaried doctor under administrative law principles, while the private hospital is contractually liable for its salaried doctor, too. Nonetheless, recently, salaried doctors in public and private hospitals are considered employees under the tort principle under Article 1384 (5). Most commentators noted that, practically, there is little technical difference in the liability of the hospital in contract, administrative and tort law. This was the main reason that the traditional control test in Article 1384(5) was interpreted to mean a salaried doctors is an employee of the private hospital by the Criminal chamber of the *Cour de cassation* decision in 1992.

In contrast with French law, Ethiopian law and health care system clearly shows that most doctors' practice in the hospitals is based on employment relationship. Doctors in the public hospitals are civil servants while doctors, except some specialists working as independent contractors, in the private hospitals are employees governed by the labour law. That is why Art.2651 specifically referred to the doctors, for whom the hospital is civilly liable, as an employee of the hospital. This does not, however, mean doctors in Ethiopia do not have professional independence. Indeed, the hospital cannot dictate a doctor as to her clinical practice. The fact that most doctors in Ethiopia are employees of hospitals implies that the apparent control test in Art. 2134 of Ethiopia's CC should be interpreted broadly. Its literal

interpretation would render doctors independent contractors even in the presence of employment relationship.

Moreover, the control test is not applicable to doctors where their employer cannot provide direction to them due to the high expertise and technicality of their professional knowledge and skills, and in view of the profession's established autonomy in practice.[114] Generally speaking, control test "can no longer be said to represent many employment relationships accurately and a more sophisticated test is required." [115] Prof. Giliker, after thorough comparative analysis of tests used to identify contract of employment, concluded that contextual approach is preferred option as follows:

> As seen in relation to the civilian system which seek to maintain a test based on subordination or the right to give instructions, it may appear to avoid the uncertainties of the multi-faceted common law test, but changes in the workplace and increased use of technology have led the courts to interpret the test loosely, requiring only the possibility of some form of control. It has been objected that this renders the test a formality, described as being simultaneously ambiguous and inadequate, whilst raising difficulties in relation to professional whom it is difficult to encompass within any test based solely on control. On this basis, despite its uncertainties, the 'totality of relationship' test is to be preferred. It highlights the complexities of modern employment practices, the key distinction between

[114] Ellen Picard, "The Liability of Hospitals in Common Law Canada" (1981) 26 McGill LJ 997 at 1016 -7; *see* also P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London, Butterworths:1967) at 46.
[115] *Supra* note 1 at 78.

> employees and independent contractors, and the economic framework within which employment operates.[116]

Neither the control test nor its flexible interpretation by French courts is, thus, adequate to determine the status of the civil servant doctors' practice in the private wing. The basic reason is the concept of authority or subordination has less to do with doctor's practice in the private wing. Rather, the understanding of the total relationship of the doctor and hospital is important to determine independent contractor-civil servant status of the doctor practicing in the private wing. Thus, the Canadian contextual approach should be preferred in Ethiopia to interpret Art.2134. Its elements provide the basic factors to consider in deciding whether the doctor in the private wing is an independent contractor or a civil servant of the federal hospital. The next part analyses the private wing practice through this contextual approach.

III. Contextual Approach to Understand a Doctor's Practice in Private Wing

A. Justifying Contextual Approach

As discussed above, the central issue to determine regarding the liability of a federal hospital for private wing practice is to establish the status of the doctor practicing in the private wing as either a civil servant or an independent contractor. The law has defined a civil servant as "a person employed permanently by a federal government institution."[117] Based on this definition, to consider the doctor practising in the private wing of a federal

[116] *Ibid* at 78-9.
[117] *Federal Civil Servants Proclamation*, Ethiopia 2007, no.515 art.2(1).

hospital as a civil servant of the hospital is simplistic and indefensible. Obviously, the doctor is a permanent employee of the federal hospital. However, the doctor does not receive any payment from the hospital for her service in the private wing. If she were considered a civil servant of the hospital according to the civil servants law, her practice should be considered as overtime work for which she is entitled to compensatory leave or payment from the hospital.[118] But in fact, the doctor receives income from her practice in the private wing by charging her patients. Thus, if applying the definition of a civil servant does not easily determine the status of a doctor practising in the private wing, how could such status be determined?

The argument that considers a doctor working in the private wing as an independent contractor would rely on Art. 2134 of the CC which provides a test to identify an independent contractor. This provision stipulates that a person carrying out work for another person where the latter does not control the former, and where the former "is to be considered as having retained his independence," is considered an independent contractor. If by this the doctor is not an independent contractor, she should be considered a civil servant of the federal hospital for her private wing practice, too. Consequently, the federal hospital will be liable for the doctor's fault in the private wing practice.

As I argued in Section 2.3 above, the Canadian contextual approach is a persuasive option for Ethiopia to interpret Art.2134 of the CC to determine the status of the doctor in the private wing. There are two more reasons that justify the use of the contextual approach. First, the last phrase of Art.2134

[118] *Ibid* art. 34 (2). A civil servant is entitled for compensatory leave or payment based on her choice for her overtime work for the employer government institution.

of the CC, i.e., "is to be considered as having retained his independence," confers discretionary power on the court to consider the merit of each case, in addition to considering control as a factor, and determine whether the doctor retains independence to discharge her responsibility. Thus, Ethiopian law is framed in a manner to accommodate dynamic and novel circumstances arising in the future, such as private wing practice.

Second, the use of a contextual approach to interpret Art.2134 of the CC will render the federal hospital liable for the doctors' practice in the private wing (to be discussed below). There are compelling policy reasons in Ethiopian law to justify this result. These policy reasons are compensation, loss distribution and deterrence. A brief discussion of these policy considerations and how they justify the liability of a federal hospital for doctors' practice in the private wing now follows.

1. Compensation

The classical purpose of the vicarious liability of an employer for the fault of his employee is to ensure that a victim who sustained damage due to the latter's fault gets adequate compensation. A hospital has deeper pockets than its doctor employee, and thus, is in a better position to compensate the victim who suffered injuries because of the negligent conduct of a doctor.[119] However, in Canada, both the hospital and the doctor are insured, and as the insurer is the one bearing the liability, this theory is hardly defensible. Nonetheless, in Canada, the theory of compensation is still considered a

[119] Joseph Eliot Magnet, "Preventing Medical Malpractice In Hospitals: Perspectives from Law and Policy" (1979) 3:3 Leg Med Q 197 at 199.

sound justification to increase the low rate of compensation for victims of negligent conduct.[120]

Prof. Krzeczunwicz justified the Ethiopian law of liability for others on this theory that the employer is "better situated" to compensate the victim of its employee's fault.[121] This theory is more applicable in Ethiopia than its insignificant application in Canada, where the doctor and the hospital are equally insured. In Ethiopia, there is no legal obligation or voluntary assumption of insurance protection by doctors. Indeed, due to the rarity of legal actions against a hospital for its employee doctor's fault, it is uncommon for a federal hospital to have liability insurance coverage. However, it is generally known that a federal hospital is financially better able to compensate the injured patient than its civil servant doctors can. A federal hospital liability for the private wing practice of doctors ensures patient access to compensation.

2. Loss Distribution

According to this theory, the employer is in a better position to absorb the cost of liability and insurance premium and to distribute it to society through increasing the cost of its services or products.[122] This principle is closely connected with compensation justification as it reaffirms the higher capacity of the employer to compensate, and its ability to easily absorb the cost and to distribute its loss. A hospital can easily pass on to patients through health care service fee increases, its costs of insurance premium. In Canada, given

[120] *Supra* note 78 at 108; see also *supra* note 61 at 532.
[121] *Supra* note 30 at 38.
[122] Atiyah proposed this theory as a modern theory justifying vicarious liability. *See supra* note 114 at 22-8; Kurt J.W. Sandstrom, "Personal and Vicarious Liability for Wrongful Acts of Government Officials: An Approach for Liability under the Charter of Rights and Freedoms" (1990) 24 U B C L Rev 229-274 at 233.

that both hospitals and doctors are insured, this theory is criticized as incompatible with the purpose of the liability of hospitals, which is "efficiency in …loss allocation," *i.e.*, discouraging insurance duplication.[123]

The Ethiopian law of liability for others seeks to compensate the victim of an injury caused by the civil servant of the hospital through voluntary subscription to liability insurance coverage.[124] Such an insurance scheme socializes the risks of the hospital among the same group of insured through the payment of premium.[125] Therefore, establishing vicarious liability on a federal hospital for doctors' fault in private wing practice is justified on the theory of loss distribution for two main reasons. First, the federal hospital has deeper pocket to buy a liability insurance plan. Secondly, the federal hospital can pass on the cost of its liability insurance plan for its private wing practice to service fees. The hospital, not the doctors, can set the fees for health care services provided in its private wing.

3. **Deterrence**

A hospital can reduce the occurrence of medical malpractice through quality assurance mechanisms, risk management and peer review.[126] Thus, the vicarious liability of a hospital will ensure it improves its management, working procedures and implements quality assurance systems to prevent the occurrence of medical malpractice.[127] In short, the vicarious liability of a

[123] *Supra* note 119 at 197.
[124] *Supra* note 30 at 31.
[125] *Ibid* at 30.
[126] *Supra* note 77 at 26.
[127] *Supra* note 78 at 108; *supra* note 119 at 197. In *Sagaz* case the Supreme Court of Canada observed that "vicarious liability is deterrence of future harm as employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision." *Supra* note 82 at para.32.

hospital has a deterrent effect to prevent the occurrence of medical malpractice in the hospital.[128] Deterrence is also an important policy consideration to establish the liability of a federal hospital for its doctors' practice in the private wing. It supplements compensation and loss distribution, and in this way, establishes the liability of a federal hospital for doctors' practice in the private wing on solid theoretical and policy justification.

Altogether, the flexible wording of Art.2134 of the CC allows the court to consider new developments or frontiers in the law of liability for others; thus, warranting the use of the type of contextual approach. The result, that is, holding a federal hospital liable for private wing practice, complies with the underlying policy reasons for the law of liability for others in Ethiopia.

Next, I will show how the interpretation of Art.2134, using the contextual approach of distinguishing an independent contractor from a civil servant, yields the result that a doctor in private wing practice is not an independent contractor but a civil servant of the federal hospital.

B. Application of the Contextual Approach

On whose account does the private wing operate? The private wing is defined as "a system established within a federal hospital" implying that the unit is an integral part of the federal hospital. As such, there is neither a separate legal personality for the private wing, nor any legal requirement to register the unit as a business entity. Rather, it uses the legal personality of the federal hospital (which also uses the legal personality of the Federal

[128] *Supra* note 78 at 108.

Ministry of Health or the University, whichever it is accountable to). Therefore, the doctors practicing in the private wing are under the legal umbrella of the federal hospital. Nonetheless, the fee they collect from patients is kept in a bank account that is separate from that of the federal hospital's account.[129] However, this account is not operated as if the doctors were the owners of the private wing. The fees are collected through the use of federal government receipt recognized by the Ministry of Finance and Economic Development.[130] Any procurement for the private wing is made in accordance with federal government procurement laws.[131] Moreover, annual internal and external audits of the financial statement of the private wing are undertaken under the auspices of the Board.[132] Even the doctors do not have the right to hire or recruit the cashier and accountants of the private wing.[133] This lack of the minimum administrative and management privileges to run the activities of the private wing illustrates that the doctors cannot be regarded as if they are practicing as independent private contractors.

Degree of federal hospital control over the doctor in the private wing: The degree of control the hospital exercises over the private wing and doctors' practice there is significant. Practice in the private wing is supervised by the Head of the private wing who is accountable to the hospital CEO.[134] The Head is responsible for planning, program setting and their implementation;[135] and to recommend to the CEO, the appointment of

[129] *Supra* note 21 arts.5(2) & (3).
[130] *Ibid* art. 5 (1). All federal government revenue or income shall be collected by the receipt recognized the Ministry of Finance and Economic Development.
[131] *Ibid* art. 6 (2).
[132] *Ibid* art. 5 (5).
[133] *Ibid* art.5 (4).
[134] *Ibid* art. 3(1).
[135] *Ibid* art. 3(2 (5)).

doctors to the private wing[136]. To be recommended for such appointment, a doctor must have a good evaluation for the performance in her regular employment with the federal hospital.[137] After being appointed to the private wing, the rules governing the civil service apply to the doctor and her performance evaluated by the Head, and this is essential for the doctor to continue providing her services in the private wing.[138] The doctors have no capacity to determine the fee the patient shall pay for their services; the fee is determined by the Board upon the recommendation of the CEO based on the proposal submitted by the Head of the private wing.[139] The net income of the private wing is distributed among the doctors and other health professionals not by the decision of the doctors but by the CEO upon the recommendation of the Committee. Thus, a doctor in the private wing does not enjoy control over her practice, in contrast to a doctor who is an independent contractor and controls the administration and management of the health care services she provides.

Who provides the premise and equipment? The federal hospital provides the practice premise. Medical laboratory and radiography services are done using the federal hospital's equipment and in accordance with a program that would not prejudice the provision of the regular services of the hospital.[140] Surgical equipment, sterilization machines and other limited resources of the federal hospital are also utilized to provide private wing services in accordance with a program that would not prejudice the regular services of

[136] *Ibid* art. 3(2(8)).
[137] *Ibid* art. 4(1(2)).
[138] *Ibid* art. 4(1(5)).
[139] *Ibid* art. 9(2(5)).
[140] *Ibid* art. 7(2(3)).

the hospital.[141] The federal hospital also provides beds for in-patient services of the private wing, which may not exceed 10 per cent of the total hospital beds.[142] The only medical equipment the doctor may bring to the private wing is her stethoscope. This test strengthens the doubt if a doctor practicing in the private wing could be considered an independent contractor.

Can a doctor hire an assistant in the private wing? To be regarded as an independent contractor, a doctor should be able to hire assistants, such as a nurse, laboratory technician and x-ray technician. However, in the private wing, the recruitment of all health professionals and support staff is approved by the CEO upon the recommendation of the private wing Head. Thus, a doctor in the private wing has no right to hire an assistant. However, in most cases, a doctor who is an independent contractor can hire assistants.

Who bears the financial risk for the private wing? The initial capital required to set up a private wing that meets the expectations of patients is provided by the federal hospital.[143] Thus, the financial risk rests with the hospital. A doctor has no investment in the private wing. If the private wing could not attract adequate market to generate income to sustain its running costs, there is no financial loss to the doctor.

Is the private wing a profit making enterprise for the doctor? The more patients the doctor treats, the more the income the private wing will make. Thus, as the net income of the private wing increases, the amount the doctor receives increases too. However, no direct profit accrues to the doctor's

[141] *Ibid* art. 7(2(4)).
[142] *Ibid* art. 7(2(2)).
[143] *Ibid* art. 7(1(1)).

pocket, and the doctor may not consider the private wing as a profit making enterprise, but only as a source of modest income. Indeed, the whole purpose of the private wing is not profit making but to ensure motivation and retention of the doctor in the federal hospital.

All in all, for the reasons described above, a doctor practicing in the private wing cannot be an independent contractor. Thus, it can be concluded that a doctor practicing in the private wing of a federal hospital is still a civil servant of the hospital. Consequently, the federal hospital will be liable for the doctor's official fault in the private wing. As described above, this conclusion has sound policy justifications, too.

The counterargument against the thesis of this paper may claim that doctors in the private wing should be considered independent contractors. I said that part-time practice by specialists in private hospitals is considered to be practice by independent contractors, and which is, governed by contract law. Consequently, it may be argued that Art. 2134 of the CC should be interpreted by analogy so that the practice of the doctors in the private wing of a federal hospital is similar to the part-time practice of a specialist in a private hospital. The patient chooses the specialist who practices part-time in a private hospital; similarly, the patient has the right to choose the doctor in the private wing. The specialist in part-time practice gets a percentage of the hospital income from his service; similarly, the doctor in the private wing gets a share of the income the private wing generates in accordance with the decision of the CEO of the hospital. Both practices are usually undertaken outside regular working hours of the private and federal hospitals. In addition, the public understands that the private wing is a separate entity in the federal hospital because of the requirement of higher fee than the regular service fee,

the right to choose a doctor, and the outside of regular working hours that the private wing maintains. Indeed, the nomenclature 'private' conveys to the public the message that the health care service of the private wing is like that of private hospitals.

Nonetheless, I would argue that the analogy focuses on the similarity between the part-time practice of a specialist in the private sector, and a doctor in the private wing, a perception that ignores the basic differences between the two forms of practice. The most important difference is that in the part-time practice of a specialist in the private sector, she enjoys higher independence and control over her practice, while the doctor in the private wing is significantly subjected to the control of the federal hospital, as discussed above.

Conclusion

Art.2134 of the Ethiopian CC should be interpreted using the contextual approach so that examining different aspects of a given relation would explain the status of a doctor practicing in the private wing in her relations with the federal hospital. A doctor in the private wing does not practice entirely on her own account. To start with, she is subjected to control by the federal hospital in terms of her recruitment, performance evaluation and dismissal from the private wing. In addition, she does not provide the initial capital to start private wing services, the room or equipment for the practice. Also, she cannot hire an assistant for her private wing practice and does not bear any financial risk for practicing in the private wing.

On the other hand, the private wing cannot also be considered as a profit making enterprise. This is because the doctor is not primarily there to make money but to address the human resource retention problem, namely doctor attrition and lack of motivation to practice in federal hospitals. The totality of the relationship between the doctor practicing in the private wing and the government hospital, thus, unfolds that the doctor should not be considered as an independent contractor, but a civil servant. Accordingly, the federal hospital must be liable for her official fault in the private wing.

Law for the Future: the Legal and Policy Foundation for Intergenerational Environmental Justice in Ethiopia.

Yenehun Birlie Mamo[♣]

Abstract

Intergenerational equity, fairness in the relationship between generations, is a term used in many ways for many different purposes. In environmental protection laws, it refers to equity in the use and enjoyment of the fruits of nature among generations. More than a decade and half passed since the right to a clean and healthy environment is recognized as one of the fundamental rights in Ethiopia. However, it is not clear if this right can be extended to the future generations whose interest is being damaged by an unsustainable utilization of natural resources by the present generation. So far, little regard has been given to this issue both by the judiciary and the academia. This piece examines the laws and polices related to the environment and development so as to spot the legal and policy foundation for intergenerational equity in Ethiopia.

Introduction

Environmental problems are among the greatest challenges of our time which raise concerns not only about the life of the present but also the very existence of future generations. Ethiopia has one of the most degraded

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environments in the world. In terms of climate change vulnerability, Ethiopia is among the worst affected ones. At stake is not only the quality of "our" lives today but also the very existence of our offspring. This piece is an attempt to explore the legal and policy underpinning for the protection of the environmental interest of the future generations in Ethiopian context.

After analyzing the Constitutional environmental rights, environmental policies, legislation and development policies and strategies, the article concludes that intergenerational equity is a legally and politically accepted principle in Ethiopia. Despite the fact that the "intergenerational equity" label may be relatively new in Ethiopian legal system, respect for future generations has always been a concern for societies as humans endeavour to improve or sustain the quality of life for their descendants. But due to various factors such as acute poverty, misconception of the relationship between development and environmental protection by the government and the populace, lack of political commitment manifested partly by incapacitating the environmental protection organs, lack of environmental education, awareness, information, poor public participation, restricted access to justice and lenient and vague laws, the environmental interest of the future generations is not being duly implemented in Ethiopia.

The Piece begins with the discussion of the theoretical framework of the theory of intergenerational equity (IGE). The main part of the article deals with the legal and policy foundation of IGE in Ethiopian environmental legal regime. Starting with a passing remark on the moral, cultural and religious foundations for IGE, this part will make a thorough examination of the constitutional, legal and policy base for IGE in Ethiopia. The piece is

brought to an end by a concluding remark which also suggests some solutions for the proper implementation of IGE in the country.

I. Intergenerational justice: Concept, Principles and Background

The term "intergenerational equity"[1] (IGE hereinafter) is very loaded that it is hardly possible to find a common definition for it. It is defined by the International Law Association as "the rights of future generations to enjoy a fair level of the common patrimony".[2] IGE is also defined as "an obligation to conduct ourselves so that we leave to the future the option or the capacity to be as well off as we are".[3] The leading scholar in the area, Edith Brown Weiss, said that IGE is a concept that says humans "hold the natural and cultural environment of the Earth in common both with other members of the present generation and with other generations, past and future'.[4]

IGE seeks to strike a balance between the present and future generations in the use and enjoyment of natural resources. Who are future generations? There is no universally accepted definition of the term. It is said that on the face of "continuum of human existence, it seems problematic to define the

[1] In this piece the terms "intergenerational equity" and "intergenerational Justice" are used interchangeably.

[2] International Law Association, 2002 New Delhi Declaration on Principles of International Law Relating to Sustainable Development, ILA Resolution 3/2002, in ILA Report of the Seventieth Conference, New Delhi (London: ILA, 2002), Principle 2, available online: ILA :http://www.ila-hq.org.

[3] Samuel Man Abuse of intergenerational Equity, at 1, available at http://computingforsustainability.com/2011/09/04/abuse-of-intergenerational-equity, (accessed on 23 September 2012)

[4] Edith Brown Weiss (1990), *In Fairness to Future Generations*, Environment, Vol. 32, No. 3, at 8. E. Aguis also adopts more or less similar definition. E. Agius, "*Obligations of Justice: Towards Future Generations: A Revolution on Social and Legal Thought*" in E. Agius, (ed.), Future Generations and International Law (London: Earthscan Publications, 1998) at 10.

future generation as the people who are not-yet-born because 'future people' are born into the present generation every minute."[5] The meaning of "future generations" ranges from today's children to unborn persons distant in the future without limitation.[6] Given the closeness of climate change threat, Weiss argues that, there is no theoretical basis for limiting such rights to immediately successive or distant generations. [7]

"Weak sustainability" (WS) and 'strong sustainability" (SS) are the two alternative ways of looking at the need to ensure that future generations can supply their needs. In WS, the environment is regarded in terms of "the natural resources or natural capital that is available for wealth creation, and to say that future generations should have the same ability to create wealth as we have".[8] Therefore, future generations will be sufficiently "compensated for any loss of environmental amenity by having alternative sources of wealth creation".[9] In SS the environment is viewed as presenting more than just economic potential that "cannot be replaced by human-made wealth".[10] It argues that future generations "should not inherit a degraded environment, no matter how many extra sources of wealth are available to them". [11]

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[5] Burns H. Weston (2008), *Climate Change and Intergenerational Justice: Foundational Reflections* 9VTJENVTLL 375 at 383.

[6] Ibid.

[7] Edith Brown Weiss (ed.) (1992), *Environmental Change and International Law: New Challenges and Dimensions*, United Nations University Press, at 610. It is said, given the closeness of the climate change threat and, therefore, the urgent need to mobilize against it, it is pretty much imperative to think of "future generations in more or less proximate terms in this context: embracing persons potentially within one's personal awareness if not actual knowledge, possibly but not necessarily involving overlapping generations". See Weston supra note 5, at .386.

[8] Sharon Beder (2000), *Costing the Earth: Equity, Sustainable Development and Environmental Economics*, *New Zealand Journal of Environmental Law*, 4, (227-243) at 228-229.

[9] Ibid

[10] Ibid

[11] Ibid

For three closely inter-related reasons of 'non-substitutability', 'uncertainty' and 'irreversibility', SS seems many scholars' favorite. [12] It is argued that human knowledge does not offer any substitute for many types of environmental assets such as the ozone layer, the climate-regulating functions of ocean phytoplankton, and the watershed protection functions of tropical forests.[13] Therefore, the present generation cannot be certain if we can substitute the environment for future generations. Uncertainty regarding the functions of natural resources and the possible consequences of depletion and degradation are the other reasons for rejecting WS. Some depletions and degradations lead to irreversible losses of species and habitats, while others though not irreversible may be too costly and take centuries to repair.[14]

Generally, the non-perfect substitutability[15] of the natural and human- made capital for one another leads us to conclude that future generations may not be better off by the wealth created than by a rich environment. This, in turn, lends itself to a conclusion that WS is not "compatible" with the concept of IGE. Finally, it should be noted that as employed in the existing international instruments, IGE constitutes, in addition to fairness among generations of

[12] See Pearce, David, Markandya, Anil & Barbier, Edward (1989), *Blueprint for a Green Economy*, Earthscan, London, chapter 2

[13] Sharon Beder, supra note 8 at 229. This non-substitutability of natural resources has been strongly advocated by environmentalism movements which argue that plants and animals have intrinsic value and, hence, deserve protection in their own right

[14] Ibid.

[15] Even when it is possible to substitute, Weiss argues, developing substitutes may be more expensive than conserving the existing supplies. Resource depletion and species extinction narrows the options available to future generations. It is for this reason that Weiss argues "conservation of options" should, as we will discuss in the sections to come, be one of the vital principles of IGE. Even if we accept that it is possible to replace natural resources with human made assets, WS also suffers from another limitation. It raises another equity issue among future generations as human made substitutes are likely to be more expensive than the natural resources (which can also be available freely) and be available only to those who can afford. This will be an inequitable redistribution of access and is against one of the values of IGE- 'conservation of access' as we will discuss in what follows. See Weiss (1990) supra note 4, at 8., Sharon Beder, supra note 8, at 230.

different times, an "intra-generational" component which dictates that there must exist "fairness in utilization of resources among human members of present generations, both domestically and globally".[16] The success of IGE much depends on our success in achieving fairness in utilization of natural resources between and among the present generations of one or more countries particularly between citizens of the developed and developing countries.

II. Arguments for and Against IGE

It may not be so difficult to concede a moral obligation to future generations conceivably as they can't have any say in decisions taken today that may affect them. However, regarding the present generations' legal obligation (and future generations' right), as much as there are proponents, there are plenty of scholars who have made their skepticism heard. In this part, we will examine different arguments forwarded by proponents and opponents of the principle of IGE.

A. Argument for IGE

Some environmental damages pose long-lasting threats that affect the health and wellbeing of future generations. It seems imperative to craft legal frameworks to protect the environmental interest of remote generations. Future generations can't exercise influence over the present ones to demand the protection of their environmental interest.[17] Taking advantage of this power asymmetry, the present generation affects the desires and

[16] G.F. Maggio(1997), *Inter/Intra-Generational Equity: Current Applications Under International Law for Promoting the Sustainable Development of Natural Resources* 4 BFELJ 161, p. 163-164.
[17] Ibid

circumstances of the future generation and most importantly harm their interest.

This concern was seriously noted in the Brundtland Report: [18]

> Many present efforts to guard and maintain human progress, to meet human needs, and to realize human ambitions are simply unsustainable – in both the rich and poor nations. They draw too heavily, too quickly, on already overdrawn environmental resource accounts to be affordable far into the future without bankrupting those accounts …. We act as we do because we can get away with it: future generations do not vote, they have no political or financial power; they cannot challenge our decisions. But the results of the present profligacy are rapidly closing the options for future generations.

The consideration of the power of the present generation to determine or influence the advantages or disadvantages, suffering or wellbeing alone "suffices to support strong *prima facie* obligation not to do what will be seriously disadvantageous to future persons".[19]

For Weiss, IGE is a derivative of the main purpose of global environmental stewardship: "sustaining the life-support systems of the planet, in large part, to ensure the continued survival of the human beings".[20] She argues that the natural environment is the common property of all generations of human

[18] *World Commission on Environment and Development, Our Common Future,* Oxford University Press, 1987 *at 13*

[19] Clark Wolf, Intergenerational Justice, at 280. available at. www.public.iastate.edu/~jwcwolf/Papers/Wolf_Intergenerational_Justice

[20] Shorge Sato : *Sustainable Development and the Selfish Gene: A rational Paradigm for Achieving Intergenerational Equity*,11N.Y.U.Envt.L.J.503,at 509.

species.[21].Being beneficiaries entitled to use and benefit from it, the present generation "hold the Earth in trust for future generations".[22] Her theory stipulates that all generations have an equal place in relation to the natural system.

She argues that it makes sense to view the human community as a partnership among all generations.[23] Basing her argument on John Rawls' *Original Position*, she contends that in this partnership, no generation knows beforehand when "it will be the living generation, how many members it will have, or even how many generations there will ultimately be".[24] A generation that is placed somewhere along the spectrum of time but does not know in advance where it will be located "would want to inherit the Earth in at least as good condition as it has been in for any previous generation and to have as good access to it as previous generations." This requires each generation to pass the planet on in no worse condition than it received and to provide equitable access to its resources and benefits. Each generation is thus both a trustee for the planet with obligations to care for it and a beneficiary with rights to use it.[25]

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[21] Weiss (1990), supra note 4, at 10, see also, Weiss, Intergenerational Equity: A Legal Framework for Global Environmental Change in *"Environmental change and international law: New challenges and dimensions"*, Weiss ed.) Tokyo: United Nations University Press, 1992 at *611*. She argues that the theory also applies to cultural resources since they form an integral part of the legacy we give to future generations and are linked to our role as a member of the natural system.

[22] Ibid.

[23] Ibid. E. Burke said that "as the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living but between those who are living, those who are dead, and those who are to be born." See E. Burke "*Reflections on the Revolution in France*," 130-140 (1790), in 2 *Works of Edmund Burke*, 368 (London, 1854; Reprint Services, 1987).

[24] Weiss, Intergenerational equity: a legal framework for global environmental change**,** supra note 21, at 610.

[25] Ibid. Professor Paul A. Barresi strongly propounds that our concern for the future generation is deeply rooted in our inherent nature to perpetuate our selves. "As products of natural selection", he wrote, "human beings 'care' about future generations in the sense that

This partnership among all generation of the human species is recognized in different international soft and hard laws, cultures and religions. Christianity and Islam are among the religions which recognize the environmental interest of the future generations. It is mentioned in the Universal Declaration of Human Rights which recognizes the inherent dignity and of equal and inalienable rights of "*all members of human family"* (emphasis mine).[26]

In 1972, the United Nations Stockholm Conference on the Human Environment recognized that we have a responsibility to "protect and improve" the environment for both the present and the future generations. Likewise, the 1973 Endangered Species Convention, and the 1974 Charter of Economic Rights and Duties of States, the 1982 U.N. World Charter for

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each of us is genetically predisposed to do whatever it takes to perpetuate our genes into the next generation in the form of individuals who are genetically predisposed to do the same". Any legal regime intended to achieve intergenerational equity should start "by harnessing our inherent tendency to care about certain members of future generations in certain ways". He argues that neither the ICJ decisions nor the religious and other cultural doctrines Weiss mentions do support for existence of a deeply rooted, essentially worldwide, cross-cultural consensus in favor of recognizing intergenerational group rights and duties in environmental matters. They are manifestations of concerns about the welfare of future generations. For more detailed analysis, see Paul A. Barresi, *Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena, 11* Tul. Env. L.J. 59, 70 (1997), and also Paul A. Barresi, *Frame, and the Intergenerational Imperative:A Reply to Professor Weiss on "Beyond Fairness to Future Generations*"(1998), 11 Tul. Envtl. L.J. 425 pp, 433-434.. See also Weiss (1997), A *Reply to Barresi's "Beyond Fairness to Future Generations*" 11 Tul. Envtl. L.J 89, at 89-90.

[26] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). It is also mentioned in the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the American Declaration on the Rights and Duties of Man, the Declaration on the Elimination of Discrimination against Women, the Declaration on the Rights of the Child, and many other human rights documents reveal a fundamental belief in the dignity of all members of human society and in an equality of rights that extends in time as well as space. See. UN General Assembly, International Covenant on Civil and Political Rights, 16 December1966, United Nations, Treaty Series, vol. 999, Prevention and punishment of the crime of genocide, 9 December 1948, A/RES/260, UN General Assembly, Declaration on the Elimination of Discrimination against Women, 7 November 1967, A/RES/2263, UN General Assembly, Declaration of the Rights of the Child, 20 November 1959.

Nature and the 1997 UNESCO Declaration on Responsibilities Towards Future Generations, have all shown concern for the ecological legacy we leave to future generations.[27] The 1992 Rio Conference on Environment and Development has expressed the commitment to future generations in the context of environmentally sustainable development.[28]

The case laws of both international and domestic tribunals have also contributed their own share to the development of the principle. At the ICJ, Judge Weeramantry has discussed the historico-cultural framework for inter-generational equity in global legal traditions in his lengthy separate opinion exposé on "equity" in the Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark *v.* Norway)".[29] Domestically, in Minors Oposa v. Secretary of the Department of Environment and Natural Resources ("DENR"), the Supreme Court of the Philippines addressed intergenerational equity in the context of state management of national forests.[30]

B. Argument against IGE

There are as many skeptics as there are advocates for IGE. Our traditional understanding of justice and right/duty relationship has been the main obstacle for the recognition of IGE. For ages, justice has been viewed as that which only applies between the present generations. Similarly, rights have

[27] The *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* 1972, UN Educational, Scientific and Cultural Organization, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, availableat:http://www.unhcr.org/refworld/docid/4042287a4.html (accessed 11 December 2012), Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, Resolution adopted by the General Assembly 3281 (XXIX).

[28] The United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992).

[29] ICJ case Concerning Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark *v.* Norway) Judgment of 14 June 1993.

[30] *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* The Supreme Court of the Philippines 33 ILM 173 (1994) (Minors Oposa hereafter).

been treated as claims belonging only to identifiable individuals making it difficult to apply to future generations. It is argued, "[f]uture generations by definition do not exist now; they cannot now, therefore, be the present bearer or subject of anything, including rights".[31] Arguing for the rights of "nonexistent persons" is rejected as making no sense. Professor Stone opines that "[n]onpersons," which include future persons and animals, cannot have rights.[32]

By way of summary, the following are the most common arguments against IGE. These are:[33] (1) We are unable to predict the course of the future and hence unable to predict the consequences of our actions. (2) We are unable to ensure that the needs or wants of our descendants can be met, since intervening generations might not take account of them. (3) Future persons are indeterminate or unknowable to us as individuals. (4) The existence of future persons is contingent, not actual. (5) We are ignorant of the needs or desires of future persons. (6) We are ignorant of the number of future people and hence unable to make utility calculations regarding them. (7) We are unable to determine whether future persons will share our social ideals or be members of our moral community. (8) We are uncertain as to whether we share a social contract with future persons, because we have no reciprocal

[31] Ernest Partridge, On the Rights of Future Generations in D. Scherer, (ed.) (1990) *Upstream/Downstream: Issues in Environmental Ethics*, Temple University Press, at 2.

[32] Christopher D. Stone as cited in Edwin R. McCullough in *"Through the Eye of a Needle: The Earth's Hard Passage Back to Health" (1995), 10 JENVLL 389*, at .399. Stone wrote, "Why ought we to subordinate *our* welfare to *theirs*, for creatures we shall never meet, with whom there is not even the most fictitious 'social compact,' and who are in no better position to return our favors than a contemporary river?

[33] Kristin Shrader-Frechette(2002), Environmental Justice, Creating Equality, Reclaiming Democracy, Oxford University press at 101, See also *Wilfred Beckerman, The Impossibility of a Theory of Intergenerational Justice*, in Joerg Chet Tremmel (2006)"Handbook of Intergenerational Justice" Edward Elgar Publishing Limited, at 53-71

relationship with them; possibly we can affect their welfare, but they cannot affect ours.

Cynics about the prospect of IGE tend to conclude that obligations of 'justice' "simply cannot extend to distant future generations' and if our present actions cause misery "in the distant future, it may be unfortunate for members of future generations, but would not be unjust".[34]

III. Intergenerational Principles, Rights and Obligations

Weiss identifies three basic principles of IGE. These are "conservation of options", "conservation of quality", and "conservation of access". [35] Conservation of options demands each generation to "conserve the diversity of the natural and cultural resource base" so that it does not unduly hamper the existing options to future generations in "solving their

[34] Wolf, supra note 19 at 280. Nevertheless, for some like Annette Baier, the fact that future persons are not now living and that we do not know who exactly they will be or how many of them there will be are irrelevant and do not "rule out the appropriateness of recognizing rights on their part." She claims that if we do agree that "once they are present and actual", future generations "will have rights, what difference is made if we say, not that they *will* have, but that they *do* have rights-*now*?" She said that they are not different from past persons with rights in the present in that they cannot claim any new rights and that their existing rights must be claimed by a person in the present generation. And, since "rights typically are *claimed* by their possessors," the living must empower some persons to make claims for future persons. This issue of allowing the representatives from among the present generations is an issue which is reiterated in the *Oposa vs. Factoran* case. See Annette Baier, The Rights of Past and Future Persons in McCullough (1995), *Through the Eye of a Needle:* supra note 32 at. 400 see also *Minors Oposa*, Supra note 30. Some have also come up with an obligation of us without the corresponding rights of the future generation by borrowing the "perfect duties "and "imperfect duties" concepts from Kant. The problem with this approach as Partridge claims is that it would make great difficulties since "*perfect duties* follow from the claims of rights-holders while *imperfect duties* do not entail corresponding rights". Hence, this position will weaken our duties to future generations since a "duty to respect another's *rights* generally carries greater weight and has priority over an "imperfect" duty to be charitable". Partridge believes that there are rights of the future generations which would give rise to the "perfect duties" of the present generations. See Ernest Partridge *On the Rights of Future Generations* (1990), at 2-4, available electronically at:http://www.mnforsustain.org/partridge_e_rights_of_future_generation.

[35] Ibid.

problems and satisfying their own values, and should also be entitled to diversity comparable to that enjoyed by previous generations". [36] Austere preservation of the *status quo is* not what it advocates for as ecological systems are inherently dynamic and technological advances may create substitutes for certain existing resources or significantly optimize their exploitation.[37] Conservation of quality requires the present generation to "maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received, and should also be entitled to planetary quality comparable to that enjoyed by previous generation".[38] Amid the inevitable change in the environment, the principles requires, its overall quality must be maintained. The last principle, principle of access "calls for the present generation to preserve the legacy of the past to future generations. [39]

Planetary rights and obligation flow directly from the IGE principles outlined above. Rights and obligations coexist in each generations. Hence, from the perspective of intergeneration, the rights are owed to the future generations and these rights are linked to the past generations.[40] These rights and obligations derive from "each generation's position as an intertemporal entity of human family".[41] Hence, the obligations of the present generation are to conserve options, quality and access. Intragenerational rights and duties among members of the present generation further complement these

[36] Ibid.
[37] Id, at 41
[38] Edith Brown Weiss (1990)," What Obligations Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Rights and Obligations to Future Generations for the Environment" 84A.J.I.L.198 at 201-202. (Weiss ,What obligations , hereafter)
[39] Wiess(1990), supra note 4 a t 42.
[40] Weiss, Intergenerational Equity and Rights of Future Generations, supra note 21 at 609.
[41] Ibid.

rights and obligations.[42] The intragenerational rights and obligations derive from the intergenerational relationship that each generations shares with those who have come before and those yet to come. Hence, the intergenerational obligations to save the planet flow from the present generation "both to the future generations as a generation and the members of the present generation, who have the right to use and enjoy the planetary legacy".[43]

Weiss characterizes the right of the future generations as a group right in formulating her idea of "planetary rights".[44] This is an attempt to solve the difficulty posed by the problem of non-identity for the recognition of IGE. This problem arises since the traditional conceptual framework considers rights to be claims belonging only to identifiable individuals. But to start with, planetary intergenerational rights are not rights possessed by individuals. They are, indeed, generational rights. Intergenerational rights have greater moral force than do duties. They provide a basis for protecting the interests of all generations in a healthy and robust planet.

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[42] Ibid.

[43] Id, 610.

[44] Weiss (ed.) (1992) *Environmental change and international law Environmental Change and International Law*, supra note 7. at .9, This group right conception of Weiss has drawn as many criticisms as the very idea of planetary right itself most notably from, Paul A. Barresi in his article *Frame, and the Intergenerational Imperative: A REPLY TO PROFESSOR WEISS ON "BEYOND FAIRNESS TO FUTURE GENERATIONS*"(1998), 11 TUL. ENVTL. L.J. 425, pp 429-432. Recognizing that future generations indeed do have the right as against us, he claimed that this group right approach would diminish the acceptability of the theory by the developed liberal Western countries who are the most polluter of the environment. He said that it will only be accepted by African and some Asian traditions who presently have little share of the international environmental pollution. Weiss has replied to his criticism by saying that the developing countries with all their potential for development will eventually surpass the developed countries in their share of international environmental pollution and, hence, it is a precondition for a theory of IGE to be accepted by the developing and developed countries if it is going to be successful.(Edith Brown Weiss article A *REPLY TO BARRESI'S "BEYOND FAIRNESS TO FUTURE GENERATIONS*" (1997) 11 Tul. Envtl. L.J89, pp 89-92 See also Edwin R. Mccullough, *Through the Eye of a Needle:* supra note 32, at.401.

Barresi contends that IGE is conceptually a matter of intragenerational equity, individual rights and intranational equity. Any attempt to propose IGE rights as a group right, like Weiss does, would enjoy little support among developed countries, who firmly believe in individual rights and are the major polluters of the world environment and without whose support fostering IGE is very difficult.[45]

IV. Intergenerational Justice in Ethiopia: the Status Explored

A. Introduction

Previously, I have hinted that Christianity and Islam, among others, have long asserted the rights and duties of the present generations in relation to the use and protection of nature and its resources. Both religious traditions view humanity as one family having equal rights and responsibilities in relation to the use and enjoyment of the fruits of nature.

Christianity and Islam are the two dominant religions in Ethiopia. In Christianity "God gave the earth to his people and their offspring as an everlasting possession, to be cared for and passed on to each generation".[46] It is clear that nature and its resources are given to humanity equally irrespective of when it will live and the rights do have correlating duties of

[45] Paul A. Barresi (1998), *Frame, and the Intergenerational Imperative: A Reply to Professor Weiss on "Beyond Fairness to Future Generations*" 11 TUL. ENVTL. L.J. 425, at 429-430.

[46] *Genesis* 1:1-31, *17:7-8.* "I will maintain my Covenant between Me and you, and your offspring to come, as an everlasting covenant throughout the ages, to be God to you and to your offspring to come. I give the land you sojourn in to you and to your offspring to come, all the land of Canaan, as an everlasting possession. I will be their God." *Genesis 17:7-X.* Weiss has made a relatively lengthy discussions on the two major religions dictation on the rights and duties of each human beings in relation to the utilization of natural resources).

caring for and passing it on to the next generation at least in the same situation it inherited.

In Islamic law, man has inherited "all the resources of life and nature" with certain religious duties to God in using them.[47] "Each generation is entitled to use the resources but must care for them and pass them to future generations".[48] The sustainable use of the natural resources is one of the basic tenets of Islamic law. In Islam, nature and its resources are viewed as a joint ownership in which each generation uses according to its need "without disrupting or upsetting the interests of future generations". [49]

From the cultural perspective, one can raise the cultural tradition of the Oromo Society. The Oromo ecotheology teaches a positive relationship between God, humanity and nonhuman creations. It dictates that "man can exploit nature only if the use is reasonable and respectful".[50] Dr. Workneh states that "one cannot endlessly exploit family members, individuals or groups within society, or nature."[51] The ecotheology encourages the "need to avoid needless exploitation of the Earth and its resources"[52] which is available both for the present and the future generations. The importance of this ecotheology for sustainable natural resource exploitation cannot be over stated here. The farmers of Konso are well known for their homegrown special terrace building, which is one of the best locally available techniques

[47] *Islamic Principles for the Conservation of the Natural Environment*, 13-14 (IUCN and Saudi Arabia, 1983) at 13.
[48] Ibid.
[49] Ibid.
[50] Workineh Kelbessa (2005), *The Utility of Ethical Dialogue for Marginalized Voices in Africa*. Discussion paper, Addis Ababa University, at 14.
[51] Ibid.
[52] Ibid.

for soil and water conservation and has an incredible contribution for realizing sustainable development.[53]

There are also some sayings which have an intergenerational implication. To mention but one, there is an Amharic saying "*mogn yeletun bilih ye'ametun*" which means, *"The fool cares for his day, the wise for his year"*. This has a great impact on shaping the communities' thinking about the future generations and their fair share in the natural resources. Interpreted generously, it may mean that while the unwise worries with immediate economic growth, the wise worries about "sustainable" development which may have long term benefit not only for himself but for his descendants. Not only that, the northern part of Ethiopia has usually been affected by periodic drought which has often caused hunger and famine. But no matter what happens, the farmers will never consume the seeds and animals which they believe are very important to the future of their own selves as well as the future of their children and grandchildren. Moreover, whosoever fails to save assets for his children would be greatly condemned.

Hence, the above discussion reveals that diverse cultural and religious traditions in Ethiopia presume the existence of successor generations of at least their own "blood community" and care about their wellbeing.

Also**,** it must be noted that although a well-defined environmental legal regime has been attained since the coming into power of the EPRDF, Ethiopia had had laws aimed directly or indirectly at conserving natural resources and pertaining to the protection of the environmental interest of the

[53] Aynalem Adugna, *Population and Environment* at 83 available at www.EthiodemographyAndHealth.Org, (last accessed on 23 October 2012).

future generations. The most important one being the State Forest Proclamation which had the objective of ensuring " a continuous supply of forest products for *the benefit of the present and succeeding generations of the* Ethiopian people" (Emphasis mine).[54] Others like the Proclamation for preservation of Game and Fishes[55] which came in the aftermath of the 1931 Constitution, a Proclamation to provide for the Conservation and Development of Forest and Wildlife Resources[56] have also impliedly recognized the environmental interest of the future generations. Moreover, as we will see below, the 1931, 1955 Revised and 1987 constitutions of the country had all something to do with the environmental interest of the future generations.

And it should also be noted that the intergenerational thinking has a place in the Civil Code of Ethiopia. Under article 2, it is stated that "[a] child merely conceived shall be considered born whenever his interest so demands, provided he is born alive and viable". [57] This provision aims at ensuring that the preborn child's rights to both economic inheritance and other benefits are taken care of. Though it may mean stretching the provision too much to say that the preborn child's environmental interest is one of the interests the provision envisages to protect, at least one can conclude that intergenerational thinking is not new in the country's legal system.

It is against these historical antecedents, cross-cultural analogues and legal backdrop that this part of the article sets to explore the legal and policy

[54] See the preamble of State Forest Proclamation, No 225/1965.
[55] Proclamation for preservation of Game and Fishes*(* before the establishment of *Negarit Gazeta).*
[56] A Proclamation to Provide for the Conservation and Development of Forest and Wildlife Resources No 192/1980.
[57] Civil Code of the Empire of Ethiopia, Proclamation No.165, 1960, article 2.

foundation for IGE in the Ethiopian environmental laws and policies. In attempting to set out the following examples of IGE principles, it is not meant to be completely exhaustive. Virtually, all environmental conservation laws have the future in them and, as the result, their implications on the environmental interest of the future generations, intentionally or otherwise, cannot be denied. The author has chosen to focus on laws and policies that have made explicit reference to the future generations and also the Constitution. Furthermore, principles such as "sustainable development' and "green economy", which the theory of IGE is closely aligned with, are discussed.

B. The Constitutional Framework

In elaborating a framework for the domestic protection of any human rights, emphasis is generally placed on their inclusion in a constitutional bill of rights as they are most securely protected when they are entrenched as fundamental norms of a supreme law. Thus, this part of the piece is devoted to discussing the constitutional framework of IGE in Ethiopia. The 1955 Revised Constitution of Ethiopia is remarkable as far as the environmental interest of the future generations is concerned. Under article 130, it is ambitiously declared that"[t]he natural resources in the waters, forests, land, air, lakes, rivers and ports of the Empire are (a) sacred trusts for the benefit of present and succeeding generations of the Ethiopian people".[58] The 1987 Peoples Democratic Republic of Ethiopia Constitution (PDRE) also impliedly recognized the environmental interest of the future generations. The Constitution provided for the duty of citizens to protect nature and natural resources, especially to develop forests and to protect and care for

[58] Revised Constitution of Ethiopia, 1955, Article 130 (B).

soil and water resources.[59] This duty is imposed, one can argue, to protect the interests of both the present and future generations.

The Constitution of the Federal Democratic Republic of Ethiopia (herein after the Constitution) recognizes the right of all persons to live in a clean and healthy environment.[60] Government and citizens are designated as duty bearers of the right.[61] This type of formulation of environmental rights and obligations is reiterated in all regional state constitutions in almost identical terms.[62] Does the obligation here include the obligation owed to future generations? One can argue that on the face of sheer uncertainty in the Constitution over the government's and citizens' actual obligation to the present generation, it could be very difficult to extend it to future generations. The case is not helped by the jurisprudential void the area is currently suffering from.

However, it can also be argued that the obligation of the citizens and the government under the Constitution includes the duty owed to future generations. This argument can be strengthened by taking into account the following facts and considerations. Firstly, the influence of the Rio Conference[63] on the environmental and development provisions of the

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[59] The Constitution of the Peoples Democratic Republic of Ethiopia,1987, Art. 55 (3).

[60] The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 (the FDRE constitution hereafter), *Federal Negarit Gazeta, year 1 no.1, article 44(1).*

[61] Id. article 92(4) cum 9(2).

[62] See, the regional constitutions, article.42& 105 of Afar, Art.44 &113 of Amhara, Art.44 &, 114 of Benishangul Gumz, art.44 &116 of Gambela, art. 44 & 77 of Harari, art. 44 &107 of Oromia, art.44 & 104 of Somalia, SNNPR art.44 cum 120 of Southern Nations Nationalities Regional State Constitution (SNNPR).

[63]Gro Harlem Brundtland ET AL., *Our Common Future: The World Commission on Environment and Development, Our Common Future (the* BRUNDTLAND Report hereafter) (1987). Ethiopia participated in the Rio Conference through the then Premier Tamirat Layne. See Girma Hailu, Environmental Law, Ethiopia, infra note 64.

Constitution is notable. Inspired by the Rio Conference the Ethiopian government has made sustainable development the main guiding principle of development in the country.[64] As such, article 43 of the Constitution declares that all peoples of Ethiopia as a whole have the right to sustainable development.[65] Sustainable development was coined by the Brundtland Commission which defines it as a development that "meets the needs of the present without compromising the ability of future generations to meet their own needs".[66] Sustainable development is a means to integrate environmental concerns into development programmes and rests on a commitment to equity with future generations. Hence, the Constitutional right to sustainable development entails a corresponding obligation the present generations owes to future generations with regard to the use and enjoyment of the environment.

Therefore, it is very difficult to think that a Constitution that undertakes to take into account the interest of future generations in development endeavors of the present generations under article 43 would deny the future generations the right to a clean and healthy environment in the next provision. In fact the whole spirit of the Constitution[67] coupled with the timing of its making as the interest of future generations was a hot topic/issue worldwide following the Rio Conference shows that the interest of the future generations has a firm place. Consequently, for any one reading article 43 and 44 together,

[64]Girma Hailu (2000), *Environmental Law, Ethiopia, International Encyclopedia of Laws* Kulwer Law International at 27-28.

[65] Article 43 of the FDRE constitution, see specially sub article 4 of it. See also articles 43 of all the regional constitutions except Afar regional state which provides for sustainable development under article 41.

[66] World Commission on Environment and Development (WCED). *Our common future.* Oxford: Oxford University Press, 1987 at. 43.

[67] As we will see below, both the environmental rights and the right to sustainable development are recognized as a group rights. Besides, Land is the common property of all Ethiopians. See articles, 43, 44, and 41 of the FDRE Constitution.

logic would demand him to conclude that the governments and the present generations' environmental obligations are supposed to be owed to future generations as well.

Secondly, a survey into the international Conventions to which Ethiopia is a party gathers ample evidence that Ethiopia has committed itself to protect the environmental interest of future generations. These conventions are made an integral part of the law of the land by the Constitution.[68] Besides, Chapter Three of the Constitution on Fundamental Rights and Freedoms is expected to be interpreted in conformity with the principles of the Universal Declaration of Human Rights, International Human rights Covenants as well as International instruments adopted by Ethiopia.[69] In its preamble[70] and principle part,[71] the Convention on International Trade in Endangered Species of Wild Fauna and Flora calls for protection of wild flora and fauna and strict regulation of trade in specimens of these species which are available both for the present and the future generations to use and enjoy. The Convention on Biological Diversity (CBD) sets out its objective as **"**[c]onservation and sustainable use of biological diversity for the *benefit of present and future generations*".[72] Article 3 of the United Nations Framework Convention for Climate Change expressly incorporates IGE. The article provides that: "[t]he parties should protect the climate system for the *benefit of present and future generations of human kind*, on the basis of

[68] The FDRE Constitution, art. 9(4).
[69] Id., art. 13(2).
[70] *Convention on International Trade in Endangered Species of Wild Fauna and Flora,* Washington DC, March 1973 and Amended on 22 June 1979, Art II.
[71] It advocates for a strict regulation of trade in specimens of species in a way that should not endanger the survival of species, recognizes right of future people to use and enjoy from wild flora and fauna.
[72] *Convention on Biological Diversity*, Rio Dejerio, 1992, preamble; third paragraph, see also Art. 1 stating that the components of biodiversity should be used sustainably and shared equitably.

equity and in accordance with their common but differentiated responsibility and respective capabilities" (Emphasis mine).[73] Hence, interpreting article 44 in line with the Conventions discussed above reveals that the right to a clean and healthy environment is guaranteed both for the present and future generations.

Thirdly, interpretation of the Constitutional environmental rights in a way that includes the interest of the future generations is becoming common in the world these days. In the famous *Oposa V.Factoran* case, the Supreme Court of the Philippines concluded that everyone's right to the use and enjoyment of nature's endowment imposes a corresponding duty to protect it for the future generations.[74] Moreover, at least twenty-two domestic constitutions since 1970s and particularly since 1990s have recognized the inter-temporal right[75] which suggests the emergence of IGE as a customary international law.

Also, the current trend by many authors[76] is taking environmental rights not only as the rights of the present generations but also of the future

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[73] *United Nations Framework convention on Climate Change*, Rio Dejanerio, 1992, art.3 (1). See also article 2 which states that economic development should proceed in a sustainable manner".

[74] Manguiat, Ma Socorro Z "*Maximizing the value of Oposa v. Factoran*". Georgetown International Environmental Law Review. at 3.

[75]Albania, Andorra, Argentina, Brazil, East Timor, Eritrea, Georgia, Germany, Ghana, Guyana, Iran Malawi, Micronesia, Namibia, Papua New Guinea, Poland, Qatar, South Africa, Uganda, Vanuatu, and Zambia.See Marcello Mollo *et al., Environmental Human Rights Report: Human Rights and the Environmnet-Materilas for the 61st* Session of the United Nations Commission on Human Rights, Geneva, March16-April22 2005 (Oakland California: Earthjustice Legal Defense Fund,2005) A-1.

[76] Ibid, See also Richard P. Hiskes (2005), *The Right to a Green Future: Human Rights, Environmentalism and Intergenerational Justice*, Human Rights Quarterly, Vol. 27, No. 4 1346-1364, , Edith Brown Weiss (ed.) (1992) Environmental change and international law: supra note 9, *Manual on the rights of the Children* at *www.eycb.coe.int/compasito/chapter_5/5.html.*

generations. The duty to preserve and protect the environment is a duty that is owed "not merely to all other human beings, non-human beings, and inanimate objects in present time but extends also to future generations."[77] Numerous international instruments from the Charter of the United Nations, the Universal Declaration of Human Rights and its two International Covenants through a host of conventions and declarations that are concerned with the dignity, worth and progress of mankind support the right of the future to a clean and healthy environment. It is said "[w]hen we speak of mankind, we speak of the human race as it exists today and also as it will in the future".[78] Considered to be among the so-called third generation or collective rights, environmental rights "affect whole societies or groups of people rather than just individuals… [who] share in the common heritage of humankind*"*. [79]

Hiskes refers to environmental rights as "as a special category of rights distinctive for its bearers' connectedness to groups, future generations, and even fellow living organisms sharing the same environment.**"**[80] He argues that environmental rights ("emergent rights" as he prefers to call them) are rights that are markedly different from rights usually attached to individuals

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[77] Manual on the rights of the Children at w*ww.eycb.coe.int/compasito/chapter_5/5.html*. see also Alan Boyle , Human Rights or Environmental Rights: A Reassessment, electronically available at http://www.law.ed.ac.uk/file_download/publications/0_1221_humanrightsorenvironmentalrightsareasses.pdf.

[78] Weiss (ed.) (1992), *Environmental Change and International Law*, supra note 7 at 176. It is said that 'an intergenerational dimension must be necessarily inferred in these international instruments extending to all future generations as an obligation *erga omnes* that derives some support from customary international law and is regarded as an emerging norm of customary international law**.** See L. Gündling, *"Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility? Do We Owe a Duty to Future Generations to Preserve the Global Environment?"* 84 A.J.I.L. at 190& 212.

[79] *Manual on the rights of the Children,supra note 77.*

[80] Richard P. Hiskes, The Right to a Green Future: supra note 76, at 1351.

for two reasons. First, they are the response to environmental "threats that are themselves emergent phenomena".[81] According to him, the object of the right, "environment" "is a "collective product of individual human activity".[82] So, it is very difficult, if not impossible, to attribute environmental problems to a single agent. Even when this is possible, in most cases, it is not the isolated acts of the individuals that pose bigger menace but the cumulative effect and interaction of individual acts. It is in response to this problem that "emergent" environmental rights are considered to be necessary.

Environmental rights are there not just to protect an individual from another identifiable individual's foul play as is the case in most existing laws. They are rather rights "against the effects of all the unseen, unnamed, perhaps no longer living fellow citizens who collectively made choices, took actions and made policies that threaten us now".[83] Furthermore, environmental rights intend to protect the future generations from actions or welfare will be hugely affected by our decisions while we are alive."

Second, Hiskes claims that environmental rights are rights that we "hold only because of our relationships with others that cause collective effects on our shared environment".[84] Put differently, they are rights due to us-not because of "something in our individual nature-but because of the effects of our relationships with others".[85] Moreover, those

[81] Ibid.
[82] Id. As Chobanian recapitulates,"[e]nvironmental pollution is of a fundamentally different nature than isolatable single agent threats to our well-being". Collins-Chobanian , cited in Richard P. Hiskes, *The Right to a Green Future*: supra note 76 at 1353
[83] Hiskes supra note 76, at 1354.
[84] Id.1353.
[85] Ibid. See also Jack Donnelly (1989), Universal Human Rights in Theory and Practice ,at 14.

relationships involve other living humans and future generations. The unique relationship with the future invoked by emergent environmental rights makes it necessary to ascribe rights to future generations as well.

Generally, the above discussion shows that there are compelling logical and pragmatic reasons to extend environmental rights to future generations. Accordingly, one can argue that "all persons" referred to under article 44 of the FDRE Constitution refers not only to "all persons" of the present but also of those who will live in the future. Thus, the obligations to protect the environment under the Constitution flow from the present generation both to the present generation and members of future generations who have the right to use and enjoy the nation's legacy. The Constitution's employment of the terms "all persons" and "peoples of Ethiopia as a whole" under articles 44 and 43, respectively, instead of 'everyone, every person, every citizen" e.t.c. as employed in most cases in Chapter Three suggests that the right to a clean and healthy environment and of development are envisaged to be group rights. Due to the unique nature of environmental rights that connects the past, the present, and the future and of the problems the rights aim at solving, collective environmental woes, this right must be interpreted as including future generations' right.

From an intragnerational perspective, a cumulative reading of articles 25 and 44 of the Constitution reveals that equality in the use and enjoyment of environment and its natural resources among the present generation of Ethiopia is guaranteed.[86] Moreover, the Constitution states that it is the duty of the government to formulate policies that ensure and promote equitable

[86] Artilce 25 of the FDRE Constitution declares the equality of all Ethiopians without any discrimination on the basis of nation, nationality, color, sex, birth… or any other status.

distribution of wealth among all Ethiopians.[87] The equality of women and men in utilization and enjoyment of the country's natural resources is guaranteed as well.[88]

C. IGE in the Environmental and Developmental Policies and Programmes

This issue of sustainable development has been reiterated in the Conservation Strategy of Ethiopia (CSE)[89] which serves as a blueprint for sustainable development in the country and the main source of the 1997 Environmental Policy of Ethiopia (EPE herein after).[90] Reiterating the recognition of environmental sustainability in the FDRE Constitution and in the national economic policy and strategy as a key prerequisite for lasting success, the EPE aims at an "overall comprehensive formulation of cross-sectoral and sectoral issues into a policy framework on natural resources and the environment to harmonize these broad directions and guide the *sustainable development,* use and management of the natural resources and the environment".[91]

The EPE has taken the issue of IGE one step further by explicitly recognizing the environmental interest of the future generations. The Policy declares that:[92]

> The overall policy goal is to improve and enhance the health and quality of life of all Ethiopians and to promote sustainable social and economic development through the sound management and use of natural, human – made and cultural resources and the environment as a whole so as to meet

[87] Artilce 89(1&2), see also article 90(1) of the FDRE Constitution.
[88] See articles 35(1,6&7),89(7), 25 cum 44 of the FDRE Constitution.
[89] *Conservation Strategy of Ethiopia, Volume 1.The* Resources Base, its Utilization and Planning for sustainability, National Conservation Secretariat in collaboration with Ministry of Economic Development and cooperation, 1996.
[90] FDRE (1997), Environmental Policy of Ethiopia (hereafter EPE).
[91] Id., section 1.4.
[92] Id ,at 2.1.

> the needs of the present generation without compromising the ability of the future generations to meet their own.

In what seems in line with the Weiss's "conservation of diversity" model discussed in part one, the policy under its specific policy objectives has stated that essential ecological process and life support systems, and biological diversity shall be preserved so that the "*satisfaction of the needs of the future generations is not compromised"(*Emphasis mine).[93] Moreover, it is stated in the policy that "species and their variants have the right to continue existing, and are or may be useful now and/or for the *generations to come*" (Emphasis mine).[94] The EPE also pronounces that renewable natural resources shall be used in such a way that their regenerative and productive capabilities are maintained and where "possible enhanced so that *satisfaction of the needs of the future generations is not compromised*" (Emphasis mine).[95] Moreover, the issue of sustainability and intergenerational equity is mentioned here and there in the policy.[96] From the sectorial environmental policies, the water sector and the forest sector policies repeatedly mentioned the issue of sustainable development.[97] These sectoral guidelines in the policy are meant to benefit the country by helping to achieve sustainable development by avoiding the careless use and destruction of Ethiopia's fragile environment and precious natural resources on which present and future generations depend. The Policy also recognized the intragenerational aspect of IGE by stating that "social equity shall be assured particularly in

[93] Id, at 2.2(a).
[94] Id. sec.2.3 (q).
[95] Id.sec 2.2(a).
[96] See, for instance, sections dealing with non renewable resources, forest management, at 3.2(f), energy policy 3.5(b).
[97] The Federal Democratic Republic of Ethiopia, *Ethiopian Water Resource Management Policy*, Ministry of Water resources, 2001.

resource use".[98] The equality of men and women in the use and management of natural resources is also asserted.[99]

The Wildlife Development, Protection and Utilization Policy and Strategy sets out the sustainable protection and development of the countries wildlife as the most important strategy of the sector**.** Particularly, section 2.2 states "[p]rotecting the wildlife resources and their habitat, maintaining the balance of nature and transfer the same to *the next generation* in accordance with the international wildlife conventions and agreements to which the country is a signatory" (Emphasis mine). [100]

As mentioned above, Ethiopia is a party to the Biodiversity Convention which is meant to protect the world's biodiversity for the benefit of the present and future generations. Based on the principles therein, Ethiopia has adopted a Strategy and Action Plan in 2005. The Strategy underlines the importance of conserving biodiversity for attaining sustainable development.[101] The Strategy aims at containing the erosion of biological diversity and ensuring its conservation "*for the benefit of present and future generations" (Emphasis mine).*[102] Its overall goal is to see to it that "[e]ffective systems are established that ensure the conservation and sustainable use of Ethiopia's biodiversity, that provide for the equitable sharing of the costs and benefits arising therefrom, and that contribute to the

[98] EPE, supra note 90, sec.2.3(L).
[99] Id at 2..3 (j).
[100] The Federal Democratic Republic of Ethiopia Ministry of Agriculture and Rural Development Wildlife Development, Protection and Utilization Policy and Strategy, March 2005, Addis Ababa, section 2.2.
[101] FDRE (2005), Institute of Biodiversity Conservation, National Biodiversity Strategy and Action plan.
[102] Id. Section 3.2.

well-being and security of the nation". [103] The Strategy is more ambitious in that it wants to protect species that might not "have known direct economic value today" as may "*turnout to be economically important in the future*" (Emphasis mine).[104] This, indeed, is in line with the Biodiversity Convention and the principle of "Conservation of Options"[105] set out by Weiss.

The two five years development Plans of Ethiopia, A plan for Accelerated and Sustained Development to End Poverty *(*PASDEP)[106] and the Growth and Transformation Plan (GTP)[107] adopted sustainable development as a guiding principle. The GTP's long term objective is "to become a country where democratic rule, good-governance and *social justice* reigns (upon the involvement and free will of its peoples; and once extricating itself from poverty and becomes a middle-income economy" (Emphasis mine).[108] Anchoring on natural resources protection and development is indentified as a key to realizing the plan.[109] Most importantly, the plan aims at "integrated and sustainable development and utilization of water resources …ensuring fair and equitable utilization of the resources taking into consideration the demand and benefit of the future generation…"[110]

The GTP has singled out climate change and its consequential unpredictable weather conditions with potential negative impacts particularly on

[103] Ibid.
[104] Id .1.2.
[105]Weiss (1990), supra note 4. At 37.
[106]Ethiopian : Building on progress, A *plan for Accelerated and Sustained Development to End Poverty* for 2005/6-2009/10 volume 1, Main Text Ministry of Finance and Economic development ,Sept.2006.
[107] The Federal Democratic Republic of Ethiopia Growth and Transformation Plan (GTP hereinafter) 2010/11-2014/15, September 2010, Addis Ababa.
[108] Id. Section 2.1.
[109] Id. Section 5.1.3
[110] Id, 5.4.5

agriculture[111] as one of the most important challenges to its effectiveness. Hence, it provides that "building a carbon neutral and climate resilient economy and enforcement of existing environmental laws are priority actions in connection to the environmental conservation."[112] To achieve that, the Ethiopian government has come up with Climate Resilient Green Economy (the CRGE herein after) strategy.[113] Recognizing the fact that the country is severely exposed to the effects of climate change though its contribution to the causes of the change is one of the lowest in the world, the CRGE document declares its ambition to exploit the unique opportunity and necessity climate change presents "to switch to a new, sustainable development model".[114] The CRGE is completely cognizant of the fact that rapid economic growth, if not carefully managed and planned, "may jeopardize the very resources it is based on and lead to unsustainable levels of use … preventing the current generation from passing on an equivalent level of resources *to the next generation*" (Emphasis mine). [115]

D. In Environmental Laws

In addition to the Constitution and other policies discussed above, environmental legislation has explicitly or impliedly recognized IGE. A case in point here is the Environmental Protection Organs Establishment Proclamation.[116] The term "environmental protection" is defined under this Proclamation as "sustaining of the essential characteristics of nature and

[111] Id. Section 9.2
[112] Id. Section 8.7.3
[113] Federal Democratic Republic of Ethiopia: *Climate-Resilient Green Economy strategy, at I. The strategy* was adopted under the leadership of the Prime Minister's Office, the Environmental Protection Authority, and the Ethiopian Development Research Institute.(CRGE, hereinafter).
[114] Id., at III.
[115] Id at 16.
[116] *Environmental Protection Organs Establishment Proclamation* No.*295/2002*.

enhancing the capacity of the natural resource base with a view to safeguarding the interest of the present generations *without compromising the opportunity for the future"* (Emphasis mine).[117] This Proclamation which precedes virtually all post-FDRE environmental laws serves as the starting point of all actions and legislation. It can serve as an interpretative tool for all provisions both in this proclamation, in the Environmental Impact Assessment proclamation,[118] Environmental Pollution Control Proclamation,[119] etc. None of the subsequent proclamations has defined the term "Environmental protection" which suggests that only the definition under proclamation 295/2002 is to be used when the need arises. Thus, any law, policy, strategy and decision that has environmental protection as its direct or indirect objective should take into account the environmental interest of the future generations.

The Federal Environmental Protection Authority of Ethiopia (the EPA hereinafter) is established with a responsibility to "formulate policies, strategies, laws and standards, which foster social and economic development in a manner that *enhance the welfare of humans and the safety of the environment sustainable [Sic]*, and to spearhead in ensuring the effectiveness of the process of their implementation" (Emphasis mine).[120] Thus, safeguarding the interest of the future generations is one of the duties of the EPA. It is for this reason that the 2003 EPA Environmental Impact Assessment (EIA) Procedural Guideline makes equity one of the core values of EIA.[121] Similarly, Environmental Units[122] and Regional Environmental

[117] Ibid, article 2(6).
[118] Environmental Impact Assessment Proclamation, infra note 140.
[119]Environmental Pollution Control Proclamation No.300/2002.
[120] Ibid, art. 3.
[121] EPA (2003) Environmental Impact Assessment Procedural Guideline series 1, section 4.2.1.

Agencies[123] are duty bound to implement the right of future generations related to the environment.

Environmental Pollution Control Proclamation under article 11 recognizes public interest litigation (PIL herein after) which has a great significance for environmental protection not only of the present generation but also of the future ones.[124] Under this proclamation, anyone who believes that someone is polluting or is likely to pollute the environment can bring a legal action without showing vested interest.[125] This aspect of the Proclamation has a constitutional foundation under the FDRE Constitution which recognizes a broad access to justice.[126] The minute of the constitutional assembly confirms that it is possible to bring justiciable matters (like environmental issues)[127] and it can be brought by any person not only for the interest of the present but representing future generations.[128]

In *Oposa v. Factoran* case, the first of its kind in the world, the Supreme Court of the Philippines granted standing to a group of children who sued to uphold their environmental rights and those of the future generations.[129] The children represented by the Philippine Ecological Network, a Manila

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[122] Environmental Protection Organs Establishment Proclamation, Supra note 119, art. 14.
[123] Id. Art.15.
[124] EPC supra note 119.Article 11(2).
[125] Ibid.
[126] See FDRE Constitution Article 37.
[127] For details on the issue of enforcement of environmental rights, see James R. May and Erin Daly (2011), New Directions in Earth Rights ,Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmnetal Rights Worldwide, IUCN Academy of Environmental Law, at 1. See also JAMES R. MAY AND ERIN DALY (2009), Vindicating Fundamental Environmental Rights Worldwide OREGON REVIEW OF INTERNATIONAL LAW Vol. 11, 365, at 366-439.
[128] (Minute of the Constitutional Assembly),**የኢትዮጵያ ሕገ መንግስት ጉባኤ ቃለጉባኤ ጥራዝ-3-ሕዳር 8-13/1987 ጥራዝ** 00001-000063
[129] Minors Oposa, supra note 30.

Environmental Group, sought to stop the logging of the fading old-forests. The children argued that continued deforestation would cause irreparable injury to their generations and succeeding ones, and hence would affect their constitutional rights to "a balanced and healthy ecology".[130] The court held that the children had standing to defend the rights of their generation to a sound environment and to perform their duty to preserve that right to the future generations.

One can, therefore, argue that any public spirited person who believes that someone is polluting or is likely to pollute the environment and hence violate/will violate the right to a clean and healthy environment of his generation and that of future generations can bring legal action against the perpetrator in the Ethiopian courts. By doing so, not only can he defend his constitutional right under article 44 of the FDRE Constitution but also perform the constitutionally imposed duty to protect the environment. And it should be noted that this right to standing in environmental matters is allowed both for physical and juridical persons including NGOs.

Unfortunately, this liberal standing to sue is allowed only on pollution cases. Not only that the case can only be brought against the actual or potential polluters and not against government bodies which fail to discharge their duties.[131] This is confirmed by the supreme courts' decision in *APAP v. EPA* case. Using the PIL procedure provided in the Proclamation, Action for Professionals Association for the People (APAP herein after) brought a court

[130] Ibid.

[131] Action for Professionals .Association for the People (APAP Vs. Environmental Protection Authority, Civil file no.64902, Federal First Instance Court, Oct.31.2006 unpublished. (APAP V. EPA hereinafter)

action against EPA.[132] The applicant alleges the pollution of the Akaki and Mojo Rivers by different industrial effluents which cause great danger to the life and health of the people. The applicant further alleges that the EPA fails to carry out its obligation of stopping the pollution. The First Instance Court rejected the case by an order on the preliminary objection stating that APAP, the applicant, can't take a court action against the EPA unless it is a polluter itself.[133] The Court reasoned out that the cumulative readings of Articles 11(1) and 11(2) of Proclamation 300/2002 does permit any public spirited citizen to bring a legal action against the polluter and not against the EPA fail for failing to discharge its mandated duties.[134] An appeal was made to the Federal High Court which confirmed the decision of the lower court for the very same reason.[135] APAP finally applied to the Supreme Court Cassation division but the case was rejected for absence of fundamental error of law.[136]

In the absence of an administrative procedure law and poor access to environmental information that would open up the government and the absence of judicial review, arguably, putting environmental protection organs out of the reach of PIL begs many questions and hence can be counted as a missed opportunity. Little or no environmental sensitization of or misperception by the judiciary of the relationship between poverty reduction or development and environmental protection will remain to be a

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[132] Ibid. The applicant (APAP) argues that PIL environmental cases is allowed "because environmental well-being involves public interest and because the related rights are basically *group rights* that enshrine many human rights". See *APAP v.EPA*, application to the Supreme Court Cassation division, June 9, 2008.

[133] APAP *v*.EPA, Supra note 131.

[134] For a detailed treatment of the Case, see Sisay Alemayehu, *Action Professional Association for the People v. the Ethiopian Environmental Protection Authority: a Torchbearer or a Lost Opportunity?,* the Ethiopian Human Rights Series Vol.IV.at 66-85

[135] APAP (Appellant) *v*.EPA (Respondent), Federal High Court, Order of 8 May, 2007, File No.51052.

[136] APAP *v*.EPA, application to the Supreme Court Cassation division, 9, June 2008.

problem in a foreseeable future. As seen in the *APAP v. EPA* case, courts are unsympathetic to environmental cases. The rejection of the case based on preliminary objection without adequately assessing the competing arguments of both parties[137] thereby invoking their inherent power of judicial review that any active court would have done, demonstrates the courts' reluctance to engage themselves in novel cases like protection of the environmental interest of future generations. Hence, the absence of a judiciary as an active partner to sustainable development by extending its reach beyond its traditional field would continue to be a problem for the development of jurisprudence of protection of the environmental interest of the future generations. Even worse, the courts don't have a clear understanding of their role in the implementation of the rights guaranteed by the Constitution which partly explains their disinterest in the environmental cases.[138]

The other proclamation worth mentioning here is the Environmental Impact Assessment Proclamation which has constitutional and environmental policy roots and whose primary objective is the promotion of sustainable development.[139] As per the Proclamation, environmental impact assessment has to be undertaken on proposed development activities, legislation, policies

[137] See Sisay Alemayehu,supra note 134,at 83

[138] The author had the chance to visit some five First Instance Courts and the High Court of Addis Ababa (in 2007 and 2009) and talked to quite a few judges. During the conversation, it was clear that they believe that they don't have any role in implementing the constitutionally guaranteed rights, in the absence of an enabling legislation; that environmental protection is a "luxury" in this country. More than 50% of the Supreme Court, 46% of high court and 48% of first instance (Woreda) court judges in five regions including Addis Ababa thought that judges have limited or no role in enforcing the human rights chapter of the Constitution. 341 judges were interviewed in the survey. *Assefa Fiseha and Solomon Nigus, Report on the Needs Asessment for in service training of Judges and Prosecutors, June 2009.*

[139] See, for instance, EPE, supra note 90, at 2.3(f). It advocates the principle of precaution. See article 92(2) of the FDRE Constitution.

and strategies. The proclamation also provides that the principle of precaution shall be followed when there exists a conflict between short-term developmental benefits and long-term environmental protection.[140] Properly performed, EIA is a useful tool for promoting sustainable development and includes many components that can help facilitate intragenerational and intergenerational equity. But, the practice of EIA in the country leaves much to be desired and its usefulness for the promotion of the environmental interest of the future and the present generations is fully appreciated by many.[141]

V. Concluding Remarks

In our previous discussions, we have seen that intergenerational environmental thinking has a place in the cultural, religious, and legal and policy frameworks in Ethiopia. But one may ask if the future generations of this country at all deserve the concern identified above.[142]

It can be argued that in the presence of acute poverty where millions of people lack access to basic needs, where the concern is not about quality of life but about life itself and "saving" for ones' future use is hard to practice,

[140] Environmental Impact Assessment Proclamation No. 299/2002, the preamble and article 4(2).

[141] Solomon Kebede, *Some Reflections on Environmental Governance, infra* notes 154. Solomon expressed that only very few projects are undergoing EIA in Ethiopia. He also mentioned that EIA is restricted at the project level leaving Strategic EIA out. Public Lecture by Dr. Twelde Berhan Gebreegziabher Director General of EPA, 7 May 2009, at *Akaki* Campus, Addis Ababa University. I got the chance to participate in the lecture in which expressing the fact that EIA is not being undertaken at a level he would like to see, the director stated the bright future EIA will have in Ethiopia .

[142] It shall be noted that IGE applies not only to the future generation of one community or one person or one nation but to all future generations of humanity. But the discussion in this part is made in relation to the future generations of all Ethiopians since if intergenerational equity is adequately taken care of at the national level, most of the problems of inequity in the world can be tackled. But, this is not, as not noted in the forgoing discussions, to dwarf the importance of intragenerational equity for the prevalence of the intergenerational justice.

concern for the future generations is likely to be seen as a luxury that will have to wait. In a least developed country like Ethiopia, economic and social development and poverty eradication are the first and overriding priorities. Even environmental protection in general is "still a luxury". When one finds himself in a desperate situation like this, he may not worry about his future interest let alone his descendants or the descendants of his species no matter how "hard wired' in his nature the concern may be. Certain studies have shown that culture itself has conceivably undergone a shift away from the intergenerational perspective.[143] Poverty has pushed the future out of view.

But then an equally, if not more, powerful argument can be forwarded in support of future generations' claim for the safeguard of their environmental interest. Firstly, compared to the future citizens of developed countries, the future citizens of developing countries will find themselves in an exceptionally dangerous situation due to the environmental problems created by the present and the past generations. With direct dependence on natural resources rather than developing viable economic options, unsustainable exploitation and rapid population growth, the present (and the past) generations of countries like Ethiopia have caused (and are causing) numerous environmental problems that put both the present and the future generations in an intricate position.

In Ethiopia, renewable natural resources have now run down to a low level of productivity.[144] Their exploitation has been and still is beyond their "self-replicating capacity". The permanent loss in value of the country's soil

[143] Christopher D. Stone (2004), " *Common but Differentiated Responsibilities in International Law*" 98 Am J.Int'l L 276 at 295; see also Lynda Collins (2006), The Doctrine of Intergenerational equity in Global Environmental Governance, Master Thesis, University of British Colombia at 28.
[144] EPE, supra note 90 introductory sentence, paragraph 2.

resources caused by soil erosion is increasingly dire.[145] Much of the natural and cultural heritage is under threat through neglect, decay, removal or destruction as well as through the less visible and tangible impacts of changing socio-cultural values.[146]

Land degradation is the major environmental problem in the country.[147] It is one of the major causes of low and in many places declining agricultural productivity on which about 85% of the population depends and continuing food insecurity and rural poverty in Ethiopia. The depletion and degradation further intensifies poverty, leading to even more intensive depletion and degradation.

Therefore, the vicious circle of 'poverty-environmental degradation-poverty' has put future generations of developing nations like Ethiopia in such a delicate situation. As a result, heirs of poor farmers in Ethiopia may find themselves being treated like aliens. If an Ethiopian farmer in his middle age now believes that he has at least a moral backing to blame his parents for making him live with this terrible natural resource deficit now as they failed to take his welfare into account when planning on their own, he should realize that in the next few decades, failing to invest in land improvement

[145] Id., para.5. The permanent loss in value of the country's soil resources caused by soil erosion in 1990 was estimated to be Birr 59 million.

[146] Id., sec.1.3.

[147] Aynalem Adugna, *Population and Environment* available at www.EthiodemographyAndHealth.Org at 72-73. Primitive land-use practices which included clearing of vegetation cover for farming and fuel, and lack of innovation in farming practices, vague legal environments of land ownership and uncertainty of tenure with the resultant fragmentation of land-holdings, exponential growth in population numbers, several decades of war and conflict (northern Ethiopia), lack of capital resources for investment in environmental rehabilitation, climate change, drought, and the resulting population dislocation, long history of settlement, are among the prominent causes of degradation.

techniques would be tantamount to committing a "genocide" against his descendants.

With a steady increase in industrialization and a fast increase in population in the country, these problems are likely to exacerbate. Hence, viewing from this angle, the future generations of poor countries like Ethiopia have a strong moral claim necessitated by practical realities, in addition to the legal guarantees discussed above, to have their natural resources protected. We can't even think about weak sustainability[148] in this county as we are leaving nothing other than an overdrawn environment and a huge debt to our children and grandchildren.

Secondly, for an exceedingly selfish generation, environmental protection in the interest of the future generation will benefit the present generations. It is said that environmental rights are the only human rights that "are intrinsically tied to the welfare and interests of future generations as moral persons and that provide reciprocal benefits for present generations in arguing for beneficial environmental policies". [149] Hence, it shouldn't be forgotten that even current initiatives undertaken on behalf of future generations have real benefits for the present generation. We are suffering from environmental woes because of what past and present generations have done. The effects of environmental degradation and climate change will not wait for so long. It is being increasingly felt today. Hence, for a selfish generation that doesn't care about his future descendants, the theory of IGE

[148] Weak sustainability claims that future generations will be sufficiently compensated for any loss of environmental amenity by having alternative sources of wealth creation. See generally the discussion in part one.
[149] Hiskes, supra note 76, at 1357.

presents an opportunity for it to enter into environmental protection through the backdoor.

With this moral, cultural, religious, and legal and policy backing for the protection of environmental resources for future generations, one may wonder what the future holds for future generations. It should be noted that as far as legal protection is concerned, as said above, there are concerns regarding its adequacy and clarity. In some parts, it is put as a preambular paragraphs and definitional provisions, some are overly general, ambiguous, and excessively lenient. Furthermore, it is not clear from the Constitution whether its right to clean and healthy environment could be extended to future generations as the rights of future generations and the duty of the present generations in this regard are not clearly articulated. Finally, there is not specific organ mandated with the protection of the interest of the future generations.

Most importantly, even the laws with their inadequacy and ambiguity are not being implemented for the following reasons. The first factor relates to inadequate administrative capacities. There are lack of requisite scientific knowledge, managerial expertise, trained personnel, financial resources, institutional frameworks and popular support necessary to implement effective environmental protection laws both for the present and the future generations**.**[150]

[150]The Ethiopian environmental protection organs, they are poorly financed, and understaffed. Financially speaking, for instance, from the 3,907,642 birr allocated for EPA in the 2000 Ethiopian budget year,2,348,300 was intended to cover the salaries of the employees, and the remaining balance, about one and a half million birr, was intended to cover all of the EPA's other expenses. See the EPA Report, 2007**.**

Secondly, there are inadequate political commitment and popular support. Poverty eradication to increase economic growth and development opportunities being the overwhelming priority of the government, long-term environmental protection for the welfare of the future generations may not be anything more than rhetoric. As the government is caught up with these priorities, it is hard to see any development project blocked or hindered by conflicts with the environmental interest of the future generations at least in the near future**.**

But it should not be forgotten that, as the World Commission on Environment and Development noted, poverty reduction without taking into account environmental protection is a futile exercise.[151] The government's misconception of the link between environment and development is also held by the public and the courts which also do not have a clear understanding of their role in implementing the constitutional environmental rights. The environmental protection campaign, both for the future generations and the present generations, has little popular support and participation.

Future generations cannot contest decisions that would affect their interest as we have seen above. Therefore, there is a need for someone, form the present generations, including NGOs, to bring their case before the court on their behalf. But due to the unfavorable legal environment[152] and political misconceptions regarding NGOs,[153] and the requirement of standing, and

[151] Report of the World Commission on Environment and Development: Our Common Future, Published as Annex to General Assembly document A/42/427, Development and International Co-operation: Environment, August 2, 1987 accessed on September 24, 2012.
[152] S*ee* EPC, article 11.
[153] The *Charities and Societies, Proclamation* paralyzes NGOs thereby restricting them from getting more than 10% of their annual budget from foreign sources should they plan to engage in human rights advocacy. See *Charities and Societies Proclamation* No. 12/2009.

perhaps the judiciary's non-alignment, this has become such a difficult enterprise.

There is a need, therefore, for an increasing capacity building, environmental education and awareness creation, more political commitment, more liberalization of standing rules if the environmental interest of future generations is to be realized. This should, of course, be complemented by the enactment of a law that clearly and adequately protects the needs of the future generations. Otherwise, as it stands now, protection of the environmental interest of the future generations is a little more than a political rhetoric of sustainable development aimed at pacifying environmentalists, deflect pressure from the international community, attracting foreign aid from developed nations and economic or technical assistance from multilateral institutions. As exaggerated and politically motivated some of the criticisms regarding the environmental impacts of some high profile development projects such as Gibe III and the Grand Ethiopian Renaissance Dams maybe, they are not without substance.[154]

[154] The EIA of the Gibe III, for instance was made two years after the construction has started when international financial institutions demanded it for extending loan which is against the principle of EIA which suggest that it should be proactive. See Solomon Kebede, *Some Reflections on Environmental Governance with Emphasis on EA*: A Lecture Delivered to Alabama University LL.M Students, June 2009 (on file with the writer). See also See Public Lecture by Dr. Twelde Berhan Gebreegziabher Director General of EPA Supra Note 141. The problems are worse when it comes to the floriculture industries which have found the Ethiopian environmental regulatory regime favorable to boom. Around 10 floriculture farms have done EIA reports; not with the aim to fulfill the legal requirements but only to get a bank loan from the Development Bank of Ethiopia see. Mulugeta Getu (2009)*Ethiopian Floriculture and its Impact on The Environment: Regulation, Supervision and Compliance*, 3(2) Mizan Law Rev, at 257. Besides no environmental assessment is publicly available for the Grand Ethiopian Renaissance Dam. There are no known plans for watershed management or soil conservation to address it. Ethiopia's Renaissance Dam: A Mega-Dam with Potentially Mega-Consequences at http://thinkafricapress.com/ethiopia/nile-concerns-over-new-mega-dam-egypt-sudan, accessed on 4 December 2012.

Taxing Crime: The Application of Ethiopian Income Tax Laws to Incomes from Illegal Activities

Yosef Alemu[♣]

Abstract

In this article, the author argues that incomes from illegal sources are subject to the payment of income taxes in Ethiopia. The author has made an analysis of the definition of income provided in the income tax law and concludes that the definition of income in the Income Tax Proclamation is broad enough to include incomes from many sources including income from illegal sources. According to the law, in order to categorize an activity as an income, the presence of the economic benefit is the sole element that has to be considered. Even though incomes from illegal sources are in principle subject to the payment of the tax either according to schedule C or, alternatively, schedule D, various factors, specially, problems relating to the structure of the income tax, absence of suitable declaration forms, etc. may create difficulty in taxing the income. Therefore, in order to enable taxpayers to carry out their responsibility without incriminating themselves, the tax authority has to make amendments to its declaration form and other necessary formalities.

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Introduction[1]

Al Capone, the world's best known gangster and public enemy number one, was quoted saying [t]*he income tax law is a lot of bunk. The government can't collect legal taxes from illegal money'*[2] after his sentence for tax evasion in relation to incomes that he generated from illegal liquor trade.

An income tax is one of the main sources for Federal and Regional Governments' revenues. As its name implies, an income tax is a tax on incomes, not on transactions. In this short article, the writer will try to identify the standing of the Ethiopian income tax laws in relation to incomes generated from illegal activities. If illegal activities are to be taxed, then the writer will identify the applicable schedules in order to tax the incomes. Furthermore, an identification of the rules governing deductions in relation to costs incurred in order to generate the illegal income shall also be made. The writer will also discuss some relevant issues such confiscation of benefits from crimes and the relationship between taxation and the prohibition of double jeopardy.

I. Taxing crime in Ethiopia

In some countries, courts permit taxation of incomes from illegal activities, this issue is a well-established tax principle in countries like USA, Canada, UK, Australia, New Zealand and Ireland.[3]

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[1] This article exclusively deals with the Federal Income laws; nonetheless the discussion also applies to income tax laws by regional governments as well. The definition of income in regional tax laws is also the same.

[2] Alphonso ('Al') Capone, the notorious American crime boss, had escaped prosecution for his criminal activities but was convicted of tax evasion and received a custodial sentence. See *Capone v United States*, 56 F 2d 927 (1932).

[3]David Lusty, (2003),"Taxing the untouchables who profit from organized crime", Journal of Financial Crime,Vol. 10 Iss: 3 pp. 209, In USA, there are many court decisions supporting the fact that income from illegal activity should be tax. See James v United

Some scholars argue that taxing income from illegal sources will make government a silent partner in the illegal activities; therefore, the income must be free from tax and the criminal must be punished according to the criminal laws of the country.[4] On the contrary, it is frequently argued that a dollar of profit from unlawful activity will buy just as much as a dollar of lawful profit; hence, the criminal should be subject to the same income tax principles applicable to those incomes considered lawful.[5]

In order to give a fair treatment of the issue, it is better to start first by explaining some important concepts. Accordingly, first we shall defined income and then define taxable income as provided in the income tax laws and we shall finally identify the standing of Ethiopian incomes tax laws with respect to taxing income from illegal activities.

A. Definition of Income

Defining income is one of the trickiest problems in taxation of income. Broader definition of income will give tax administration an opportunity to

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States (366 U.S. 213 (1961). See also Bittker 'Taxing Income from Unlawful Activities' (1974-1975) 25 Case W. Res. L. Rev. 130 at 136.), Commissioner of Internal Revenue v Glenshaw Glass Co.(348 U.S. 426 (1955)), United States v Mueller (74 F.3d 1152), Webb v IRS, USA(15 F.3d 203 (1st Cir. 1994)), Blohm v Commissioner of Internal Revenue(994 F.2d 1542 (11th Cir. 1993)), In UK, as can be seen from the following cases, the courts tend to argue that incomes from illegal activity are taxable *CIR v Delagoa Bay Cigarette Co* Ltd 1918 TPD 391 at 394; *Commissioner of Taxes v G* 1981 (4) SA 167 (ZA) 168C-169H; *CIR v Insolvent Estate Botha t/a 'Trio Kulture'* 1990 (2) SA 548 (A) 556-557; ITC 1545, 54 SATC 464 (C) 474-5; ITC 1624, 59 SATC (T) 373 at 377-8; *Minister of Finance v Smith* 1927 AC 193 at 197-8; *Mann v Nash (Inspector of Taxes)* 1932 1 KB 752 at 757-8; *Partridge v Mallandaine* (1886) 18 QBD 276.

[4]Warneke D & Warden D 'Fraudulent Transactions – Are the Receipts Taxable?' (2003) 17 *Tax Planning* 28, Bittker, Boris I., "Taxing Income from Unlawful Activities" (1974). *Faculty Scholarship Series.* Paper 2289. available at http://digitalcommons.law.yale.edu/fss_papers/2289 accessed on July 11,2011

[5] Stein M 'Tax on the Fruits of Fraud – A Tale of Two Cases' (1998) 12 *Tax Planning* 116, Ranjiana Gupta, 'Taxation of Illegal Activities in New Zealand and Australia'3 Journal of the Australasian Tax Teachers Association (2008) 108, Celeste M Black**,** *Taxing Crime: The Application of Income Tax To Illegal Activities* (2005) 20 AUSTRALIAN TAX FORUM440

collect revenues from as many revenue sources as possible while narrower definition of it is a negative to the public treasury as it curtails the taxation powers of the treasury to restricted fewer items recognized by the law as income. One of the issues relating to defining income is the identification of what an income itself is, for instance, a person with a 2000 birr may use the money in order to purchase a cloth, in this case, which one is the income, the money itself or the satisfaction that the person receives from purchasing and using the purchased cloth? According to Taussig only the latter can be considered income 'all *income consists in the utilities or satisfactions created*'.[6] Seligman concurs with this position when he said *"We desire things at bottom because of their utility. They can impart this utility only in the shape of a succession of pleasurable sensations. These sensations are our true income."*[7] Therefore, at least, for these two economists, an income is not the money itself rather the satisfaction that a person derives by using the money. Nonetheless, this definition of income is impossible to put into practice as it is difficult to assess these utilities of a person from consumption of a particular thing in financial terms. For instance how much is the benefit that a person gets from wearing his new cloth or living his newly built and furnished home. In this regard Haig argued that:

> 'An individual, it is true, can compare the relative worth to him of a pipe or a book or a dinner and arrange his order of consumption without the use of any formal common denominator such as money. Yet this individual would have great difficulty in telling you exactly how much satisfaction he derived from his pipe or his book. **How much more difficult would it be for a second person to measure those satisfactions for him without the aid of some common unit!** [Emphasis mine][8]

[6] Taussig H, Principles of Economics (1916)134
[7] Seligman , Princples of Economics(1914)16
[8] Robet Haig,The Concept of Income –Economic and Legal Aspects(1921)28

Therefore, as a solution Professor Taussig proposed that . . . *for almost all purposes of economic study, it is best to content ourselves with a statement and an attempt at measurement in terms not of utility but of money income.*[9]

Consequently, the definition of income suggested by many economists is this one: '*Income is the money value of the net accretion to one's economic power between two points of time'*. It will be observed that this definition departs in only one important respect from the fundamental economic conception of income as a flow of satisfactions. *It defines income in terms of power to satisfy economic wants rather than in terms of the satisfactions themselves. It has the effect of taxing the recipient of income when he receives the power to attain satisfactions rather than when he elects to exercise that power.*[10]

B. Definition of Income in Ethiopia

The Ethiopia income tax proclamation defines an income as:

> **every sort of economic benefit** including nonrecurring gains in cash or in kind from **whatever source derived and in whatever form paid** credited or received.[11] [Emphasis added]

As can be seen from the above definition, the Ethiopian income tax law has defined an income in terms of benefits received, not actual money. Of course, for actual taxation purposes, these economic benefits have to be changed to money income.

When it comes to the source of income, according to the law the presence of an economic benefit is the most critical factor in determination of whether a

[9] Taussig,cited above at note 6,135
[10] Robert Haig cited above at note 8 ,29
[11] Income tax proclamation, 286/2002, See Art. 2(10).

particular activity suffices as an income or not. The law makes it crystal clear that the source and form of payment of the economic benefit is irrelevant in the determination of whether a particular benefit can be considered an income or not. Accordingly, the source of the income can be employment, business or winning lotteries. By the same token, the payment can be effected using cash or in kind. As long as persons receive economic benefits, then the benefits will be considered incomes.

According to this definition, incomes from illegal sources such as dealing with illegal narcotic substances, corruption, theft and others will be considered incomes. In all these cases, the persons carrying out the criminal activities will get economic benefits from the acts. By doing so, they fulfill the only requirement needed in order to categorize their benefits as an income.

C. Taxable Income

The other equally important concept in imposition of tax on income is the concept of taxable income. The concept of taxable income is an important concept as it effectively defines the income tax base for a tax period. This is because in income tax, the law aims to impose duty on economic benefits generated by a person. In this regard, the taxable income is the one that most precisely reflects person's increases in economic gains during the tax period. The general income simply defines the total economic benefit generated by the person without taking into consideration the actual costs incurred by the person in order to generate that income. The taxable income, on the other hand, takes into consideration the total expenses incurred by the person in order to generate the income. Thus, it precisely reflects the net worth derived by a person for a particular tax period.

The taxable income of a person for a tax period is commonly defined as the gross income of a person for the period less the total costs incurred by the person in order to generate the income. For that reason, in order to derive the taxable income, we must subtract all the expenses incurred in order to generate the gross income. The gross income as defined above is the total of amounts derived by a person during the period that is subject to tax. Our law has defined taxable income as "the amount of income subject to tax after deduction of all expenses and other deductible items allowed under the Proclamation".[12]

D. Exempt Income

There will be amounts that are not to be included in gross income of the person. These amounts are commonly referred to as "exempt income". Exempt incomes are not included in the gross income of a person and thus excluded from the calculation of taxable income.[13]

Tax laws may treat an income as exempt due to various reasons. First, an amount or an entity may be exempt for social reasons. An example of amounts that may be exempt on this basis is compensation payment in case of life insurance.[14]

Second, an amount may be exempt as a result of international convention, agreement, or practice.[15] For example, a country that is a signatory of the Vienna Convention on Diplomatic Relations is obliged to exempt from tax the official employment income and foreign-source income of a foreign

[12] See.art.2(11).
[13] Chaturvedi and pithisaria's, Income Tax Law (1998)654.
[14] See for instance article 13(f) of the Income Tax Proclamation.
[15] See art.13(c) (ii) of the Income Tax Proclamation.

diplomatic officer, consular officer, administrative or technical employee of a diplomatic mission or consulate, consular employee, member of the service staff of a diplomatic mission or consulate, or a private servant of a diplomatic mission.[16]

Third an amount may be exempt for political or administrative reasons. For instance, collecting a tax from persons working in domestic duties as servants and guards is difficult.[17]

Finally, an amount may be exempt as an incentive to encourage a particular activity.[18] For example, the income of a retirement fund may be exempt from tax to encourage retirement savings.

E. Deductions

The other important concept in the determination of the tax base is the issue of deductions. The general principle in case of deductions stems from the general economic principle that it is not possible to generate an income without incurring costs or all outputs require inputs of some kind and deductions are costs incurred in order to purchase these inputs. In case of deductions, a general rule followed by supplementary definition and allowance provisions is the typical approach followed by most jurisdictions. The general rule commonly allows a deduction for expenses to the extent to which they are incurred in deriving amounts included in gross income.[19] Supplemental provisions allow deductions for capital allowances such as

[16] The Vienna Convention on Diplomatic relation 1961, see arts.32-36.
[17] This income is also exempted in Ethiopia, see art.3 of the Income Tax Regulation.
[18] See article 30 of the Income Tax Proclamation, with the intention of encouraging creativity the law exempts from the payment of tax the incomes generated in the form of award.
[19] See art.20 of the Income Tax Proclamation.

depreciation and amortization provisions and as a tax incentive such as charitable donations and retirement fund contributions.[20]

F. Structure of Income Tax

Two theoretical models exist for the structure of the personal income tax. The first one is a scheduler structure. According to this structure, incomes from different sources shall be grouped into different separate schedules and taxed separately. In this approach, each income under a different schedule shall be treated separately. The tax rate, exemptions, deductions, and, at times, mode and time of payment for each schedule shall be different. Incomes are classified into different schedules mainly by using the source of income as criterion.[21] The second one is a global structure. According to this structure, a single tax is imposed on all income irrespective of the source of the income.[22]

Ethiopia follows a scheduler approach and, according to Ethiopian Income Tax proclamation, all incomes are clustered into the following schedules:[23]

- **Schedule 'A'** – Income from employment
- **Schedule 'B'** – Income from rental of buildings
- **Schedule 'C'** – Income from business
- **Schedule 'D'** – Other incomes including incomes from:
    - Royalties;
    - Income paid for services rendered outside of Ethiopia;
    - Income from games of chance;

[20] See art.11 of the regulation and art. 21(1) and art. 13 Income Tax Proclamation.
[21] Lee Burns and Richard Krever, Individual Income Tax(1998)2.
[22] Ibid.
[23] See art.8 of the Income Tax Proclamation.

- Dividends;
- Income from casual rental of property;
- Interest income; and,
- Specified non-business capital gains.

All incomes generated from sources other than employment, rental of building and business shall be taxed based on schedule D.

II. Categories of Taxpayers

Administrative convenience requires classification of taxpayers into different groups at it is not possible to extend the same treatment to all taxpayers at the same time. In addition, principle of economy also requires the tax system to concert tax efforts on those taxpayers with high revenue potential. For this purpose, taxpayers must be classified into different categories. Taxpayers are classified into three categories according to the annual turnover they generate during a particular tax year. The Ethiopian income tax law classifies taxpayers into three categories.[24] Book keeping, declaration of income and other obligations differ from the taxpayer to taxpayer depending on the category they belong to.

A. Category A Taxpayers

Category "A" taxpayers are composed of two groups. The first group comprises of those taxpayers whose annual turnover for a single tax year is 500,000 or more.[25] In addition, any company incorporated under the laws of Ethiopia is a category "A" taxpayer irrespective of its annual turnover.[26] The rational for incorporating companies under category "A" irrespective of their

[24] See art. 18 of the Income Tsax Regulation.
[25] Ibid.
[26] See art.18 (1) (a) of the Regulation.

annual turnover seems to dwell upon the idea that given the present local and international business environment by the time companies are established they must have at least 500,000 as a starting capital.[27]

Category "A" taxpayers are required to keep books and accounts. The books and accounts, among other details, must include the following:[28]

- Gross profit and the manner in which it is computed;
- General and administrative expenses;
- Deprecation;
- Provisions and reserves;
- Business asset and liabilities;
- Date lost of acquisition and the current book value of the good; and,
- All purchases and sales of goods and services related to the business activity.

Keeping books and accounts is a mandatory requirement for Category "A" taxpayers.[29] Consequently, failure to keep books and accounts shall result in the payment of an administrative penalty.[30] Accordingly, if the taxpayer fails to keep books and accounts for one year, it shall pay 20% of the tax assessed as an administrative penalty.[31] If the taxpayer fails to keep proper books and accounts for consecutive two years, the license of the taxpayer will be

[27] According to the Commercial Code, the minimum capital requirement for a share company is 50,000 Birr while for a private limited company it is only 15,000 Birr. Nonetheless, for some businesses there are separate minimum capital requirements for instance for banks it is 500,000,000.
[28] See article 19 of the Income tax Regulation.
[29] Id.
[30] Article 89 of the Income Tax Proclamation.
[31] Id.

suspended.[32] Suspension of the license will force the taxpayer to be out of the business for the period during which the licenses is suspended. This penalty may extend to the extent of revoking the license of the taxpayer depending on the gravity of the act of the taxpayer.[33] In addition to administrative penalties, failure to keep books and accounts results in determination of the tax liability of the taxpayer through estimation.[34] The books and accounts kept by the taxpayers will later be used as a means to determine their tax liability for the tax period.

B. Category "B" Taxpayers

Category "B" taxpayers are those taxpayers with annual turnover greater than 100,000 but less than 500,000 Ethiopian Birr.[35] Like category "A" taxpayers', category "B" taxpayers are also required to keep proper books and accounts.[36] Nevertheless, the books and accounts to be kept by category "B" taxpayers are less complicated compared to category "A" taxpayers.[37] Thus, they are required to keep an account incorporating mainly profit and loss statements for the particular tax year.[38] Their income tax liability will be assessed based on the books and accounts kept by the taxpayers. The same administrative penalties apply if Category "B" taxpayers fail to keep books and accounts.

C. Category "C" Taxpayers

Category "C" is the third and the last category. Small businesses are the main types of businesses included in this category. All taxpayers with annual

[32] See article 89(1)(a) of the Income Tax Proclamation.
[33] Id. art.89 (1) (b).
[34] Id. Article 69(1).
[35] See art.18 (2) of the Income Tax Regulation.
[36] Id. art.19 (2).
[37] Id.
[38] Id.

turnover income less than 100,000 Birr are grouped as category "C" taxpayers.[39] This category of taxpayers is not required to keep books and accounts. Their income tax liability shall be determined through a special procedure known as presumptive taxation.[40]

With this in mind, we can now proceed and discuss the issue of taxing income from illegal sources in Ethiopia.

III. Modes of Taxing Income from Illegal Sources in Ethiopia

To start with, in Ethiopia, incomes from illegal sources can be taxed either as income form business or as other income. We will discuss these two possibilities in this section.

A. Income from illegal sources as a business income

As identified above, the Ethiopian tax system follows a scheduler structure. As a result, in order to levy tax on a particular item one must first identify the applicable schedule for that particular income. Regarding income from illegal activities, the activity itself has not been clearly designated in any of the schedules as an income. However, given the nature of the activity, we can consider it as business, business as defined in article 2(6) of the proclamation. The income tax proclamation has defined business as "any industrial, commercial professional or vocational activity or any other activity recognized as trade by the Commercial Code of Ethiopia and carried on by any person for profit." According to the above definition, profit is an important element that must be satisfied in order to consider a particular

[39] See art.18 (3) of the Regulation.
[40] See the attached schedules at the back of the Income tax Regulation.

activity as a business or trade. In addition to profit, the activity must be of commercial professional, vocational or any other activity recognized as a business by the Commercial Code of Ethiopia.

Regarding illegal activities, for obvious reasons, every thief makes a cost benefit analysis before embarking on his activity. That means, if the costs that he is going to spend in order to carry out a particular crime are much greater than the expected returns, the person will definitely not carry out the task. Therefore, one can argue that profit is an element which is installed in every illegal activity since without a profit they would not do the act. For that matter, not only that there should be a profit, in some cases, even the profit margin has to be big enough in order to merit the particular risk associated with task. If the profit element is satisfied, then, the next issue would be identifying whether the illegal activities in general are professional commercial or vocational. Criminal activity is not recognized in the Commercial Code as trade; hence, there is no need to go there as such.

Article 2(6) while defining business, has not further defined those terms like *professional commercial activity* and *vocational activity*. This, in my opinion, is a right approach as it would be impossible to provide a clear and workable definition of profession that could be applicable to all areas. I think, that is why Cogan in his earlier writings regarding profession started his work by saying '*to define profession is to invite controversy*.'[41] Therefore, it is the opinion of the author that terms like professional commercial activity or vocational activity must be construed broadly and loosely. In my opinion, for any analysis of *profession*, only four from the six

[41] Charles L. Stevenson, Ethics and Language (1944)210; Morris L. Cogan, 'The problem of defining a profession' available at http://www.jstor.org/stable/1029845, accessed on 11/01/2013.

criteria laid down by Flexner should be used. Accordingly, a profession is an activity[42] requiring intellectual operations coupled with large individual responsibilities, practical application, tendency toward self-organization, and increasingly altruistic motivation.[43] Hence, any person including a thief, drug dealer, serial killer etc. could be considered professional as long as their work fulfills the above criteria. Accordingly, a thief or drug dealer will be no less organized than an ordinary trader or a person engaged in import or export activity albeit that requires some kind of expertise depending on the crimes to be committed. For instance, a person hired to kill must know how to operate a gun; hence, a professional in the area. Therefore, criminal activities in this regard are commercial professional activities conducted for profit, therefore, taxable according to schedule C.

The rate to be applied would, of course, be subject to the person conducting the activity. For instance, if the criminal activity is conducted by an organization, then the income would be taxed at a flat rate of 30%, and if it is conducted by an individual, it would be taxed according to the schedule provided in article 19(2) of the Income Tax Proclamation.

1. Deductible expenses

The next important issue in taxation of income from illegal activity is the availability of deductions for their 'businesses'. In simple terms, is it possible to deduct the cost of a bullet for a hired killer as it is the cost of running his business or income? So far, as the Ethiopian tax law is concerned, the answer is a definite YES. This is because as provided in the income tax laws taxpayers are required to pay tax only from their taxable income. Therefore, as long as their income is subject to tax, they should get

[42] Abraham Flexner, "Is Social Work a Profession?" School and Society, Vol. 1 (1915) 904.
[43] Id.

the same treatment with other business persons. Hence, all costs incurred for the purpose of securing the income must be deducted. In simple terms, the burglar who purchased flash light, drilling materials and rented a car in order to transport the stolen goods will have the right to get deductions for the costs incurred since all these costs are incurred in order to generate the particular income.

B. Income from illegal sources as other income

The Ethiopian tax system follows a scheduler approach whereby income from various sources shall be treated and taxed separately. As provided in the Income Tax Proclamation, incomes other than incomes from rental of buildings, employment and business shall be taxed separately, the heading of article 8(4) says *'other income including income from'* and lists down the incomes that could be taxed according to schedule D. As can be seen from the heading, the list is enumerative not exhaustive. Therefore, it is possible to levy tax on income based on schedule D when it is not possible to levy tax according to the previous schedules in as long as the individual has received an economic benefit from his activity.

Therefore, in case of income generated from illegal sources, it is quite possible to levy tax on the income based on schedule D. Nonetheless, since schedule D has not provided the rate and modes of payment for other incomes other than those stated in the Income Tax Proclamation, it would not be possible to put it into practice.

IV. Taxation of Income Vs. Confiscation of Property

Confiscation of property is one of the punishments provided under Ethiopian laws. In this regard, for instance the new Anti-Corruption

Procedure Proclamation provides for the following: '*The court shall issue a confiscation order proportionate to the property acquired by the corruption offence, where the accused is found guilty'*[44] According to this law, the criminal shall be forced to return the property acquired from the commission of the crime and the benefits derived from those properties to the government. Similar provision also exists in the Criminal Code.[45] Confiscation rules aim at preventing criminals from being able to enjoy the fruits of their crimes by depriving them of the proceeds and benefits gained from criminal conducts.

The presence of confiscation rules makes taxation of incomes from illegal activity more complicated as confiscation takes away the income and the fruits of the crime from the criminal. There are persons who are argue that government must not resort to taxing income from illegal sources when it is possible to confiscate the whole amount. In my opinion, these should not be the case. Firstly, the Criminal Code and the tax law have distinct objectives. It is not the objective of the tax law to punish the criminal for his act; this is something to be taken care of by the Criminal Code.[46] In the tax law, collecting tax from individuals getting an economic benefit is the main objective, not punishment. Hence, any comparison between the tax law and confiscation is inappropriate.

Furthermore, it is a truism that confiscation rules take away properties at the hands of the taxpayer when arrested by the law enforcement authorities. Nonetheless, it cannot go back and confiscate the incomes already consumed

[44] Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005, art.29.
[45] Proclamation 414/2004 art.98.
[46] The Ethiopian Criminal Code in addition to punishment has also other objectives. See the preamble of the Criminal Code.

by the criminal, thus, making the punishments partial. For instance, Mr. X started to lend money to people without having a license from the National Bank of Ethiopia in 2000 Ethiopian calendar. Every year, he has been profiting 10,000 from the activity. Let us further assume that he had consumed half of the income and saved only the rest. If the law enforcement authorities apprehend him after five years, out of the total 50,000 income generated from the activity, only 25,000 Birr in the hands of the criminal can be subject to confiscation of property rule, the amount consumed by the criminal before being caught would be out of the realm of the rule. Therefore, taxing income from illegal sources by collecting taxes, fines and administrative penalties from previously consumed incomes can complement the effective implementation the Criminal Code.

V. Declaration of Income Vs. The Right Against Self-Incrimination

The income tax laws require taxpayers to declare their income during the fixed time provided in the Income Tax Proclamation.[47] During the declaration income, taxpayers are required to submit the balance sheet and profit and loss account of the business for that tax year.[48]

Declaration period differs from category to category. Accordingly, category "A" taxpayers are required to declare their income within 4 months from the end of the taxpayer's *tax year*.[49] On the other hand, category "B" taxpayers

[47] See art.66 of the Income Tax Proclamation. A person who receives his income exclusively from single employer and a Schedule D taxpayers whose tax is to be paid through a withholding method are not required to personally declare their income-see art.65 and 31-37 of the Income Tax Proclamation.
[48] Id.art.66(1) .
[49] Id.art.66(1)(a).

are required to declare their income within two months from the end of the taxpayers' tax year.[50]

In order to declare their income within the given period, taxpayers must first know their tax year. Only then can they declare their income either within 4 months or within 2 months of the tax year depending on the category they belong to.

Tax year is defined in article 64(2) of the Income Tax Proclamation. Accordingly, the tax year of a person is**:**

a) In case of an individual or an association of individuals, the fiscal year.
b) In case of a body, the accounting year of the body.

Hence, as provided in article 64(2) of the Income Tax Proclamation, for an individual or an association, the tax year is the fiscal year of the Country. The fiscal year as defined in article 2(15) of the Income Tax Proclamation is the budget year of the Country. The budget year starts on *Hamale* 1 and ends on *Sene* 30.Therefore, if the taxpayer is a category "A", he shall declare his income within four months from the 30th of *Sene* and within two months of this period in case of category "B" tax payers.

In case of a body, their tax year is the accounting year of the body. The accounting year of the body will be determined through their respective memorandum of association. The memorandum of association determines the beginning and the end of the accounting year. The body will declare its income within 4 months if it is category "A" and within 2 months in case of

[50] Id.art.66(1)(b)

category "B" from the end of the accounting year determined by its memorandum of association.

In case of category "C" taxpayers, they are required to make tax payment between the 7th of July and the 6th of August every year.[51] These groups of taxpayers are not required to keep books and accounts. Tax assessment in case of these group taxpayers shall be made based on presumptive taxations

According to these provisions, category "A" and "B" are required to declare their income to the tax authority using declaration forms prepared by the tax authority. In the declaration form, there are only three spaces to be filled while declaring incomes of a particular taxpayer; these are local sales, export sales and service incomes.[52] The declaration forms leave no space for incomes from illegal sources thus making declaration of income from illegal business impossible. The appropriate remedy in this case is to provide one line for miscellaneous incomes. This way, the taxpayer can easily declare his income using the declaration forms.

Taxpayers with the duty to declare their income are also duty bound to keep books and accounts and, during declaration, the books and accounts must be presented with the declaration forms to be filled by the taxpayer. In case of incomes from illegal sources they may keep books and accounts, however forcing them to surrender these books and accounts to the tax authority shall be against the constitutional provision that provides for the right of persons' *not be compelled to make confessions or admission which could be used in*

[51] Ibid.
[52] See Income Tax declaration form for Schedule C taxpayers especially Section 3, available at the official website of the Ethiopian Revenue and Customs Authority and can be accessed using http://www.erca.gov.et/index.jsp?id=documentation&menu_id=102&menu_ch_id=0

evidence against them'.[53] This would make the whole point of taxing illegal income pointless. Therefore, to make the system workable, the courts should interpret the last provision of the Constitution that provides for 'Statements obtained under coercion shall not be admitted as evidence'[54] and, in the process, make all evidence gathered from the accounts kept by the person inadmissible during criminal proceedings.

VI. Taxing Crime Vs. Double Jeopardy

Many constitutions including ours extend the double jeopardy protection rules to accused persons.[55] According to this rule, accused persons cannot be tried and punished for the same offense after conviction or acquittal. By doing so, the rule protects the accused from double trial, double conviction and multiple punishments. Accordingly, many people argue that imposing tax on crimes derived from the criminal activity will amount to double jeopardy because his punishment, if it happens, takes into account the gains obtained from his criminal act.

However, one must always keep in mind that taxation is not a penalty on a any person. Tax is a contribution expected of citizens so that government can provide the necessary goods and services to citizens. In income tax, people with ability to pay are being asked to pay their fair share of contribution to the government. When a criminal is apprehended, the criminal law punishes him for the wrongful act. On the other hand, what the income tax does is simply to collect the money the criminal should have paid to the government. In income tax law, the person is not being prosecuted for the crime but he is simply being asked to make his overdue contribution to the government. As

[53] Constitution of FDRE, Proc.No1/1995, article 19(5).
[54] Id.
[55] See art.23 of the Constitution.

the principle of prohibition of double jeopardy cannot protect a negligent driver who killed a passenger from being prosecuted under criminal law for his crime and tort law at the same time, the same should be applicable to criminal prosecution and taxing crime, these two laws aim at achieving completely different objectives. Therefore, punishment for both criminal offense and taxing crime don't violate the principle of prohibition of double jeopardy because each has an element that the other does not.

VII. Judicial Practices and Taxation of Income form Illegal Sources in Ethiopia

Recently, many court cases relating to taxation of incomes from illegal sources are appearing in Ethiopia. In two famous cases, the Federal Revenue and Customs authority brought cases against individuals caught violating the law regarding illegal money lending. According to Ethiopian law, a person needs to have the permission from the National Bank of Ethiopia in order to engage in activities reserved for financial services. One of such service is lending money. Even when persons secure permission from the National Bank of Ethiopia in order to lend money, they must do so by observing the lending rates set by the National Bank. And in all the three cases, individuals were caught violating these two requirements.

In addition to the criminal punishments against these persons, the Federal Customs and Revenue Authority requested the Federal High Court for the payment of unpaid income and Value Added Tax by persons. The Authority in its pleading argued that the defendants failed to pay income tax from their activities and had requested the court for the payment of the unpaid tax and interest on those incomes. The Court, without further investigating the issue, simply ordered the defendants for the payment of the unpaid income tax and

interest on those incomes.[56] Incidentally, it is worth noting that, before this decision, the highest court of the country passed a decision on an issue directly affecting the definition of income.[57]

Conclusion

Incomes from illegal sources are taxable incomes according to Ethiopian tax laws. Income from illegal sources can be subject to schedule 'C' or 'D'. To facilitate tax payment and fair contribution of their share to the production of public goods and services by the government these groups of the taxpayers must be given an opportunity to declare their income without providing self-incriminating information to public authorities. In order to enable the person declare his income, the tax declaration forms must be modified in such a manner to include the person carry out his responsibilities by reproducing additional declaration forms or even including spaces that can be used by persons who derive their income from such 'business'.

[56] In Ethiopia, it is only the decision of the Cassation Bench that has a binding authority. Hence these decisions by the high court can only be as indicators of the path being followed by the lower courts in Ethiopia. Ayele Debela Tax Authority Appeal Sentence, Vol.10, No. 599.

[57] In a case between Ministry of Justice and six other persons, the court decided that incomes paid to individuals in the form of compensation when reduced from their work is not subject to the payment of the tax. In its reasoning the court argued that: 'after looking at articles 2(10) and 11 of the Income Tax Proclamation, it has found no ground to consider the above payments as an *income*'. [Translation mine]. See Ministry of Justice Ethiopia v Takle Garedeaw and six others, file No.65330,Vol. 11. The court, instead of concluding in general terms, should have first analyzed the definition of income as provided in article 2(10) of the income tax proclamation. As discussed above, the definition of our income is broad enough to include any payment as an income as long as the recipients of the payments derived an economic benefit from it. In this case, the recipients have received an economic benefit from their payments. Therefore, payments made to them can be considered an income for income tax purpose. In my opinion, the court has made a serious mistake by looking at other matters than the economic benefit derived by the persons.

Period of Limitation Applicable to Claims over Immovable Property under the Ethiopian Law: Gateway to Hindsight Scrutiny of Legality of Nationalization of Immovables? Case Analysis

By: Biruk Haile (PhD)[*]

Introduction

This commentary analyzes the decision of the Federal Supreme Court Cassation Division of Ethiopia relating to period of limitation applicable to ownership claims over immovable property in Cassation, Case No. 43600, involving applicant Dawit Mesfin and respondent Governmental Houses Agency, decided on January 05, 2002 (E.C).[1] This commentary argues that the court wrongly decided the case based on prescriptive limitation while the respondent's preliminary objection relates to a mere limitation of actions; in doing so, the court confused prescription with a mere limitation. The court also created unwarranted room for opportunistic claims challenging whether the act of nationalization of immovable things during the Dergue regime was conducted in strict observance of the then law.

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[1] Dawit Mesfin v Governmental Houses Agency, (Federal Supreme Court Cassation Division, January 5, 2002 (EC), Federal Supreme Court Cassation Division, Vol. 10 (2003 (EC)), pp. 225-29.

I. Background of the case

Brief account of the facts of the case is as follows. The above applicant filed a suit in Federal First Instance Court claiming ownership of a house (house no B-8/8008/30 found in former Wereda 18, Kebele 05, Addis Ababa) he alleged the respondent unlawfully occupied.[2] He invoked a title certificate No 18/31246 issued by Ministry of Urban Development and Housing on Tikmt 23, 1985 (E.C). Accordingly, he sought a judgment that, in recognition of his ownership right, compels the defendant to surrender the house he alleged it unlawfully occupied. The defendant, on its part, raised both preliminary objections and substantive defenses. The preliminary objection relates to period of limitation. It contended that the plaintiff's right of action was barred by period of limitation under Articles 1845 cum. 1677 (1). The Federal Fist Instance Court accepted the objection and ruled against the current petitioner. On appeal the Federal High Court confirmed the decision. As a result, the current petitioner filed application in the Federal Supreme Court Cassation division for review of the decision which is based on limitation. The Cassation Division reversed the lower courts' decisions based on the preliminary objection (i.e., limitation) and remanded the case for trial.

II. The Arguments of Parties

The petitioner urged the court to reverse the decisions of the lower courts which were based on limitation and raised several specific

[2] There is no doubt that the petitioner is alleging to have a better claim over the house than the agency (and hence inevitably challenging the decision/act that brought the government to control of the house, which is the act of nationalization).

arguments.[3] First of all, he pointed out that since the dispute relates to (immovable) property it should be governed by provisions of property law. Accordingly, he insisted to be the owner of the house pointing that he had a valid title certificate as required under Article 1195 of the Civil Code and it was not nullified by any interested person under Article 1196. He also insisted that no one had acquired ownership under Article 1168 of the Civil Code (i.e., usucaption). Secondly, he contended that Article 1845 of the Civil Code is applicable only to disputes emanating from contractual relations and does not apply to the case at hand.

The respondent, on its part, emphatically argued on its defense based on the 10 years limitation under Article 1845 and turned down the petitioner's contention that Article 1845 is relevant only to contractual claims. It mentioned that provisions on contract law (title XII of Book IV of the Civil Code) are applicable to obligations which do not emanate from contract as provided under Article 1677 (1).

III. Holding of the Court

The Federal Supreme Court Cassation Division reversed the decisions of the lower courts arguing that the Ethiopian law does not provide limitation for some claims of ownership over immovable things like the one in the case at hand and that the ten years limitation under Article 1845 of the Civil Code is inapplicable to the case.

[3] Dawit Mesfin v Governmental Houses Agency, cited above note 1, p.226 (para 2).

IV. Analysis of the Court Decision

The Cassation Division called attention to resolve whether there exists a period of limitation applicable to claims based on ownership of immovable property (i.e., petitory action under Article 1206 of the Civil Code) and proceeded to examining the relevant provisions of the law. It also proceeded to examining the applicability of Article 1845 to a dispute that emanates under Book III of the Civil Code (Title Six on Goods in General and Possession, and Title 7 on Individual Ownership).

At the beginning of its analysis, the Cassation Division recalled Article 40 (1) of the FDRE Constitution which recognizes every Ethiopian citizen's right to ownership of private property. More specifically, the Cassation Division referred to the second paragraph of the same provision which provides, "unless prescribed otherwise by law on account of public interest this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose such property by sale or bequest or to transfer it otherwise." As per the analysis of the Cassation Division, the Civil Code Articles 1126 and the following provisions provide for the manner of acquisition, transfer, extinction and proof of ownership. The Cassation Division noted that the rules that apply to movables vary from those that apply to immovable things. In this regard, the Cassation Division mentioned Articles 1168 (1) (usucaption) and 1184 (transfer-by law or agreement) that are relevant for acquisition of ownership of immovable things.[4] In a bizarre manner, the

[4] Dawit Mesfin v Governmental Houses Agency, cited above note 1, p. 227 (para 2).

Cassation Division also cited 1186 on acquisition of ownership of immovable things while in fact the provision primarily deals with transfer of corporeal chattels. The Cassation Division further noted the need for registration in a register of immovable property under Articles 1553-1646 for acquisition of title over immovable things through a contract or a will.

As regards extinction of ownership, the Cassation Division referred to Articles 1188-1192 of the Civil Code. The Cassation Division rightly observed that these provisions govern extinction of ownership of both movable and immovable things. Among these provisions the Cassation Division noted Articles 1189 and 1190 (acquisition by third parties) and Article 1192 (prescription) which it says are relevant to the preliminary objection raised by the respondent. The court stated that ownership over immovable things, as per these provisions, may be extinguished with or without the consent of the owner and Article 1190 provides such extinction will take effect where the entry relating to such immovable is struck off from the register of immovable property. The genesis of the logical jump in Cassation Division's analysis seems to trace its root here. The court is engaged in to such bewildering examination of rules affecting substantive ownership right while the objection of the respondent relates to limitation of action under Article 1845 of the Civil Code (that affects procedural right/right of action). We will return to this issue after a while.

The Cassation Division found it appropriate to examine if there exists limitations (based on time) in Book III of the Civil Code that affect (petitory) claims over immovable things. Accordingly, the Cassation Division found relevant Article 1192 which provides for 10 years limitation for extinction of ownership right over movables.[5] The Cassation Division noted this provision does not extinguish ownership claim over immovable things (which includes the right to bring petitory action). That is, the Cassation Division opined that rules governing extinctive prescription relating to immovable property do not exist in the part of the Civil Code that deals with property as Article 1192 is applicable to only movables. At this juncture, we can see that the court confused prescription with limitation and Article 1192 was not a relevant provision in the first place; it failed to understand the nature of the objection raised by the respondent. The respondent's preliminary objection was not based on the contention that the plaintiff/petitioner has lost his ownership right rather it was based on the contention that the right to bring (petitory) action is limited by a period of limitation.

A. Understanding limitation

It is important to say a few words about the concept of limitation and the rationales underlying it to fully understand the effect of the Cassation Division's decision and the arguments in this analysis. Limitation is the time laid down by a statute within which legal and

[5] Article 1192, under title prescription, provides that the owner of corporeal chattel shall loose his rights as an owner where he failed to exercise them for a period of 10 years by reason of his not knowing where such chattel was or that he was the owner thereof. Since this provision talks about prescriptive limitation while the preliminary objection of the respondent is based on mere limitation, one can notice, at this stage, that Article 1192 does not have relevance.

arbitral proceedings must be commenced; if proceedings are started outside the stipulated time, the plaintiff may be met with a plea from the defendant that it is time-barred and should consequently be struck out.[6] In relation to majority of actions limitation is not prescriptive; it bars the remedies than extinguishing the right itself.[7] In fact, there are some who contend that the distinction between mere limitation and prescriptive limitation is only academic and illusory. They argue that saying substantive right remains even though right of action is affected by limitation is self-refuting because once limitation has run against the plaintiff, there is no means to enforce the substantive right and, therefore, the substantive right itself will disappear. Yet, this is over-generalization and there are instances where the substantive right may be effective even after limitation. For instance, the plaintiff may be able to find an alternative method to enforce his rights (e.g., lien) against defendant.[8] Such is the case, for example, under Article 1850 of the Civil Code that allows a creditor whose claim is secured by a pledge to exercise rights arising out of pledge notwithstanding that the claim is barred.[9] More importantly, when an action is brought it is up to the defendant to plead limitation and not up to the court to invoke limitation.[10] If the defendant fails to raise limitation as preliminary objection, he will not have the opportunity to raise it in the course of litigation and when the court enters judgment against him on substantive issues it will validly be enforced against him.

[6] Ruth Redmond-Coper, *Limitations of Action*, (London, Sweet & Maxwell, 1992), p.1
[7] Ibid
[8] Ibid
[9] In fact, questions remain as to how such pledge rights can be realized in view of Article 2851 and the following provisions of the Civil Code that require recourse to judicial procedure (except secured bank creditors under certain conditions).
[10] Article 1856 (2) of the Civil Code cum Article 244 (f) of Civil Procedure code

Similarly, a debtor may voluntarily perform his obligations after period of limitation has run against the creditor and when he realizes the limitation subsequently, there is no way that he can claim back the payments since the plaintiff did not lose his substantive right to demand payment but right of action. This means, limitation does not primarily kill plaintiff's substantive right but affects right of action.

On the other hand, prescriptive limitations affect substantive (ownership) right itself. In case of acquisitive prescription, a person acquires title to a property after a certain period of time stipulated by law. In case of extinctive prescription, a person loses (the substantive) ownership right after a period fixed by the law (like the case of Article 1192 of the Civil Code).

The above being the distinction between prescription and limitation, let's briefly see the rational for limitation in a given legal system. Why is the legislature interested in putting a period of limitation for one to bring legal actions to enforce his substantive rights?[11] First, limitations encourage plaintiffs to commence proceedings within reasonable time before evidence is lost. For instance, if the plaintiff delays action very long, he may loose documents, witnesses may disappear or die or lose their memories and even if he is allowed to bring legal action, he will not be able to win the case. In a country like Ethiopia keen to avoid court congestion, it becomes in the public interest to bar futile actions. Allowing legal action after long time will also make it difficult for the defendant to defend the case. Thus,

[11] In most countries, not only civil actions but also criminal actions, except grave crimes like genocide and crimes against humanity, are limited by time.

the law wants to limit time for which the defendant should calculate and keep records of accidents or proof of payments of debts as it will be unjust to subject the defendant to limitless action. Leaving the defendant in a limitless state of uncertainty also affects efficient conduct of his business.

In relation to the case at hand, the Cassation Division opened up a huge room for people affected by nationalization during the *Dergue* regime to challenge whether the act of nationalization was conducted in accordance with the then nationalization laws after such a long period of time. This places the Governmental Houses Agency in extremely difficult position to establish that the nationalization of each and every house was conducted in compliance with the substantive and procedural requirements of the law. The documents and other evidence may have been lost or may not have been retained in the first place, not to mention prejudicial effect of hindsight judicial analysis in today's ideologically transformed policy landscape.

One of the arguments raised by the petitioner is that the respondent has not established its title through a title deed or under Article 1168. However, such argument will not be tenable in view of Article 13 (1) of the Proclamation to Provide for Government Ownership of Urban Lands and Extra Urban Houses No 47/1975 that provides all extra houses within the boundaries of a municipality or town shall be government property. This means there is no need on the part of the government to acquire title certificate for the ownership of houses it acquired through the act of nationalization as required by the Civil

Code provisions. That is why the agency has not had processed the paper works leading to acquisition of title in accordance with the requirements of the Civil Code. However, allowing claims without time limit makes it difficult for the agency to litigate multitude of issues like whether a particular house was extra and whether the entire process that led to transfer of ownership to the state was in consonance with the requirements of the law. This simply opens up room for opportunistic claims that are intended to take advantage of the justice system.

Laws usually provide for different length of time limits for different actions taking into account different relevant factors. Generally, the limit should enable the plaintiff to properly appreciate the loss suffered, to collect evidence and make other preparations to institute legal action against the defendant. For instance, in case of bodily injury in the context of extra-contractual relation, the recollection of witnesses is essential and laws provide shorter limitation than claims established in written instruments. It will also make sense to provide longer limitation for claims regarding immovable things than movables as such claims are likely to be incorporated in instruments and the value/sentiment the society has towards immovable things is more important.

In view of the above, property law and contract law stipulate various limitations. For instance, article 1165 provides a period of three years (longer in the Amharic version) for a person whose property is stolen

to claim his movable from a good faith acquirer.[12] Article 1845 of the contract law provides 10 years limitation for enforcing claims resulting from contract in the absence of other (shorter) limitation by special laws. One obvious point regarding Article 1845 is that it is applicable to even claims relating to immovable property resulting from contractual context. For instance, invalidation of contract relating to immovable property due to defective formation relating to problem of form or object is governed by this provision as Article 1810 (1) governs arguably only defects relating to capacity or consent. This point disproves any assumption that the legislature wanted to entirely unlimit claims relating to immovable properties.

Therefore, we should not confuse prescription with limitation and article 1192 is prescription that kills the substantive ownership right over moveable things after 10 years time than a limitation for bringing legal action based on ownership. Thus, there is nothing we can infer from Article 1192 about the relevance of Article 1845 on limitation of action on ownership of immovable property. The fact that Article 1192 provides extinctive prescription only with respect to movable things cannot logically lead us to an inference that the legislature intended to avoid limitation on action relating to immovable properties (and exclude the application of Article 1845). This is specifically because Article 1192 is not limiting right of action relating to movable things rather extinguishing substantive right of ownership on movable things. Probably, if we have to seek the equivalent of Article 1192 in relation to immovable things, it

[12] There are also other provisions in property law that provide for a period of limitation for exercising the right of action.

should be Article 1168(1). This latter provision provides for a situation where a person who has been paying (ownership) tax relating to an immovable (which does not belong to him) in his name for consecutive 15 year period becomes an owner of the property. On its face, this provision is acquisitive prescription while Article 1192 is extinctive prescription. Yet, we can derive extinctive prescription dimension from Article 1168 (1) in that it extinguishes one's ownership right after a period of 15 years if taxes have been paid in other's name for the said period.[13] Therefore, Article 1192 cannot logically impede reference to Article 1845 of the Civil Code in seeking applicable limitation to claims relating to immovable property.

In fact, the crux of the Cassation Division's argument lies on Article 1192;[14] it says since the legislature provides for a period of 10 years for extinction of ownership of movable things and remains silent as to extinction of ownership of immovable things, it will not be justified to refer to 1845, i.e., the legislature wanted to avoid extinctive prescription with respect to ownership of immovable things. As pointed out earlier, this argument is flawed in two respects as far as the case at is concerned. First, it does not address respondent's objection based on limitation. While the respondent's preliminary objection relates to limitation (of actions), the Cassation Division went into analysis of prescription, i.e., whether or not the petitioner's ownership right is extinguished by prescription. In doing so, the Cassation Division improperly went it to substantive

[13] Article 1189 of the Civil Code provides that ownership shall be extinguished where it is acquired by a third party in accordance with law.
[14] Dawit Mesfin v Governmental Houses Agency, supra note 1, p. 228.

objections-not the subject of the petition as there was no decision on the issue. Secondly, the Cassation Division also erred by boldly asserting that ownership of immovable (petitory action) is not affected by passage of time.

The Cassation Division explained its finding that prescription is not applicable to immovable things (compared to movable things) because such things are of permanent nature and pass over from generation to generation. Rather, the Cassation Division should have applied this justification to limitation. The fact that claims based on immovable things are also subject to period of limitation is beyond controversy and ownership claims should also be seen in that context. When we see the significance and nature of immovable things, all we can say is that they should be subject to the longest possible limitation under the law, i.e., the 10 years under Article 1845 of the Civil Code. The Cassation Division argued that the fact that Article 1168 provides for longer period of 15 years compared to the ten years under Article 1845 is an indication that the legislature wanted to disregard the application of the latter provision in relation to immovable things. That is, the Cassation Division argued that the fact that Article 1168 stipulated a longer period of 15 years for a person who has been paying taxes to acquire ownership implies that the legislature did not intend to grant a shorter period of 10 years under Article 1845 to be invoked by a person who has not been paying taxes for such a long time. This argument is still unsound in that there cannot be comparison between Article 1168 which provides for acquisitive/extinctive prescription with Article 1845 which provides for mere limitation of actions. Under article 1168, a person loses his

substantive ownership right and such can be invoked by a court even though not pleaded by a defendant; whereas Article 1845 is a mere limitation that does not affect ownership right but the right of action to enforce ownership right and such cannot be invoked by a court unless pleaded by a defendant as a matter of preliminary objection.

The other instance of lack of logical coherence in the Cassation Division's analysis is that the Division conceded that claims related to ownership of immovable things resulting from transactions like marriage, succession, and sale are subject to (shorter) limitations stipulated under those special laws.[15] If the legislature is prepared to limit certain claims of ownership arising from some contractual and extra contractual context, there is no satisfactory reason as to why the same legislature should not be prepared to limit claims of ownership resulting in other (extra) contractual context like the one under consideration.

In sum, we can say that the court failed to distinguish between prescriptive limitation (that affects substantive rights) and a mere limitation of action. As a result, the Cassation Division failed to give effect to acceptable preliminary objection based on limitation. Secondly, the court failed to appreciate the importance of limitation of action in a legal system and as a result exposed defendants to stale claims. After all, it defies common sense why the petitioner did not challenge the appropriateness of the act of (nationalization of) the state for more than a decade if he felt it was not conducted in

[15] Dawit Mesfin v Governmental Houses Agency, supra note 1, p. 229

accordance with the law.[16] Thirdly, the Cassation Division undermined the relevance Article 1677 (as invoked by the respondent) that extends application of contract law provisions (including Article 1845) to obligations that do not arise from contract.

[16] In fact the petitioner does not seem to explicitly challenge the act based on which the state appropriated his property but simply asserted his ownership right as established by a title certificate and that no other person has obtained title to it under article 1168. However, there is no doubt that his action is petitory action than possessory action (which has even a very short limitation under article 1149 (2)).

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