Haramaya Law Review

Vol. 6 **2017** **ISSN-2227-2178 (P) & 2305-3739 (E)**

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HARAMAYA LAW REVIEW: POLICIES AND SUBMISSION GUIDELINES (2nd Edn., 2016)

Haramaya University College of Law

HARAMAYA LAW REVIEW

VOL. 6 2017 ISSN-2227-2178 (P) & 2305-3739 (E)

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HARAMAYA LAW REVIEW *Vol.* 6 (2017) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this article: Abiy Chelkeba Worku, *Human Rights Approach to Water in the Ethiopian Context: Legal and Policy Assessments and Challenges*, HARAMAYA LAW REVIEW 6 (2017): 1-28

HUMAN RIGHTS APPROACH TO WATER IN THE ETHIOPIAN CONTEXT: LEGAL AND POLICY ASSESSMENTS AND CHALLENGES

Abiy Chelkeba Worku[*]

ABSTRACT

The supply of accessible, adequate, clean and drinkable water in order to improve the quality of life has remained a challenge for many countries. One possible way of ensuring accessibility to clean water is to articulate it from a human rights perspective. International human right instruments have recently been invoked to infer human right to water and are increasingly getting scholarly attention. In Ethiopia, laws and policies have been enacted in the last two decades to enhance a legally protected access to clean water. This article discusses rights of citizens and obligations of the state related to the right to clean water as enshrined in the constitution and other relevant laws. The article explores the manner in which the right to clean water is spelled out boldly in the FDRE Constitution. It further explores how the human right to water is elaborated in the Water Resource Management Proclamation and Water Resource Management Policy of the country and other laws and policies. However, there are some legal impediments that have become barriers to the enjoyment of the right. Absence of proper judicial interpretation of the right to water made the exact nature and scope of the right unknown in the Ethiopian context. This article argues that the human right to water is justiciable and it is within the power of the courts to interpret the human right to water vis-à-vis international and regional human rights instruments. It, thus, proposes that Ethiopian courts should adopt an expansive approach to interpreting the right in crystallizing the exact nature and scope of the right and improve the quality of life via citizens' enjoyment of the right to water.

Keywords: Ethiopia, human rights, human right to water, socio-economic rights, water

I. INTRODUCTION

Water is one of the most "essential, shared, and scarce natural resources" so basic to the very existence of humanity.[1] It is a finite resource without an alternative and upon which there is a total dependence for survival. Social and economic development is closely tied to water and

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[1] P.P. Mollinga, *Water, Politics and Development: Framing a Political Sociology of Water Resources Management*, 1(1) WATER ALTERNATIVES, 7-23 (2008).

poverty is prevalent mostly in areas that face water shortage.[2] It must be noted that there are many poor countries with abundant water resources but vulnerable to lack of clean and drinkable water services due to lack of sustainable development and infrastructure.

It is paramount to define two important concepts before the article delves into the discussion about the human right to water. The right to water can be discussed from at least two aspects of water rights, i.e. basic water right and water use right. The two phrases are used differently in this article. The basic water right is also known as the human right to water (interchangeably used with water right) is a term that is in vogue these days throughout the world and is a concept that is mostly associated with Third World Countries.[3] Basic water right refers to the right of use of water for domestic use such as for drinking, cooking and related household level of water consumption. The human right to water is "a personal right, a right of all persons".[4] The human right to water is all about providing clean, safe and sufficient water required on daily basis and is recognized in many international human right instruments. Water use right, on the other hand, refers to a particular entitlement or a right based upon a predefined prioritization rules. It should be noted that "human right to water" refers to the basic water right and the water use right is not within the scope of this article.

Despite the recent attention paid to water, many people still lack access to clean, safe and sufficient water needed for everyday life. The advantages of utilizing the human rights approach are that "water needs are transformed into water rights".[5] The vertical relationship of human rights law, i.e. between the state and the individual, means that the right to water is applicable to everyone within that state.[6] As Scanlon *et al* noted "by making water a human right, it could not be taken away from the people".[7]

The Millennium Development Goals (MDG) under goal 7 set to half the number of people denied of access to water and sanitation by 2015.[8] The UN Sustainable Development Goal (SDG) under Goal 6 stipulates that ensuring access to water and sanitation for all by the end of 2030 is "an essential part of the world we want to live in."[9] Despite such global commitment to improve the situation, data continue to prove the desperate situation of water problem across the globe. One billion people lack access to improved water resources; 2.6 billion people are without

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[2] Salman M.A Salman, The *human Right to Water and Sanitation: is the Obligation Deliverable?* 39:7, WATER INTERNATIONAL 969-982 (2014).

[3] Pedi Obani and Joyeeta Gupta, *The Evolution of the Right to Water and Sanitation; Differentiating the Implications*, Vol. 24(1), REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW, 27-39 , 28 (2015).

[4] *Id.* 272.

[5] Amanda Cahii, *The Human Right to Water-a Right of Unique Status; The legal Status and the Normative Content of the Right to Water,* 9:3, THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, 390 (2005).

[6] *Id.*

[7] John Scanlon, Angela Cassar and Noemi Nemes, *Water as a Human Right?* Paper for the 7th International Conference on Environment Law, 'Water and the Web of Life', Sao Paulo, Brazil, 2-5 June 2003 in Id, at 390.

[8] Millennium Development Goals agreed by the 191 UN member states at a plenary session of the 2000 Millennium summit and Ethiopia is one of the counties that have achieved Goal 7 of MDG in terms of providing access to safe drinking supply. *Available at* http://www.un.org/millenniumgoals/ (accessed on 28th of September 2017)

[9] UN, Transforming Our World: The 2030 Agenda for Sustainable Development, UN Resolution A/RES/70/1, 25 September 2015 (Sustainable Development Goal/SDG).

provision for sanitation and 1.5 million children under five die annually of water-borne diseases.[10] Almost 663 million people, one in every ten-persons, lack access to safe water globally and 2.4 billion people are without access to improved sanitation facilities according to World Health Organization and United Nations International Children's Emergency Fund Joint Monitoring Programme.[11] Moreover, in 2015, nearly half of all people using unimproved drinking water sources live in sub-Saharan Africa.[12]

In 2001, the average access to clean and safe water supply was about 17% of the total population of Ethiopia.[13] This may be cited as an example of a very low supply and coverage level even by Sub-Saharan African standards.[14] In 2012, close to 42 million people in Ethiopia did not have access to safe water and over 71 million did not have adequate sanitation.[15] More than 9,000 children die every year from preventable diarrhoea diseases caused by poor water and sanitation.[16] In 2015, close to 43% of the total population did not have access to clean and safe drinking water.[17] This shows that the water coverage is very low coupled with the unreliability and non-sustainability of the supply of safe water.[18]

Lack of access to clean water is also directly related to the maintenance of public health. Water-related diseases, caused by the unsafe drinking and the absence of proper sanitation facilities, are among the leading causes of death in the developing world.[19] For instance, improved access to clean water can reduce diarrhea and waterborne diseases by at least 25% and improved sanitation is accompanied by more than a 30% reduction in child mortality.[20] Similarly, environmental hygiene, under the right to health, would require the protection of water resources from contamination.[21] Provision of the right to food is closely associated with the availability of clean water. Moreover, under the right to food, it would be necessary to provide equitable access to water and water management systems, including sustainable rain harvest and irrigation technology.[22]

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[10] Salman M.A Salman, *supra note 2*, 969.

[11] Progress on Drinking Water and Sanitation, Update and MDG Assessment.UNICEF and World Health Organization, New York, USA, 2 (2015), *available at* http://apps.who.int/iris/bitstream (Accessed on 28 of February, 2017).

[12] *Id*, at 15.

[13] Ethiopian Water Sector Policy, The Federal Democratic Republic of Ethiopia, Ministry of Water Resources (hereinafter Ethiopia Water Sector Policy), II (2001). Available at https://www.cmpethiopia.org/page/479 (accessed on 28th of September 2017).

[14] *Id*.

[15] Water Aid Ethiopia, 1, *available at* http://www.wateraid.org/where-we-work/page/ethiopia, (accessed on 28th of February, 2017).

[16] *Id.*

[17] See Global Health Observatory of May 2016 http://apps.who.int/gho/data/node.cco (accessed on 3rd of October 2017).

[18] Ethiopian Water Sector Policy, supra note 13, III.

[19] Salman, *supra note 2*, at 969.

[20] Corinne J. Schuster-Wallace, Velma I. Grover, Zafar Adeel, Ulisses Confalonieri, and Susan Elliott, Safe Water as the Key to Global Health, The United Nations University, at 6, (2008), *available at http://*www.inweh.unu.edu (Accessed on 28th of February, 2017).

[21] Obani and Gupta, *supra note 3*, 33.

[22] *Id.*

The very objective of this article is to infer the human right to water from FDRE Constitution and other subsidiary laws to enhance current conceptualizations and ultimately improve citizens' enjoyment of the right to water. The article will also serve as an eye opener for Ethiopian courts to interpret the right to water in line with many of the international human right instruments Ethiopia has adopted. To do this, the article relied mainly on the FDRE Constitution, Ethiopia Water Resource Proclamations and Water Resource Policy, environmental and related policies and regulations as well as international human right instruments and relevant commentaries by UN Committee on the Economic, Social and Cultural Rights (CESCR). Moreover, secondary sources of scholarly articles, books and online sources have been referred to and consulted in the course of writing this article.

After this introductory section, Section II proceeds with tracing back the roots of historical genesis of the human right to water. It deals with the different international and regional human right instruments, soft laws and general comments of the UN CESCR that make reference to the human right to water. Section III discusses the manner in which a human right to water may be inferred from the constitutional text and interrogate the extent to which Water Resource Management Proclamation and Water Resource Management Policy of Ethiopia and related laws and policies give content to the right to water. Section IV interrogates whether it is possible to judicially enforce the human right to water and the related challenges. Finally, under section V, conclusions are drawn on the potential of interpreting the human right to water in line with international human right instruments as a means to enhance the enjoyment of the human right to water in Ethiopia.

II. HUMAN RIGHT TO WATER: CONCEPT, SCOPE AND DEVELOPMENTS

This section examines the developments relating to the human right to water that has appeared in different international and regional human rights conventions, soft laws including important UN resolutions and General Comments of the UN Committee on the Economic, Social and Cultural Rights (CESCR).

A. International Human Rights Conventions

The debate on the human right to water started as early as the end of the Second World War. After the Second World War, human rights emerged from the United Nations system as a prominent international law approach for the protection of human dignity.[23] The UN's Economic and Social Council drafted the Universal Declaration of Human Rights.[24] This gave rise to the legally binding International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The human right to water laid its foundation in the centrality and necessity of water to other ICESCR and ICCPR rights although the explicit recognition of water as an individual human

[23] *Id*. at 27.
[24] *Id*. at 28.

right has yet to take place.[25] It has been recognized as an integral part of other human rights, such as the right to life, which is contained on ICCPR, and the rights to health, food, housing and adequate standards of living, which are included in the ICESCR. Article 11 of the ICSCR forms the basis of the right to water in international law and is partially reproduced as follows:

> The State Parties to the present Covenant [ICCPR] recognize the right to an adequate standard of living for himself and his family, *including adequate food, clothing, and housing, and to the continuous improvements of living conditions* (emphasis added).[26]

In addition, Article 1(2) of ICCPR and ICESCR provides "in no case may people be deprived of its own means of subsistence", which must, for survival, include water.[27] The aforementioned international agreements do not expressly refer to the right to water; rather they are about the right to an adequate quality of life and the right to good health.[28]

Moreover, two relatively recent conventions namely the Convention on the Elimination of Discrimination against Woman (CEDAW)[29]and the Convention on the Rights of the Child (CRC) has explicitly recognized water as an individual human right. CEDAW under article 14 (2) (h) stipulates that state parties shall take all appropriate measures "to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and *water supply*" (emphasis added)". The CRC under article 24 (1) (2(c)) stipulates that:

> State parties recognize the right of the child to the enjoyment of the "highest attainable standards of health"… and pursue full implementation of this right and, in particular, shall take appropriate measures: (c) to combat diseases and malnutrition,…through the provision of adequate nutritious foods and *clean drinking water*, taking into consideration the dangers and risks of environmental pollutions (…).[30]

The CRC's provision relates only to a certain aspects of water, "that of quality (safety) and it does not include availability and accessibility of water".[31]

It is also important to briefly discuss the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter Watercourse Convention) in light of the human right to water context.[32] Article 10 of the Watercourse Convention refers about the relationships between different kinds of water uses. Article 10, paragraph 1, states that "no use of

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[25] The centrality of the water offers significant reinforcement to the concept of a human right to water, because without water many of the rights contained in the core international human rights instruments would be meaningless and left devoid of any practical effect. See Salman, *supra note 2*, 973.

[26] See also article 12 of the ICESCR. Article 12.1 stipulates that 'The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest standards of physical and mental health'. Article 12 indicates the steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for (b) the improvements of all aspects of environmental and industrial hygiene.

[27] Cahii, *supra note 5*, 391.

[28] Antonio Embid Irujo, *The Right to Water*, 23(2) INTERNATIONAL JOURNAL OF WATER RESOURCES DEVELOPMENT, 267-283 269 (2007).

[29] Ethiopia has signed the agreement on Jul 8, 1980 and deposited Sep 10, 1981 via ratification. *Available at* http://www.un.org/womenwatch/daw/cedaw/states.htm (accessed on 20th of February, 2017).

[30] Ethiopia has ratified the agreement on 14 may 1991, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src (accessed on 28th of March of 2016).

[31] Cahii, *supra note 5*, 391.

[32] The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, UNGA Resolution A/RES/51/229, 36 ILM 700.

an international watercourse enjoys inherent priority over other uses." In the following paragraph, 10.2, it is stated that in the event of a conflict, it shall be resolved "with special regard being given to the requirements of vital human needs". There is a problem of the definition of "vital human needs". In clarifying the expression, the UN General Assembly stated that 'in determining "vital human needs", special attention is to be paid to providing sufficient water to sustain human rights, including both drinking water and water required for the production of food in order to prevent starvation'.[33] Thus, drinking water is the most vital human need. It almost certainly implies that water for cooking and washing to maintain public health standards also falls within the scope of vital human needs.

Other treaties that refer to the right to water include the Geneva Convention Relative to the Treatment of Prisoner of War, and the Geneva Convention Relative to the Treatment of Civilian in time of War as well as Additional Protocol I thereto, and Additional Protocol II. Under the 1949 Geneva Convention relative to the Treatment of Civilian Persons in Times of War stipulates that detaining powers have an obligation in providing adequate water for internee's basic water needs such as sanitation and personal laundry.[34] Under the same Convention in connection with food, internees must also be provided with sufficient drinkable water.[35] The same Convention also imposes an obligation on the detaining powers to provide internees with drinkable water to maintain them in good health during transfers from one place into another.[36] In the Protocol additional to the Geneva Convention of August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), basic water infrastructures that are vital to the survival of civilians are afforded protection and must not be "attached, destroyed, removed or rendered useless".[37] According to the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), to persons whose right of movement has been limited due to the armed conflicts, drinking water shall be provided to the same extent as the local civilian populations, and basic water infrastructures must also be protected from demolition and attacks.[38] Moreover, Convention on the Rights of Persons with Disabilities (CRPD) of 2006 mentions the human right to water in the context of the social protection of disabled persons.[39]

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[33] Salman, *supra note 2*, 971.

[34] See Art 85, Geneva Convention relative to the Treatment of Civilian Persons in Times of War, 12 August 1947, 75 UNTS 287, entered into force 21st October 1950.

[35] *Id*. Arts 26 and 29.

[36] *Id*. Art 46.

[37] See Art 54, Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts (Protocol I, 8 June 1977, 1125 UNTS 3, entered into force 7 December 1949*)*.

[38] See, Arts 5 and 14, Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (Protocol II), 8 June 1977, 1125, UNTS 609, entred into force on 7 December 1978.

[39] See art 28 of CRPD. The CRPD was adopted during the 61st Session of the General Assembly: see GA Res. 61/611, 13 December 2006, A/61/611; 15 IHRR 255.

B. African Human Rights Frameworks and Other Agreements

This subsection discusses the textual basis of the right to water in mainstream regional human rights treaties in Africa. In addition to the absence of a comprehensive and separate guarantee of the human right to water in the international human rights treaties, the basic regional human rights agreement, the African Charter on Human and Peoples' Rights (Africa Charter), has failed to incorporate the right to water.[40]

Another leading regional human right instrument, the African Charter on the Rights and Welfare of the Child (African Child Charter), provides that member countries shall fully implement the right and ensure "*the provision of* adequate nutrition *and safe drinking water (emphasis added*)".[41] The scope of the provisions of the African Child Charter applies only to children and limits the content of the right to the mere regulation of ensuring access to safe drinking water and excludes physical accessibility and affordability.[42]

Similarly, the Protocol to the African Charter on Human and People's Rights of Woman in Africa[43] provides that state parties shall take "appropriate measures to provide women with *access to clean drinking water (emphasis added)"*.[44] The aforementioned instruments say nothing on the amount of safe water that should be available to the ultimate beneficiaries of the right.[45]

There are regional non-human right treaties that provide a direct point of legal reference for the normative definition of the promotion and realization of the human right to water. Inferring human right to water is not limited to the implicit terms of the African Charter, but also to the more explicit and demanding substantive provisions of the African Convention on the Conservation of Nature and Natural Resources (hereinafter ACCNNR). The ACCNNR contains peculiar substantive provisions that are important in promoting and realizing the human right to water. Under the same Convention, member countries undertook "to adopt the measures to ensure conservation, utilization, and development of soil, water….in accordance with scientific principles and with due regard to the best interest of the people".[46] However, the most relevant core substantive provision is found in Article V(1). It relates to the provision of states obligation to promote water quantity and continuous delivery. The provision is reproduced as follows:[47]

> The Contracting States shall establish policies for conservation, utilization, and development of underground and surface water, and shall endeavor to guarantee for their populations *a sufficient and continuous supply of suitable water (emphasis added).*

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[40] Takele Soboka, *The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights system*, Vol. 11 (2) AFRICAN HUMAN RIGHTS LAW JOURNAL, 344, 341-367 (2011).

[41] See article 14 of the African Charter on the Rights and Welfare of the Child , adopted 11 July 1990 and entered into force 29 November 1999, *available at* http://www.refworld.org/docid/3ae6b38c18.htm (accessed on 01-Mar-2017)

[42] Takele Soboka, *supra note 40*, 344.

[43] African Charter on Human and People's Rights of Woman in Africa, adopted 13 September 2000, entered into force 25 November 2005, available at www.achpr.org/instruments/women-protocol/ (Accessed on 01 March , 2017)

[44] Art 15(a) African Charter on Human and People's Rights of Woman.

[45] Takele Soboka, *supra note 40*, 345.

[46] *Id*, at Art III.

[47] *Id*, at Art V(1).

The ACCNNR imposes an obligation on member states to put in place policies that promote the conservation, utilization and development of water sources. The Convention also imposes an obligation on states to exert effort to provide ample and sustainable water supply suitable for human use. The Convention has incorporated an important part of the human right to water core contents such as water availability, quantity and water service continuity.[48] Thus, it is safe to conclude that the human right to water approach is partially addressed in the ACCNNR.

C. Soft Laws

In addition to international and regional human rights conventions, various international conferences since the 1970s have also made a declaration on the right to water. For example, the right to water was affirmed in the Action Plan on "Community Water Supply" issued by the Mar del Plata Conference in Argentina in 1977,[49] and in Agenda 21 on the 1992 UN Conference on Environment and Development.[50] The International Conference on Water and the Environment in Dublin in 1992 also recognized the right to water.[51] The 1992 Declaration of Dublin is not the same as instrument produced by a convention. However, it is important to make reference in the context of the human rights to water. The Declaration of Dublin has four famous principles in which the fourth principle is relevant to the discussion at hand. The principle begins by saying in economic terms that "water has an economic value in all its competing uses and should be recognized as an economic good" and goes on to add that "Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price". The declaration of a fundamental right that includes both supply and sanitation while making specific reference to "an affordable price" sets the framework for the content of the right within the broad-based statement of a declaration of this nature.

The UN General Assembly's legally non-binding resolution declared a human right to water and sanitation.[52] The Resolution has declared "the right to safe and clean drinking water and

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[48] The core contents of the human right to water will be discussed in detail in the subsequent section.

[49] Report of the United Nations Water Conference (Mar del Plata, 14-25 March 1977) (UN Doc.E/CONF.70/29, 1977) ('Mar del Plata Declaration'). Indeed this is the first instrument to be issued by an international meeting that included an explicit reference to the right to water.

[50] Agenda 21, in: Report of the UN Conference on Environment and Development (UN Doc. A/Conf. 151/26, 14 June 1992), Chapter 18. Agenda 21 of the Rio Summit 'Program of Action for Sustainable Development' included a separate chapter (Chapter 18) on freshwater resource. Chapter 18 states that 'In developing and using water resources, priority has to be given to the satisfaction of basic and the safeguarding of the ecosystem'.

[51] Dublin Statement on Water and Sustainable Development (Dublin, 31 January 1992), *available at* http://www.un-documents.net. (Accessed on 27th September , 2017) Principle 4 of the Dublin Statement on Water and Sustainable Development proclaimed that 'water has an economic value in all its competing uses and should be recognized as an economic good'. Yet, this principle clarified further that 'it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price'. See also Salman, *supra note* 2, 970.

[52] General Assembly Resolution, UNO document A/RES/64/292. The document was adopted with 122 states voting in favor none against and 41 including Ethiopia abstained. Some countries like the United States noted that that the right to water and sanitation does not exist in a legal sense as described by the Resolution. The same stand was followed by the United Kingdom, Canada, Sweden, Japan, Ireland, Australia and Austria. The representative of Ethiopia said 'he had abstained although access to clean water was a natural right. States had the sovereign right to their own natural resources, according to the United Nations Charter, and that principle should have been included in the text'. See available at https://www.un.org/press/en/2010/ga10967.doc.htm (accessed on 1 October 2017)

sanitation as a human right that is essential for the full enjoyment of life and all human rights".[53] Moreover, the UN Human Rights Council in its resolution in the same year has elevated the status of access to drinkable water as one of the fundamental human rights.[54] The Resolution marked a turning point in the long debate on the human right to water.[55] The UN Human Rights Council adopted the "Human Right on Access to Safe Drinking Water and Sanitation" by affirming "that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity".[56]

The 2004 Berlin Rules on the Uses of the Water of International Rivers also discuss the human right to water.[57] Chapter IV deals with the right of persons. Article 17 of this chapter states that 'every person has a right of access to sufficient, safe, acceptable, physically accessible and affordable water to meet that individual's vital human needs.' Everyone has the right to obtain water within acceptable physical accessibility and the economic affordability. The quality of the water must also be safe for consumption in a sufficient amount.

D. General Comment No. 15 of UN Committee on the Economic, Social and Cultural Rights

In addition to formally codified international human right instruments, there are international human rights legal standards and guidelines, which refer to the right to water. Among others is General Comment No 15 adopted by the Committee on Economic Social and Cultural Rights (CESCR). General Comment No. 15 (hereinafter GC 15) is the most comprehensive recommendation of the CESCR to governments, elaborating the right to water in the ICESCR. Although it is not a binding instrument nor a rule or guideline passed through the General Assembly Resolution, its contribution to the issue at hand necessitated the discussion here. General Comment No. 15 ensures that "the right to water was the least protected right".[58]

The reason that the CESCR was forced to work on this General Comment is to give clarification regarding the normative nature and content of the right to water and to define states' obligations towards the same right.[59] Since there is no direct explicit acknowledgement of the right to water in the ICESCR, the CESCR has dealt with detail length issues pertaining to general and specific core obligations of states, measure of incorporation of the right to water in national laws and policies as well as the corresponding penalties and remedies available for victims of

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[53] General Assembly Resolution, UNO document A/RES/64/292.

[54] Human Rights Council Resolution, UNO document A/HRC/15/L.14) *available a*t http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G10/163/09/PDF/G1016309.pdf? Open Element (accessed on 1 November 2016).

[55] A. Belinskija and L. J. Kotzéb, Obligations arising from the right to water in Finland and South Africa, AQUATIC PROCEDIA 6 (2016) 30 – 38, (World Water Week , WWW (2015).

[56] Human Rights Council Resolution, *supra note 54*, para 3.

[57] See Berlin Rules of 2004 on the Uses of the Water of International Rivers developed by International Law Association, a private non-governmental institution. *Available at* https://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf (Accessed on 27th of September 2017).

[58] Erik K. Bluemen, *The Implication of Formulating a Human Right to Water,* 31:4 ECOLOGY LAW QUARTERLY 957 (2004): 957-1006.

[59] Cahii, *supra note 5,* 392.

violations of the right to water.[60] Moreover, CESCR also called upon states parties to have a comprehensive policy dealing specifically with the human right to water as a separate right or secondary to other related rights.[61] Therefore, these aforementioned reasons compelled CESCR to draw GC 15 as guidance and recommendations to states parties on their effort to promote and ensure the right of access to water in compliance with the international human right standards.[62]

CESCR has relied on derivation and inference as an analytical foundation for the recognition of the right to water and sanitation.[63] It relied upon the derivation of a right to water from Article 11 and 12 of the ICESCR.[64] The core content of the relevant provision is reproduced as follows[65]:

> Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living 'including adequate food, clothing and housing'. The use of the word 'including' indicates that this catalog of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival…*The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1)(emphasis added).*[66] The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.[67]

The normative content of the right to water as set out in GC 15 initially defines the entitlements recognized by the right to water. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.[68] Sufficient and safe water is "necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements".[69] In addition, GC 15 paragraph 6 states that priority in the allocation of water must be given to the right to water for personal and domestic uses. This means that the GC 15 has given the human right to water the highest priority among potential water use rights. In other words, it clearly states that priority of water use should go to water for survival and basic needs.[70]

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[60] Irujo, *supra note 28*, 269.
[61] *Id*.
[62] See GC 15, at para. 3.
[63] Salman, *supra* note 2, 972.
[64] GC 15, at para 3.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] With regard to quality, the water required for each personal or domestic use must be safe, therefore free from microorganism, chemical substances and radiological hazards that constitute a threat to a person's health. See GC 15, para. 12 (b).
[69] *Id*, at para. 2.
[70] Cahii, *supra note 5*, 400.

E. State's Domestic Obligations

The normative content leads to the question about the State Parties' core obligations with regard to the right to water. The right to water, like any other human rights, imposes three types of obligations on states: obligation to respect, obligation to protect, and obligation to fulfill.[71]

The obligation to respect requires that state parties refrain from directly or indirectly intruding with the enjoyment of the right to water.[72] The states have the power to frustrate people's access to water and sanitation. States tend to disconnect water in some cases arbitrarily. When consumers are unable to pay water tariffs, disconnection measures must be carried out if there is an alternative, sufficient and safe water source.[73] The restriction on disconnections has important consequences for the realization of the human right to water. States may successfully serve half of the population with clean water, but if there is no protection against disconnection, progress may be significantly negated.

The obligation to protect requires states to prevent third parties from interfering in any way with the enjoyment of the right to water.[74] While the ICESCR does not place legal obligation directly on private actors, it requires that states take action, e.g. private companies should not pollute the water that is used for domestic consumption. The duty to protect also implies that states protect drinkable watercourses from contamination by non-state third parties.

The third obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide water.[75] The right to water includes the right to maintain existing water supplies necessary for the enjoyment of the right. The ICESC demands that states must use all available means to implement progressively the right to water. This means actively mobilizing available resources, nationally and locally. The right to water cannot be realized overnight as the nature of the right demands huge resource and investment. The duty to fulfil imposes an obligation on the states to take immediate steps in the direction of ensuring the right of access to water. The duty to fulfil includes developing a plan and strategy on expanding affordable access as well as protecting the quality of the water supply.[76] It means implementing the plan and monitoring its implementation over time.[77]

Despite GC 15 effort to define the core contents of the human right to water in an authoritative form, it hardly escaped critics. The GC 15 lack of clarity remains on the normative content of the right and the core obligation of states to human right to water.[78] Another major

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[71] GC 15, at para 20-29.

[72] *Id*. at para 22-22.

[73] The CESCR Committee set out a number of procedural safeguards that must be satisfied before disconnection can proceed. See Id. at para 56.

[74] *Id*. at para 23-24.

[75] *Id*. at para 25-29.

[76] *Id*, at para 28.

[77] *Id*.

[78] For a detailed discussion on the discontents of GC 15, see Takele Soboka Bulto, the *Emergence of Human Right to Water in International Human Right Law: Invention or Discovery,* Vol. 12, (1), MELBOURNE JOURNAL OF INTERNATIONAL LAW, 1-25 11 (2011).

weakness of the GC 15 within the contents of the standard is the inadequacy of highlighting the sanitation provision as an integral part of the right to water.[79]

III. HUMAN RIGHT TO WATER UNDER ETHIOPIAN LAW

Guided and influenced by international law and dialogues, countries have increasingly recognized the right to water in their domestic laws and constitutions.[80] This section covers the Ethiopian Constitution, the Ethiopian Water Resource Management Proclamation, Public Heath Proclamation and Policy, the Ethiopian Water Resource Management Policy, Ethiopian Environmental Policy, National Hygiene and Sanitation Strategy, Ethiopian Growth and Transformation Plan I and II, and the Ethiopian Human Rights Action Plans.

A. Inferring a Constitutional Right to Water from the 1995 FDRE Constitution

The conceptualization of the right to water in international human rights instruments constructs a universal entitlement to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.[81] The right to water is not explicitly mentioned under Chapter three of the Constitution. However, the constitution, under the social object, makes explicit reference to a human right to water subject to the condition of availability of the resource. Article 90 (1) provided that "to the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, *clean water***,** housing, food and social security" (*emphasis added).*

The main objective of Article 90(1) of the FDRE Constitution is the promotion of social objective. In the context of the human right to water, Article 90(1) deals with the provision of access to water supply service instead of the provision of the water supply. Moreover, the provision of clean water supply is subject to the country's available resources. Abdi and Kwadwo noted that "social objectives do not contain all duties that social rights (the right to water) impose on the state as they are formulated in general terms".[82] One thing very clear from the wording of Article 90(1) of the Constitution is that the right is framed as "collective right" rather than "individual right". The provision makes it clear that the beneficiaries of the right are "all Ethiopians" and it does not enable individual to have standing on the right to clean water. This will raise an issue of interpretation and has its own implication on the enforceability of the right.

In furtherance of the provision of the right to clean water, the FDRE Constitution adds that "(a)ny organ of Government shall, in the implementation of the Constitution, other laws and

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[79] Cahii, *supra note 5*, 390.

[80] Some countries such as South Africa under article 27 (1) of the 1996 have in their Constitution provisions on the human right to water. Uruguay in 2004, article 47 of its Constitution explicitly recognizes that 'access to drinking water and sanitation is a basic human right'. More recently, Bolivia's Constitution states in article 16 that:' Every person has the right to water and food'. In Morocco, article 31 of the Constitution (1 July 2011) stipulates that: 'The State, public institutions and local authorities are working in mobilize all means available to facilitate equal access of the citizens to the conditions allowing them to enjoy the rights of access to water and a healthy environment'.

[81] GC 15, at para 2.

[82] Abdi Jibril Ali and Kwadwo Appiagyei-Atua, *Justiciability of Directive Principles of State Policy in Africa: The Experiences of Ethiopia and Ghana*, Vol. 1, ETHIOPIAN JOURNAL OF HUMAN RIGHT, 18 (2013).

public policies, be guided by the principles and objectives specified under this Chapter (National Policy Principles and Objectives)".[83] The wording of the FDRE Constitution imposes an obligation on all organs of the government including the judiciary to be guided by the specific objectives, among other things, the social objectives of article 90(1).

Moreover, the Constitutional impetus for reading the right to water into the Bill of Rights is provided by the state's obligation to comply and confirm with international human rights law principles and standards. Article 13(2) of the FDRE Constitution reads: "[t]he fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia". There are several rights in Chapter three into which aspects of the human right to water may be read. For instance, it is stated that "[a]ll persons have the right to a clean and healthy environment".[84] Considering that the CESCR's GC 15 regards the sustainability and quality of water resources as integral components of the right to water, it is possible to argue that a human right to water may be read into interpretations of environmental rights in the 1995 Constitution.[85] Water is part of the environment and must be kept free from contamination and pollution. The sustainability and quality of water for basic human consumption can be maintained if water is protected from pollution. Thus, access to clean water is one of the core contents of the right, i.e. safety.[86]

The FDRE Constitution states that "(e)very Ethiopian national has the right to equal access to publicly funded social services".[87] The provision of equal access to public funded social services such as the supply of water is related to the human right to water since one of the core contents of the right is the accessibility of the service on equal basis without discrimination. To this end, UN's CESCR GC 15 stipulates that core contents of the human right to water are the "entitlements including the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water".[88] And, the significance of access to water service as an important component of the human right to water is emphasized by the same Constitution, which stipulates that "the state has the obligation to allocate ever increasing resources to provide to the public health, education and other social services".[89]

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[83] Art 85 of Chapter 10 of the FDRE CONSTITUTION.

[84] *Id*. at Art 44.

[85] GC 15, *at* para 11 -12. It must be noted that the General Comment of ESCR are not binding. However, its services a source of inspiration where courts can infer in order to clarify contents of the human right to water. For instance, in Argentina, Supreme Court invoked General Comment 15 in the 'Kersich Juan Gabriel Yotros e/Aguas Bonaerenses yotros s/amparo (herein after Kersich)' and concluded that access to drinking water is a fundamental right and community interest and is therefore subject to the exercise of collective right. Available at www.adaciudad.org.ar/.../CSJN-Kersich-c.-Aguas-Bonaerenses-s.-a. (accessed on 3rd of October 2017)

[86] In the Kersich case, the High Court of Argentina pronounced the explicit recognition of the right to water as a collective right deriving from its integration in the right to the environment. See *Id*.

[87] Art. 41 (3) of the FDRE CONSTITUTION.

[88] GC 15, at para, 10.

[89] *Id*. at Art. 41 (4).

B. Elaborating the Right to Water in the Ethiopian Water Resource Management Proclamation

One of the most important governing laws with regard to basic water rights in Ethiopia is the FDRE Water Resources Management Proclamation No.197/2000 (hereinafter called the Water Resource Proclamation). This proclamation has a much larger scope in contrast to its preceding repealed Water Resources Utilization Proclamation. The Proclamation regulates three aspects of water namely the management, environmental protection and utilization aspects of water resources in Ethiopia.[90] Whereas the previous revoked Water Resources Utilization Proclamation only dealt with narrow aspects of the water use regulations, the current proclamation further regulates the management aspect of water resources.[91] And, very relevant to the on-going discussion on the human right to water is the regulation of water use priorities and is rightly and boldly articulated in the Water Resources Proclamation. It aims to achieve that water use allocation rights must be geared towards protecting and utilizing the water resources of the country in order to maximize social benefits of the people of Ethiopia.[92]

It is visible that the human right to water is an important value and social objective of the Water Resources Proclamation and it wants to attain the goals by deploying the use of the water resources of the country to the highest social benefits.[93] There is a need for the definition of "social benefits" in order to contextualize it in the realm of the human right to water. The "social benefits" can be related indirectly to the human right to water and "social benefits" in the context of the human right to water must be defined. The definition can be deduced from prominent international human right documents, the FDRE Constitution and other national water laws and policies. For instance, under the Food and Agriculture of the United Nations Legislative Study, Stephen Hodgson states that "the right to water is a putative human right which is claimed to exist either as a right in itself or as an ancillary aspect of the '*right to food*' created by Article 11 of the ICESCR".[94]The FDRE Constitution embodies social objectives, among other things, access to clean water as one of the social objectives of the constitution.[95] The Constitution wording of access to clean water is in line with the terminology used by international and regional human right instruments as well as with GC 15 of UN CESCR. In a similar vein, the FDRE water policy document (to be discussed in next sections) also confirms that highest water use right is allocated to water supply and sanitation.[96] Thus, the aforementioned national and

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[90] See preamble of the Ethiopia Water Resources Management Proclamation 197/2000, FEDERAL NEGARIT GAZETA, 61st Year No. 25 ADDIS ABABA, 9th March 2000.

[91] *Id.*, Art. 32(1) stating, "The Water Resources Utilization Proclamation No. 92/1994 is hereby repealed." See also, Zbelo Haileslassie Embaye, *The Quest for Standard Tests in Prioritizing Water Use Rights in Ethiopia: Reasonable Use, Beneficial Use or 'Beyond'*, 10 (1), MIZAN LAW REVIEW, 198 (2016).

[92] *See*, paragraph 1 of the preamble and the third line sentence of Art 3 FDRE Water Resources Management Proclamation 197/2000. See also Zbelo, *Id.*

[93] *Id.*

[94] Joseph L. Sax, '*Reserved Public Rights in Water'*, VERMONT LAW REVIEW, 36:535 (2012), at 8. See also *Id*, at 204.

[95] *See* FDRE CONSTITUTION, Art 90(1).

[96] *See* FDRE, Ministry of Water resources, Ethiopian Water Resources Management Policy, 5 (1995).

international documents validate that 'the status of automatic allocation (as a priority for *"social purposes"* under the Ethiopian water law) is related with the priority given to domestic uses'.[97]

The Water Resources Proclamation, in relation to different types of water uses, gives a primarily preference among the potential water uses[98] to "domestic water use" that has a core value of promoting the very idea of the human right to water. Domestic use[99] is considered utilization of water at a household level that is basic to sustain human life.[100] In the same manner, the Ethiopian Water Resource Management Policy gives an absolute preference and protection priority among the potential water uses to domestic water uses.[101] The domestic water use is protected without any limitations and other potential water use must comply with the absolute protection of water uses at the household level.[102] The human right to water core idea is further reinforced is "exception of the non-requirement of permit for domestic water uses".[103] All the aforementioned laws and policies reinforce each other and the justification is largely related to the human quest for survival[104] since "the right to life is beyond any right".[105]

The Water Resource Proclamation has used the terminology 'domestic use' and non-exhaustive listing. Gleick argue 'a human right to water should only apply to basic needs for drinking, cooking and fundamental domestic uses.'[106]On the other hand, Younis contends that the right to water means water for drinking and sanitation or water for other uses.[107] Langford questioned whether the right to water should be extended beyond household uses to include water for food production.[108] He gave an example of Ethiopia, where water is essential for keeping livestock and farming crops.[109] Lack of water has led to famine, as 80% of water use is

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[97] See also, Zbelo Haileslassie, *supra note 91*, 211.

[98] Under Ethiopian Water Law, water use is defined as the "… use of water for drinking, irrigation, industry, power generation, transport, animal husbandry, fishing, mining and uses of water for other purposes". See art 29) of Council of Ministers Ethiopian Water Resources Management Regulations No. 115/2005, FEDERAL NEGARIT GAZETA, 11th Year No. 27 Addis Ababa, 29th March, 2005.

[99] *Domestic use* comprises the utilization of water resources for drinking, cooking, washing etc. See FDRE Water Resources' Management Proclamation, 197/2000. Art 2(6). It also resembles to the UN Committee work on ESCR in which it defines domestic and personal use as constituting 'drinking, personal sanitation, washing of cloths, food preparation, personal and household hygiene'.

[100] Anthony Scott and Georgina Coustalin, *The Evolution of Water Rights*, NATURAL RESOURCES JOURNAL, Vol 36 (1995), 873.

[101] FDRE, Ministry of Water resources, Ethiopian Water Resources Management Policy, (1999), at 12, under the "General policies of water", Roll number 10, of section 2.1.1. Comment I borrowed from one of the reviewers: 'Unlike other countries' water law, the Ethiopian Water Resource Proclamation does not provide 'order of priorities', except domestic use as the first priority'.

[102] Read both Art 7(1) and 7(2) of FDRE Water Resources Management Proclamation 197/2000.

[103] *See* Art 7(1) about domestic use FDRE Water Resources Management Proclamation 197/2000. See also, Zbelo Haileslassie, *supra note 91*, 204.

[104] See Scott and Coustalin, *supra note 100*, 867.

[105] Irujo, *supra note 28*, 267-28 citing Art 12 paragraph 1 of International Declaration of Human Rights (1948). See also, Zbelo Haileslassie, *supra note 91, 202.*

[106] Peter H. Gleick, *The human right to water*, WATER POLICY 1 (1998) 487-503.

[107] *Id.*

[108] M Langford Coordinator of the Right to Water Programme, COHRE, Day of General Discussion, UN CESCR 29th Session, Geneva, (2002) in Cahii, *supra note 5*, 401.

[109] *Id.*

for agriculture. As such, there are competing uses for scarce water.[110] However, the position of GC 15 is not clear on the distinction between domestic use and other uses which are necessary for survival.

Another important point worth discussing in relation to the human right to water is the ownership of water. Under the FDRE Constitution and the Water Resource Proclamation, all Ethiopian waters are publicly owned. According to Article 40(3), without mentioning water as such by name, the right of ownership of all natural resources is exclusively vested in the state and the peoples of Ethiopia. The FDRE Constitution is clear, as who owns the water resources and it states that water resources are the common property of the nations, nationalities, and peoples of Ethiopia. The Ethiopia Water Resource Proclamation, in the same manner, declares that water resource is the common property of the Ethiopian people. Water is a public asset, meaning that there are no privately owned water resources in Ethiopia. A derivative of the common ownership of water resources places the government an agent of the people and as custodian of the water resources and as result, has three obligations as per the FDRE constitution.[111]

First, the government must refrain from unfairly interfering with people's access to water. This imposes an obligation on the government not to interfere with the human right to water and the absolute protection of domestic water use afforded by various laws. Second, the government must protect people's access to water from interference by other. There is a possibility that other potential water use may interfere with the human right to water and it is the duty of the government to prevent other potential water users from interfering with the enjoyment of the right. This is especially vital in rural areas where the probability of water uses without duly interfering the rights of downstream users is 'unlikely and rare'.[112] Thirdly, the government must adopt necessary measures directed towards the full realization of the right, for example, by passing legislation, devising and implementing programs, allocating budgets and monitoring their progress. The government has the "duty to hold, on behalf of the people, land and other natural resources and to deploy them for their common benefit and development".[113] The power of legislating on water uses and an order of priority lies with the federal government.[114]

As per the FDRE Constitution, regional states have the power to enact laws that deal with the administration of natural resource in accordance with the federal laws.[115] As such, both the federal and state governments are required to put in place appropriate laws that regulate the management of water resources to attain the "highest social and economic benefits". [116] The

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[110] *Id*.

[111] In some jurisdictions like Ethiopia, water resources are designated to be publicly owned and administered by the state on behalf of the people and this is conceptually known as 'public trust doctrine'. See Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine,* 19(1) ENVIRONMENTAL LAW, 85-491, (1989). Citing Cohen, *The Constitution, the Public Trust Doctrine, and the Environment, UTAH L. REV.* 388 (1970).

[112] Scott and Coustalin, (1995), *supra note 100,* 832.

[113] Art 89(5) of FDRE Constitution.

[114] *Id*. at Art 51(1).

[115] *Id*. at Art 52(2)(d).

[116] *See* FDRE Water Resources Management Proclamation 197/2000, Art 6(2).

"social benefits" imply the human right to water since the provision of access to clean and drinkable water is one that must be given priority in the administration of water resources.

C. Human Right to Water and Public Health Proclamation and Policy

The Public Health Proclamation is one of a domestic regulatory framework having relevance to the human right to water concept. The Public Health Proclamation No. 200/2000 makes it illegal to provide water "unless its quality is verified by the Health Authority".[117] One of the core contents of the human right to water is the quality of the water. The quality of water is at the center of the country Public Health Proclamation. It has placed the mandate of controlling the quality of water to the Ministry of Health and waters must first be checked for their quality before it is delivered to users. Furthermore, Public Health Proclamation also states that "no person shall dispose of solid, liquid or any other waste in a manner which contaminates the environment *(among other things water)"* (emphasis added*).*[118] Another core content of the human right to water is the safety of drinkable water and it is addressed in the same Proclamation. The Proclamation makes it illegal to dispose of any form of waste in a manner that will endanger the safety of the environment, among other things, water. Therefore, it can be deduced that the Public Health Proclamation addresses quality and safety, which are core elements of the human right to water. The Health Policy's "general strategies" in article 3 states the promotion of "intersectoral collaboration" including "accelerating the provision of safe and adequate water for urban and rural populations".

Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009 (hereinafter Food, Medicine and Health Care Proclamation) has relevance in the ongoing discussions about the human right to water. Article 30 of Food, Medicine, and Health Care Proclamation deals with water quality control and states that: 1) it is prohibited to supply water for public consumption from spring well or through pipes unless its quality is verified by the appropriate organ. 2) it is prohibited to import or produce and distribute bottled mineral or plain water for public consumption unless its quality is verified by the existing organ.[119] The Food, Medicine and Health Care proclamation emphasizes that maintaining the quality of water sustainable for human consumption must be checked by appropriate organs. Imported or produced bottled water quality must be checked. Therefore, Food, Medicine, and Health Care Proclamation addresses the safety of water, which is one of the core contexts of the human right to water.

D. The Right To Water in Ethiopia Water Sector Policy

Initiating and implementing national policies that embrace a human right to water approach to delivering water services is a function and mandate of the executive organ of the government.[120]

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[117] See Art 10 of the Public Health Proclamation No. 200/2000 , FEDERAL NEGARIT GAZETA, 6th Year No. 28 Addis Ababa, 9th March 2000 (herein after Public Health Proclamation)

[118] *Id*. at Art 12.

[119] Food Medicine and Health Care Administration and Control Proclamation No.661/2009, FEDERAL NEGARIT GAZETA, 16th Year No. 9, Addis Ababa, 13th January 2010.

[120] Art 77 (6) of the FDRE CONSTITUTION.

Urging a closer reading of executive water policy may well be ultimately responsible for the impediments to the full actualization of the human right to water. .

The Water Policy of Ethiopia was adopted in 2001 after the enactment of Water Resource Management Proclamation. It is an important policy document elaborating on water delivery. It explicitly recognizes that "Macro Economic and Social policies and development strategies, as well as objectives accepted by the Federal Democratic Republic of Ethiopia and the principles of water resources development objectives, must enhance the socio-economic development of the peoples of Ethiopia".[121]Accordingly, subject to available resources, it is the state's responsibility to provide clean and safe water and the state's responsibility to manage water resources sustainably.[122] In view of this, the policy recognizes the "provision of basic necessities of water at the household level' must be given the highest priority when addressing water development and use".[123] It also stipulates special criteria that shall be used in allocating water resources for domestic use while apportioning other uses through highest socio-economic benefits.[124] The policy adheres conceptualizing water supply within the context of the human right to water.

The Ethiopian Water Policy presents in further detail regarding the quality of water basic to fulfill vital human needs by making implicit reference from which water for human consumption ought to be sourced. For instance, the Water Policy anticipates that water for domestic use is to be sourced from household connections; public standpipe, borehole, protected dug well, and protected spring.125 This is presumably because these water sources can be easily developed given the limited resources of the country.

E. Water Permit and Water Price (Tariffs)

The Water Resource Development Proclamation and Water Resource Policy recognize water rights for basic needs in view of fulfilling social equity. The right to use water resources for various activities requires permits.[126] Nevertheless, there are water uses for which it is not necessary to obtain licenses.[127] These are water use from hand-dug wells and use of water for traditional irrigation, artisanal mining, for traditional animal rearing as well as water mills. The exemption of water permit for domestic-related activities such as personal and limited household consumption has a direct implication on the human right to water. The exemption affords protection to domestic water use as envisaged by the Water Resource Development Proclamation and Water Resource Policy. Water permits and priority of allocation have also an implication on the human right to water. The issuance of water permit in accordance with the protection of domestic use in priority of allocation among potential water use can cement the human right to

[121] Ethiopian Water Sector Policy, 4. Also refer to the meaning of 'domestic use' in the Water Resource Proclamation referred to earlier. See art 6 (2) of Water Resource Proclamation.

[122] *Id*, at 4.

[123] *Id*, at 7.

[124] *Id*, at 2.

[125] Mulugeta Ayalew, Jonathan Chenoweth, Rosalind Malcolm, Yacob Mulugetta, Lorna Grace Okotto, and Stephen Pedley, *Small Independent Water Providers: Their Positions in the Regulatory Framework for the Supply of Water in Kenya and Ethiopia,* 26, JOURNAL OF ENVIRONMENTAL LAW, 77 105-128 (2013).

[126] See Art 11(1) of the Water Resource Proclamation.

[127] *Id*, at Art 12.

water. The domestic use has a priority in water permit systems and it reinforces the human right to water.

On the other hand, the Water Resource Policy has stipulated that water has to be considered both as an economic and social good. Water has to be priced in order to promote economic efficiency, social equity, and ecological sustainability. Generally, water tariff structures according to the Ethiopian Water policy are site-specific and determined according to local circumstances.[128] The same water policy also advocates that tariff structures (Water prices) should be based on equitable and practical guidelines and criteria.[129] With regard to water supply and sanitation services, the commanding principle issued in the Ethiopian Water Resources Management Policy is that the "user pays principle", especially for urban water supply and sanitation services.[130] The policy further states that the "user pays" principle should carefully be harmonized with the ability and willingness to pay principles.[131] The Ethiopian Water Resources Management Policy strongly emphasizes that tariffs should neither be too low leading to the abuse of its use or should it be too high discouraging consumption.[132] While rural tariff settings are based on the objectives of fully meeting the operation and maintenance costs, urban tariff structures are based on the basis of full cost recovery.[133]

One of the core contents of the human right to water is the affordability of water tariffs. The Ethiopian Water Policy considers the ability of the water supply consumers and it must be harmonized with the actual ability to pay. The Policy exempts economically disadvantaged rural communities from paying water service tariffs and the cost must be borne by the government, as appropriate, and in so far as the communities are able and willing to cover the operation and maintenance costs on their own. The policy affords protection to disadvantaged rural communities and their basic human needs of water must be ensured. The policy's objective of fully meeting the operation and maintenance costs, for rural community water users have an implication on the human right to water. The policy main objective of maintaining the operation and maintenance cost is an indicator of the commitment of the policy in ensuring the right of access to water for basic human needs. Therefore, the water policy has addressed the issue of affordability of water services which is one of the core contents of the human right to water.

F. Other Subsidiary Legal Documents

1. Ethiopian Environmental Policy

The Ethiopian Environmental Policy states that it is important to maintain "water quality and quantity" for the use, development, and management of water resources. This indicates that the water quality and quantity as important contents of the human right to water recognized by the international human right instruments are also reemphasized in the Ethiopian Environmental

[128] Section 2.2.5 (b) of Water Policy of Ethiopia.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*

Policy. Moreover, the Environmental Policy also addressed the correlation provision of adequate water supply and the right to sanitation, which is considered as an extension of the human right to water. The policy recognizes the paramount importance of adequate water supply as "an important component in achieving a sustainable and healthy urban environment, and on the other hand to recognize the minimization of the need for water as an important factor in the choice of sanitation technologies".[134] The policy has also addressed the affordability of access to water as one of the core content of the human right to water and that uses of water and consumption should be charged appropriately and provide, if appropriate, subsidies, taxes or tax concessions to achieve the sustainability of the use of natural resource. [135]

2. National Hygiene and Sanitation Strategy

The National Hygiene and Sanitation Strategy is relevant in order to understand the human right to water in the Ethiopian context. It is one of the strategies that concretize the human right to water from the perspective of water quality and safety. The strategy underscores that, "all drinking water supplies must be routinely monitored for chemical and bacterial pollutants".[136] The strategy emphasis on the chemical and bacterial free contaminated water as a prerequisite for safe drinkable water. One of the core contents of the human right to water is that drinkable waters must be safe for human consumptions.

3. Ethiopian Growth and Transformation Plan (GTP) I and II

The Ethiopian Growth and Transformation Plan I and II (hereinafter GTP I and II) have incorporated the human right to water. According to GTP I, development and expansion of reliable water supplies to rural and urban areas have been undertaken. One of the aims of GTP I was ensuring fair and equitable development and utilization of the country's water resources for sustained socio-economic development. According to the standard of GTP I, national potable water supply coverage recorded was 84%, with rural coverage being 82% and urban 91% in 2014/15.[137] The GTP I standard of physical accessibility is fifteen liters per person on daily basis within 1.5km radius for rural areas and twenty liters per person on daily basis within 1 km radius for urban areas.[138]

In the same manner, the aim of GTP II is expanding water supply coverage and it has set standards. Based on these standards, rural and urban water supply shall be strengthened.[139] According to the standard of GTP II, the accessibility of rural water services is expected to provide twenty-five liters per person within a 1km radius.[140] Urban residents based on demand

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[134] Federal Democratic Republic of Ethiopia, Ethiopian Environmental Policy, Addis Ababa, para 3.7 (I) (1997).

[135] *Id*. at para 4.6(f).

[136] Ethiopia National Hygiene and Sanitation Strategy, Ministry of Health, Federal Democratic Republic of Ethiopia, Addis Ababa 22 (2005). *Available at* http://documents.worldbank.org/ (accessed on 27th September, 2017).

[137] The Federal Democratic Republic of Ethiopia Government Growth and Transformation Plan I *2010/11-2014/15, 77* (2010).

[138] *Id*.

[139] Ethiopian Growth and Transformation II, 182 (2016).

[140] *Id*.

categories[141] are expected to be provided with 100, 80, 60, 50 and 40 liters per person. The plan of GTP II of twenty liters and above per person per day for rural and urban areas respectively are above and compatible with the minimum standards set by the World Health Organization (WHO), which is 20 liters of potable water per person per day. The WHO has set out a standard of 20 liters of potable water per person per day as a minimum level of protection of the right to water.[142] The 20 liters are "the amount of water needed to satisfy metabolic, hygienic and domestic requirements of safe water (water free from biological or chemical agents at concentration levels directly detrimental to health) per day are available within one kilometer of a dwelling (the distance measured from a house to a public stand post or any other improved drinking water sources)".[143]

4. The Ethiopian Human Rights Action Plans

National Human Rights Action Plans do give emphasis to the human right to water. The First Human Rights Action Plan (2013-2015, hereinafter "The First Action Plan") reaffirms that Ethiopia is committed to the progressive realization of the access to clean water as stipulated in the FRDE Constitution and other subsidiary water laws. It emphasizes that national water sector policy, Water Resource Management Proclamation and international human rights instruments must guide Ethiopia's commitment on the right to clean water.[144] The first action plan imposes the duty and the authority to respect, protect and fulfil to the extent of the country's resources, the right of clean water to all citizens on the Ministry of Water and Energy currently called Ministry of Water, Energy and Irrigation.[145]

The Second National Human Rights Action Plan (2016-2021) (hereinafter "The Second Action Plan") also underscores the importance of access to clean water. It lays down detailed action plans that will help in realizing the right to water. According to the Second Action Plan, the coverage of access to clean water is expected to reach 85 and 75 percent in rural and urban areas respectively. [146] The plan acknowledges that close to 15 million people are vulnerable to chloride contaminated water and it affects the safety and quality of water supply and interferes with the enjoyment of the right to water.[147] Women are given special attention in the action plan since the majority of women living in rural areas do not have access to clean water supply.[148] As per the Second Action Plan, the standard for water coverage in a rural area for the upcoming five years is 25 liters per person within 1 km radius.[149] The standard for an urban area depends on the

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[141] Based on the size of population the ranking of the towns are; Level-I, greater than 1,000,000; Level-II, 100,000-1,000,000; Level-III, 50,000-100,000; Level-IV, 20,000-50,000 and Level-V, less than 20,000 populations according to the Ethiopian Growth and Transformation II. Id, at 39.

[142] World Health Organization, Global Water Supply and Sanitation Assessment 1 (2000).

[143] Mulugeta et al, *supra note 125*, 77.

[144] First Human Right Action Plan, 120-121 (2013) available at http://www.abyssinialaw.com/human-right-documents?...1231...human-rights-action-plan (Accessed on 28th September, 2017)

[145] *Id.*

[146] Second Human Right Action Plan, 99 (2016). The author was likely enough to have the document from one of the drafter of the Second Human Right Action Plan. Yibekal G. Agonafir, email exchanges, March. 4, 2017.

[147] *Id.* at 98.

[148] *Id.*

[149] *Id.*

basis of demand categories. Depending on the size of the demand, urban areas water access is expected to be 100, 80, 60, 50 and 40 liters per person within 1 km radius.[150]

IV. CHALLENGES OF ADJUDICATING THE HUMAN RIGHT TO WATER IN ETHIOPIA

A. The Status of International Human Right Agreements and Power of Courts in the Interpretation and Application of the Agreements

The applicability of international frameworks depends initially on the status a given country gives to international instruments in its legal system. Its commitment begins with the clear statement it makes regarding the status and application of those ratified instruments. It is why usually states determine in their domestic legislations, status related issues such as incorporation, hierarchy, implementation mechanisms, implementing institutions, etc of international instruments. This section briefly discusses the status of the human right to water and related international and regional instruments,[151] particularly the ICESCR, CEDW, CRC, ACRWC, and ACCNNR[152] in Ethiopia since all the aforementioned have been ratified by Ethiopia.

The mode of incorporation of an international agreement in Ethiopia appears in chapter two of the FDRE Constitution. FDRE Constitution of Article 9 (4) recognizes the automatic standing incorporation of international instruments ratified to form "an integral part of the law of the land". The Federal Negarit Gazeta Establishment Proclamation requires publication of every law either duly enacted domestically or ratified to have judicial notice.[153] Except for the CRC, many international and regional agreements have not been published in the official Federal Negarit Gazeta. The Ratification Proclamation No.10/1992 for the Convention on the Rights of the Child incorporates an article with a succinct statement about the treaty (in its full name).[154] Other ratification proclamations never reproduced the full text of the treaty in question and translate the treaty provisions into the working languages of the country.[155]

Article 2(3) of the Federal Courts Proclamation provides that all federal or regional legislative, executive and judicial organs, as well as any natural or juridical person, shall take judicial notice of laws published in the Gazette. Therefore, in relation to international human rights instruments, the ratification which is published in the official gazette, one may argue that the statements that the treaty is ratified or acceded are as good as publishing the full text of the instrument.[156]And, this implies that there is room for their application in the Ethiopia legal

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[150] *Id*.

[151] Ethiopia is party to international and regional human right instruments and it has signed, and ratified many of this agreements. Ethiopia ratified ICESCR on11 Jun 1993 (a) while it has signed CEDW on 08 Jul 1980 and ratified it 10 Sep 1981. Ethiopia has also ratified CRC and ACRWC on 14 may 1991 (a) and 02 Oct 2002 respectively.

[152] Ethiopia has signed the African Convention on the Conservation of Nature and Natural Resources on 01/06/2004. See list of countries which have signed, ratified/acceded to the revised African convention on the conservation of nature and natural resources (adopted in Maputo, Mozambique, 0n 11 July 2003) *available at* https://portals.iucn.org/library/sites/library/files/documents/EPLP-056.pdf (Accessed on 01 March , 2017)

[153] See Art 2(3) Federal Courts Proclamation No. 25/1996, FEDERAL NEGARIT GAZETA, 2nd Year No. 13, 15 February 1996 (hereinafter Federal Courts Proclamation).

[154] Sisay Alemahu Yeshanew, *The Justiciablity of human rights in the Federal Democratic Republic of Ethiopia*, 8 (2), AFRICAN HUMAN RIGHTS LAW JOURNAL, 287 (2008).

[155] *Id*, at 288.

[156] *Id*.

domestic system. However, there are those who argue that publication is not an important requirement for international human rights instruments to have a legal effect. This can be inferred from the wording of the FDRE Constitution itself since the Constitution in various provisions has employed different terminologies. For instance, article 9(4) of the Constitution uses 'ratification' as a prerequisite for international agreements including international human right instruments to be an integral part of the law of the land.[157] Therefore, the requirement of publication for international human rights instruments that incorporates the human right to water to have a legal effect is still unsettled issue and a challenge in itself.

In relation to giving a judicial notice on recognizing the human right to water, article 13(1) of the Constitution imposes a duty on the judiciary to enforce the rights enshrined in the Constitution definitely extends to applying the provisions in specific cases. There is confusion on the issue of "constitutional interpretation", and the jurisdiction of the judiciary to interpret the fundamental rights and freedoms of the FDRE Constitution in light of a 'manner conforming to the principles of the UDHR, international covenants on Human Rights and international instruments adopted by Ethiopia'.[158]

On the one hand, The FRDE Constitution assigns power to interpret the Constitution to the House of Federation rather than courts.[159] One line of understanding is that interpretation of the entire text of the constitution lies with the House of Federation. In this regard, the FDRE Constitution stipules that "all constitutional disputes must be decided by the House of Federation".[160] According to the Council of Constitutional Inquiry Proclamation, the House of Federation has the power to decide on the constitutionality of any law or decision by any government organ or official, which is alleged to be contradictory to the Constitution.[161]

On the other hand Article 13(1) of the FDRE Constitution imposes the obligation to respect and enforce primarily on the state organs including the judiciary. And, this line of reasoning does not limit the power of courts in Ethiopia in the interpretation and application of chapter three of the Constitution including international human right provisions. Article 13(1) of the FDRE Constitution is silent "whether we go for direct or indirect application".[162] The direct application

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[157] Article 13(2) of the Constitution uses 'adoption' as means of incorporation of international human right instruments to have a legal effect. Article 57 of the same Constitution employs "deliberated upon and passed by…' for any law to have a legal effect. In a similar manner, article 71 92) imposes an obligation on the FDRE president to 'proclaim in the Negarit Gazeta laws and international agreements approved by the House of Peoples' Representatives in accordance with the Constitution'. These are the comments I borrowed from one of the reviewers.

[158] See Art. 13 (2) of the FDRE CONSTITUTION.

[159] *Id*, Arts. 62(1) & 82-84. The House of Federation is the Upper House vested with the power to interpret the Constitution up on a recommendation from Council of Constitutional Inquiry, a body that mainly consists of legal experts.

[160] *Id*, Art. 84 (1).

[161] See art 2(1), Council of Constitutional Inquiry Proclamation No. 250/2001, FEDERAL NEGARIT GAZETA, 7th Year No. 40, Addis Ababa, 6th July 2001.

[162] Direct application are to be "directly applied to cases in court proceedings as a special regime of law entailing a special regime of remedies while indirect application are application of the human rights chapter not directly to cases that are presented before a court but rather as tools that indirectly influence laws, decisions, actions, and

of chapter three of the FDRE Constitution by other organs of the government is limited and it is "safe to conclude that courts are expected to take the challenges of direct application".[163] It is silent "as to whose responsibility it is to interpret".[164]However, the Council of Constitutional Inquiry Proclamation No. 250/2001 stipulates that "any person who alleges that his fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the CCI for constitutional interpretation".[165]

In this regard, Tsegaye argues: (a) interpretation of all laws including the FDRE Constitution is the core task of the judiciary (b) unless it is explicitly indicated in other section of the FDRE Constitution, the interpretation of the entire text of the Constitution including chapter three is an inherent judicial function (c) there is no absolute "prohibition of judicial interpretation although there is the explicit recognition of the mandate of the House of Federation in this regard".[166] It makes no sense to put the burden of enforcing the constitutional rights on the judiciary and at the same time depriving them of the power in the interpretation and application of chapter three of the Constitution. It will be difficult for courts, for instance, to determine the core contents of the human right to water if a case is submitted to them provided that the issues are justiciable.[167] In connection with enforcement presupposes interpretation, Assefa Fiseha noted that the task of the judiciary in respecting and enforcing the Constitutional Bill of Rights is "illusionary unless the judiciary is, in one way or the other, involved in interpreting the scope and limitation of those rights and freedoms for which it is duty-bound to respect and enforce".[168] Courts are in a position to interpret chapter three of the Constitution without determining the constitutionality of an action of organs of the government which must be left to the House of Federation. Yonatan Tesfaye noted that "constitutional interpretation may not always be in determining the constitutionality of legislation".[169] After all, in practice courts interpret the provisions of chapter three of the Constitution.[170]

Legislations enacted after promulgation of the Constitution have reinforced that courts indeed have power to interpret fundamental rights and freedoms specified in the FDRE Constitution "although they do not comprehensively regulate it".[171] That ordinary courts have jurisdiction over cases arising under the Constitution is confirmed by Article 3(1) of the Federal

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practices". See Tsegaye Regassa, *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, Vol. 3 (2), MIZAN LAW REVIEW, 311 (2009).

[163] *Id*.

[164] *Id*. at 319.

[165] See Article 23(1) of Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/200 FEDERAL NEGARIT GAZETA, 7th Year No. 41, Addis Ababa, 6th July. 2001. It must be noted that Authors such as Assefa Fiseha have questioned the constitutionality of the Proclamation No. 250/2001. For detailed discussion of the subject matter see Asefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF),* 1(1) MIZAN LAW REVIEW, 17 (2007).

[166] Tsegaye Regassa, *supra note 162,* 320.

[167] Justiciablity of the human right to water is discussed in the next section.

[168] Assefa Fiseha, *Constitutional Interpretation: the Respective Role of Courts and the House of Federation,* in Faculty of Law/Civil Service College (ed.) Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution 14 (2000).

[169] Yonatan Tesfaye, *Whose Power is it anyway?* 22 (1) (2008), JOURNAL OF ETHIOPIAN LAW, 134 (2008).

[170] Tsegaye Regassa, *supra note 162,* 319.

[171] Abdi Jibril and Appiagyei-Atua, *supra note 82*.

Courts Proclamation which provides that "federal courts shall have jurisdiction over cases arising under the constitution, federal laws, and international treaties". And, Article 6(1) of the same proclamation states that federal courts shall settle cases or disputes submitted to them on the basis of, among others, international treaties. In practice, however, litigants and as well as courts avoid referring to international human rights instruments ratified by Ethiopia even in cases where they are directly relevant.[172]

The Proclamation establishing the Ethiopian Human Rights Commission and the Institution of the Ombudsman also imply that courts have "power over the violation of fundamental rights and freedoms".[173] Ethiopian Human Rights Commission Establishment Proclamation Article 6(4) empowers the Commission to "undertake an investigation of human rights violations" while Article 7 "prohibits Commission from investigating complaints on human rights violations when they are brought before courts of law at any level". [174] In the same manner, Ombudsman Establishment Proclamation under Article 7(2) prohibits the institution of the Ombudsman from investigating "cases pending in courts of law at any level'. [175]

B. The Ethiopian Approach to Justiciability of the Human right to water

It is generally agreed that the realization of economic, social and cultural rights is costly, unlike the realization of the civil and political rights, and that such costs pose major challenges to the realization of the human right to water.[176] The limitations of "maximum available resources" and "the progressive realization" have surfaced as some of the challenges to the fulfillment of the obligation of the states of the human right to water.[177] Some scholars also argue that courts lack the ability to fully understand and adjudicate the complex issues involved justiciability of the human right to water.[178]

It is true that justiciability of the human right to water can be realized in the Ethiopian legal system if the right is expressly protected as the justiciable substantive norm and are directly enforceable by the adjudicatory organ. However, that is not the case and the human right to water is inferred from the Constitution through an extended and derivative interpretation of social rights and related human right norms. Hence, the only way out to make the human right to water a justiciable matter is to rely on the indivisibility, interdependence, and interrelatedness of all human rights. For instance, the right to life is enshrined in the FDRE Constitution and the ICCPR and this could have implications for the justiciability of the right to water at national and international level. In other words, if the human right to water is violated, it may by extension

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[172] Sisay Alemahu, *supra note 154*, 286.

[173] Abdi Jibril and Appiagyei-Atua, *supra note 82*, 1.

[174] See Arts. 6 & 7 of Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000, FEDERAL NEGARIT GAZETA, 6th year No. 40, Addis Ababa, 4 July 2000; See also Id.

[175] See Institution of the Ombudsman Establishment Proclamation No. 211/2000, FEDERAL NEGARIT GAZETA, 6th year No. 41, Addis Ababa, 4 July 2000. Id.

[176] Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio Economic Rights In National Law* 22 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, *35-64, 45 (2006).*

[177] Salman, *supra note 2*, 977.

[178] [], *What Price for the Priceless?; Implementing the Justiciability of the right to water*, HARVARD LAW REVIEW, Vol. 120, 1067- 1088 , 1075 (2007) .

mean denying the human right to life.[179] Another example, a court may, for instance, find a policy adopted to realize the right to health in violation of the human right to water if it happens due to lack of access to water and sanitation.

The Constitution incorporates social rights, water supply as one of the most important components of the human right to water, under the "crudely-formulated" provision of Article 41.[180] Without specifically listing and defining these rights, the article generally requires "the creation of an equal opportunity to …health, education and social services".[181] It is argued that certain social rights can be read into the broad provisions of Article 41.[182] The poor formulation of the article increases the ambivalence regarding the justiciability of social right as it is difficult to clearly delineate the precise scope of these rights.[183] However, the detailed provisions of international instruments would also be used to define the content and scope of the rights, which are protected in very general terms of the Constitution.[184]Article 41 of the Constitution may, for instance, be juxtaposed with ICESCR to read social rights, among other things, water services into the Constitution.

Moreover, the FDRE Constitution has adopted the fundamental objectives and directive principles of the state policy in chapter ten.[185] The FRDE Constitution states that "any organ of Government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under this Chapter".[186] Promising as they may appear, chapter ten provisions seem non-justiciable and their non-compliance cannot be taken as a claim for enforcement against the state.[187] The FDRE Constitution does not expressly prohibit courts from enforcing the provisions of chapter ten of the Constitution, which among other things include access to clean water under the social objectives, and it is understandingly difficult to make the provisions justiciable since it can raise so many issues such as "jurisdiction, standing, and remedy for their violations".[188] In addition, Article 85 of chapter ten of the FRDE Constitution makes no explicit reference whether the national policy principles and objectives, *among other things the provision of access to water*, are "enforceable by judiciary or semi-judiciary organs *(emphasis added)"*.[189]

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[179] In some jurisdiction such as Indian legal system, the human right to water has been derived from the right to life and it is justiciable. While in South African, the national constitution explicitly makes the issue of the human right to water a justiciable matter which is upheld by their Constitutional Court. *Id*. at 1069.

[180] Sisay Alemahu, *supra note 154*, 275.

[181] See art 41 of the FDRE Constitution.

[182] Sisay Alemahu Yeshanew, *The Constitutional Protection of Economic and Social Rights*, JOURNAL OF ETHIOPIAN LAW, VOL. 22 (2) 135 (2008).

[183] Sisay Alemahu, *supra note 154*, 276.

[184] *Id*. at 285.

[185] See Art 85-92 of the FDRE Constitution.

[186] *Id*. at art 85 (1).

[187] *Id*. at Art 37.

[188] The Ghana judicial experiences shows that directive principles of state policy are justiciable although the Supreme Court of Justice failed to dig deep in to some of the most contentious issues such as 'jurisdiction, standing and remedy for their violations'. See Abdi Jibril and Appiagyei-Atua, *supra note 82*, 1.

[189] *Id*.

Despite the absence of such clear stand in relation to the justiciability of provisions of chapter ten of the FDRE Constitution, it has been argued that "they are not justiciable"[190] because Article 85 and article 90 are silent on appropriateness of their justiciability of basic water rights and it requires the government, which also includes courts, to be guided by them instead. At the time of writing this article, no single case related to the enforceability of basic water rights has been brought to the attention of the judiciary or the House of Federation. However, it does not mean that the basic water rights are not justiciable. First, the silence of national policy principles and objectives on the justiciability of national policy objectives 'does not make them non-justiciable'.[191] Since all laws including the FRDE Constitution are meant to be justiciable, "it is not necessary to include a provision on their enforceability in courts".[192] Second, since all laws are made to guide any organ of government in pursuit of various objectives, and "the provisions that the government shall be guided by chapter 10 of the Constitution, cannot be understood as prohibiting their enforcement".[193]

It can also be argued that the social objectives of the FRDE Constitution in ensuring the right of access to water do not require the determination of a particular level of resources to be spent by the state and, thus, it is justiciable. For instance, ensuring the human right to water requires a huge investment in constructing dams, digging holes, constructing pipelines and related infrastructures. And, the obligation of states to fulfill the demand for basic water needs requires huge resources and the state can be held responsible if it fails to progressively increase resources required to develop water infrastructures. However, the realization of the human right to water may not demand resources; for instance, issuing an injunctive order requiring a state to abstain from interfering with the enjoyment of the right by a citizen and that it is justiciable. The state can also prohibit other parties including individual and companies from interfering with the enjoyment of the right through an act of pollution, contamination or diversion of water supply. Ensuring the human right to water requires respecting and protecting citizens' enjoyment from the undue interference from state and non-state actors and that it is justiciable.

V. CONCLUSION

The human right to water is a recent development under international human rights law. It is not mentioned explicitly in the bill of rights and has initially surfaced in to the body of international human rights law through the general comment 15 on article 11 and 12. According to general comment 15, the human right to water emanates from the right to adequate standard of life and the right to health. This right is also advanced through other soft laws. As a new development and not well advanced through jurisprudence, however, one can simply expect challenges particularly on the implementation of this right at domestic level. This article set out to explore the extent to which human right to water is embodied in the FDRE Constitution and the Ethiopian Water Development Proclamation and Water Resource Policy as well as other laws

[190] Sisay, *supra note, 154,* 142.
[191] Abdi Jibril and Appiagyei-Atua, *supra note 82,* 1.
[192] *Id.*
[193] *Id.*

and policies to demarcate the content and nature of the right. The human right to water is not explicitly mentioned in the human and democratic rights chapter of the Constitution. However, the human right to water is spelt out under article 90, national policy and principles and objectives section of the FDRE Constitution. It is also implicitly envisaged under Water Resource Proclamation, and Water Resource Policy of the country which requires prioritizing domestic use over other uses.

However, the fact the human right to water is mentioned under the national policies, principles, and objectives rather than under chapter three rights has raised concerns on whether citizens are able to invoke a human right to water in the court of law. The article argues that there is a room for recognizing the enjoyment of the right through judicial activism. Firstly, nowhere in the Constitution is said that socio-economic rights, among other things, the right of access to basic water needs, is non-justiciable. Moreover, justiciability based on the nature of rights has waned as human rights are considered universal, indivisible and interdependent under international human rights law. Thus, government can be held accountable for its regressive measure or for omission to improve the right of citizens to the supply of clean water which it is expected to realize it progressively. Considering that the FDRE Constitution requires interpretation of chapter three rights, there appears to be ample leeway for judicial activism in support of the promotion of the human right to water in Ethiopia.

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HARAMAYA LAW REVIEW *Vol.* 6 (2017) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this article: Aberra Degefa Nagawo, *Beyond the Individualization of Punishment: Reflections on the Borana Oromo's Collective Criminal Responsibility*, HARAMAYA LAW REVIEW 6 (2017): 29-42

BEYOND THE INDIVIDUALIZATION OF PUNISHMENT: REFLECTIONS ON THE BORANA OROMO'S COLLECTIVE CRIMINAL RESPONSIBILITY

Aberra Degefa Nagawo[*]

Abstract

The article mainly looks at the role collective responsibility plays in the prevention of crime among the Borana Oromo of Ethiopia. Borana is a clan-based society where every member of a clan enjoys privileges and is given protection by his (her) clan. The clan provides support to its member when it is needed, and assumes responsibility when a member commits crime. If a member of a clan commits homicide, Guma is paid by the perpetrator's clan to the clan from which a member has been killed. The objective of this article is to examine the underlying philosophy for the principle of collective responsibility and the merits of the principle in preventing crime among the Borana. The philosophy differs from that of the formal criminal justice system, where crime is individualized and the individual is answerable for the crime he commits. The article is based on the interviews the author has made from 2012-2014 with Borana elders during fieldwork to the area and review of the relevant literature. As it is part of the cultural values of the society and suitable for the clan-based and pastoralist Borana society, the practice of collective responsibility cannot easily be dismissed by forcibly imposing individual responsibility.

Keywords: *Borana, clan, collective responsibility, crime, Guma*

I. INTRODUCTION

Social norms and disputes are as old as human society. Every human society has norms which regulates relations of its members. Long before the emergence of the modern state and its formal justice system, human society had normative rules, procedures and institutions through which they resolved all their disputes. In the process of resolving disputes, the main parties involved were the disputants and the community within which wrongs have been committed. Previously, states had no role in settlement of disputes including crime. Dispute settlement was the property of the society which the state has stolen at a certain point in human history.[1]

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[1] Nill Christie, *Conflicts as Property*, 17(1) BRITISH JOURNAL OF CRIMINOLOGY (1977) 1-15.

With the emergence of the modern state and its formal criminal justice system, the stakeholders lost their control over the justice process and the outcome. Under the formal state criminal justice system, the earlier authority and roles of the society in the settlements of criminal dispute disappeared and replaced by the state. But even if states have taken the monopoly of settling criminal disputes, in significant parts of the world, some indigenous societies have continued to settle their own disputes informally based on their own customary laws.[2]

In many parts of Africa and the world, these informal justice systems and their corresponding dispute resolution processes are still operating along the formal justice systems.[3] The norms regulating the dispute processes are rooted in the communal values of the people. When a certain wrong is committed, it is not only personal relationship but also community harmony that is disrupted.[4] For this reason, dispute resolution aims at restoring the communal relationships disrupted by the wrongful act.[5] As religion, law and culture are interwoven, it is quite difficult to separately look at the law.[6] In order to know the African approach to criminal dispute resolution system, one needs to understand the peoples' worldview and the social setting within which each African society is placed and interact.

Worldview is described as "mental lenses that are entrenched ways of perceiving the world."[7] African people have their own indigenous worldviews that shape their perception of the world and human relationships. What gave rise to these indigenous worldviews are their close relationships and interactions with their environment. Since the assumptions, decisions and modes of problem solving in a given society are influenced by their worldviews, any study concerning a community would require proper understanding of the target community's worldview.[8] Without proper understanding of the worldview of a certain people, the judgment we make about the practices among a certain people will not be sound.

African indigenous worldviews are holistic, local and oral in their characteristics. Africans view knowledge itself as holistic, cyclic, and dependent upon relationships and connections to living and non-living beings and entities.[9] In many indigenous communities, harmony and peace are looked at not only as harmony between human beings but it extends to harmony with nature. In Africa, family ties, kinship relation and community networking are constantly respected,

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[2] Ewa Wojkowska, *Doing Justice: How Informal justice can Contribute*, UNDP-Oslo, Governance Centre, 2006.

[3] PENAL REFORM INTERNATIONAL, ACCESS TO JUSTICE IN SUB SAHARAN AFRICA: THE ROLE OF TRADITIONAL AND INFORMAL JUSTICE SYSTEMS, London. Astron Printers (2000).

[4] H Driberg, *The African Conception of law,* JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW, Third Series 16(4) (1934) Retrieved on November 10, 2014 from http://www.jstor.org/stable/753856

[5] R.B.G. Choudree, *Traditions of Conflict Resolution in South Africa,* AFRICA JOURNAL ON CONFLICT RESOLUTION, 1:1 (1999).

[6] L. A. Ayinia, *African Philosophy of Law: A Critique,* 6 JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 147 (2002)

[7] Michael Anthony Hart, *Indigenous Worlds Views, Knowledge and research: The Development of an Indigenous research paradigm,* JOURNAL OF INDIGENOUS VOICES IN SOCIAL WORK, 1(1) 2010, at 2.

[8] Idowu William, *Against the Sceptical argument and the absence thesis: African Jurisprudence and the Challenges of Positivist Historiography*, THE JOURNAL OF PHILOSOPHY, SCIENCE & LAW, 6(2): 9-24 (2006).

[9] Carol A. Hand, Judith Hunks & Toni House. Restorative Justice: The Indigenous justice system, CONTEMPORARY JUSTICE REVIEW: ISSUES IN CRIMINAL, SOCIAL, AND RESTORATIVE JUSTICE, 15(4) 449-467 (2012), DOI:10.1080/10282580.2012.734576.

maintained and strengthened. This strong belief in collectiveness is an indication of the centrality of communal life with emphasis on interconnectedness and relationships.[10] The attitude of togetherness and the spirit of humanity are universal values embedded in African indigenous worldviews. As stated by Steve Biko,

> We [Africans] regard our living together not as an unfortunate mishap warranting endless competition among us but as a deliberate act of God to make us a community of brothers and sisters jointly involved in the quest for a composite answer to the varied problems of life. Hence, in all we do, we always place man first and hence all our action is usually joint or community-oriented action rather than the individualism which is the hallmark of capitalist approach.[11]

According to Biko, rather than self-centered individual competition, what governs traditional African way of life is collectiveness and spirit of harmony. In their daily interactions and relationships, Africans are guided by their indigenous norms and values which is an integral part of their worldviews. Belief in consensus, dialogue, inclusion, reciprocity, fairness and mutual trust are the core values of African societies.[12]

In most traditional African societies, social relationships and harmony are given prime attention. A criminal dispute settlement process usually involves relatives of the victim, the offender and the community. The immediate objective of a criminal dispute resolution is to mend the broken or damaged relationship and repair wrongs, and restore community harmony. In Ethiopia itself, there are societies with their own indigenous justice systems settling disputes based on their own customary laws. Borana Oromo is one such society where disputes including criminal disputes are settled by indigenous justice system.[13]

The Borana have their indigenous dispute resolution system which is operating along the formal justice system without formal recognition. This has given rise to the co-existence of two competing justice systems. Because of lack of recognition and defined relationship, the two systems have uneasy relationship which is having its own impact on the people of the area. Under Borana indigenous justice system, clan members are collectively liable for the harm one of their members caused to a victim by way of paying *Gumaa* which is made in the forms of heads of cattle or sum of money. Among the Borana what applies is the principle of collective responsibility which is opposed to the dominant Western principle of criminal justice which makes only the individual offender responsible for a crime.

When looked at from the viewpoint of the formal criminal justice system, the principle applied among the Borana is considered collective punishment for a crime committed by an

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[10] A Melton 'Indigenous justice systems and Tribal society', Accessed 29th April 2011 from http://aidainc.net/Publications/ij_systems.htm

[11] STEVE BIKO, I WRITE WHAT I LIKE: A SELECTION OF HIS WRITINGS, Heinemann (1987), at 42.

[12] J.H. Driberg, *The African Conception of Law*, JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW, 16(4) 230-245 (1934) available at http://www.jstor.org/stable/753856; Ada Pecos Melton, Indigenous Justice Systems and Tribal Society, in WANDA D. MCCASLIN, ED., JUSTICE AS HEALING: INDIGENOUS WAYS. WRITINGS ON COMMUNITY PEACE-MAKING AND RESTORATIVE JUSTICE FROM THE NATIVE LAW CENTRE. St. Paul, MN: Living Justice Press. (2005), at 108-120.

[13] ALULA PANKHURST & GETACHEW ASEFFA (EDS) GRASS ROOTS JUSTICE IN ETHIOPIA: THE CONTRIBUTION OF CUSTOMARY DISPUTE RESOLUTION, Addis Ababa, French Center of Ethiopian Studies, (2008).

individual. Rules, institutions and systems in different societies are created by the particular societies to address their own specific problems. If such systems are user-friendly and responsive to the needs of the particular people, imposing an alien system would harm the society. This article aims at exploring the merits of the principle of collective criminal responsibility which is being used among the Borana in the context of Borana society. It tries to investigate how this system has helped in preventing crime within the Borana social setting.

To meet its aim, the study is conducted based on qualitative data gathered from Borana elders during the author's PhD field work between 2012 to 2014. The data were gathered through interviews and focus group discussions with Borana elders. In addition, interviews were conducted with individuals in the justice sector, prisoners and victims of crime. Further information was also gathered by consulting the relevant literature to deal with the merits of collective criminal responsibility as it is being practiced among the Borana.

The remaining parts of the article are organized as follows. Section II looks at Borana indigenous worldview and how the indigenous justice system works. The principle of collective criminal responsibility as applied among the Borana is presented under Section III. Finally, section IV provides conclusion and remarks on the subject.

II. BORANA WORLDVIEW AND INDIGENOUS JUSTICE SYSTEM

Borana is located in the southern part of Ethiopia in Oromia National Regional State. Although, Borana is one of the administrative zones of the National Regional State of Oromia, Borana people also inhabit other neighboring zones of the region. While Borana and Guji Oromo constitute the majority in the zone, other minorities include the Gabra, Burji and Garri.[14] Borana people are largely pastoral where the livelihood of the people is based on pastoralism. In Borana social system, the entire society is divided into two exogamous moieties known as *Sabo* and *Gona*. The two moieties are further subdivided into clans and sub-clans. Among the Borana, clans share collective rights and obligations. Clan members settle their disputes peacefully at clan assemblies and help one another in times of hardship. The clan elders (*hayyus)* have the responsibility of settling disputes and imposing sanctions on those who commit wrongful act.[15]

A. Borana Oromo Worldview

Without proper understanding of Borana worldview that shapes the entire Borana way of life and their interactions with one another and the natural world, it is difficult to understand their philosophy as applied to problem of crime and its consequences. The defining feature of Borana worldview is harmony and solidarity between human beings, nature and God. Among the Oromo in general, there is a strong belief that human beings and the natural environment are interconnected and live together in a relationship of harmony. As they believe in the reciprocal relationships and interdependence between human beings and nature, the Borana Oromo give high respect for the cosmic order put in place by *Waaqa (God)*. They take care of all forms of

[14] TOM LEUS & CYNTHIA SALVADORI, AADAA BOORANA: A DICTIONARY OF OROMO CULTURE, Addis Ababa Shama Books, (2006)

[15] MARCO BASSI, DECISION IN THE SHADE, POLITICAL AND JUDICIAL PROCESSES AMONG THE OROMO-BORANA. Asmara: The Red Sea Press, 2005.

life; they never mistreat any form of life.[16] The indigenous religion of the Oromo is known as *Waaqeffanna*. This indigenous Oromo religion is centered around *Waaqa*, who among the Oromo is considered the Creator of the universe and the sustainer of all life on earth.[17]

According to Oromo holistic view of cosmic order, *Waaqa* has placed everything in a well-balanced order. In their view, it is only by being in harmony with each other and with nature that they get the blessing of *Waaqa.* They all believe that any human act that disturbs the cosmic and social order is an infringement of the laws of *Waaqa* which would bring danger to the wrongdoer, his relatives and the community. In the context of human relationship, Oromo holistic view plays significant role in maintaining social peace and harmony. In giving recognition to interconnectedness of lives of human beings, the worldview establishes a necessary check and balance to human relations.[18]

In terms of regulating human relationships, an important moral value that is an integral part of Oromo worldview is the concept of *safuu (*moral rules*). Safuu* is a moral standard that is based on Oromo notions of distance and respect for all things. It is a standard which helps to judge social taboo and deplorable habits.[19] The moral and ethical obligations embodied in *safuu* are guides for the respect of the creator and all creatures (*Uuma and Uumama*). Human actions or inactions are founded on *safuu* which directs everyone on the right path. The underlying philosophy of *safuu* is that everything has a role to play and natural right to exist. Oromo understanding of what is wrong and right in human interactions is drawn from their holistic and relational worldview.[20] The ways they deal with problems are also shaped by the same relational worldview.

One very strong moral bond that unites the Borana is the concept of *Boorantitti* reflected in "peaceful well–being, unselfishness and respect for a common law."[21] In Borana social life, "the ideology of *Boorantitti* demands that all conflicts between Borana should be solved peacefully and the maintenance of internal peace is a strongly expressed ideal."[22] Every Borana grows up with full awareness of the supreme value of the ideology of *Boorantittii* and *nagaa Boorana. Nagaa Boorana* is the governing philosophy of Borana social relations. *Nagaa Boorana* refers to the orderly running of all relations, interactions and the non-violent settlement of disputes and conflict while *Boorantittii* refers to the feeling of commonality each Borana will have for one

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[16] Workneh Qalbessa, *Traditional Oromo Studies towards the Environment: an Argument for Environmentally Sound development,* SOCIAL SCIENCE RESEARCH REPORT SERIES, number 19. Addis Ababa: OSSREA (2001).

[17] LAMBERT BARTELS, OROMO RELIGION: MYTHS AND RITES OF THE WESTERN OROMO OF ETHIOPIA, Berlin, 1983

[18] *Id*.

[19] Gemechu Megerssa, *The Oromo Worldview,* JOURNAL OF OROMO STUDIES 12 (1&2) 68-79, 2005

[20] Dejene Gemechu, *Conflict and Conflict Resolution Among the Woliso Oromo of eastern Macha, with particular emphasis on the Guma*, Addis Ababa, United Printers (2007)

[21] Gufu Oba, Shifting Identities along Resource Borders: Becoming and continuing to be Borana Oromo in P.T.W BAXTER, J HULTIN, AND TRIULZI (EDS.), BEING AND BECOMING OROMO: HISTORICAL AND ANTHROPOLOGICAL ENQUIRIES, 117-132, Asmara: Red sea Press, (1996) at 120. The Borana common law is their *Aada Seera* which is the embodiment of all their laws.

[22] Johan Helland, *Institutional Erosion in the Dry Lands: The Case of the Borana Pastoralists*, EASTERN AFRICA SOCIAL SCIENCE RESEARCH REVIEW (EASSREA), 14(2): 49-73, (1998) at 64.

another. The maintenance of *nagaa Boorana* is the core value that guides the actions of both the spiritual and political institutions in Borana.[23] The duty of *Abba Gadaa* and clan elders (*hayyus)* at every level is to maintain peace and harmony among the Borana. [24]

Nagaa is a pervasive and sustained concern in the daily life of every Borana and the daily blessings given by Borana elders are prayers of peace.[25] Borana conception of peace is holistic, relational and collective. Relationships of harmony among members and with the environment are central features in Borana conception of peace and justice. Among the Borana, peace is viewed as a collective value and disruption of this value will have collective harm. The Borana believe that a certain wrongful act disrupts the social harmony within a community. In their view, re-establishment of the disrupted peace would require collective response.[26]

The Borana view their *Waaqa* as the source and guardian of peace and truth. When a wrong-doer violates Borana *aada-seera*, he does not only disrupt *nagaa Boorana* which is extremely valued by the Borana as a community, but he would also offend *Waaqa* who is the God of peace (*Waaqa mufachiise*).[27] The totality of Borana normative system is known as *aada-seera* referring to a sacred and profane set of laws governing behavior and maintenance of peace and order in Borana society.[28] Every Borana comes to know and understands *aada-seera* through his daily experience as a way of life.[29] A wrong-doer faces not only public condemnation but also possible punishment of *Waaqa*. This fear of possible condemnation of the community and *Waaqa*'s punishment has helped to curb crime among the Borana. The Borana have developed strong moral standards which helped them cultivate and maintain the ideology of *Boorantittii* and regulate their behavior towards one another. As an individual, in the daily interactions, every Borana should refrain from saying words that spoil relationships with others. The common saying among the Borana is, "*nageenyi fuula arrabnni abba oole oolti.*"[30] This literally means 'peace follows our tongue': what we verbally express during our daily interactions with others. If a person makes a statement or utters a word that spoils relationship with others in the daily interaction, it will disrupt harmony.

B. Borana Indigenous Justice System

The Borana have an indigenous governance system known as Gada. The system is an all-embracing governance system which has been regulating the political, legal, juridical and

[23] ASMAROM LEGESSE, OROMO DEMOCRACY: AN INDIGENOUS AFRICAN POLITICAL SYSTEM, Red Sea Press, Asmara (2000).

[24] Borbor Bule, Interview made in Aug 1, 2013.

[25] Every assembly begins and ends with blessings and prayer of peace. I have observed this during the 40th Gumii Gaayyo Assembly in 2012.

[26] BASSI, *supra* note 15.

[27] Borbor Bule, Interview made August 1, 2013

[28] E. Watson, Interinstitutional alliances and Conflicts in natural resources management: Preliminary Research findings from Borana, Oromia Region, Ethiopia, Marena research Project Working Paper no 4 (2001).

[29] There are clan elders or *Hayyus* who know all the laws. Besides, most of these laws are discussed every eight years on the Gumii Gaayyo where every participant has the opportunity to know them. Surely, it is also through intergenerational transference of knowledge.

[30] Jaatanii Diida, Interview made July 30, 2013.

economic aspects of the Borana people.[31] Gada is an age-grade class system that succeeds each other every eight years in assuming economic, political and social responsibilities. One age-set rules for eight years before handing over to the next younger age-set. A complete Gada cycle consists of five age-grades. The roles and rules attached to the age-grade system is the most important element that regulates Gada system. Borana Gada governance system is built in such a way as to enable all members of the society to learn and to carry out their duties at different stages of their lives and careers.[32]

Gada system has strong institutional structure with linkages from the *Abba Gada* at the top, down to the village levels. The *Abba Gada* is elected from one of the two Borana moieties with his team of advisors. The governing power under Borana Gada system is decentralized and vested in the assemblies at various levels. At the apex of all the assemblies is *Gumii Gaayyo* which is a pan–Borana assembly drawn from representatives of all Borana clans. *Gumii* refers to the general assembly and *Gaayyo* to the place where the assembly gathers. The assembly takes place every eight years mid-point within one Gada period. *Gumii Gaayyo* has supreme authority on all important matters like lawmaking and enforcement. Every eight years, the *Gumii* proclaims new laws, amend the old ones, and evaluate the *Abba Gada*. As a supreme judicial body, the *Gumii* resolves disputes referred to it which could not be resolved at lower levels. No other Borana authority can reverse decisions made by *Gumii Gaayyo.* Borana people have indigenous laws known as *aada seera* (customary laws). These laws are made by Gumi Gaayyo and amended by the same body.

The executive authority in Borana is entrusted to *Adulaa Council* elders who are six in number. Three each are drawn from *Sabo* and *Gona* moieties. As a legitimate leadership of the Borana, the *Adulaa Council* is responsible for upholding *nagaa* and *aada* (peace and custom) of Borana. The *Adulaa Council* administers all Borana affairs based on laws and customs of Borana *aada seera*, which is made and modified only by *Gumii Gaayyo*. The *Abba Gada* heads the *Adulaa Council* and with his team of council members, he is responsible for the eight year period.[33]

Like most African societies, the same collectivist and holistic worldview is prevalent among the Borana Oromo of Ethiopia. Oromo indigenous worldview is an expression of Oromo values and their perception of the world. Oromo worldview is holistic and collectivist in its approach to social problems and ways of solving these problems. The Borana conception of peace (*nagaa*) goes beyond harmony between human beings and extends to harmony with nature. Their collectivist approach to problem of crime has been shaped by their holistic and collectivist worldview. This collective approach of the Borana has evolved from their local experiences and is part of their indigenous knowledge systems which makes it more suitable in addressing local problems including crimes.

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[31] ASMAROM LEGESSE, GADA: THREE APPROACHES TO THE STUDY OF AFRICAN SOCIETY. London: The Free Press, (1973).

[32] BASSI, *supra* note 15.

[33] E. Watson, *Interinstitutional alliances and conflicts in natural resources management: Preliminary research findings from Borana, Oromia Region*, Ethiopia Maren research Project Working Paper no 4 (2001)

The Borana have their indigenous dispute resolution system which is operating along the formal justice system without formal recognition. This has given rise to the co-existence of two competing justice systems. Because of lack of recognition and defined relationship, the two systems have uneasy relationship which is having its own impact on the people of the area. Under Borana indigenous justice system, clan members are collectively liable for the harm one of their members caused to a victim by way of paying *Gumaa* which is made in the forms of heads of cattle or sum of money. Among the Borana what applies is the principle of collective responsibility which is opposed to the dominant Western principle of criminal justice which makes only the individual offender responsible for a crime.

When looked at from the viewpoint of the formal criminal justice system, the principle applied among the Borana is considered collective punishment for a crime committed by an individual. Rules, institutions and systems in different societies are created by the particular societies to address their own specific problems. If such systems are user-friendly and responsive to the needs of the particular people, imposing an alien system would harm the society. This article will try to show the relevance of this principle still being used among the Borana in their specific setting.

Borana indigenous justice system embraces the laws and institutions which serve as a framework for settlement of all disputes.[34] The Oromo Gada system ascribes great value to the rule of law. Under Oromo indigenous *Gada* democracy, since law is considered supreme, no one is above the law. The Borana say "*Seerri laafaaf kaa'an jabaa hinhaanqatu*" which in short means 'everyone is equal before the law'.[35] In their long history of self- administration, one important value that has been maintained by the Borana is respect for the rule of law. According to Asmarom Legesse "the Oromo are one of the most orderly legalistic societies in black Africa and many of their laws are consciously crafted rules, not customarily evolved habits."[36] There is a strong belief among the Borana that any act that disrupts Borana interconnectedness and harmony poses a danger to *nagaa Boorana* and erode the ideology of *Boorantitti.*[37]

Borana indigenous justice system has indigenous dispute resolution mechanism and institutions of justice and reconciliation that are operating and coexist along the formal Ethiopian criminal justice system. Since the formal justice system has exclusive authority over criminal matters, Borana indigenous justice system handles criminal cases without formal recognition. The Borana have effective indigenous laws for the use of common range resources like wells and pasture.[38] The Oromo in general strongly believe that social justice and equal benefit from natural resources cannot be maintained in the absence of rule of law.[39]

[34] Like in other indigenous African societies, Borana laws don't have classification into criminal and civil laws.
[35] Badajaa Waariyoo, Interview made July 28, 2013.
[36] Asmarom, *supra* note 23, at 29.
[37] Kanu Jilo, Interview made on July 31, 2013.
[38] BASSI, *supra* note 15.
[39] DIRRIBI DEMISSIE, OROMO WISDOM IN BLACK CIVILISATION, Finfinnee Print. & Pub. Finfinne (Addis Ababa) 2011.

The main objective of Borana indigenous justice system is to ensure *nagaa Boorana* through effective regulation of relations among the people.[40] The social harmony and collective identity of Borana people is ensured by their *aadaa-Seera*. Since litigation is detested, disputes are rare among the Borana.[41] Besides, in view of the fact that every day greetings constitute a form of preaching peace, a "sustained feud between groups or individuals is unacceptable" in Oromo society.[42] According to the interviews with the justice officers of Borana Zone drawn from the judiciary, public prosecutors, police and prison and corrective centers, disputes and crimes were frequent around urban areas like Yaballo, Moyale, Bule Hora and the highland areas where there is farming.[43]

The Borana are socially tied together by kinship relations in that everyone is connected to one of the Borana clans by which he identifies himself. How the Borana behave and address their problems is determined by the kinship relationship and interconnected nature of the society. In view of the fact that Borana people are largely pastoral and significant resources are collectively used, the clan system serves as an important structure through which wealth distribution among clan members is made. Important communal activities of clans include digging, maintenance and regulation of wells and other sources of water. Clans also play a key role in ritual performance, regulation of water resources and in the election of political leaders. Within his own clan, everyone has obligations toward one another. Failing to discharge one's obligation towards a clan or fellow Borana would spoil the mutually supportive relation established by *Boorana aada-seera.*[44]

III. COLLECTIVE SANCTION (RESPONSIBILITY)

A. Collective Sanction-Exclusion from Nagaa Boorana

Collective sanction may result from two situations. One is when a Borana violates Borana *aada-seera* and fails to carry the penalty imposed on him by elders at clan and Borana levels. The other sanction is the one imposed collectively on a clan whose member has committed a crime like homicide. When a Borana defies Borana *aada–seera* and disregards decisions given by elders, the case will be brought before *Gumii Gaayyo* where his exclusion from *nagaa Boorana* will be announced.[45]*Gumii Gaayyo* is a supreme body with a supreme governing power which is

[40] Badajaa Waariyoo, Interview made July 28, 2013.

[41] In an interview I have made with Borbor Bule on August 1, 2013, since land and pasture are collectively used and regulated by the community, the causes for criminal disputes between individuals are minimal. In one of my observations during my visit to Dirre district in May 2014, I have been to Dubuluq town on a big market day where there was a single police in the town who as he told me went there from Yaballo for that day. There are no police stations in the Pastoral areas.

[42] Mamo Hebo, The Role of elders in conflict Resolution: The Case of arsi Oromo with Special reference to Dodola District and its Environments, in TAREKEGN ADEBO & HANNAH TSADIK (EDS.), MAKING PEACE IN ETHIOPIA: FIVE CASES OF TRADITIONAL MECHANISMS FOR CONFLICT RESOLUTION, pp 48-77 Addis Ababa: peace and development committee, 2008, at 48.

[43] Interviews were made on February, 23, 2012, Aug 23, 2012, and July 24, 2013 With the Zonal Justice Bureau Officer (T.A.), Public Prosecutor (M.G) and Police Officer (T.L).

[44] BASSI, *supra* note 15.

[45] The exclusion includes denial of greetings.

subordinate only to divine rule. It is organized every eight years and made up of all the Gada assemblies of the Borana clans. Legislative power on all matters concerning Borana is vested in the *Gumii Gaayyo.* In addition to legislative power; *Gumii Gaayyo* has political and juridical powers.[46] A person brought before the Gumii will lose all Borana privileges attached to *Boorantitti* which will make him defenseless.

The formal way of depriving a disruptive person his *Boorantitti* identity is by excluding him from *nagaa Borana* at *Gumii Gaayyo.* As a result of the exclusion, the law-breaker will be excommunicated from the community where every Borana will withhold greetings and blessings from him. Most importantly, the habitual offender will be deprived of all social privileges and ritual support required from the whole Borana. In their justice system, the Borana bring habitual law-breakers into line simply by withdrawing all the social privileges, benefits and ritual support required from the whole Borana including the daily greetings, blessings and the prayers of the Borana.

At the 40th *Gumii Gaayo*, which took place in August 2012, a person who has raped a girl and defied the authority of the Gada was brought before the *Gumii* and he was cursed for the act and defiance.[47] The act of the young person was described by the *Abba Gadaa* as a detestable and disruptive of *nagaa Boorana.* He considered the act as unacceptable under Borana *aada-seera* which required the decision of the *Gumii.*[48] After hearing the case from the *Abbaa Gadaa*, *Gumii* members discussed on the issue and finally decided to exclude the young person from *nagaa Boorana.* Since, having known about his son's criminal act, the father failed to advise his son to respect the law; he was also excluded from *nagaa Boorana*. According to Borana *aadaa-seera*, if a person harbors a criminal or advises him not to appear before elders, his act is considered against the law for which he will be punished.

Based on the exclusion declared by the 40th *Gumii Gaayo*, the young person and his father will not be looked for if they are lost; they will not be buried, if they die. No one will marry their daughters nor does any person give them his daughter. They will be deprived of the right to use water-wells (*eela)* belonging to Borana clans. No one should enter their houses and sit on the seats they provide. The *Gumii* declared that the exclusion will apply to any Borana who violates the exclusion imposed on the young person and his father. If any person violates the exclusion by allowing them to use a water-well, that person will also face the same exclusion. As a result of the exclusion from *nagaa Boorana*, the young person and his father have been deprived of *Booranntitti* and all the privileges and benefits derived from it. In May 2014, the young person asked for forgiveness as a result of which his Borana rights and privileges have been restored.

In Borana pastoral way of life, watering of animals, herding, sharing of goods and services and settlement of disputes dictates mutual support and collaboration.[49] In Borana social setting, where everything required for livelihood including water is collectively used and administered

[46] A Shongolo, *The Gumii Gaayyo assembly of the Boran: A traditional legislative organ and its relationship to the Ethiopian state and a modernizing worlds*, Zeschcrift fur ethnologie 119 (1996).

[47] I have personally observed this.

[48] Abbaa Gadaa Guyyo Goba interview made on Aug 20, 2012

[49] Jaatanii, Interview made May 14, 2014.

through clan system, a habitual offender who may possibly be subjected to such withdrawal cannot survive. A person who violates rules having to do with the use of water resources will be punished by exclusion from using that water resource (*eela*) which is used collectively by all clan members. If a person repeatedly violates the rules, he will be deprived of access to these collectively used water resources and excluded from all vital social supports.[50] In that context, the kind of sanction imposed on the young person and his father at the 40th *Gumii Gaayo* can be considered a very severe punishment. In a pastoral society, withdrawal of social support and exclusion from access to dry season water wells means the impossibility of carrying out the traditional pastoral activity.

Among the pastoral Borana, even a basic work like the extraction of water from the deep traditional wells requires the cooperation of numerous pastoral units. That is why clans share collective rights and obligations and clan members help one another in times of hardship. Through his clan, a person can be coerced to fulfill his obligations towards his clan and fellow Borana. Each Borana clan is clustered into lineages which is an important subdivision of a clan with a considerable influence on the life of individual Borana. The social privileges, rights, duties, seniority position, and social identity of a person are rooted in the lineage. In addition to being an effective way of reaching him in Borana land, in times of crisis, a person's clan and lineage comes to his rescue.[51]

Among the Borana, an individual who disrupts *nagaa Boorana* by repeatedly infringing Borana *aada-seera* is considered as a person lacking the character of *Boorantitti*.[52] If a Borana disregards his obligations towards his clan and fellow Borana by repeatedly disobeying Borana *aada –seera*, the clan will withdraw all the benefits and privileges the habitual offender enjoys. Such a person is outlawed by his clan and deprived of his status where he can no more claim clan protection. The clan to which such an offender belongs disowns him and discontinues all further responsibility for his criminal actions.[53]

B. Gumaa - A Practice of Collective Responsibility

Borana *aada-seera* has put in place punishment (*adaba)* that is effective by way of inducing obedience and enabling members of the society to maintain a strong sense of discipline. Under Borana indigenous justice system, the clan whose member has committed serious crime like homicide will be collectively responsible for the criminal act committed by such a member. Through such collectivist sanctions, the Borana have created a mechanism of containing crime where every clan as a collective and every individual member make sure that laws are respected by way of refraining from committing crime. The system has been found to be appropriate for the kinship-based Borana pastoral way of life.[54]

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[50] Borbor Bule, Interview made on Aug 1, 2013.

[51] Asmarom, *supra* note 23.

[52] Jaatanii, Interview made on Aug 3, 2013.

[53] Gufu, *supra* note 21.

[54] P.T.W Baxter, Borana Age-Sets and Generation-Sets: Gada, A Puzzle or a Maze, in P.T.W BAXTER & URI ALMAGOR (EDS.) AGE, GENERATION AND TIME (pp. 151-182) London (1978).

The common practice among the Borana is, when homicide takes place, the killer will immediately report the incident to his near relatives and he will be kept at a certain temporary sanctuary. No Borana clan gives shelter to a culprit or a Borana who has spilled Borana blood with a view to hide him from justice. A culprit will be sheltered until the victim's relatives are approached and *araara* process begins. The *araara* process commences with the family of the offender, with the help of elders, immediately approaching the relatives of the victim and asking for *araara* so as to avoid revenge. The *araara* ritual requires that the wrong-doer verbally express his remorse to the victim's relatives. This will remove the feuds (*warra gumaa*) between the relatives of the victim and the offender thus bringing the *araara* process to its consummation.[55] *'Booranni nama ajeese gumaa oso hinbaasin of kessa hinkaa'u. Dhignni namaa dhangala'e sun lammii sana xureessa*. *Kanaafu gumaa fi hooda baafachu qaba*.'[56] This means, among the Borana, a clan does not keep or hide a person who has spilt human blood and has not gone through the reconciliation ritual and paid *gumaa* since doing that would bring from God a certain misfortune to that community.

The belief among the Borana is, in case of homicide, the killer's act violates not only *Booranaa aadaa-seera* but also the law of *Waaqa*. As a consequence, the clan to which the perpetrator belongs will collectively be disposed to spiritual retribution from *Waaqa*. *Adabbi Waaqa hambisuuf nama qoffatti oso hintaane Waaqatti araaramuutu barbaachisa.*[57] This literally means, in order to escape God's punishment, you need to make reconciliation not only with man but with God as well. For this reason, the Borana consider both the payment of *gumaa* and the *araara* compulsory. From the offender's perspective, based on Borana collectivist philosophy and *aadaa-seera*, clan members enjoy privileges and benefits deriving from their membership which includes giving a member protection and coming to his rescue when a clan member is in need of support.

This indigenous principle of collective responsibility applied among the Borana may be viewed as a practice that encourages criminality. Because if one knows that his/her clan is going to be responsible for his act, he will tend to commit crime. However, the Borana argue otherwise. They say "*Gosti sodaa kaffalti yakka irra of eegee, wal'eega."*[58] This means the clans restrain their members from committing crime for fear of paying *gumaa.* Besides, as intentional killing is not acceptable among the Borana, the payment of *Gumaa* is limited to cases where the killing is accidental (*Dagu).*[59]

In case of a clan member who has intentionally killed a Borana and that is proved, the clan will not be responsible for that.[60] These days, such cases are left to the court to be dealt with.

[55] Dirribii, *supra* note 39.

[56] Waaqo Guyyo, Interview made on July 30, 2013.

[57] Jaatanii Diida, Interview made on May 14, 2014.

[58] Borbor Bule, Interview made on Aug 1, 2013.

[59] Actually, from what I have gathered from the elders, *dagu* is much broader than accidental. The elders who see the case will determine whether it is *dagu* or intentional killing.

[60] Rape, serious bodily injuries and spilling of human blood are punishable but what is paid may vary. The Borana have laws for everything and what the punishments are for the wrongs committed against another person and even horses. Accidental killing cannot be prevented but the belief and the moral restraint among the society is preventative effect.

According to Borana elders, supporting a clan member who intentionally killed a person would be encouraging killing. Since this is known, everyone refrains from intentionally committing crime. Besides, in terms of material costs, since repeated crimes will be too great a strain on the resource of a clan, every clan will see to it that all members comply with *Boorana aada-seera*. If there is a clan member who repeatedly commits crime, the clan to which the habitual offender belongs withdraws all the privileges and benefits such member enjoys and excludes him from *nagaa Boorana*.[61]

As violation of *aada-seera* is detested under Borana indigenous justice system, there is no room for criminals. Clans restrain their members from committing crime in fear of paying *gumaa.*[62] As an individual, every Borana comply with Borana laws in fear of being deprived of the privileges and protection flowing from membership which in effect has made the Borana generally law-abiding. According to Asmarom, "how deep the sense of order is among the Borana can be gleaned from the fact that homicide-within their society is virtually unknown."[63]

In Borana society, the principle of collective responsibility is serving as an effective instrument through which the individual Borana and the collective mutually ensure obedience to *Boorana aada-seera,* prevent crime and consequently avoid payment of *gumaa*. The principle has enabled the pastoral Borana to collectively control those who may possibly disrupt their social harmony (*nagaa Boorana*).[64] The formal criminal justice system has imposed itself on the Borana people and claims to be the best protector of Borana peace.[65]

As a whole, the philosophy of collective responsibility among the Borana views crime as having communal character. They do not consider crime as a mere solitary act of an individual which has nothing to do with the community. The Borana look at the causes, consequences and remedies of crime in collective sense. In actual fact, the merits of a certain practice are measured by its responsiveness to the needs of the users of the system.

IV. CONCLUSION

Communal way of life is the bedrock of African indigenous worldview. Africans measure the effectiveness of their laws and sanctions by their ability to maintain communal harmony. The fact that Borana people are largely pastoralists has shaped their values, rules and institutional set up. Borana is a kinship society where a member of a clan enjoys benefits and privileges as a member of a clan. A clan will provide the necessary support and protection to a law-abiding clan member where he faces hardship and attack. But a Borana who disregards his obligations

[61] Borbor Bule, Interview made on May 16, 2014.

[62] A person who commits crime is a liability to a clan so in order to avoid this liability, clans want to make sure that every clan and clan member comply with Borana laws.

[63] Asmarom, *supra* note 23, at 27.

[64] The only prisons in Borana are in Yaballo and Bule Hora. In places where this practice is effectively working, there are police stations. I met a single policeman at Dubuluq on a market day.

[65] The formal justice system is inaccessible to Borana pastoral areas. They are limited to the big towns and the Zonal capital Yaballo. Besides, a Zonal police officer I have interviewed has told me that they don't have police stations in the lowland pastoral *woredas* (Interview with T. L July 24, 2013). The same thing is true of other formal justice institutions. All these gaps are filled by the Borana informal justice system.

towards his clan and fellow Borana will lose his benefits and privileges. Among the Borana, the combined use of exclusion (*abaarsa*) and principle of collective responsibility has made the Borana law-abiding. This approach has been shaped by the people's collectivist and relationship-focused worldview. Collective responsibility is one of the core values embedded in Borana worldview along with mutual survival and interdependence.

Among the Borana, crime is viewed as an act which disrupts *nagaa Boorana*. For the Borana, *nagaa* (peace) is indivisible and considered as a collective treasure which belongs to all Borana. The philosophy is that to restore *nagaa Boorana* which is collective, collective response is necessary. In other words, the maintenance of harmonious relations is a shared duty of every Borana. Collective responsibility and sense of shared destiny are necessary features of Borana way of life. The people have successful record in organizing collective action and managing conflict.

In general, so far, in terms of performance, the clan-based Borana justice system in general and its principle of collective responsibility seem to have worked well in disciplining its members. Every clan member has been kept within the bounds of the norms of the society because of the fear of being deprived of his social connection which is a severe kind of punishment. Every clan has more or less ensured that its members continued to be law-abiding in fear of paying *gumaa*. Hence, in the context of Borana clan-based and pastoral social setting, the principle of collective responsibility would still be relevant.

In the context of Ethiopia in general, where there are diverse indigenous justice systems operating, studies have to be made to determine the potential each one may have in preventing crime in the concerned societies. As they are derived from local experiences, indigenous knowledge systems of the people are more suitable in addressing local problems including crimes than the one imposed by the State. The practice of involving the community in the prevention of crime which is working among the Borana can be used by the formal justice system itself.

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HARAMAYA LAW REVIEW *Vol.* 6 (2017) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this article: Daniel Behailu Geberamanuel and Gemmeda Amelo Gurero, *The Enigma of Informal Rural Land Deals In Ethiopia: Evidence from Peri-urban Areas of Hawassa City,* HARAMAYA LAW REVIEW 6 (2017): 43-66

THE ENIGMA OF INFORMAL RURAL LAND DEALS IN ETHIOPIA: EVIDENCE FROM PERI-URBAN AREAS OF HAWASSA CITY

*Daniel Behailu Geberamanuel and Gemmeda Amelo Gurero**

Abstract

The 1995 FDRE Constitution and all statutes pertaining to the land law regime of Ethiopia either prohibited or strictly regulated transfer of rural land use rights. However, land transaction has been going on informally against prohibitions or strict requirements for transfer of rural land use rights. Thus, this study investigates nature, manner and status of informal rural land deals vis-à-vis formal statutes, court decisions, and expert views of key informants. The focus of this article is on peri-urban areas where transfer is made mainly for the construction of dwelling houses (squatting). In addition, acquiring land for other uses like farm land and small businesses (poultry, dairy farms, for planting perennials etc.) are considered. Consequently, informal rural land deals is defined in this paper as any transactions in land except those allowed by law. The nature of informal rural land deals include transferring land use rights through donation and inheritance without fulfilling legal conditions related to family member, minimum holding size, and willingness to live on agriculture by the transferee, and in a manner that does not displace the landholders. It also includes sale and mortgage in any manner, and rent without following preconditions such as: minimum holding size, rent period, consent of the family, registration and writing contract. Hence, informal land transition is found to be rife in the study area. The formal laws and institutions are unable or incapable to control it and in effect the rule of law is being undermined. The government is well advised to study the matter and bring order by paying attention to the realities on the ground.

Keywords: *land deals (transactions), land use rights, mortgage, peri-urban land, rural land,*

I. INTRODUCTION

Land is vital for life, directly or indirectly, as it is often a source of food, shelter, income and even at times social identity. Given this primal importance, institutions dealing with land (both formal and informal) have evolved over long periods and several studies have long pointed to the need for a careful and differentiated approach as a precondition for making clear policy in

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relation to land that can help improve both efficiency and equity.[1] For that, the 1995 Constitution of the Federal Democratic Republic of Ethiopia (here in after, FDRE Constitution) regulates and places umbrella policy framework. The Constitution confirms under Art. 40(3) that *'the right to ownership of rural land and urban land is vested in the state and the peoples of Ethiopia. Land… shall not be subject to sale or to other means of exchange.*'[2] Besides, Art. 89(5) of the FDRE Constitution entrusts the government with the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development.

Hence, the umbrella land policy is underlined in the FDRE Constitution itself. Yet again, vesting ownership rights on government and people are an empty shell. One important message is that individuals cannot be owners, nor the people and the government are effective owners in terms of exercising the full ownership rights (*abusus, usus and fructus*). Thus, no one is an effective owner of land. Besides, this fact raised and invited debates (and controversies) on the import (inner message) of the land policy, and the debates are predisposed by three prevailing thoughts;

> First, there is a great fear that opening up land markets provides inroads for involuntary dispossession of land from "poor and vulnerable" peasants and increased concentration of land. Second, there is a "safety net" type of argument that reinforces the justification for control of land by the state. It is assumed that a provision of a minimum guaranteed access to land is necessary to ensure the food security of peasant households. The third perspective is centered on search for market-based land tenure system recognizing importance of land as a key economic input.[3]

On the other hand, raging debates are there opposing the official stance of the government. However, currently, regional governments are given the right to administer land[4] while the federal government enacts laws concerning land and natural resources which amounts to guiding norm/framework legislation. The regional states also adopt land laws towards accomplishing land administration endeavors.[5] Accordingly, the Federal Rural Land Administration and Use

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[1] KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION, A World Bank Policy Research Report XVII (World Bank and Oxford University Press, 2003).

[2] Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, FEDERAL NEGARIT GAZETA, 1st Year No.1, Addis Ababa, 21st August, 1995, (FDRE CONSTITUTION hereafter).

[3] Teklu Tesfaye, Emerging Informal Land Markets: A Quest for Equitable and Efficient Land Tenure Systems International Conference On African Development Archives. Paper 41, at 1, (2001) http://scholarworks.wmich.edu/africancenter_icad_archive/41 (Accessed on 12 December 2016).

[4] Article 52 (2) (d) of FDRE CONSTITUTION, in here, the power of regional governments to administer land in accordance with Federal laws is clearly recognized. The power to administer impliedly indicates making of laws to facilitate endeavors of land administration and to enact laws in the domain left by federal land laws based on particular local conditions. Besides, Art.17 of Federal Land Proclamation 456/2005 clearly reveals the existence of power of regional states to "enact rural land administration and land use law" which is consistent with it (Proc. 456/2005) in order to implement the land administration mandate. Accordingly, all of the regional states (Oromia, Tigray, Amhara, Afar, Gambella, Somali, Benishangul Gumz and SNNPRS) have adopted their own Rural Land Administration and Use proclamations in order to implement the federal rural land proclamations. It is also to be noted that the Afar and Somali regional states enacted, very recently, laws that cater to the needs of the pastoral society in reality to the situation of their regions. Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No. 456/2005, FEDERAL NEGARIT GAZETA. 11th Year No. 44, Addis Ababa-15th July, 2005 (hereafter Federal Rural Land Proclamation).

[5] Article 51(5) of FDRE CONSTITUTION, the federal government is constitutionally obligated to come up with the framework legislation to be used as a standard by the regional states while discharging their duty of administering

Proclamation No. 456/2005 provides the anchoring principles that guide enactment of regional laws. Hence, the Southern Nations, Nationalities and Peoples Regional State (hereinafter, SNNPRS) is one of the regions that have already enacted the rural land law that determines land use and administration in its own region (i.e., Proclamation No. 110/2007).[6] The SNNPRS land laws, on the same token, recognize free access to rural land use rights with some restriction and at times total prohibition of transfer of land use rights.

Nevertheless, informal rural land transactions have been taking place in the nation (as well as in SNNPRS), which the formal law vows to discourage or prohibit. Where the land value is high, there are large land markets going on against the formal law. It has been observed that where the land is irrigable, a cash-crop area, or is peri-urban areas, land based transactions are enormous thereby allowing informal land deals to go on.[7]

Thus, the issues which this paper investigates are regarding the nature and manner of informal land deals, and what its status is under formal law, court practices and other land related government organs. Hence, the purpose of this paper is to investigate the extent and trend of informal land deals in peri-urban areas of Hawassa city and surrounding rural areas. It is also in the objective package that the nature, manner and status of such deals shall be investigated vis-à-vis the state land laws and practice thereto. Thus, the Second section is about the nature of informal rural land deals while the Third section considers manners of informal rural land deals. Section Four deals with status of informal rural land deals under the regional law, court practice and other concerned government organs. Finally, conclusion and possible recommendations are made.

Accordingly, the methodology adopted to reach our conclusions and findings are largely qualitative approach where cases are reviewed and key informants are interviewed. Besides, personal observations is often resorted to. Yet again, legal analysis is key instrument which is used to figure out the matter at hand.

II. UNDERSTANDING PERI-URBAN INFORMAL LAND DEALS

It is erudite to shed some light on the notion of '*peri-urban land'*. Peri-urban land is an area with immediate vicinity to a city or town with a potential to be included to the city

land and natural resources. Thus federal government has currently issued the guiding/framework legislation i.e. Federal Rural Land Administration and Land Use Proclamation No, 456/2005 which repealed the Federal Government Rural Land Administration Proclamation No. 89/1997 (Federal Rural Land Administration Proclamation No. 89/1997, 3rd Year No. 54, Addis Ababa - 7th July 1997). This federal guiding/framework law has left room to be determined by the rural land administration laws of regions on certain matters; such as the duration of rural land use right of other landholders (i.e. except peasant farmers, semi-pastoralists and pastoralists who shall have no time limit). Thus, regions can determine, as per Art. 7(2), a period for lease of rural land holding rights and as per Art. 8(1)), particulars obligations of rural land users (Art. 10 (1)), and the minimum rural land size holding (Art. 11). However, whether federal law has sufficiently left the room that enables the regions to accommodate their particular local conditions is difficult to assess as there is no yardsticks under the constitution against which it can be measured.

[6] SNNPRS Land Administration and Use Proclamation No. 110/2007, DEBUB NEGARIT GAZETA, 13th Year No. 10 Hawassa, 19th Feb. 2007 (hereinafter SNNPRS Land Administration and Use Proclamation No. 110/2007)

[7] See in general chapter three in DANIEL BEHAILU, TRANSFER OF LAND RIGHTS IN ETHIOPIA, TOWARDS SUSTAINABLE POLICY FRAMEWORK, Eleven International Publishing, The Hague (2015).

administration or already included but not formalized via executed city plan. These areas are areas between city administration and proper rural land and often its status is always in a *legal limbo*. Yet again, defining '*peri-urban informal land deals*' in the context of Ethiopia is a daunting task. It can be understood as any transaction relating to land except those allowed by the formal land law. In other words, informal land deals is transacting in land rights completely under prohibited circumstances, or not fulfilling (or honoring) conditions provided by the formal laws meriting legal transactions. Thus, to elucidate informal rural land deals, one must be in a position to appreciate and understand the prohibitions and restrictions of the formal laws with regard to land rights transaction.

Currently, transfer of rural land use right is permitted, in some instances, in accordance with the formal law of the nation. It is to be noted that the FDRE Constitution and subsequent legislations provide for the public ownership of land and strictly curb any transfer, be it through sale or otherwise. However, short of transfer of ownership, transfer of use rights could be possible and there are some legal rooms for transfer of rural land via lease or rent, gift and inheritance under the limitations specified by the land laws.

Therefore, transfer of land rights in Ethiopia has to follow the land policy of the nation which curbs ownership transfer. According to the formal law of the country, transfer of land rights does not include sale or transfer of ownership title for obvious reasons. Hence, land holders can only transfer land use rights. This goes in line with the legal maxim that '*no one can transfer better title than he has'*. But this is not always true. For instance, if an investor rents land from a farmer who only has use rights, the investor can have a mortgaging right over the rented land.[8]

A. Sale of Peri-urban Land Use Rights: An Affront to the Formal Law

Article 40(3) of the FDRE Constitution clearly states that land is an exclusive common property of the state and the peoples of Ethiopia and is not subject to sale or other means of exchange. Thus, sale of land or land use rights is strictly prohibited. Ownership of land rests in the state and the people though this is also very impractical albeit land leasing (for consideration) to some extent. The idea is that the state should hold the land as a trustee of the people (true also in practice) and the law should prohibit the sale of land.[9] The law prohibited any transfer of land through sale by landholders or beneficiaries of land or settlers on formerly state-owned land towards preventing them from selling or mortgaging their land. Such a restriction was justified as a temporary measure to prevent the beneficiaries of a land reform program from selling their land based on inadequate information or in response to temporary problems (preempting distress sell) or imperfections in product and financial markets.[10] The stand of the present government

[8] Article 8(4) of SNNPRS Land Administration and Use Proclamation No. 110/2007. Note, thus, investors who rent land either from the government or peasant farmers have the right to mortgage their lease right as security to banks. However, what is being mortgaged here is not the land itself but the lease right that the right to use the land for a given period of time as land is not private property in Ethiopia.

[9] Mamo Hebo, *Disguised Land Sale Practices among the Arsii Oromo of Kokossa District, Southern Ethiopia*, 353 ASIAN AND AFRICAN AREA STUDIES, Vol. 6 No. 2 (2007).

[10] See in general, Dessalegn Rahmato, *Agrarian Change and Agrarian Crisis: State and Peasantry in Post-Revolution Ethiopia, Africa:* JOURNAL OF THE INTERNATIONAL AFRICAN INSTITUTE, Vol. 63, No. 1, 36-55 (1993)

(after four decades of the radical land reform) is also along this line that market distortion leads to land accumulation by the few.

On the other hand, it can be argued that, precluding land reform beneficiaries from sales in the medium term would reduce efficiency by preventing adjustments in response to differential beneficiary abilities, and could, if combined with rental restrictions, cause large tracts of land to be underutilized. The danger of beneficiaries' undervaluing their land could be reduced through other means, and the goal of preventing small landowners from selling out in response to temporary shocks would be better served by ensuring that they have access to output and credit markets and to technical assistance, and by providing safety nets during disasters to avoid distress sales.[11]

Thus, the formal law has strict stance against selling or mortgaging or another modes of transfer of land to preempt its purported effect of denying permanent use rights of the landholder. The easy way out taken by the government is to prohibit private ownership of land or denying active rental markets promoted by a secured tenure. Hence, the rigor of the law is being circumvented and there is a huge informal market for the land.

B. Mortgage of Peri-urban Land Use Rights

The land laws do not allow land use rights being used as collateral for loans. But, agricultural investors are permitted to collateralize their land use rights while small scale farmers (and subsistence farmers) are prohibited from doing so. The rationale provided for this prohibition is to shield rural landholders from exploitation by loaners and land speculators and also to abate the tide of rural to urban migration.[12] The government also argues that financial institutions are not interested to provide credits to rural land holders.

Many scholars do not agree with this and ask the question 'why are investors who lease land for a limited period are allowed to use their land use right as collateral while small scale landholders who have use right in perpetuity are not accorded the same privilege?'[13] Furthermore, they question the validity of the government's argument that smallholders will lose the use rights they mortgaged in case of default on the loans and could migrate in masses to the cities and towns and that governments should play the role of *pater familia.*[14] But, an overwhelming majority of rural land holders are smart enough not to gamble with the future of their families' livelihood.[15] Currently, any rural landholder, except investor, who mortgaged his/her land use rights for whatever obligation is violating the law.

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[11] DEININGER, *supra* note 1, at 122.

[12] See Margi Mcclung, *Making Land Rental Markets Work for Ethiopia's Rural Poor,* LANDSA BRIEF (2012).

[13] Solomon Bekure et al., *Removing Limitations of Current Ethiopian Rural Land Policy and Land Administration (Paper Presented at the Workshop on Land Policies & Legal Empowerment of the Poor) 10 (The World Bank November 2-3, 2006, Washington D.C., 2006)*

[14] See chapter one, DANIEL BEHAILU, *supra* note 7.

[15] *Id*. Moreover, the countrywide survey conducted by the Ethiopian Economic Policy Research Institute in 2002 found out that only 4.5% of landholders are willing to sell their land if given the opportunity and 90% indicated that they will not consider selling whole or part of their holdings.

C. Rent/Lease of Peri- urban Use Rights Against Prescribed Conditions

Rent of rural land is permitted both under the Federal Rural Land Administration and Land Use Proclamation[16] and SNNPRS Land Administration and Use Proclamation[17] following prescribed conditions. Hence, in principle, a peasant or a pastoralist with landholding right is permitted to rent his or her land under the terms and conditions provided by the law. In other words, rent is permitted only in compliance with conditions and otherwise the transfer is informal or illegal.

The first condition is related to size of land. Peasants or pastoralists can rent their holding and use right to either other fellow farmers/pastorals or investors in a manner that does not displace them. Primarily, the farmer must be a true landholder, which she or he must validate via landholding certificate. Second, the rent must not displace the lawful user of the land. Besides, these conditions must also be taken and analyzed cumulative with the requirement of the minimum holding size of each farmer meant to counter land fragmentation. Thus, a farmer who wants to rent out land must have some extra land to the size of the minimum holding and the land to be transferred via rent must also respect the minimum holding size requirement.[18] Under the SNNPRS land proclamation,[19] the minimum holding size is 0.5 hectare. Hence, for a person to avail himself of the right to rent his/her use right and be able to transfer it, the size of the land must be at least one hectare, otherwise, it amounts to displacement. The lessee also must acquire the minimum land size, and this is so, dictated by rules of consistency and considering the justification for providing minimum land holding size which is to curb land fragmentation. Thus, land holder, to exercise rent right, his/her holding must be at least one hectare and larger.

The other condition is duration of contract. Federal Rural Land Use Proclamation leaves the power to determine rent period to regions according to their situation.[20] Accordingly, SNNPRS, like other regions, has determined rent period for the rent of rural land. The lease period vary depending on whether the lessee is a farmer or an investor and on the mode of land use. If rent is from peasants to peasants, the maximum rent period is five years and if the rent is to investors, the rent period extends to ten years, yet for the investors who cultivate perennial crops the rent periods may go up to 25 years.[21] For investors, the law affords longer lease period and also such right is accompanied by the right to present his use right as collateral. Noted here is that the rent

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[16] Article 8 of Federal Rural Land Administration and Land Use Proclamation No, 456/2005.

[17] Article 8(1, 2, 3) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

[18] DANIEL BEHAILU, *supra note* 7, at 58.

[19] Article 11(1)(a) of SNNPRS Land Administration and Use Proclamation No. 110/2007. However, if it is irrigable land constructed by the expense of the government which is to be given to peasants, pastoralists or semi pastoralists, the size shall not be larger than half a hectare.

[20] Article 8(1) of Federal Rural Land Administration and Land Use Proclamation No, 456/2005, FEDERAL NEGARTI GAZETTA, 11th Year, No.44, Addis Ababa, 15th July, 2005 (hereinafter Federal Rural Land Administration and Land Use Proclamation No, 456/2005. This provides discretion to Regional States and thus Regional Rural Land Laws do not follow similar approach in the duration of the lease period. For instance, in Tigray, the peasant is allowed to rent his land for 20 years if the lessee uses modern technology, and 3 years if he/she uses traditional means of production. In Amhara Region, renting land is allowed for a maximum of 25 years irrespective of mode of land use. In Oromia region rental is allowed for a maximum of 3 years for those who apply traditional farming, and 15 years for mechanized farming.

[21] Article 8(1) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

right of the poor farmer over his holding shall not exceed five years with a number of conditions attached to it and minus the right to present his use right as a collateral.

The final condition is about securing the consent of all family members (not necessity with blood tie) who have the right to use the land and registration by the competent authority.[22] The rent agreement has to be registered with the local government and, hence, the contract has to be in writing regardless of the rent period. Therefore, any rent that do not fulfill the above requirements (minimum land size, rent period, consent of family, registration and writing contract) can be considered as informal land deals or illegal land transfer.

D. Donation of Rural Land Use Rights against Prescribed Conditions

Transfer of rural land rights through donation/gift is allowed with conditions. The first condition is that the donee must be family member of the donor.[23] Family member is defined as any person who permanently lives with landholder sharing the livelihood of the later.[24] From this it is understandable that a blood tie is not sufficient as well as not necessary condition to be called a family member and thereby satisfy the requirement. To transfer, the donee (transferee) can also be the one who permanently lives with the donor by sharing livelihood regardless of blood relations.

The second condition is respecting the minimum size of holding on both sides i.e., the donor and the donee.[25] Hence, in order for one to donate a use right, the minimum size holding of 0.5 hectare shall be met except in cases of irrigable land. Thus, the donor must possess a minimum of one hectare to be able to transfer. Nonetheless, it is not clear whether one can donate the entire holding and stop farming activity. The controlling principle is that donation has to be done in a manner that must not displace the land user.[26] The law provided minimum farm size to improve the structure of agricultural landholdings or to prevent further fragmentation and land miniaturization. Because excessive fragmentation of agricultural parcels can harm agricultural productivity in a number of ways. It increases the amount of land needed for paths and roads; increases time needed to get to plots; requires additional spending on fencing and boundary demarcation; increases the difficulties of management, supervision, and pest control; and makes investments in irrigation, drainage, and soil conservation, as well as the use of certain machinery more difficult.[27]

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[22] See in general also DANIEL BEHAILU, *supra note* 7 (chapter two) and Article 8(2) of Federal Rural Land Administration and Land Use Proclamation No, 456/2005. See also Article 8(2) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

[23] Article 5(11) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

[24] Article 2(7) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

[25] Article 11(1) of SNNPRS Land Administration and Use Proclamation No. 110/2007. The minimum size of holding shall applies for both the donor and the donee. This is because the phraseology of the article ' the farm plot to be given in the future shall meet minimum size of holding' indicate as it not limited to land given by government to peasant but also it includes land that is donated/given by peasant from his/her holding to family members. Besides, the reason for proving minimum size of holding, which is to avoid land fragmentation, is equally applies for both donor and donee.

[26] DANIEL BEHAILU, *supra note* 7, at 61.

[27] DEININGER, *supra note* 1, at 127.

The other condition is that the donee must live on agriculture. Thus, transfer of land use right through donation without fulfilling the above requirements (family member, minimum holding size, and agricultural purpose) is contrary to law and thus can be considered as informal land deals. In nutshell, to avoid the rigor of the law, people circumvent and engage in informal land deals and use any other possible trick to get a legal cover.

E. Inheritance of Rural Land Use Rights to Non-family Members

Inheritance is also another important means, which gives access and transfer to rural land use in Ethiopia in general and in SNNPRS in particular with conditions. The conditions required for donation equally apply here, and the focus is only on family membership requirements. The Federal and the SNNPRS land proclamations state that rural landholder shall have the right to transfer his rural land use right through inheritance to members of his family.[28] In both proclamations, the phrase '*family member'* is defined, as any person who permanently lives with the holder of the holding right and sharing the livelihood of the later.[29]

Thus, unlike the Family Codes, in which blood and marital ties are important elements to identify a family member, under the federal and regional rural land proclamations, living under the same roof and sharing the same livelihood with the holder of the right are sufficient conditions. These provisions enable even a non-blood related family member to have inheritance right if they shared livelihood with the deceased by the operation of the law. As a result, a hired laborer who has been living for years with the farmer or a maid servant, who likewise lives with the family, may be eligible to inherit the holding rights. This definition of family members conflicts with the provision of the Civil Code of the nation, which clearly defines it along blood ties. The rationale behind the law is to prohibit children who are not sharing the livelihood of the deceased parent from accessing the land since they might have another source of livelihood or that they are not actual residents on the land.[30] This shows current federal and regional land laws restrict inheritance of rural land only to family members who are resident in rural areas while the country's succession law does not put any restriction to whom one can bequeath their property and rights.

Thus, in case of SNNPRS, inheritance is possible only to family members (i.e. a person who permanently lives with land holder sharing the livelihood of the later) and thereby testate (inheritance by leaving a will) is void if the beneficiary is not a family member as per the prescription of the law. Such restrictions are introducing distortions in child/parent relations and conservation of natural resources.[31] Anecdotal reports indicate that city-dwelling children are beginning to reduce support to aging parents knowing that they will not bequeath their parents'

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[28] Article 8(5) of Federal Rural Land Administration and Land Use Proclamation No, 456/2005. See also Article 8(5) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

[29] Article 2(5) of Federal Rural Land Administration and Land Use Proclamation No, 456/2005; Article 2(7) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

[30] DANIEL BEHAILU, *supra note*, at 56.

[31] It can be argued that (revealing concerns of family members the author talked to) the potential heirs look after their family hoping that they inherit the property in land and could also invest in it in the meantime to benefit their family and eventually take it over.

property.[32] Aging farmers are showing tendencies of cutting trees and paying less attention to conservation measures, knowing that when they die, their children and relatives may not benefit from these resources.

In general, the current mode of transferring land rights without fulfilling those inheritance conditions is contrary to law and informal whatever arguments against it. Yet again, the cover of inheritance is used to engage in the informal land deals to avoid leaving property to aliens.

III. INFORMAL PERI-URBAN LAND DEALS: THE GLARING TRUTH

The land transactions in peri-urban areas have developed its own informal norms. The process of acquiring and transferring a plot of land in the informal way is not chaotic, but follows its own process. The key activities or behavioral patterns of key actors as well as rules through which actors acquire and retain a plot of land from the informal market follow more or less predetermined procedures, norms and events. In short, it has its own established rules and 'customary' (shadow) institutions. These key activities/stages in the process of informal acquisition and development of land are:

> 1) Identifying a plot; 2) showing an interest in the plot; 3) studying the behavior of the transferee; 4) undertaking price negotiations; and 5) concluding and evidencing the transaction by traditional agreement or contract.[33] Besides, 6) in case of peri-urban areas getting tips from the inside circle of the government as to the future of the land, especially on its fate of being regularized.

Land transactions can be conducted in writing or orally.[34] The choice between either of the options depends on several factors. The strength of social relationship between the parties engaging in a land transaction influences the level of confidence and trust between them. Besides, the size of land, the future of the area on matters of regularization, and the amount of cash involved, are prominent among the major factors influencing the deal. When the transferor and the transferee are distant relatives or non-kins, or when the land is large and the money paid for it happens to be large, the agreement tends to be in writing and also involves other formal contracts in cases of peri-urban; for instance, loan contract involving greater amount of money than paid to the land as a guarantor of the land contract. But, the loan contract is to be pulled out if there is a non-performance issue on the part of the seller of the land.

Even though the contract is signed by transacting parties in front of community elders or chiefs, it is not valid and has no legal ground, since land is not for transaction. Yet again, these documents/contracts play a significant role in avoiding future land related conflicts between the transacting parties as elders use the same evidence to solve the matters amicably. Moreover, the behavior of the transferor also plays a significant role for the conclusion of land transaction. It is only after the informal transferee has built trust in the behavior and reliability of the transferor

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[32] Solomon Bekure et al, *supra note* 13, at 10-11.

[33] Achamyeleh Gashu, *Introducing Land Readjustment as an Alternative Land Development Tool for Peri-Urban Areas of Ethiopia, at 47, Paper Prepared For Presentation At The 2016 World Bank Conference On Land And Poverty The World Bank - Washington* Dc, March 14-18, 2016.

[34] Mamo Hebo, *supra note 9*, at 356.

that the process of negotiation for transacting will start often via the help of land brokers. It is also possible to say that informal land transaction is mainly built on trust and there is not much dispute yet after transactions, but in case of dispute elders play crucial role in solving the dispute amicably.[35] Often disputes arise as a result of price hikes in a very short period of time.

The following are modalities of peri-urban land transactions: share tenancy contracts/crop sharing arrangement, rent-out land for cash/fixed rental arrangement, and disguised land sales. Many people use the informal land deals to avoid the rigor of the law and for its mere convenience.[36]

A. Sharecropping Arrangement: Customary Contracts

Sharecropping is a land rental arrangement whereby landholder and tenant share outputs according to a formula agreed on in advance rather than (in juxtapose to a fixed rent contract) a cash payment that has to be made irrespective of the productions obtained. It is more common among farmers who live in the same locality and whose knowledge of farming experience and trustworthiness of fellow farmers is strong. It is done by oral or traditional agreements. Farmers with long farming experience and ability to supervise labor often choose share tenancy, especially in communities where they have knowledge of farming and trustworthiness of their fellow farmers.[37] There are two modes of sharecropping arrangements.[38] One is where the landholder provides land and the tenant contributes labor and other variable, for instance inputs, farm jointly, and share output according to mutually agreed formula. Such arrangement provides a legal cover in areas where farmers fear open land transactions. Sharecropping has a backing of strong tradition but the formal law neither allows it nor prohibits it. Yet, the new draft Federal Land Law tries to regulate it.

The second modality is a more explicit land transaction where the tenant has a control (partial or full) over the rental land subject to commonly agreed rules and conditions. Any rental arrangement consists of a sharing rule that defines how output will be divided between tenant and landholder, and includes parameters on risk sharing as developed by the custom. These will affect the efficiency and the equity outcome. They do calculate benefit and risk sharing through the incentives for effort exerted as well as on the risk that each of the contracting parties has to bear. The final impact of these on productions, and on the chosen contract, will depend on the technology and the importance of long-term investment for soil fertility and other productivity-enhancing measures.[39]

Sharecropping leads to permanent transfer of land to the tenant (transferee). A good entry point for transferee to get land through contract (locally called as *kontraata*) is the age-old *koota*

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[35] Interview with farmer who has bought land and help others as broker (Datu, SNNPRS, and 25 December 2016).

[36] Zemen Haddis, *Towards Improved Transactions of Land Use Rights in Ethiopia, Paper Prepared for Presentation at the Annual World Bank Conference on Land and Poverty, at 11, The World Bank - Washington DC*, April 8-11, 2013.

[37] Teklu Tesfaye, *supra note* 3, at 4.

[38] *Id.*

[39] DEININGER, *supra note* 1, at 88.

(sharecropping) practice of the Sidama.[40] One first becomes a sharecropper and then in that status; the sharecropper keeps on extending loan after loan to transferor (land holder), and putting the landholder under loan bondage thereby taking over the land in the long run. This, lending money by sharecropper to the landholder to the point where the latter becomes heavily indebted and gives the former a bargaining chip to propose and enter into a contract. The sharecropper has every incentive to entice the landholder to transform their sharecropping *into kontraata* as he usually has permanent crops such as coffee, *khat* and sugar cane on the land.[41] This sort of transaction is not backed by the law and can aptly be categorized as informal land deal. The deal is usually achieved in protracted debt bondage.

B. Renting Land for Cash: Fixed Rental Arrangement

Land renting is permitted under the formal legal regime with plethora of conditions discussed above. But, the prohibition of the law is largely ignored in areas where the land value is high, owing to the accessibility of water or the fact that the land is near to cities (peri-urban area) or in cash-crop areas.[42] No leasing, except when involving investors, is done in the manner prescribed by the law.

Fixed cash or fixed output rental co-exists with share rental within the same localities. Its incidence tends to be high in areas where rural road infrastructure and markets are better developed and agricultural production is commercialized, especially among cash crop producers. Cash rental contract is common where the contractors who rent in land are either nonresidents or recent immigrants. Unlike share contracts that are mostly orally arranged, cash rentals are mostly based on written agreements. The rental rates are negotiated and vary depending on fertility of soil, scarcity of land, and resource endowment position of farmers including their financial status. There are two forces that appear to influence the choice of contracts:[43] transaction costs and risk attitude. The greater preference for sharecropping among farmers with long established social interaction suggests the costs for monitoring and enforcement of share contract are small compared to fixed rental arrangements. And, to the extent these farmers are risk averse, share contract provides a vehicle to pool and share risks. Nonetheless, as costs of transaction rise, farmers tend to shift towards fixed cash rental, especially among farmers with little social interaction. Farmers who lease out land shift uncertainty in production to farmers who lease in land, especially if these are non-resident farmers.

However, land held under these legally permitted short-term rental land contracts is rarely used to grow permanent crops. Application of improved or new technology such as chemical fertilizers is sparse and low in intensity, unless the immediate return is enormous, for instance via cultivating vegetables and fruits. Lessees invest little in on-site land conservation and

[40] Muradu Abdo, State Policy and Law in Relation to Land Alienation in Ethiopia, PhD Thesis 180 (University Of Warwick, School of Law 2014)

[41] Achamyeleh Gashu, *supra note 33*, at 9.

[42] DANIEL BEHAILU, *supra note 7*, at 116.

[43] Teklu Tesfaye, *supra note 3*, at 4.

improvement since the probability of capturing future benefit from current investment is low. As a result, the outcome is thin and speculative.

Short-term rental contracts will provide only limited incentives for users to undertake land-related investment.[44] For longer-term contracts to be feasible, long duration of land rights and high levels of tenure security are critical, and finding ways to ensure such tenure security is a key policy issue. While effectively implemented tenancy regulations can benefit sitting tenants, implementing such regulations is costly, and may, therefore, not be an efficient way of transferring resources to the poor, even in the short term. In the longer term, tenancy restrictions will reduce the supply of land available to the rental market and undermine investment, directly hurting the poor. Evidence from countries that have eliminated such restrictions suggests that doing so can not only improve access to land via rental markets, but can also increase households' participation in the nonfarm labor market and, by reducing the discretionary power of bureaucrats, improve governance.[45] A key policy issue is, therefore, how to sequence the elimination of such restrictions in a way that does not undermine equity and promotes efficiency.

Economists generally credit land rental markets with considerable potential to enhance productivity and equity by facilitating low-cost transfers of land to more productive producers and permitting participation in the nonfarm economy, thereby allowing consumption smoothing in response to shocks and accumulation of experience and capital.[46] Because the structure of land rental contracts will affect productivity outcomes and theory suggests that in many situations wealth constraints by tenants may make the first-best contract (fixed rent) infeasible, a major policy concern has traditionally been to avoid the suboptimal outcomes that may arise in this context. Yet, in nutshell, cash rent is also tied to debt bondage and facilitates ultimate sell of the land.

C. Disguised Land Sale

Despite what the people claims and government legislation dictates, land sale under different disguises and in a variety of forms does exist. Whether the deal is based on a written or oral agreement, the phrase '*land sale'* is carefully avoided and replaced by such words crafted as '*contract,' 'gift'* or *'inheritance' and 'land exchange'*.[47] Research also shows that, at present, among these modes of land acquisitions in the Sidama Zone, *farm-contract* is probably the dominant mode of farmland transfer next to donation and inheritance.[48] In all cases, respected members of the community from both sides are called upon to witness the transaction and the agreements on which the transaction is based.[49] Written land transactions were deliberately left vague and employ ambiguous statements or even records substantively different stories from the ones agreed upon between the parties involved. Peasants (society at large) are aware of prohibitions of land sale by state law and thereby they have adopted a number of innovative

[44] See in general, KLAUS DEININGER, MAKING LAND RENTAL MARKETS WORK FOR ETHIOPIA'S RURAL POOR: KEY ISSUES AND CHALLENGES AHEAD, WB (2005).

[45] DEININGER, *supra note* 1, at xxxvi.

[46] *Id*, at 84-85.

[47] Interview with an Advocate in SNNPRS (Hawassa, 28 December 2016)

[48] Muradu Abdo *supra note* 40, at 177.

[49] Mamo Hebo, *supra note* 9, at 357.

ways to circumvent such prohibitions placed on land sale and other land transfer. Currently, there are three major ways through which people are undertaking disguised land sale in the focus area;[50]

(1) Explicit sale of property such as perennial crops and cash crops without mentioning the land *per se*;

(2) In the form of farm field rent/contract (locally known as *kontraata)* stating that the rent is for life or fifty years or thirty years;

(3) In the form of donation/inheritance but in reality the transferor receives money/price for the land.

In all cases, transactions are done either in the presence of elders and through signing contracts on a piece of paper which contains signatures of the seller and the buyer as well as witnesses. Often, the contract is made in writing with the attestation of three to seven elders drawn from each side. The written contract indicates, *inter alia*, heavy fines against a party who might opt to invalidate the contract, stating therein that part of the fine would go to the state treasury and part of it to the elders. Coupled with this is the obligation on the part of the transferor to repay the entire sale price if he demands restitution. Besides, at times separate loan contract is agreed upon to warrant against violation of the contractual terms for the sale of land.

Often the local land administration office is also baffled as the transferee comes for the registration of the land. The parties now conceal (as they approach the government for registration) their original agreement and come up with fabricated cover contract deliberately made to the agreement of the law but helps the transferee to get legal titles. All this is often facilitated by land brokers and government officials.

Still, it is difficult to identify and detect disguised land sale which is done under the cover of land donation, and sale of avocado, chat, coffee, sugar cane, etc. Such apparently simple transfers/transactions are backed by the law and it is in accordance with the sale of private property which is a constitutional right of individuals.[51] Likewise, there is no limitation on selling private property (perennial crops) in SNNPRS unlike other regions such as Oromia region.[52] In Oromia, selling of perennials such as coffee, mango, avocado, papaya, orange etc. shall be possible if and only if the land occupied by the product to be sold shall not exceed half of the total land holding of the individual and the product shall be sold for three years only.

Previous research among the *Sidama kontraata* practice shows the same in which *contract* is concluded between *akonatari* (transferor) and *tekonatari* (transferee).[53] It comes under different

[50] Interview, *supra* note 35.

[51] Interview with Mr. Silashi Dasalegn, Rural Land Information (Registration and Certification) System Experts at SNNPRS Bureau of Agricultural and Natural Resource Development (Hawassa, 26 December 2016).

[52] Article 6(3) of Oromia Rural Land Use and Administration Proclamation No. 130 /2007. The rationale behind this restriction is to minimize the insecurity felt by peasant holders in coffee growing rural areas of the region, particularly, the peasant holders in coffee and khat growing area of the region have been evicted from their holdings as a result of sale of the products of coffee and khat to unscrupulous urban wealthy individuals. *(Source: an Interview with Ato Aman Muda, Oromia Bureau of Agriculture and Rural Development, Head of Land Use and Administration Department, June 22, 2011 as cited by* Girma Kassa, *Issues of Expropriation: The Law and the Practice in Oromia* (LLM Thesis Addis Ababa University School of Law 2011), at 28.

[53] Muradu Abdo, *supra note* 40, at 177.

disguised nomenclatures such as *contract* for the sale of coffee or *khat* or fruit trees (i.e., mango and avocado). It also comes under the rubric of: contract for land to 'process coffee beans' (business premises), land for lifetime use by the transferee (*tekonatari*), his children and their descendants forever and contract for sale of land to construct residential house.

In reality, contract does not relate to the sale of property on the land. It rather purely involves transfer of bare farmland for whatever purpose. Thus, if some assets such as crops, fruit trees, incomplete constructions and a hut on the land are transferred with the land, they are merely incidental to the transfer of the land and serve as a cover for the land transaction. Muradu noted that "*The contract relates to the land not things attached thereto nor is it an agreement concerning anything else*".[54] The *akonatari*, often the head of a household, enters into a land deal with the *tekonatari* without securing the consent of his family members, which is contrary to what is required by federal and state land laws. And, the *contract* is not submitted for registration and approved at the initial stage by the concerned authorities who are kept in dark for fear of that they might hamper the transfer process. Yet, informally, the local authorities know about it simply because the land is being traded under their nose or with their informal cooperation.[55]

This disguised land sale is prevalent especially in high value land such as peri-urban, cash crop and water accessibility areas. On the one hand, the fear of peri-urban local landholders that their land could be taken (be expropriated) and on the other hand, the acute demand for the land from the urban dwellers fueled by the inefficiency to provide affordable houses to the low income people in the inner-city, have created a huge market for the land to be sold and bought in the informal market.[56] Peri-urban landholders (farmers), by comparing the amount of compensations that they may be paid upon expropriation and the sales price that they are likely to receive on informal sale of their land, often opt for the informal land market. The informal land market pays them attractive price when compared to the compensation amount. Besides, the informal market is immediate, prompt and convenient.

The separation of land governance into urban and rural spectrum is another favorable ground for the widespread practice of informal transactions of land in the *transitional* peri-urban areas. Sometimes a power vacuum in the peri-urban areas might be created when the urban administration adopts a revised master plan that includes the periphery into the urban center without expropriating and putting the land into its domain. Then, this newly created administrative areas fall under no one's jurisdiction or can be confused during the transition. For this reason, local farmers try to transform their agricultural land to residential plots by subdividing and then selling the plots without any interference from government bodies. Such illegal subdivision and transfer of agricultural plots have created unplanned and haphazard developments without public facilities and infrastructures.[57] At times such division can take also semi-planned structure where the sale is being facilitated by insiders of the government. Hawassa

[54] *Id*, at 178.
[55] *Id*, at 179.
[56] Achamyeleh Gashu, s*upra note* 33, at 9.
[57] *Id*, at 10.

City, concerning recently included peri-urban areas to the city, is reputed for this insider tips where the farmers are able to tell future roads sites and other infrastructures as they sell the land.

In other high value land areas (such as cash crop area and water accessible areas), the market for sale is prevalent for obvious reasons. As the rent allowed by the law is often for shorter period, it encourages rent-seeking and causes insecurity about contract terms that is likely to undermine the scope for long-term investment on such lands. Besides, distress sales can also provide supply for land in cash crop areas. Such sales happen during the time of unexpected misfortunes befalling the farmer (like illness, facing liability) small landowners (farmers) need immediate cash for use which forces them to put their land for offer thereby land sale is the sole option for them[58]

Generally, prohibiting sale of land by the formal laws couldn't stop the informal rural land transactions. Peasants have circumvented and maneuvered those policies in order to undertake land transaction. Such adaptive strategies that are disguised as land sales by claiming to have sold plants (crops) and trees, have transferred farm fields on contract (*kontraata*), and land donation constitute some of the ways to transfer land informally in peri-urban areas surrounding the Hawassa City.

IV. STATUS OF INFORMAL RURAL LAND DEALS

A. Status of Informal Rural Land Deals Under Statutory Laws

Informal land deals are '*illegal transactions'* for they are being undertaken against the prescription of the FDRE Constitution and subsequent land laws. The effect of status of informal land deal is null and void as far as the law is concerned since land is not a private property in Ethiopia.[59] This position is well supported by the legal scholars like who once wrote:

> The idea of making ownership over land ex-commercium is encapsulated under the Constitution which provides in Article 40(3) that "Land…shall not be subject to sale or to other means of exchange." Thus, legally speaking, any practice or decision which authorizes transfer of ownership over rural land shall be of no effect for it contradicts with one of the tenets of the Constitution. This conclusion is in line with the supremacy clause of the Constitution that stipulates that "any …practice or a decision…which contravenes this Constitution shall be of no effect" as Art. 9(1) of constitution. Article 1716 (1) of the Civil Code also stipulates that "A contract shall be of no effect where the obligations of the parties or of one of them are unlawful…" Thus it is unlawful for the transferor to assume an obligation to deliver ownership or even use rights over rural land to the transferee for consideration. Similarly, it is illegal for the latter to assume an obligation to pay for the transfer of ownership or use rights in regard to rural land.[60]

From this we can understand and deduce that the law is clear enough as to the effect of informal land deals, i.e. illegal, and thus have no effect from the very beginning and the defect cannot be cured. The scholars, judges, elders, CSOs and even the farmers themselves are baffled with this

[58] Interview with Mr. Mohammed Burka, Judge at SNNPRS Supreme Court Civil Bench (Hawassa, 27 December 2016).

[59] Interview with Mr. Mulugeta Aggo, President of SNNPRS Supreme Court (Hawassa, 27 December 2016).

[60] Muradu Abdo, *supra note* 40, at 184.

illegality of informal land deals. Farmers engage in disguised land sale knowing that explicit land sale is prohibited. Thus, they are transacting in a disguised form and using legal loopholes and legal covers with the assistance (at times) of government officials. This implies dissatisfaction with the law than lack of awareness. The extent they go to go-around the law is a witness that the law is either not to their liking or that they do not have much option than to use what is available at their disposal for their demands.

B. Court Practice Regarding Informal Rural Land Deals

Courts are baffled with the issue of land deals which stand in contradiction to the formal law. Here the issue is how courts in the study area (SNNPRS) treat informal land deal disputes in the context of constitutional provisions and subsidiary land laws which stand against it. It is noted, however, that most of the disputes relating to informal land deals are not brought to court rather it is solved through mediation by elders, chiefs and family members or friends.[61] Achamyeleh also stated that informal land transactions related conflicts are mainly solved by the intervention of elders and/or leaders of traditional social institutions in the village.[62] The conflicting parties prefer to take their cases to the socially respected elders and leaders of *idir*, a community based social institution, in the village, who are quite efficient in solving such disputes. Then those elders in the village act as mediators and bring the disputing parties together (face to face) and urge them to reach an agreement by proposing solutions. If the disputing parties cannot reach an agreement or if one of the disputing parties does not accept the solutions suggested by the mediators, the declining party may face social sanctions; like being excluded from social affairs in the community. In short, there could be costs to be paid for dishonoring elders or chiefs.

However, that doesn't means no case has been brought to the court or no pending cases exist relating to informal land deal disputes. Yet again, it is useful to profile land related cases carefully to figure out the nature of the transaction. Often, respondents come with contract documents attesting land purchase, inheritance, donation or long term rent or witnesses attesting the same facts. Concerning this, SNNPRS Supreme Court Civil Bench judge states that;

> Currently the numbers of cases relating to informal land deal disputes are increasing as a result of ever-increasing value of land. There are cases that were decided by SNNPRS Supreme Court. There are also pending cases in which the transferors transferred land 10 years ago and received money in return and now claim restitution of land via possessory action….where the transferees have built houses, planted trees and other crops on it.[63]

Though, the cases often relate to rural lands but their implication is also clear for peri-urban land often purchased from farmers and resold. The land based dispute has huge implication in a case where it is initiated by transferor's family members invoking the concept of contract invalidation on the ground of the unlawful nature of the land deal. In frequent cases, they claim that under this contract there is a promise to deliver land ownership or land use rights contrary to the law of the land. Their pleading is based on the constitutional provisions which relates to land alienation

[61] Interview, *supra note* 47.
[62] Achamyeleh Gashu, *supra note*, at 48.
[63] Interview, *supra note* 51.

prohibition and its enforcement (Arts. 40(3), 9(2) and 13(2) of FDRE Constitution) and also Civil Code articles 1723(1) and 1727 relating to written form of contract.[64] Besides, Article 1808 (2) of Civil Code which provides "A contract whose object is unlawful…may be invalidated at the request of any contracting party or interested third party". This is so, because "obligations to convey rights on things, if the latter are not in *commercio*, that is, are made non-transferable (non-conveyable) by law, the obligation is clearly unlawful" and one illustration of this is an attempt to transfer land ownership in Ethiopia.[65]

Regarding practice of SNNPRS Supreme Court, Daniel found out that the regional Supreme Court has adopted a stance in which if one has been in continuous possession of the land for ten years and beyond, he or she shall be deemed the proper holder of the land in question and can use the constitutional right, which prohibits eviction.[66] He cited, for instance, case involving Mr. *Tilahun Wondo vs. Mr. Tadesse Shalo* in which the court ruled that if one used the land for more than ten years, the constitutional right, which bars eviction, comes to operation no matter how the land has been acquired.[67] In fact, the holder in this case presented evidence of sale contract at the *Woreda* court. The ruling of the court is meant to stop socio-economic crisis as such transaction are rife and prevalent everywhere. People genuinely thought that the transaction they have undertaken was legitimate and right and hence have been using the land for a longer period of time. Their livelihood also totally depends on the land. This consideration moved the court to the standing that where one used the land for ten years and beyond, the right not to be evicted from the land comes to operate. However, the constitutionality of this ruling is a point for contention. The standing of the Supreme Court of the SNNPRS could be a practical solution to the matter, yet the legality is questionable. The law is clear as far as the prohibition on land sale is concerned. Muradu also reiterated the wide absence of uniformity in handling informal land dealing disputes in the region.[68]

SNNPRS Supreme Court adopted a uniform position in the disposition of cases through a circular approved by a forum which brings all court presidents in the region together. The circular, whose validity the Supreme Court traces to the region`s courts establishments proclamation, states that all informal land dealings should be treated like any other ordinary agreements and as such those legal rules governing contracts in general shall apply to these deals as well. One of these stipulations is, Article 1845 of the Civil Code that provides "actions for the invalidation of a contract shall be barred if not brought within ten years." The circular is a reaction to diverse practices of the courts regarding informal land deals.

The circular also assumes that the intention of the parties at the time of the conclusion of the contract is clearly to transfer ownership over land; there is no intention on the part of the parties to restitute the land at a certain point in the future. The land is assumed to have gone out of the

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[64] For instance, the case between Mr. Feto Dangura vs Mr. Dubala Feto SNNPRS Supreme Court Cassation Bench File No. 64745, (08/11/2007 E.C.)

[65] Muradu Abdo, *supra note* 40, at 189.

[66] DANIEL BEHAILU, *supra note* 7, at 115.

[67] Mr. Tilahun Wondo vs. Mr. Tadesse Shalo, SNNPRS Supreme Court Cassation Division Case, File No. 36888 (2001 E.C.)

[68] Muradu Abdo, *supra note* 40, at 189-190.

hands of the transferor forever. Based on these premises, the circular divides agreements sought to be invalidated into two: those whose duration between the date of conclusion and that of filing of invalidation suit is ten or more years and those with less than ten years. The former shall be barred by a period of limitation while the latter shall be struck down, which should lead to the restitution of the disputed land to the transferor. The underlying purpose of the circular is ensuring stability of investment on land and giving effect to the constitutional rule of immunity against eviction by saving agreements whose duration is equal to or greater than ten years from being attacked by the transferor.

The courts would decide a contract which was concluded ten or more years ago in favor of the buyer based on the standard justification behind application of period of limitation, that is, allowing such deal to be attacked any time would make decision making difficult, if not impossible. This problem could arise due to destruction of the evidence or death of witnesses and restitution is not desirable lest it creates uncertainty on investment activities and reward those who slept on their rights. Yet, the main reason for the courts in giving sanctity to contracts is the principle of not evicting the transferee who is regarded as land improver.

President of SNNPRS Supreme Court also affirmed that:

> Decisions on informal land deals dispute had been categorized into two: invalidation of agreement and ordering the transferee to return the land to the transferor if the transaction has not reached ten years; and favoring an agreement that reached ten years in which the transferee retains the land by applying the ten years period of limitation embodied in article 1845 of the Civil Code. Here what is considered in addition to period of limitation is the investment made on the land by transferee.[69]

He added that currently the courts dominant practice is taking the positions to treat all informal land deals in the same way (i.e. invalidation of agreement and ordering restitution) regardless of duration of the transaction. This is because once the transaction is identified as informal or illegal its effect is clear which is null and void. And also the effect of void contract is clear that it is considered as non-existent from the very beginning and cannot be healed by a period of limitation. The federal court's position, including the cassation court is also to treat the matter as a void contract.

The current trend of court practice is in line with arguments of scholars for example Muradu[70] who argues that SNNPRS courts are applying contract principles as embodied in the Civil Code to dispose informal land deal cases which purport to transfer land ownership in violation of the spirit and letter of the Constitution. One clear violation of the tenets of the Constitution is the unambiguous constitutional stipulation that under no circumstances and by any actor whatsoever land ownership may be alienated. Further, the invocation of the period of limitation provision of the Civil Code itself is not convincing. When one reads the first limb of Article 1845 and Article 1810 (1) of the Civil Code jointly, one gets the message that contracts tainted with unlawful objects are not subject to prescription. This is so because the phrase "unless otherwise provided by law" yet article 1854 suggests so. This line of argument gets

[69] Interview, *supra note* 51.
[70] Muradu Abdo, *supra note* 40, at 192.

strength when one reads Article 1810 (1) which says "No contract shall be invalidated unless an action to this effect is brought within two years from the ground for invalidation having disappeared." One might say that the ground for invalidation of a contract on account of unlawful object disappears when the law making such object unlawful is repealed, in our case by allowing ownership or use rights over rural land to enter commerce.

On the other hand, nullifying the contract of informal land deals has socio economic impacts. For example, if the buyer with huge family has invested on the land (or often their livelihood hinges on it) and has resided on that land for many years, and also has no other land elsewhere; these factors need to be considered while upholding the principles of the constitution. Besides, the seller has sold willingly to satisfy his/her need, and then claims restitution of land in bad faith bearing in mind increment of land value but using the cover of *illegality* of the contract. Though nullifying informal transaction is in line with law, it is punishing only the buyer (transferee). Both parties have involved in the illegal transaction and as such must share the burden of their illegal acts. In this regard, the courts simply state nullity of informal land transaction and order restitution of land without addressing the matters relating to the property on the land and repayment of price, and other attendant factors. For example one of the cases on which the court did so goes as follows:

> The facts of case are that the father transferred a plot of land to his son for consideration receiving 13,000 birr. Later on, the father claimed for restitution of the land stating that the transaction is illegal. The son argued that he purchased the land. Besides, he planted permanent tree (like *bahirzaf*). The court decided that the transfer is illegal as per on Art 40(3) of FDRE Constitution and Art. 8 of SNNPRS land use Proc. No.110/2007. Hence, the son should return the land to the father. This decision will not preclude the son (respondent) from requesting repayment of his money.[71]

Concerning the decision of the court while nullifying the informal contract; it is necessary to decide as to how parties are possibly be reinstated back to the position which would have existed, had the contract not been made as per Art. 1815 of Civil Code. Of course, the effect of illegal contract is void but this does not make sense in the practical world. An acts that stayed for while cannot be made void. Instead, the concept of voidable contract needs to be favored inhere. Simply stating that the respondent can sue and ask for payment, will result in another new court proceeding which affects the parties and the resources of the courts. Thus, it is better if courts settle both parties' interests i.e. restitution of land, fate of permanent property on the land and price paid at the time of the deal, livelihood issues and some deterring actions towards the willing seller as well. If the land has no permanent property raised by the buyer, and that a considerable time elapsed since the contract, the monetary value at the time of payment and now must be moderated. In case of permanent improvements made on the land, the buyer must take the property that can be moved without demolishing, and for the property that is intrinsic to the land, the seller should pay its value to retake the land. This is to protect the interests of both and

[71] Mr. Feto Dangura vs Mr. Dubala Feto SNNPRS Supreme Court Cassation Bench File No. 64745 (08/11/2007 E.C.)

uphold constitutional principle of no sale of land. This is also the position of one SNNPRS Supreme Court judge.[72]

However, in view of lasting solution, as the informal land transaction is getting bigger and is becoming a formidable challenge, the government is advised to recheck its stance (and rethink) its polices to spare harassment on both sides.

C. The practice of other Government Institutions and Informal Rural Land Deals

In addition to the courts, there are other actors such as land administration and use office of SNNPRS under region's Bureau of Agriculture and Natural Resource Development which register and issues land holding certificate. The office is mandated to administer land but with manifest structural deficiencies and shortage of man power. Unlike other regions, the office is not constituted to a bureau level but as an office with limited staff and budget. This office is also unable to control informal land deals. The expert who works on registration and certification asserts that:

> Before 1996 E.C there was no certification and registration that could enable the office to control informal land transaction. From 1996 to 2003 E.C the first round of registration was carried out in the region and it coved 99.9% of the lands using traditional means like robe. This doesn't sufficiently convey the plot. This enabled the adjacent land holders to sell their land to each other. To counteract this, the office concluded a contract with a German Company to use GPS and GIS towards modern registration and certification, and the first trial began as of January 09, 2017 G.C. Yet, sometimes, even if there is strong registration and certificate, it is difficult to identify whether the transfer is sale or permitted transfer such as donation of land or sale of property on the land. For example, donation of land in the region is permitted only to family members, which is defined to include any person so long as the transferee can prove that the transferee permanently lives with the transferor sharing the livelihood of the latter. Using these facts, any person comes for landholding transfer registration and issuance of certificate in name of transferee. But, the reality is that transfer is for consideration which is often agreed up on by the parties including sale of land. In such cases the office has no ground to deny transfer registration and issuance of certificate in the name of transferee.[73]

Thus, the absence of modern registration and certification has facilitated a way for informal rural land deals as the parties transact on trust and government organ cannot exactly know the extent and location of each farmers plot. Conversely, modern certification and registration will not totally control informal land deals as the transferor and transferee can agree between themselves for a sale, but for registration purpose they can claim donation or inheritance or any other legal cover.

Moreover, especially in peri-urban areas, many people live and work on land that they do not legally own in accordance with enforceable state law. Government also knows these facts. Yet again, there is ongoing practice of legalizing informal land deals in peri-urban area by government. One of the experts at Hawassa Municipality states that:

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[72] Interview, *supra note* 51.
[73] Interview, *supra note* 47.

> There are many people who bought land from farmers and then built houses on it around Hawassa city. It is clear that they obtained the land illegally and built houses without permission. The government tried to clear such illegal construction but people reacted with use of force (they rebelled), and a huge commotion ensued and the situation become difficult for government. Demolishing these properties, some of which has high value, is a sheer wastage of resource which not only affect the owners but also the government itself. Hence, on a second thought, the government decided to formalize the landholding and as of 2008 E.C., those informal land holders are receiving lease holding certificate.[74]

This shows that there is a trend and chance of formalization or legalization of informally acquired plots in the peri-urban areas on the part of the government. This also triggers the spread of informal land deals against the formal.[75] Hence, informal holdings may be converted into new formal rights through the process of formalization (legalization). This can be seen as specious for the government to act contrary to its law. The one that prohibits land sale (and at least effective land rental market) is the government itself. If the law fails short of satisfying the need of societies, what government can do best is changing the law and allowing free land transactions. On the other hand, it is pragmatic solution. Instead of demolishing that property, it is good to legalize. Yet again, it is also wise not to allow the problem to take root in the first place. The impact of demolishing illegal settlements, for instance, is high in terms of crisis, security issues and property loss.

The absence of state recognition of local property rights affect peoples, which in turn impinges on people's socio-economic security and impedes development. Besides, the people are resisting including use of force against government since their eviction is putting their life in miserable conditions and this will affect the peace and security of the nation and it is affecting as it is now. Furthermore, it is also a brute fact that the government officials are also actors of the informal land deals and facilitators of the same as well.

Generally, the challenges of informal land deal is real and present, the undertaking of abating it (via regularization or other means) is insurmountable. The concerned government organs are also unable to control it (worse some are fueling it) and the government is compelled to legalize it, especially in peri-urban areas. Moreover, the current land laws which limits land transaction is not up to current societal need and not effective. A law that is not effective at implementation level is not law, rather is a hindrance or at least a nuisance. The government is well advised to rethink its policy and use land for development and security than using land as a factor for control, division and breading corruption.

V. CONCLUSION AND RECOMMENDATIONS

Public ownership of land policy was adopted in 1975 in Ethiopia which among other sanction against free transfer of land rights. The policy stayed effective, in Ethiopia, well above four decades. However, currently, there are incremental relaxation of the strict prohibitions; that

[74] Interview with Mr. Tesema Kakiso , Expert of Urban Land Administration at Municipality of Hawassa City (Hawassa, 28 December 2016)

[75] Achamyeleh Gashu, *supra note* 33, at 51.

broadens the use and transfer rights of the rural land, such as the rights to transfer land to heirs, to rent land, to donate land, and get compensation for investments on the land at times of expropriation. Even if, there is incremental relaxation on the prohibition of transfer of land rights, the basic creeds of the law did not change. Likewise, the 1995 Constitution and the subsequent laws only allow transfer of rural land use rights under strictly regulated scenarios. Transferring rural land use rights through sale, mortgage (except for investor who acquired rural land via lease), and others means of exchanging are prohibited unless provided otherwise by the law. Transfer through inheritance, donation and rent is allowed with preconditions, of which nonfulfillment such conditions makes it informal land deal. Yet again, the effectiveness of such prohibitions and conditions of the law are far from material.

Nevertheless, government laws and its implementations are far weaker to abate informal transactions (including prei-urban areas) which have existed under various disguises. Informal rural land markets (i.e. transacting land contrary to state law) is not current phenomena in Ethiopia. It is as old as public ownership of land policy are and even before. In the study area, the routines of informal rural land dealings are in forms of sharecropping, cash land rental against prescribed conditions, and disguised land sale. Within disguised land sale; there are three major ways through which people are transacting: sale of land under the cover of selling property such as perennial crops and planted trees; in the form of farm field contracts (locally known as *kontraata)* stating that the contract is for life or fifty or thirty years; cover contracts (like loan contract which can be pulled out if sellers violates his/her commitment); and in the form of donation but in reality they exchanging land for consideration.

However, the trouble is honoring these *customary contracts* whose object is unlawful as per the formal law of the land. The effect of a contract that has unlawful object is void which cannot be even preserved by period of limitation. Yet, the SNNPRS Supreme Court had adopted the position that informal land transaction should be considered as any other ordinary contract. Thus, land transactions (contracts) that stayed for ten years or more will be effective by the operation of the law, i.e. the claimant would be barred by period of limitation to claim invalidation of the contract. For those transactions with less than ten years' time span, courts invalidate the contract and order restitution of the land. But, currently courts are taking positions to treat all informal land deals in the same way (i.e. invalidation of agreement and ordering restitution) regardless of passage of time (years) of transaction, they differ (for some reason) the fate of the decision is annulment (as attested frequently) at the higher court level both in SNNPRS and Federal courts.

With regard to the land administration and use office practices, there is sheer incompetence to control informal land dealings, and even there is the practice of legalizing informal land transactions particularly in peri-urban areas. Such practice is encouraging the informal land deal and fueling the market. Besides, the bureaucracies in the formal land acquisition processes, the high standard of constructions and corruption attracts people to acquire land via the informal market.

Based on the foregoing discussions and findings, the authors would like to recommend the following points:

- Strengthening tenure security and allowing long term land transfer is a better policy option, and even going to the extent of allowing private ownership in selected high value land areas. Moreover, rural landholders already demonstrated the need for improved land transactions; thus, the law has to have a wide spectrum of land use rights. It is evidenced from the experience of Hawassa City and other major cities in the nation that informal land market is ever booming. Thus, it is erudite to harmonize the law to the reality on the ground.

- Extending and improving rural land holders' right to mortgage and access credits is an advisable line. Allowing mortgage of rural land use rights will enhance production efficiency for farmers who need money for agricultural inputs and related matters. Moreover, such effort must be accompanied by creating *agricultural bank* which would extend credits to farmers going to small scale modem farms and farm related businesses.

- Legalization of informally obtained landholding in Peri-urban areas and further abating its expansion is also another line for policy direction. Especially in peri-urban area, people involve in informal transactions as state-controlled land allocation is unaffordable and is not always sufficient and efficient enough to satisfy the ever growing demands. Thus, the very poor have not been able to afford land for housing. Even for the middle class, it is becoming increasingly difficult to acquire land through the formal lease system. Informal dealings complement partly the inefficiency of the formal system. Moreover, the demolition of informal settlement areas is the worst-case scenario, which results in eviction of the community and aggravates the local sense of insecurity and hence, regularization of the existing informal settlement and further strict regulation is the way out.

- However, the long term solution is for the government to rethink its land policy and allow free transfer of land rights, especially in identified high value land areas as first thing in order of importance.

- The courts are also advised to encourage the parties to settle land matters amicably pending the adjustment of the legal framework to the reality on the ground.

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HARAMAYA LAW REVIEW *Vol.* 6 (2017) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this article: Wakgari Kebeta Djigsa, *The Adequacy of Ethiopia's Bilateral Investment Treaties in Protecting the Environment: Race to The Bottom*, HARAMAYA LAW REVIEW 6 (2017): 67-90

THE ADEQUACY OF ETHIOPIA'S BILATERAL INVESTMENT TREATIES IN PROTECTING THE ENVIRONMENT: RACE TO THE BOTTOM

Wakgari Kebeta Djigsa[*]

Abstract

States have the sovereign right to regulate investment activities within their territories to cope up with various policy objectives. One of such areas where regulation is necessitated is the protection of the host State's society and the environment. This article aims at elucidating how to strike a balance between the protection of the foreign investment and the protection of the environment under Ethiopia's Bilateral Investment Treaties (BITs). Though a comparative doctrinal investigation, this piece finds that the BITs of Ethiopia accord various protections to investments of foreign investors but they do not impose adequate obligations on the investors concerning environmental protection. It comes across the need to adopt a holistic approach of reforming the BITs from the preambles to the substantive contents. In order to safeguard Ethiopia's right to regulate, the preambles, the fair and equitable treatment (FET) and indirect expropriation provisions of the BITs should be reconsidered. For this to happen, a resort to amendment, termination and renegotiation of the agreements would be a way-out. Thus, new generation of BITs is needed to introduce a bottom-up approach and ensure sustainable development.

Keywords: Bilateral investment treaties (BIT), environment, Ethiopia, fair and equitable treatment, foreign direct investment (FDI), regulatory space

I. INTRODUCTION

The current international economic relationship among States is characterized by massive cross-border flow of capital paving ways through which foreign nationals could directly invest their finance in other States. This type of capital flow, referred to as Foreign Direct Investment (FDI), often takes place between capital exporting and capital importing countries. The effect of FDI in the state which hosts the investment is multifarious. For instance, it has the potential to contribute to the economic growth and development of the state. A properly regulated FDI can provide developing countries with foreign capital; new jobs; new and improved technology and management practices; increased domestic production, more developed and diversified domestic

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markets, stronger institutional capacity and less dependency on foreign aid and external debt to promote poverty reduction and other development initiatives.[1] Contrary to this, loosely regulated FDI causes pollution, land degradation, climate change and thereby causing harm to the society and the environment. As a matter of fact, the wastes that industrial plants release threatens the human, animal, and plant life and safety. Investors may also bring obsolete technologies which can endanger the environment and life in the host state.[2]

The inward flow of FDI into Ethiopia is increasing rapidly and the country's economy is in transition.[3] Ethiopia has concluded dozens of BITs for the promotion and reciprocal protection of the investments.[4] These BITs are concluded hoping that they will contribute to the development of the country. Over the past few years, industrial activities in Ethiopia are attracting attention of not only the local communities but also of the government because of their harm to the society and the environment. In light of this, it is important to consider the extent to which the existing BITs of Ethiopia support the imposition of measures to protect the environment when the environment is harmed as a result of FDI. This, however, is not to mean that domestic investments do not harm the environment. Rather, the application of BITs unduly restricts regulatory space and causing a regulatory chill on socially desirable action.[5]

The Ethiopian Constitution[6] explicitly provides that the people of Ethiopia have the right to improved living standards and to sustainable development.[7] It goes on saying that all international agreements and relations to which Ethiopia is a party shall ensure the country's right to sustainable development.[8] Within the ambit of this sub paragraph falls the BITs concluded by Ethiopia. Accordingly, it is a must that Ethiopian BITs be consistent with the notion of sustainable development. The Constitution also declares that "all persons have the right to a clean and healthy environment."[9] Ethiopia has also adopted various legislations, policies and strategies in this regard.[10] Furthermore, the country has become a party to numerous Multilateral

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[1] Genevieve Fox, *A Future for International Investment? Modifying BITs to Drive Economic Developmen*t, 46 GEORGETOWN J INT'L L. 229, 234-235 (2014).

[2] M SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 109-110 (3rd edn, Cambridge University Press) (2010).

[3] National Planning Commission, The Second Growth and Transformation Plan (GTP II) (2015/16-2019/20), The Federal Democratic Republic of Ethiopia, Addis Ababa, 2015, at 14.

[4] So far, Ethiopia has concluded a total of thirty three BITs for the promotion and reciprocal protection of investments. See UNCTAD page, *available at* http://investmentpolicyhub.unctad.org/IIA/CountryBits/67. (Accessed on 28th of October 2017). Out of these, only twenty one BITs are in force. These are those signed with Algeria, Austria, China, Denmark, Egypt, Germany, Finland, France, Iran, Israel, Italy, Kuwait, Libya, Malaysia, the Netherlands, Sudan, Sweden, Switzerland, Tunisia, Turkey and Yemen.

[5] See e.g. UNCHR, 'Human Rights, Trade and Investment,' UN doc E/CN.4/Sub.2//2003/9 (2003).

[6] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1/1995, FEDERAL NEGARIT GAZETTE, 1st Year No.1, 1995 (hereafter FDRE CONSTITUTION).

[7] *Id*. Art. 43 (1). According to the World Commission on Environment and Development definition of sustainable development of 1987, "*sustainable development is a development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs*." WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT. OUR COMMON FUTURE. Oxford: Oxford University Press, (1987)

[8] *Id*. sub para. 3.

[9] *Id*. Art. 44 (1).

[10] E.g. Environmental Pollution Control Proclamation No. 300/2002, FEDERAL NEGARIT GAZETA, 9th Year No. 12, Addis Ababa, 3rd December, 2002; Federal Democratic Republic of Ethiopia, Ethiopia's Climate-Resilient Green Economy, Green economy strategy, Addis Ababa, 2011.

Environmental Agreements (MEAs) that strive to ensure sustainable development through environmental protection.[11]

Against this backdrop, this article aims at examining how to strike a balance between the protections of FDI and Ethiopia's right and duty to impose regulatory measures to protect the environment through BITs. By using comparative and doctrinal analysis, this piece assesses the approaches of inculcating environment-friendly provisions into BITs and identifies the best experiences of other jurisprudences and creating a new roadmap for new generation of BITs. The legal analysis part is corroborated with cases rendered at different tribunals. The BITs Ethiopia has signed with other countries are analyzed through an explorative critical review approach. In the comparative part, IISD (International Institute for Sustainable Development) Model Agreement, Indian Model BIT, SADC (South African Development Community) Model BIT, and BITs agreements from different jurisdiction, most importantly signed between developed and developing countries are considered.

The remaining part of the article is organized as follows. Section II presents the general overview of BITs. Based on model agreement and comparative experience, Section III examines how environmental regulatory spaces are opened up within BITs frameworks. Adequacy of policy space under Ethiopian BITs towards the protection of the environment are analyzed under Section IV. Finally, section V comes up with conclusion and the way forward.

II. GENERAL OVERVIEW OF BILATERAL INVESTMENT TREATIES

A. Nature, Structure and Scope

Bilateral investment treaties are International Investment Agreements (IIAs) entered into between two countries that are designed to establish rules and enforcement mechanisms governing foreign investment between the state parties and their nationals.[12] BITs usually constitute a title, preamble, definition of terms, the rights and duties of the Parties, standards of protections and dispute settlement mechanisms. IIAs in general and BITs in particular have used to concentrate on the protection and promotion of foreign investments. But in recent years, the protection of the environment and other public policy objectives are emerging as one of the most serious contemporary issues of the international investment legal regime.[13] Given the binding nature of their dispute settlement mechanisms, IIAs have a key role in supporting the protection of the environment that is essential for our economies and for sustainable development.[14] In

[11] Ethiopia is Party to the United Nations Framework Convention on Climate Change and the Kyoto Protocol, the Convention on Biological Diversity, the United Nations Convention to Combat Desertification, the Stockholm Convention on Persistent Organic Pollutants, to mention few.

[12] Fox, *supra* note 1, at 229.

[13] Won Kidane and Weidong Zhu, *China-Africa Investment Treaties: Old Rules, New Challenges*, 37 FORDHAM I L J, 4 (1034), 1067 (2014).

[14] United Nations Environment Programme, UNCTAD Conference on International Investment Agreements and Sustainable Development: UNEP Statement on IIAs delivered by Anja von Moltke 16.3.2016, *available at* http://unctad-worldinvestmentforum.org/wp-content/uploads/2016/03/Statement-UNEP.pdf. (accessed on 3rd of November 2016).

particular, IIAs can be used to properly define how the treaty partners balance investor protection with other public policy objectives.[15]

Nevertheless, investment treaties of our time are more of mechanisms through which a small and typically powerful set of private actors can change the substantive content of the law outside the normal domestic legislative and judicial frameworks.[16] In order to tackle this problem, BITs need to be reconstructed to accommodate both private and public interests. In this regard, one may question whether capital importing countries have the leverage to influence the capital exporting countries in determining the terms and conditions of BITs. This has a lot to do with the bargaining power of the Parties while making the treaties. In addition, capital importing nations need to be selective enough when potential investments tend to override public interests. This way, it is possible to reform and extend the scope of the current BITs.

B. Provisions of BITs with Repercussions on Environmental Protection and the Jurisprudence

This subsection aims at discussing specific provisions of BITs having implications for the protection of the environment. The discussion is further corroborated by the arbitral awards of investment arbitration tribunals.

1. Fair and Equitable Treatment (FET)

The FET standard requires the host State to accord a 'fair and equitable treatment' to the investments of foreign investors. This standard of protection of foreign investment remains a controversial standard of treatment under IIAs. The concept of FET is more of uncertainty because the notions of fairness and equity do not connote a clear set of legal prescriptions in international investment law and allow for a significant degree of subjective judgment paving ways for foreign investors to bypass domestic laws and other regulatory measures.[17] The Black's Law Dictionary defines fair as "impartial, just, equitable, and disinterested".[18] An important element that tribunals have considered in determining whether there was a violation of the FET standard is the notion of the legitimate expectations of the investor. Some tribunals have read an extensive list of disciplines into the FET clause, which are taxing on any state, but especially on developing and least-developed countries; lack of clarity persists regarding the appropriate threshold of liability.[19]

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[15] Kathryn Gordon and Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey, OECD Working Papers on International Investment*, OECD Publishing, (2011), at 7.

[16] Lise Johnson and Oleksandr Volkov, State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law, (2014), at 1. *Available at* https://www.iisd.org/itn/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/.(accessed on 2nd of November 2016).

[17] United Nations Conference on Trade and Development (UNCTD), Investment Policy Framework for Sustainable Development, 2015. *Available at* http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf. (Accessed on 10th of January 2017). (UNCTAD 2015 hereafter).

[18] BRYAN A. GARNER, BLACK'S LAW DICTIONARY, 8th ed. (2004).

[19] UNCTAD, *supra* note 17.

In *Tecmed v Mexico,* concerning the revocation of a license for the operation of a landfill, the tribunal reasoned that:

> The FET standard of treatment, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner… so that it may know beforehand any and all rules and regulations that will govern its investments…[20]

Some tribunals have explicitly ruled that a breach of legitimate expectations may happen even where the host State is acting in the good faith pursuit of a legitimate regulatory measure. In *Enron v. Argentina,* the tribunal noted that FET is desirable to maintain a stable framework for the investment and concluded that a key element of FET is the requirement of a "*stable framework for the investment*."[21] The same tribunal added that legitimate expectations are derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest.[22] It further established that the principle of good faith is not an essential element of the FET standard and therefore violation of the standard would not require the existence of bad faith on the part of the host State.[23]

Other tribunals also ruled that if the legal framework governing the investment changes in a way that was not anticipated by the investor at the time of making the investment, then the investor should be compensated for the cost of complying with those changes.[24] This means that if a new law is adopted, or an existing law is changed or applied in a new way,[25] those changes can trigger state liability. Moreover, onerous levels of compensation awarded to investors could preclude poorer states from taking effective measures to give effect to their international obligations to protect their environmental patrimony since they will often not be in a position to finance interference.[26]

Thus, the use of FET to protect investors' legitimate expectations can indirectly restrict countries' ability to change investment-related policies or to introduce new policies including those for the public good that may have a negative impact on individual foreign investors.[27] FET

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[20] Tecnicas Medioambientales Tecmed SA v. United Mexican States, (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003, para. 154.

[21] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, May 22, 2007. Paras. 259 & 260.

[22] *Id*. para 262.

[23] *Id*. para 263.

[24] See, e.g., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, para. 207; Total v. Argentina, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010, para. 122.

[25] Occidental Exploration and Production Company v. Ecuador, LCIA Case No. UN 3467, Final Award, July 1, 2004.

[26] Luke E. Peterson and Kevin R. Gray, International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration, International Institute for Sustainable Development (IISD) (2003), at 31. *Available at* https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf. (Accessed on 2nd of November 2016).

[27] UNCTAD, *supra* note 17.

protections can, under some treaties, extend to subsequent actions of the state, for example changes in laws or regulations, withdrawals of essential licenses, imposition of new duties or export quota or similar.[28] This type of FET is evident from those treaties which use broad connotations without qualifying the standard of treatment. This, in turn, results in extensive subjectivity in the course of interpretation of the FET by arbitral tribunals. Those BITs which recognize qualified FET and those which omit the FET standard play a vital role in minimizing this unnecessary subjectivity.

At this juncture, it is important to reiterate that BITs usually contain adequate provisions that protect foreign investors against opportunistic intervention by the host states and that the notion of legitimate expectations is improperly used by investors to acquire unjust benefits. It is not uncommon to see the following six core investor protection provisions in BITs:

> *(1) right to national and most-favored-nation treatments; (2) protection against expropriation, and fair, prompt, and adequate compensation when it happens; (3) right to repatriate capital and investment proceeds; (4) limitations on performance requirements; (5) access to international arbitration in the event of a dispute; and (6) authority to select top managerial personnel of their choice.*[29]

It is also vital to note that the host states are duty bound to protect the legitimate expectation of investors. However, any interest invoked by foreign investors shall not be protected to the extent it impairs the ability of the host state to comply with its obligation to protect the environment under domestic laws and international agreements. This necessitates to draw a boundary between the genuine mistreatment of foreign investments that should be outlawed by the FET standard and measures of host states taken in pursuance of legitimate policies that cannot be held in breach of the standard, even where such measures harm foreign investments.[30] BITs can be used to set criteria for ensuring a proper balance between the interests of investors and host states.

Some BITs tie the FET standard to the customary international law minimum standard of treatment. In such type of agreements, FET cannot be invoked as a separate standard. What is more, the violations of other provisions of the agreement or another agreement do not give rise to the breach of FET. Art 6 of both the Canada-Tanzania BIT and Canada-Senegal BIT provides for the "Minimum Standard of Treatment" to be accorded to the investments of foreign investors. The provisions oblige each party to accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment.

According to the United Nations Conference on Trade and Development (UNCTAD), "where an IIA ties the FET obligation to the customary international law minimum standard of treatment of aliens, the threshold of liability as applied by arbitral tribunals has been generally

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[28] Dunn Gibson and Crutcher LLP, Bilateral and Multilateral Investment Treaties: What all Dealmakers Need to Know (2015), at 2. *Available at* http://www.gibsondunn.com/publications/documents/Bilateral-and-Multilateral-Investments-Treaties--What-All-Dealmakers-Need-to-Know.pdf. (Accessed on 11th of November 2016).

[29] Fox, *supra* note 1, at 233-234.

[30] United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II*, United Nations, New York and Geneva (2012), at 15.

higher, i.e. the host state's conduct needs to be egregious or outrageous."[31] In a similar fashion, the tribunal in *Pope and Talbot v. Canada* ruled that the FET standard was "additive" to the international minimum standard of treatment.[32] As such, the host state is obliged not to deny justice so that the foreign investor acquires adequate protection to her economic rights and interests. At the same time, the host state will also be able not to give up its non-economic interests.

2. Expropriation

In a nutshell, investment rules and regulations do not provide precise definition for the term expropriation.[33] Generally speaking, expropriation can be of two types: direct and indirect.[34] The former is made through a formalized expropriation decree or law whereas the latter emanates from measures the host state takes to regulate economic activities within its territory, even where such regulation is not directly targeted at an investment.[35] It has to be clear that not all measures of the host State constitute expropriation under international investment law. In other words, there are some measures essential to the efficient functioning of the state for which no compensation shall be paid like non-discriminatory measures taken for environmental protection.[36] In the course of imposing any measure for environmental protection, however, the host state must take into account its investment treaty obligations.

Though whether a measure taken by the host State is non-compensable regulatory measure or otherwise is to be determined on a case by case analysis in the course of dispute settlement, it is important to highlight some criteria that may be taken in to consideration. Basically, the purpose of the measure needs to be examined. Accordingly, it is important to make sure that the measures are taken for environmental protection. Second, any such measure shall not cause a substantial deprivation of the economic interests of the investor. When severe economic impact is caused to the foreign investor, the host State may be required to pay compensation. Third, it shall not be used as a disguised taking of the investment and shall be non-discriminatory.[37]

A broad definition of indirect expropriation, adopted because of lack of precise definition of the term, in IIAs may result in a situation where all state measures that harm an investor can be considered an indirect expropriation, irrespective of the reasons that underlie any such measure.[38] Accordingly, the determination of the scope of indirect expropriation is a prominently debated issue particularly whether or not it includes "measures tantamount to expropriation." The practice of tribunals tends to show that such a phrase includes indirect expropriation. For

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[31] UNCTAD, *supra* note 17, at 13.

[32] Pope and Talbot v. Canada, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 110.

[33] OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law, OECD Working Papers on International Investment*, No. 2004/04, 2004, at 5. *Available at* http://dx.doi.org/10.1787/780155872321. accessed on 23rd of September 2017.

[34] *Id*.

[35] Suzy H. Nikièma, Indirect Expropriation, Best Practices Series, IISD, 2012, at 1. *Available at* http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf. (accessed on 3rd of November 2016).

[36] *Id*. at 4.

[37] OECD, *supra* note 33.

[38] Nikiema, *supra* note 35, at 3.

instance, in *Tecmed v. Mexico,*[39] the tribunal held that the failure to renew the operating permit had violated Article 5 of the Mexico-Spain BIT, which safeguards investors from expropriation or equivalent measures. It recognized that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and further noted the following:

> Generally, it is understood that the term 'equivalent to expropriation' or 'tantamount to expropriation' included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called 'indirect expropriation' or 'creeping expropriation', as well as to the de facto expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not express the purpose of depriving one of rights or assets, but have actually that effect.[40]

As most IIAs also prohibit indirect expropriation, which extends to regulatory takings, and as some arbitral tribunals have tended to interpret this broadly so that it includes legitimate regulatory measures in the pursuit of the public interest, the expropriation clause has the potential to pose undue constraints on a State's regulatory capacity.[41] To avoid this, policymakers could clarify the notion of indirect expropriation and introduce criteria to distinguish between indirect expropriation and legitimate regulation that does not require compensation.[42]

Some international investment tribunals have found that environmental regulatory measures constituted expropriation thereby entailing the liability to pay compensation. For instance, in *Santa Elena v. Costa Rica*, the tribunal stated that:

> *Expropriatory environmental measures, no matter how laudable and beneficial to society as a whole, are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.*[43]

Some BITs to which developing countries are parties recognize that non-discriminatory measures aimed at protecting the environment do not constitute expropriation. In this regard, the BIT entered into between India and Senegal[44] is a good example. It constitutes an annex for the interpretation and clarification of expropriation, which forms an integral part of the BIT. It provides that "except in rare circumstances, non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives including health, safety

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[39] Tecmed v. Mexico, *supra* note 20.
[40] *Id*. para. 114.
[41] UNCTAD, *supra* note 17.
[42] *Id*.
[43] Santa Elena v. Costa Rica, ICSID, Case No. ARB/96/1, para 72 (2002).
[44] Agreement between the Government of the Republic of India and the Government of the Republic of Senegal for the Promotion and Protection of Investments, (signed 03/07/2008 and entered into force 17/10/2009). *Available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1595. (Accessed on 3rd of December 2016). (India-Senegal BIT hereafter).

and the environment concerns do not constitute expropriation or nationalization."[45] Similarly, the BIT concluded between Canada and Tanzania BIT[46] states that:

> Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[47]

Accordingly, it is possible for the host State to impose measures to protect the environment without the measure constituting indirect expropriation.

Furthermore, the India-Senegal BIT states that "actions and awards by judicial bodies of a Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns do not constitute expropriation or nationalization."[48] Pursuant to the BIT between Turkey and Senegal,[49] measures aimed at the protection of the environment do not constitute expropriation provided that they are non-discriminatory.[50] Thus, tribunals need to be cautious of the regulatory measures that host States may take to protect their environmental interest and measures that CONSTITUTE INDIRECT EXPROPRIATION.

III. ENVIRONMENTAL REGULATORY SPACE IN IIAS

Being an integral parts of modern IIAs, environmental stipulation have featured in different parts of agreements, from preamble through substantive parts and annexes. As looking into IIAs serve as a foundation to evaluate Ethiopian BITs, this section presents how sovereign rights of regulating the national environment are coined in IIAs, and its implication and meaning (enforceability) when they appear in different parts of an agreement.

A. Preambles

The sovereign right to regulate and environmental protection may be expressly recognized in the preamble of IIAs. At this juncture, it is vital to consider the role of preambles. The Vienna Convention on the Law of Treaties stipulates that treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[51] It goes on saying that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and

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[45] *Id*. Annexure 5.1 (3).

[46] Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (signed on 17th May of 2013). *Available at* http://investmentpolicyhub.unctad.org/IIA/CountryBits/222. (Accessed on 23rd of January 2017). (Canada-Tanzania BIT hereafter).

[47] *Id*. Art. 10 (5) last para.

[48] India-Senegal BIT, *supra* note 44, Annexure 5.1 (4).

[49] Agreement between the Government of the Republic of Turkey and the Government of the Republic of Senegal Concerning the Reciprocal Promotion and Protection of Investments, Signed on 15th of June 2015. (Turkey-Senegal BIT hereafter).

[50] *Id*. Art 5 (2).

[51] Vienna Convention on Law of Treaties, concluded at Vienna on 23rd May of 1969, Art. 31 (1).

annexes.[52] Thus, preambles could be used in interpretation of treaties both at the text and context stage, and at the object and purpose stage. Since the existing BITs primarily focus on the protection of investments, tribunals have often relied on preambles to justify expansive interpretations of investor protections, where the preambles clearly indicated that the overriding objective of the treaty was investment promotion and protection.

For instance, in *SGS v. Philippines*, the tribunal relied on the preamble of the applicable BIT, i.e. Philippines-Switzerland BIT of 1997, which is intended to create and maintain favorable conditions for investments by investors of one contracting party in the territory of the other contracting party thereby favoring the investor. The tribunal stated that:

> The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended …to create and maintain favorable conditions for investments by investors of one Contracting Party in the territory of the other…. It is legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments.[53]

The BIT entered into between Finland and Nigeria,[54] employs environmental language in its preamble. After stipulating the desire to promote and protect international investment, the preamble of the agreement recognizes the importance of environmental protection. It provides that "these objectives can be achieved without relaxing health, safety and environmental measures of general application."[55] The preamble to the Canada-Senegal BIT also explicitly refers to the promotion of sustainable development.[56] It reads "recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development…"[57]

The preamble of the Canada-Tanzania BIT can also be considered as a good example in striking the balance between investment protection and sustainable development. It acknowledges the Parties' desire in the following terms:

> Desiring to intensify economic co-operation and promote sustainable development for the mutual benefit of both countries…; recognizing that the promotion and reciprocal protection of such investments favor the economic prosperity and sustainable development

The foregoing preambles declare not only the parties' interest to achieve economic objectives but also their desire to reach the objectives in a manner consistent with the protection of the environment. This concern for the protection of the environment and other social objectives

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[52] *Id*. Art. 31 (2).

[53] SGS Société Générale de Surveillance SA v Republic of the Philippines, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 116.

[54] Agreement between the Government of the Republic of Finland and the Government of the Federal Republic of Nigeria on the Promotion and Protection of Investments, signed 22nd June 2005. (Finland-Nigeria BIT hereafter).

[55] *Id*. Preamble; See also the Turkey-Senegal BIT, *supra* note 49.

[56] Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments, (concluded on 27th November of 2014) (Canada-Senegal BIT hereafter). *Available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/3240. (Accessed on 15th of February 2017). Art 16

[57] *Id*.

could not be underestimated as it informs tribunals to take care of such non-economic interests in the course of interpretation of the BIT.

The IISD Model Agreement[58] introduces the concepts of sustainable development and sustainable investment. Some of the expressions employed in its preamble[59] are worth due attention. To mention few:

a) The concern for sustainable development in terms of sustainable investment has become at the forefront. It has been admitted that the development of the national and global economy is possible only through sustainable investment.
b) Sustainable investment begs for the cooperation between foreign investors, their home states and host governments of the concerned investment activity.
c) The need for balance of rights and obligations in international investment between foreign investors, their home states and the host states has become immense.
d) IIAs are required to reflect the principles of transparency, accountability and legitimacy for all participants (investors, home states and host states) of FDI.

The Indian Model BIT[60] has also a room for the notion of sustainable development. It declares the Parties' objective in the following terms:

> Reaffirming the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including the right to change the conditions applicable to such Investments; and seeking to align the objectives of Investment with sustainable development and inclusive growth of the Parties.[61]

In addition to its adoption of the principle of sustainable development, the Indian Model acknowledges the parties' right to regulate the investment and to exercise flexibility with respect to the conditions applicable to such investments.

B. Substantive provisions

When BITs do not create express exceptions from the obligations contained therein, they might nonetheless expressly mention the noninvestment obligations of the contracting parties, in balancing clauses.[62] The new generation of BITs has seen the multiplication of this kind of clauses, which can take different forms and express different levels of commitment to non-investment obligations.[63] In this regard, it is vital to consider some BITs to which developing countries are Parties. For instance, the BITs concluded between Canada and Tanzania[64] as well as that of Canada and Senegal[65] contains a provision on "Health, Safety and Environmental

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[58] Int'l Inst. for Sustainable Dev., IISD Model International Agreement on Investment (Apr. 2005), *available at* http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf, (accessed on 23rd of January 2017).

[59] *Id*. preamble.

[60] Model Text for the Indian Bilateral Investment Treaty, (Indian Model BIT hereafter), *Available at* https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf. (Accessed on 7th of November 2016).

[61] *Id*. preamble.

[62] Alessandra Asteriti, Greening Investment Law, PhD thesis, University of Glasgow, (2011), at 144. Also *available at* http://theses.gla.ac.uk/2813/. (accessed on 15th December of 2016).

[63] *Id*.

[64] Canada-Tanzania BIT, *supra* note 46.

[65] Canada-Senegal BIT, *supra* note 56, Art. 15.

Measures" which states that "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures".[66]

The SADC Model BIT[67] enshrines sustainable development concerns both under its preamble and substantive provisions. The Model BIT provides for options the parties can resort to in the course of drafting their investment agreements. In the preamble, the need to promote investment opportunities that enhance sustainable development is acknowledged. It also recognizes the right to regulate investment in explicit terms.[68] According to Art. 1 of the SADC Model, the objective of an investment agreement shall be to encourage and increase investments that support the sustainable development of each party.[69] With respect to FET, the SADC Model optionally refers to customary international law. It states that "each State Party shall accord to Investments or Investors of the other State Party FET in accordance with customary international law on the treatment of aliens".[70]

Pursuant to Art. 6.7 of the SADC Model, a non-discriminatory measure of a state party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Agreement. The Model further requires investors to comply with environmental impact assessment under its Art. 13. Art. 14 (1) of the Model also requires investments to implement a system of environmental management in light of available international environmental management standards. By virtue of Art. 14 (2) of the Model, such environmental management system has to be improved and updated regularly. More importantly, the SADC Model requires "investors and their investments not to establish manage or operate investments in a manner inconsistent with international environmental, labor, and human rights obligations binding on the host State or the home State, whichever obligations are higher."[71] Art. 22 of the Model provide that each state party is permitted to adopt its own environmental standards and to modify such standards where the need arises.

The IISD's model multilateral investment agreement attempts to change the prevailing structure of investment treaties to specifically introduce development objectives into them.[72] The IISD model agreement achieves this by creating both rights and obligations for investors and host countries. The Model was designed in such a way that the protections for investors are

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[66] Canada-Tanzania BIT, *supra* note 46, Art. 15.

[67] SADC Model Bilateral Investment Treaty Template with Commentary, 2012. (SADC Model hereafter). *Available at* http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf. (Accessed on 19th of February 2017).

[68] Art. 20.1 of the SADC Model reads: 'In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.'

[69] *Id*. Art. 1.

[70] *Id*. Art. 5, Option 1. The second option refers to 'fair administrative treatment.'

[71] *Id*. Art. 15.3.

[72] Jennifer Maul and Kate Vyborny, *Globalization, International Law and the Future of International Investment Treaties, An Introductory Workshop on the International Institute for Sustainable Development's Model International Agreement on Investment for Sustainable Development*, Carnegie Endowment for International Peace, at 1. *Available at* http://carnegieendowment.org/files/IISD.pdf. (Accessed on 3rd of December 2016).

conditioned upon minimum responsibilities, including conducting environmental impact assessments.[73] Art. 12 of the Model requires foreign investors or their investments to undergo environmental or social impact assessments prior to the establishment of the investment in accordance with the laws of the host state. Similarly, Art. 14 impose post-establishment obligations on foreign investors to maintain environmental management system and standard. Furthermore, Art. 20 provides that it is inappropriate for the parties to attract foreign investment through the adoption of lax environmental and other standards. More specifically, Art. 21 (1) of the Model calls for high levels of environmental protection. By so doing, the model seeks a balance between rights and obligations for investors, host states, and home states. The agreement affirms the inherent right of governments to regulate foreign investment in the public interest and to articulate their own development policy.[74]

Art. 7 of the IISD Model entitled "Minimum international standards" provides that "each Party shall accord to investors or their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security and such obligation is to be understood as consistent with the obligation of host states."[75] Furthermore, the preceding sub-paragraph is said to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments.[76] It goes on saying that the concepts of FET and full protection and security are included within this standard, and do not create additional substantive rights.[77]

The provision of the IISD Model on expropriation reiterates that regulatory measures may not be considered as expropriation.[78] The IISD Model, under its Article 8 (I), stipulates that non-discriminatory regulatory measures taken by a party that are designed and applied to protect or enhance legitimate public welfare objectives, such as health, safety and the environment, do not constitute an indirect expropriation. Such measures, nevertheless, are required to be in consistency with the right of states to regulate and the customary international law principles on police powers.

Under Art. 10.6 (ix) of the Indian Model, foreign investors and investments are duty bound to develop and comply with policies to ensure timely and accurate disclosure of material information relating to environmental impacts and management systems. This obligation persists even in the absence of such obligation under the laws and regulations of the host state. Furthermore, investors and their investment are obliged to comply with the environmental laws of the host State applicable to the concerned investment by virtue of Art. 12.1 (iii) of the same Model.

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[73] Luke E. Peterson, *Bilateral Investment Treaties- Implications for Sustainable Development and Options for Regulation, FES Conference Report* (2007), at 2. *Available at* http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf. (Accessed on 15th of January 2017).

[74] *Id*.

[75] IISD Model, *supra* note 58, Art. 7 (A).

[76] *Id*. Art. 7 (B).

[77] *Id*.

[78] *Id*. Art. 8 (I).

C. Exceptions

An environmental exception clause is a general provision that excuses governments from treaty obligations where the challenged measures were taken for environmental purposes.[79] Exceptions can be inserted in IIAs in two ways- general and specific. General exceptions permit the Parties to the agreement to derogate from all of their obligations provided that certain requirements are satisfied. Specific exceptions, on the other hand, are aimed at preventing the application of specific obligations, such as those arising from expropriation clause.

Many countries have included general exceptions for measures taken to protect environmental interests in treaty texts. These express carve-outs allow the parties to adopt necessary measures to protect human, animal and plant life or health as well as for conserving natural resources and ensure that environmental policies are not watered down to attract more investments.[80] A good example of the general exceptions is the BIT concluded between Egypt and Canada.[81] Under Art XVII of the BIT, general exceptions to the application of the agreement are recognized. The relevant part of the provision reads "nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[82] It goes on saying that:

> Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources[83]

The foregoing provision is almost similar to the general exception recognized under the General Agreement on Tariffs and Trade (GATT).[84] Despite its exceptional recognition for natural resource conservation and protection of the environment, the dispute settlement organs of the World Trade Organization (WTO) regime constructed this exception narrowly.[85] The effectiveness of the environmental general exception under the international trade regime is complicated by the range of interpretations concerning Article XX of the GATT that have been

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[79] Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures under the Trans-Pacific Partnership*, 45 ELR 10684 (2015) at 11.

[80] Francesca R. Jacur, Changing Climate in Climate Change Investment; An International Law Perspective, at 14-15, *Available at* http://www.law.nyu.edu/sites/default/files/ECM_PRO_071568.pdf. (Accessed on 12th of February 2017).

[81] Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, concluded on 13th of November 1996). (Egypt-Canada BIT hereafter).

[82] *Id*. Art XVII (2).

[83] *Id*. Art XVII (3).

[84] General Agreement on Tariffs and Trade, Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, in World Trade Organization, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (Geneva: WTO, 1995), Art. XX (b and g).

[85] Jonathan M. Harris, *Trade and the Environment, Global Development and Environment Institute, Tufts University* (2004) at 12.

issued by several GATT/WTO dispute settlement panels.[86] However, the possibility of ensuring environmental protection, at least to some extent, cannot be ruled out.

With a slight difference from the preceding paragraph, the BIT signed between India and Senegal[87] provides for a "General and Security Exceptions" which encompasses measures for public health reasons or to prevent diseases affecting animals and plants.[88] Furthermore, Art. 16 of the Indian Model BIT provides that nothing in this Treaty precludes the host state from taking actions or measures of general applicability which it considers necessary with respect to the protection and conservation of the environment including all living and non-living natural resources.[89] Though 'exceptions' are more difficult to prove than 'principles,' which are positive rules that establish parallel rights and obligations for the concerned parties, they can still serve as one of the approaches used to incorporate environment-friendly provisions in BITs.

D. Separate side agreements

Apart from or in addition to the recognition of environmental-friendly provisions in BITs, it is also possible to adopt a separate side agreement to protect the environment. This approach makes it easy to come-up with all necessary details towards environmental objectives. A good example in this regard is the NAFTA Side Agreement[90] signed by NAFTA member countries. Even if it is not a BIT, NAFTA regulates investment activities under its Chapter Eleven and the side agreement concluded under its ambit can be taken as a good practice.

IV. STOCKTAKING OF ENVIRONMENTAL REGULATION UNDER ETHIOPIA'S BITS

Evidences show that there are multiples of ways for exercising the sovereignty right of regulating environmental by host states. They have done that without adversely affecting other investment interests within the frameworks of BITs. Against such backgrounds, this section critically evaluates the extent to which Ethiopia's BITs empower the state and oblige investors of their environmental duties. Accordingly, examination of different sections of the signed BITs and new developments are analyzed.

A. Preambles

The Ethiopia-Turkey BIT was concluded on 16th November 2000.[91] Before proceeding with its substantive contents, it is vital to start by examining its preamble which stipulates:

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[86] Douglas J. Caldwell, *Multilateral Environmental Agreements and the GATT/WTO Regime*, Discussion Draft, 1998, at 13.

[87] India-Senegal BIT, *supra* note 44.

[88] *Id*. Art. 13.

[89] Indian Model BIT, *supra* note 60, Art. 16.1 (v).

[90] North American Agreement on Environmental Cooperation Between the Government Of Canada, The Government of the United Mexican States and the Government of the United States of America, *available at* http://www.sice.oas.org/trade/nafta/Environ.asp. (Accessed on 17th of November 2016).

[91] Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia concerning the Reciprocal Promotion and Protection of Investments, (concluded on 16th of November 2000). (The Ethiopia-Turkey BIT).

> Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party; …; Agreeing that FET of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.[92]

The Ethiopia-China BIT[93] was meant to create favorable conditions for the investment activities and to bring economic prosperity as envisaged from the following terms:

> Intending to create favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party; Recognizing that the reciprocal encouragement, promotion and protection of such investments will be conducive to stimulating business initiative of the investors and will increase prosperity in both States.[94]

From the very outset, the Parties' foremost objective is to create favorable conditions for the investment activity of investors of one contracting Party in the territory of the other contracting Party. This objective, on its face, is sound as it creates a safe business environment for the investors of both Parties. The next paragraph enshrines two things: stimulating business initiative of the investors and an increment of prosperity in both States. This paragraph seems to have been constructed on the belief that investment activities by themselves could ensure prosperity. The preamble also strives to intensify economic cooperation. A close look at the foregoing preamble illustrates the Parties' sole interest to encourage investment activities. No single word is inserted, which recognizes other non-economic interests of the contracting Parties including the need to protect the environment.

The Ethiopia-France BIT[95] was concluded on 25th June 2003. To start with its preamble, it aims at creating favorable conditions for investments by the investors of one contracting Party in the territory of the other contracting Party. It reads:

> Desiring to strengthen the economic cooperation between both States and to create favorable conditions for French investments in Ethiopia and Ethiopian investments in France, Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two countries in the interest of their economic development[96]

This preamble also lacks the regulatory space through which states could impose measures to protect the environment.

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[92] *Id*. preamble.

[93] Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments, Signed on 11 May 1998 and entered into force on 1 May 2000. (Ethiopia-China BIT hereafter).

[94] *Id*. preamble.

[95] Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, (concluded on 25th of June 2003). (Ethiopia-France BIT).

[96] *Id*. preamble.

The Ethiopia-Sudan BIT[97] was signed on 7 March 2000 and entered into force on 15 May 2001. Just like other BITs to which Ethiopia is a Party, the preamble of the BIT focuses on the sole aim of protecting foreign investments. It reads:

> Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relation between them and in particular to create favorable conditions for investments by Investors of one Contracting Party in the territory of the other Contracting Party; Recognizing the need to protect investments by Investors of the Contracting Parties and to stimulate the flow of investments and individual business initiative with the view of promoting the economic prosperity of the Contracting Parties;

The currently effective BIT between Ethiopia and Germany was concluded on 19 January 2004.[98] This BIT, in its preamble, declares the intention of the Parties to cooperate in promotion and protection of investments in the following terms:

> Desiring to intensify economic co-operation between both States; intending to create favorable conditions for investments by investors of either State in the territory of the other State; recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations.

Just like other BITs of Ethiopia, the preamble to this BIT focuses on the protection and promotion of investments and it does not reflect the need to protect the environment. The following subsection also presents that the BITs of Ethiopia are means by which foreign investors maximize their interests.

B. Duty to promote and protect investment

Generally speaking, Ethiopian BITs lack provisions that impose parallel obligations on investors with respect to environmental protection. In the absence of such provisions in BITs, a resort to only domestic environmental rules and regulations may not effectively address environmental concerns. This is attributable to two reasons. First, the protection offered to investors may limit the ability of governments to regulate investment for the protection of the environment, natural resources and other social goods, and to ensure that foreign investment contributes to overall national development goals.[99] Any attempt by the host state to impose measures for environmental protection could result in the violation of its obligations under BITs. Second, by virtue of the Vienna Convention on the Law of Treaties, states are precluded from invoking their domestic laws as a defense for the breach of their treaty obligations.[100] As such, for the host state's environmental measure to be justifiable without constituting treaty violation, the measure

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[97] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of the Sudan on the Reciprocal Promotion and Protection of Investment, (concluded on 7th March of 2000). (The Ethiopia-Sudan BIT).

[98] See Treaty between the Federal Democratic Republic of Ethiopia and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments, (concluded on 19th January of 2004). (The Ethiopia-Germany BIT).

[99] Livia Costanza, *The Security of International Investments – A Synthesis of Impacts on Public Policies and Domestic Laws of Host States*, LL.M Dissertation, Faculty of Law, Victoria University of Wellington, 2009, at 66.

[100] Vienna Convention, *supra* note 51, Art. 27.

must first get an equal status with the obligation to protect and promote foreign investment under the applicable treaty.

Under the BITs of Ethiopia, the Parties' conviction of promotion and protection of investments is further elaborated under the substantive provisions of the BITs. At this juncture, it is vital to examine the implications of a heavy reliance on attracting, promoting and protecting foreign investment. Basically, it is important for every State to promote and protect investment so as to comply with its investment treaty obligations. The question, however, is what kind of investments deserve protection? Or could States be better-off by protecting all investments whatsoever? These questions are relevant because there are some investments which are irresponsible to the society and the environment in which they operate. Thus, States should protect quality investments that are responsible for each and every of their activities. This takes us to a third question which asks how should the duty to promote and protect investment appear in BITs. The answer is clear: BITs should not promote and protect investments in generic terms but only those responsible to the society and the environment.

According to Art. 2 of the Ethiopia-Turkey BIT, each Party assumed the obligation to encourage and create favorable conditions for investors of the other Party to invest in its territory.[101] By the same token, the substantive part of the BIT also focuses only on the protections of the investors and their investments. For instance, the provision on the promotion of investments obliges the Parties to encourage investors to make investments and to grant all sorts of assistance with respect to activities associated with such investments.[102] Contrary to the normal BITs practice, the Ethiopia-Belgian-Luxembourg BIT, which has not entered into force yet, introduces environmental measures under its Art. 5.

The Ethiopia-France BIT enshrines the duty of the parties to promote investment. Article 2 provides that each contracting party shall encourage and admit on its territory and in its maritime area, investments made by nationals or companies of the other contracting party. What is more, under the Ethiopia-Sudan BIT, the Parties are duty bound to encourage and create favorable conditions for investors of the other contracting Party[103] and to grant the necessary permit needed for the investment.[104] The Ethiopia-Germany BIT also follows the same stance. Article 2 of the BIT is another indication of the Parties commitment to focus solely on economic objectives. It provides that "each Contracting Party shall within the framework of its policies in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its legislation."[105] In this regard, most BITs of Ethiopia talk similar language. They tend to maximize the interests of foreign investors by providing for various obligations on the country.

[101] Ethiopia-Turkey BIT, *supra* note 91, Art. 2 (1).
[102] Ethiopia-China BIT, *supra* note 93, Art. 2.
[103] Ethiopia-Sudan BIT, *supra* note 97, Art. 2 (1).
[104] *Id*. Art. 2 (2).
[105] Ethiopia-Germany BIT, *supra* note 98, Art. 2 (1).

C. Standards of Treatment

Ethiopia's BITs provide for different types of standards of treatment to be afforded to foreign investors and their investments. One of such standards of protection is the FET. With the exception of the Ethiopia-United Arab Emirates BIT, which has not entered into force yet, the remaining BITs of the country recognize the FET principle. Not surprisingly, in some cases, the BITs stipulate the FET as their very objective in their preamble in addition to the substantive provisions.[106]

Out of the effective BITs of Ethiopia covered under this article, only the one concluded with France recognizes a qualified FET.[107] Basically, FET can be qualified by reference to international law (this is the stance taken by the Ethiopia-France BIT), by listing FET elements (making exhaustive or illustrative lists) and by incorporation of FET modifiers like, for instance, combining with NT and MFN.

The Ethiopia-Turkey BIT provides that investments of investors of the other contracting party shall at all times be accorded FET and shall enjoy full protection in the territory of the other contracting party.[108] It is nowhere clear as to what amounts to the breach of this obligation. In addition, the provision is not clear whether this protection is self-containing or dependent on the international minimum standard of treatment.

Art. 3 of the Ethiopia-China BIT, on its part, provides for the standards of treatment to be accorded to investments. Accordingly, the Parties are duty bound to extend FET to the investments and associated activities of the investors. It goes on saying that investments and activities associated with investments of investors of either party shall be accorded FET and shall enjoy protection in the territory of the other party.[109]

What makes the FET under the Ethiopia-China BIT different is that the Ethiopia-China BIT uses a broad language which extends to activities associated with investments. As it is difficult to ascertain such related activities, it is more likely that foreign investors argue on the basis of this provision to attack all measures of host states.

Article 3 of the Ethiopia-Sudan BIT prescribes the necessary standards of treatment. Hence, parties shall accord to the investments of investors from the other contracting party full protection, non-discriminatory, NT and FET. It stipulates that each contracting party shall ensure FET within its territory to investments and investors of the other contracting party and shall not be less favorable than that accorded to investments made by its own investors or investors of any third states.

Furthermore, with respect to the FET principle, the Ethiopia-Germany BIT acknowledges that each contracting party shall in its territory in any case accord investments by investors of the

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[106] See *e.g.* Ethiopia's BIT concluded with Denmark, preamble and Art. 3 (1).

[107] The BITs Ethiopia concluded with Finland, Germany, Iran, Israel, Italy, Kuwait, Libya, Malaysia, Netherlands, Sudan, Sweden, Switzerland, Tunisia, Turkey and Yemen recognize unqualified FET. Consequently, the FET under these BITs is vulnerable to a broad interpretation with the possibility of zeroing policy space.

[108] Ethiopia-Turkey BIT, *supra* note 91, Art. 2 (2).

[109] Ethiopia-China BIT, *supra* note 93, Art. 3(1).

other contracting party FET as well as full protection under the Treaty.[110] Rather than providing for the FET, the provision, just like other BITs, is not clear as to what constitutes FET.

D. Expropriation

Concerning expropriation, some BITs of Ethiopia explicitly recognize the direct-indirect expropriation classification.[111] Others employ equivalent terms or phrases such as "expropriate, nationalize or take similar measures", "other measures having the same nature or the same effect" and "subjected to any other measure the effects of which would be tantamount to expropriation".[112] These latter terminologies connote indirect expropriation. Not surprisingly, all the BITs require that indirect expropriation, too, must be compensated. Indirect expropriation includes regulatory measures that harm, affect or interfere with the investment to such a degree that they effectively take the investors' property even if the investors still technically retain ownership.[113] Thus, environmental regulation could fall in the ambit of such phrases thereby entailing liability.

The Ethiopia-Turkey BIT connotes that investments shall not be expropriated, nationalized or subject, *directly or indirectly*, to measures of *similar effects* except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in the Article III of this Agreement.[114] It lacks a language that excludes regulatory measures taken for environmental protection from constituting indirect expropriation.

The expropriation provision of the Ethiopia-China BIT lacks adequate policy space to regulate in the interests of the society and the environment without paying compensation to the foreign investors. It stipulates that neither party shall expropriate, nationalize or take similar measures against investments of investors of the other party in its territory, unless it is for the public interests; under domestic legal procedure; without discrimination and against compensation.[115] It is important to note here that the host state may expropriate foreign investments provided that it is for public interest and against prompt, adequate and effective compensation. In other words, although environmental concerns may constitute public interest in this scenario, environmental measures may not be imposed in the absence of compensation. This needs to be compared to the provisions of some BITs which enable the host state to adopt environmental regulatory measures without effecting compensation to the foreign investors.

Article 5 of the Ethiopia-France BIT entitled "Dispossession and Indemnification" recognizes privilege against expropriation. With respect to expropriation, it states that "Neither Contracting Party shall take any measures of expropriation or nationalization or any other

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[110] Ethiopia-Germany BIT, *supra* note 98, Art. 2 (2).
[111] E.g. Ethiopia-Turkey BIT, *supra* note 91; Ethiopia-France BIT, *supra* note 95.
[112] E.g. The BITs Ethiopia concluded with China, Sudan and Germany.
[113] Nathalie Bernasconi-Osterwalder and Lise Johnson, Belgium's Model Bilateral Investment Treaty: A review, Draft for Discussion (2010) at 15. Also *available at* http://www.iisd.org. (Accessed on 11th of February 2017).
[114] Ethiopia-Turkey BIT, *supra* note 91, Art. 4 (1).
[115] Ethiopia-China BIT, *supra* note 93, Art. 4(1).

measures having the effect of dispossession, direct or indirect."[116] What makes the Ethiopia-France BIT different from others in this regard is that it introduces a "More Favorable Provisions" that could prevail over the BIT. Article 7 of the BIT provides that investments made by nationals or companies of one contracting party having formed the subject of a particular commitment from the other contracting party, according to its legislation, to a specific contract, or to any other form of agreement, shall be governed, without prejudice to the provisions of this Agreement, by the terms of this said commitment if the latter includes provisions more favorable than those of this Agreement.

Article 4 of the Ethiopia-Sudan BIT provides that neither contracting party shall take any measures of expropriation, nationalization or *any other measures having the same nature or the same effect* against investments of Investors of the other Contracting Party unless some requirements are satisfied. The Ethiopia-Germany BIT recognizes both direct and indirect expropriation. The relevant part of the provision on expropriation states that investments by investors of either Contracting Party shall not be expropriated, nationalized or subjected to *any other measure the effects of which would be tantamount to expropriation* or nationalization in the territory of the other contracting party.[117] The way indirect expropriation is inculcated in this provision may overwhelm measures taken for the protection of the environment.

At this juncture, it is important to note that expropriation is a sovereign right of the host State when the conditions prescribed in the appropriate legal frameworks is satisfied like the existence of *public purpose*, non-discrimination, prompt, adequate and effective compensation. The *public purpose* criterion here is not to mean that regulatory environmental measures should result in the obligation of the host State to pay compensation. This is because not all regulatory measures constitute expropriation and there must be a room for police power. If the host State is required to pay compensation for each and every measure taken to protect its environment, the law itself would defeat its purpose. Thus, expropriation should start to count only where the environmental regulatory measures go beyond their objectives and cause substantial deprivation of the rights of the investor.

E. The Possibility of Reforming Ethiopia's BITs

1. Amendment, Termination and Renegotiation

Amendment is one of the ways via which the BITs can be reformed. The Parties may amend the provisions of BITs to incorporate environment-friendly provisions. Unfortunately, only very few BITs of Ethiopia permit amendment. Under the BITs of the country concluded with Algeria (Art. 11), Denmark (Art. 13), Malaysia (Art. 11), Turkey (Art. 9 (3)), amendment is permitted by the mutual consent of the Parties and in writing. In a somewhat different language, Art. 11 of the Ethiopia-Malaysia BIT provides that amendment by mutual consent is possible without prejudice to the rights and obligations arising from the BIT prior to the date of such alteration or modification until such rights and obligations are fully implemented. On the other hand, the BITs

[116] Ethiopia-France BIT, *supra* note 95, Art. 5 (2).
[117] Ethiopia-Germany BIT, *supra* note 98, Art. 4 (2).

Ethiopia signed with Austria, China, Finland, France, Germany, Iran, Israel, Kuwait, Libya, Netherlands, Sudan, Sweden, Switzerland, Tunisia and Yemen do not permit amendment to the agreements.

Termination of BITs is the other means by which the Parties reconcile the discrepancy between economic and non-economic objectives. However, a State could be better-off where termination is followed by renegotiation to introduce new generation of BITs. Practice envisages that countries have terminated BITs to minimize the unnecessary effects of such agreements. According to UNCTAD, at least 110 BITs were renegotiated by the end of 2006.[118] For instance, in 2005, China renegotiated BITs with Belgium Luxembourg, the Czech Republic, Portugal, Slovakia and Spain, while Germany renegotiated BITs with Egypt and Yemen.[119] It has to be noted at this point that the termination of BITs could differ from the termination of other treaties. For instance, it is not easy to terminate BITs before the date of their expiry. By the same token, the Ethiopian BITs stipulate that the agreements will remain effective for certain fixed period of time like ten,[120] fifteen,[121] twenty[122] or thirty[123] years. Once the initial period is over, either of the contracting parties may cause termination upon giving written notice to the other party. Upon termination, prior investments will receive protection under the terminated BIT for additional period of time.[124]

2. Recent Developments: the Draft Model BIT of Ethiopia and the Ethiopia-United Arab Emirates BIT

Currently, there is an attempt to adopt a model BIT[125] which incorporates the notion of sustainable development. More specifically, it explicitly refers to environmental protection and also acknowledges the need to promote corporate social responsibility. The preamble of the draft model adopts the need to promote and protect investment on the one hand and the need to protect the environment on the other.

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[118] UNCTAD, Investor-State Dispute Settlement and Impact on Investment Rulemaking, United Nations, New York and Geneva, 2007, at 3. *Available at* http://unctad.org/en/docs/iteiia20073_en.pdf. (Accessed on 25th of February 2017).

[119] *Id*.

[120] See BITs of Ethiopia signed with Algeria (Art. 11 para. 2), Austria (Art. 25 (2)), Belgian-Luxembourg (Art. 14 (1)), China (Art. 13 (1)), Denmark (Art. 16 (1)), Germany (Art. 12 (2)), India (Art. 15 (1)), Iran (Art. 14 (1)), Israel (Art. 14), Libya (Art. 12 (1)), Malaysia (Art. 12 (2)), Spain (Art. 13 (2)), Sudan (Art. 11 (1)), Switzerland (Art. 11 (1)), Tunisia (Art. 12), Turkey (Art. IX (1), United Kingdom (Art. 15 (1)) and Yemen (Art. 11 (1)).

[121] See Art. 14 (1) of the Ethiopia-Netherlands BIT, Art. 12 (2) of the Ethiopia-Russia BIT and Art. 12 (2) of the Ethiopia-South Africa BIT which provide that the agreements shall be effective for the period of fifteen years.

[122] See BITs of Ethiopia signed with Finland (Art. 17 (2)), France (Art. 12 para. 2), Sweden (Art. 11 (2)).

[123] For instance, the relevant part of Art. 15 (1) of the Ethiopia-Kuwait reads: *This Agreement shall remain in force for a period of thirty (30) years and shall continue in force for similar period or periods…"*

[124] For instance, pursuant to Art. IX (2) of the Ethiopia-Turkey BIT, Art. 13 (4) of the Ethiopia-China BIT and Art. 11 (3) of the Ethiopia-Sudan BIT, the treaties shall remain in force for additional period of ten years in respect of investments made or acquired prior to the date of termination. Similarly, under Art. 12 (3) of the Ethiopia-Germany BIT and Art. 12 paragraph 3 of the Ethiopia-France BIT, prior investments will receive protection under the terminated BITs for additional period of fifteen and twenty years, respectively.

[125]Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the for the Promotion and Reciprocal Protection of Investments, draft (unpublished), 2016, accessed from the Ethiopian Investment Commission, Addis Ababa, Ethiopia.

The NT provisions of the draft model also introduce some qualifications. For instance, Art. 4 (4) provides that the extension of financial assistance or measures taken by a Contracting Party in favor of its investors and their investments in pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a breach of NT. In addition, the draft provides for environmental exception to the MFN treatment. Accordingly, any non-discriminatory regulatory measure taken by a Party to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute a breach of the MFN treatment.[126] The draft model also omits the FET obligation. This will enable to take regulatory measures for environmental protection whenever necessary. The expropriation provision acknowledges that measures taken to safeguard the environment shall not constitute indirect expropriation.[127]

What is more, a separate provision is adopted concerning environmental protection under the draft model. Pursuant to Art. 14 of the draft, Ethiopia as a host State of a foreign investor has wide regulatory space that permits the regulation of FDI. It recognizes the right to adopt one's own standard of environmental protection policy and to freely modify such standards when desired without the fear violating FET and indirect expropriation provisions. More importantly, any alleged violation of the provision on the environment (Art. 14) shall not be subjected to the dispute settlement provision of the draft model BIT.[128] This shows the country's need not to take away the adjudicatory power concerning disputes involving environmental measures from domestic judicial organs.

Recently, Ethiopia concluded a BIT with the United Arab Emirates on 3rd of December 2016. The BIT recognizes the interests of the host country in terms of environmental protection and sustainable development. Its preamble attempts to reconcile problems related to investment protection on the one hand and police powers on the other. In addition, it omits FET standard. Furthermore, Art. 11 (2) of the BIT obliges investors and their investments to contribute to the development objectives of the host State and to the benefit of the local community in which the investment is made. The BIT acknowledges the need to protect the environment under its Art. 12. Accordingly, the host State can adopt, modify and implement environment-friendly laws and policies without transgressing its obligations to protect investment. Unfortunately, this BIT has not entered into force yet.

V. CONCLUSION AND THE WAY FORWARD

In sum, Ethiopian BITs have no adequate regulatory space to protect the environment. It is only under the Ethiopia-France BIT that a general right to regulate is recognized with no specific reference to the environment. There are also some other BITs which make a specific reference to

[126] *Id.* Art. 6 (1).

[127] *Id,* Art. 8 (4). This provision is a verbatim copy of Annex B, Art. 13 (1) (c) of the 2004 Canadian Model BIT.

[128] By virtue of Art. 17 of the Model BIT, disputes between a Contracting Party and an investor of the other Contracting Party shall, first, be submitted to amicable settlement. If the dispute has not been settled amicably within six months from the date of request, the investor shall institute a claim before a competent domestic court or administrative tribunal of the host State. After exhausting all available local remedies, the investor may resort to international arbitration.

environmental regulatory measures. The Ethiopia-Finland BIT enshrines the need to protect the environment only in its preamble. The Ethiopia-Belgian-Luxembourg BIT, which has not entered into force yet, incorporates a separate provision for environmental protection in its substantive part. Furthermore, the Ethiopia-United Arab Emirates BIT adopts environmental protection both in its preamble and substantive parts. Save for these few scenarios, the preambles of Ethiopia's BITs are mute on the right to regulate in general and on environmental issues in particular.

Except the Ethiopia-France BIT which recognizes a FET qualified by reference to international law, the remaining effective BITs of Ethiopia adopted unqualified FET. Accordingly, such unqualified FET is open to broad interpretation with the possibility of nullifying policy space of the host State. In addition, the expropriation provisions of Ethiopia's BITs are not defined and have no carve-outs which preclude environmental measures from constituting indirect expropriation.

There is no a single formula for inserting environmental clauses in investment agreements. Instead, a holistic approach i.e. a reference in the preamble, main text, annex or separate agreement could produce a better result. With that said, Ethiopian BITs should recognize the protection of the environment as its objective and must also reflect the right of the States to regulate environmental matters. The BITs must also be capable of ensuring the continuing duty of States to promote and enforce environmental protection measures. It has to be noted that environmental issues will be fully addressed when all States cooperate avoid the race to the bottom. To introduce a bottom-up approach, it is important that the concerned government office of Ethiopia develop a model BIT that guides the negotiations and renegotiations. So as to introduce new generation of BITs, it is advisable to amend or terminate the existing BITs of Ethiopia that lack room for the regulatory power of the state.

This should be indicated in different parts of BITs. Accordingly, the preambles to the BITs of the country shall be restructured in a way that acknowledges the Parties' interest to ensure sustainable development through environmental protection. This has to be followed by inserting explicit obligations on foreign investors and the host State to protect the environment in BITs. The BITs of Ethiopia must also eliminate FET standard of protection. In addition, the BITs must incorporate provisions that explicitly exclude measures taken for the purpose of environmental protection from constituting indirect expropriation. That way, our BITs can serve as a means of striking the balance between private gain and public loss.

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HARAMAYA LAW REVIEW *Vol.* 6 (2017) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this note: *Gebremeskel Hailu Tesfay, Note on The Adverse Effects of Polygamy on the Rights of Women: A Case Study in Gedeo and Sidama Zones*, HARAMAYA LAW REVIEW 6 (2017): 91-110

NOTE ON: THE ADVERSE EFFECTS OF POLYGAMY ON THE RIGHTS OF WOMEN: A CASE STUDY IN GEDEO AND SIDAMA ZONES

Gebremeskel Hailu Tesfay[*]

Abstract

A variety of researches conducted in diverse contexts of Ethiopia found that polygamy type of family relationship hinders the realization of the rights of women in many respects. This research inquires whether the polygamous life style practiced in Gedeo and Sidama Zones adversely affects the rights of women in the same way. To deal with this question, the research has reviewed the legal status of polygamy under the international human rights instruments ratified by Ethiopia and the Ethiopian legal system. It also scrutinizes how polygamous marriages affect the rights of women in Gedeo and Sidama Zones using interview and focus group discussions. The study finds that while the prohibition against polygamy is presumed in the constitutional provisions, there is leniency in the subsidiary laws in Ethiopia. This practice is found to affect the social, economic, and civil rights of women in the study areas. Based on these findings, this article recommends that the Federal and SNNPR governments should revisit their respective laws to outlaw polygamy. Besides, to enhance voluntary compliance of the laws, educational campaigns have to be conducted revealing the adverse effects of polygamy on women and the society as a whole.

Key words: adverse effect, cultural practice, polygamy, rights of women

I. INTRODUCTION

The union of a man to multiple women or the practice of having more than one wife at a time is commonly referred to as polygamy.[1] There are two lines of arguments in relation to polygamy. Advocates of multiculturalism argue that different cultures have the right to recognition of their identity and cultural practices including polygamy that are essential to forming their identity.[2] On the other hand, advocates of liberalism contend that polygamy subjugates the rights of women and, hence, needs to be abolished.[3]

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[1] Ruth Gaffney-Rhys, *Polygamy and the Rights of Women*, WOMEN IN SOCIETY, Volume 1, 1(2011) p.1.

[2] Jessica Freitas, *Practicing Polygamy: Multicultural Right or Liberal Crime?* GLOBAL TIDES: Vol. 6, Article 10, (2012).

[3] *Id.*

In the midst of the above contentions, state practice remains diverse. While it is outlawed in most states,[4] the practice remains to be common in much of Africa.[5] In Ethiopia, the FDRE Constitution and international human rights instruments which the country has adopted seem to go against polygamy. However, the subsidiary laws neither entirely permit nor denounce it. In fact, polygamy is being practiced in Ethiopia including in the South Nation, Nationalities and Peoples Region (herein after, SNNPR).[6]

The main issue that this article intends to investigate is the practical impacts of polygamy on the rights of women in Gedeo and Sidama Zones of SNNPR. To do this, interviews and focus group discussions have been conducted involving women and men in polygamous marriages, persons from social courts and Women and Children Affairs Offices. In Addition, different literatures are consulted to substantiate the issues addressed in this article.

The remaining parts of this article are organized as follows. Section II addresses the theoretical and legal discourses relating to polygamy. It tries to define polygamy, reviews its international and national prevalence and tries to examine the arguments for and against and the advantages and disadvantages of polygamy. Section III reviews the legal status of polygamy in the African Regional Human Rights, International Human Rights Instruments which Ethiopia has adopted and the Ethiopian domestic laws. Section IV explores the practical effects of polygamy on the rights of women in Gedeo and Sidama Zones. Finally, section V provides conclusions and recommendations.

II. THE THEORETICAL AND LEGAL DISCOURSES OF POLYGAMY

A. Defining Polygamy

The term polygamy is derived from a Greek word '*polugamos'*, which literally means often marrying.[7] According to Oxford Advanced Learners Dictionary, polygamy is defined as; "the simultaneous union of a man to multiple women or a practice or custom of having more than one wife at a time and vice versa."[8] This definition is the wider and technical understanding of polygamy within which the ideas of '*polyandry'* (a woman having more than one husband), and '*polygyny'* (a man having more than one wife) are incorporated.[9] As a general term, therefore, polygamy includes the practices of '*polyandry'* and '*polygyny'*.[10]

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[4] Countries in Eastern and Western Europe, North America, South America, Central America, Australia, New Zealand and large parts of Asia, including Japan and China have outlawed. See Rebecca J. Cook & Lisa M. Kelly, *Polygyny and Canada's Obligations under International Human Rights Law*, (Unpublished, Family, Children and Youth Section Research Report, University of Toronto, 57-65 (2006).

[5] Countries like Nigeria, Mozambique, Kenya, Botswana and Malawi do not prohibit polygamy as stated in Gaffney-Rhys, *supra note* 1.

[6] Jetu Edosa, *Bigamous Marriage and the Division of Common Property under the Ethiopian Law: Regulatory Challenges Adoptions*, 3(1) OROMIA LAW JOURNAL, 84(2014).

[7] Obonye Jonas, *the Practice of Polygamy under the Scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a Critical Appraisal*, 4(5) JOURNAL OF AFRICAN STUDIES AND DEVELOPMENT, 142(2012).

[8] OXFORD ADVANCED LEARNERS DICTIONARY 1123 (8th Ed., 2011)

[9] Jonas, *supra note* 7.

[10] Cook & Kelly, *supra note* 4, at 1.

The second understanding given to polygamy comes from the common usage where polygamy connotes the simultaneous or successive union of a man to multiple women or a practice or custom of having more than one wife at a time.[11] This definition represents the practice of '*polygyny'*. According to this definition, even though '*polygyny'* refers to the relationship of a man who is married to or involved in a stable sexual relationship with several wives simultaneously or successively, this, by far, suggests the most common form of polygamy. In most academic discourses, polygamy is used to refer to the condition of a man who has two or more wives at the same time.[12] This definition is the most accepted definition by researchers mainly because '*polygyny'* is practiced in different regions of the world including parts of India, most of the Islamic world and Sub-Saharan Africa.[13] On the contrary, *polyandry* is rarely practiced.[14] Therefore, polygamy is often used in reference to '*polygyny'*.[15]

For the purpose of this research, the common usage, as depicted above, is adopted as a working definition. The researcher's preference to adopt this definition is not arbitrary. To begin with, there is a wide range of consensus on the definition of polygamy in the sense that it portrays the conjugal relationship of a man to more than one woman at a time. In addition, the practice of *'polyandry'* is rarely practiced, to the extent of being notional,[16] and it is non-existent in the Ethiopian context. Thus, in this article, this common understanding is adopted as a working definition.

B. The International and National Prevalence of Polygamy

Although polygamy has long been permitted in law and custom in the world, there has been a move away from this practice in recent days.[17] Monogamy is now the rule in Eastern and Western Europe, North America, South America, Central America, Australia, New Zealand and large parts of Asia, including Japan and China.[18] Yet polygamy is still common in much of Africa.[19] In several Sub-Saharan countries such as Nigeria, Mozambique, Kenya, Botswana and Malawi, more than 10% of married women are living in a polygamous union.[20] In the 'polygamy belt' stretching from Senegal to Tanzania, it is also common for more than one third of married women to live in a polygamous marriage.[21]

African polygamy has been increasingly contested in defense to the rights of women.[22] James Fenske argues that polygamous marriage in Africa is declining due to the increased cost of

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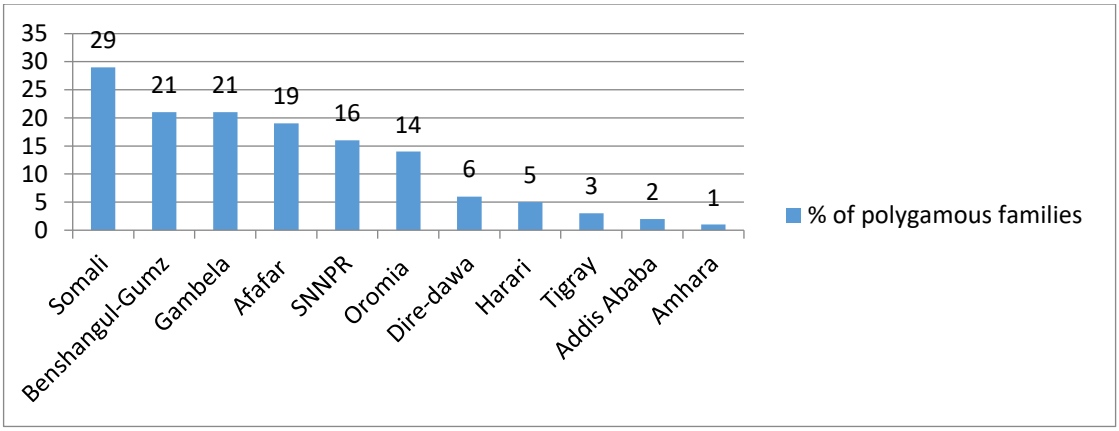
[11] Freitas, *supra note* 2, at 3.
[12] *Id.*
[13] JAMES FENSKE, AFRICAN POLYGAMY: PAST AND PRESENT**,** University of Oxford, 1 (2015).
[14] SAMUEL CHAPMAN, POLYGAMY, BIGAMY AND HUMAN RIGHTS LAW, 11 (Xlibris Corporation, 2001).
[15] Cook & Kelly, *supra note* 4.
[16] Obonye, *supra note* 9.
[17] Gaffney-Rhys, *supra note* 1, at 5.
[18] Cook & Kelly, *supra note* 4, at 58.
[19] Gaffney-Rhys, *supra note* 1.
[20] Id, at.3; See also S. Elbedour, A. J. Onwuegbuzie, C. Caridine & H. AbuSaad, *The Effect of Polygamous Marital Structure on Behavioral, Emotional and Academic Adjustment in Children, A Comprehensive Review of the Literature*, CLINICAL CHILD AND FAMILY PSYCHOLOGY REVIEW, 255-271 (2002)
[21] FENSKE, *supra note 13.*
[22] Gaffney-Rhys, *supra note* 1, at.5-6.

living, an increase in the education of women and a gradual change in the status of women to resist polygamy.[23] While some intellectuals appreciate the decline in the practice of polygamy, others are much dissatisfied with the trend.[24]

When it comes to Ethiopian, polygamy is practiced in all regions though the prevalence varies. Pursuant to the Ethiopian Demographic and Health Survey (EDHS) Report of 2011, 11% of married women in Ethiopia are in bigamous marriage, with 9% having one co-wife and 2% having two or more co-wives.[25] Similarly, 5% of married men in Ethiopia live in a bigamous marriage having two or more wives. According to this report, rural women are more likely to be in bigamous unions (12%) than urban women (5%). Moreover, women who are in the lowest wealth quintile are the most likely to be in a bigamous union (16%), compared with just 6% of women in the highest wealth quintile. Lack of women's education is mentioned as another reason for the prevalence of the practice, and the report indicated the existence of an inverse relationship between education and polygamy.

The 2016 EDHS Report also shows similar prevalence of polygamy compared to that of the 2011 report. However, if we look at the whole trend, the percentage of women in a polygamous union has declined slightly over time; from 14% in 2000 and 12% in 2005 to 11% in both 2011 and 2016.[26] According to the 2016 EDHS Report, polygamy is being practiced in through out of Ethiopia though the magnitude differs from region to region.[27] As it can be seen from the chart, the prevalence of polygamy in SNNPR, the study areas, is among the highest, i.e., 16%.

Fig. 1: Prevalence of Polygamy per Regions



Source: *EDHS Report, 2016*

Over all, though the legal systems differ on banning or allowing polygamy, the practice of having plural wives still remains on the ground. As a result, there remains a conflict between the

[23] FENSKE, *supra note* 13, at.22.
[24] *Id.*
[25] Jetu Edosa, *supra note* 6, at 76.
[26] The Ethiopian Demographic and Health Survey, 2016, Central Statistical Agency Addis Ababa, Ethiopia, The DHS Program ICF, Rockville, Maryland, USA, 66(2017).
[27] Ethiopia Demographic and Health Survey 2016, Central Statistical Agency, Addis Ababa, Ethiopia, the DHS Program, ICF Rockville, 66(2017), *available at* < https://dhsprogram.com/pubs/pdf/FR328/FR328.pdf> (Accessed on Nov 2, 2017)

desire to keep the status quo rejoicing polygamy as a cultural and religious value or abolishing it to ensure the realization of the rights of women.[28]As part of this discourse, the upcoming discussion tries to briefly look into the arguments forwarded for and against polygamy.

C. Arguments for and against Polygamy

When traditional practices, such as polygamy seem to clash with universal approaches to human rights, which rights shall get primacy? Should it be group rights such as cultural or religious identity or individual rights such as equality between men and women? With regard to this, proponents of universality of rights claim that human rights, such as gender equality, self-determination and freedom must be the same everywhere. For that reason, they argue cultural or religious norms and practices including polygamy that conflict with the values of universal human rights shall be rendered inapplicable. On the other hand, the cultural relativists regard different value systems as distinctive and incomparable units. Thus, they argue that cultural or religious practices of the society should get precedence over the protection of individual rights and freedoms. The central precept of 'cultural relativism' in this regard is that it challenges the universal standards of human rights arguing human rights should be relative to the context.[29]

By and large, cultural relativism argues that different cultures have a right to recognition of their identity and that their practices are essential to forming that identity.[30] Universalism, in contrast, argues that polygamy results in the subjugation of women to men's desires for more wives and restrains individual rights. Within such conflict, polygamy is being practiced in different ways depending on the religious, customary, cultural and socio-economic contexts.[31]

Jessica Freitas argues that polygamy can provide many advantages to a society as a whole and to the spouses, children, and the extended families of polygamous unions in particular.[32] Furthermore, William Blum states that "polygamous societies accept polygamy because, in some respects, it embodies some of the society's ideas."[33] Societies practicing polygamy maintain that polygamy provides protection for widows and handicapped girls who might otherwise get no husband at all. It helps solve the problems of childlessness and widowhood and takes care of the children of the deceased relative. Polygamists are convinced that polygamy is suited to the social and economic structures of their community. In short, the following points are often summarized as the advantages of polygamy.[34]

- It increases the probability of having children, particularly when a wife is barren or gives birth to female children only;
- It increases the labor supply within a kinship network;

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[28] Simeon O., Universalism and Relativism in Human Rights Debate in Africa: A Critique of Cultural Essentialism (*A talk given at a gathering of Wake Forest University Endowed Professors, November 4,* 2009).

[29] *Id.*

[30] FREITAS, *supra note 2.*

[31] Cook & Kelly, *supra note* 4, at 7. Ezra M., *Factors Associated with Marriage and Family Formation Processes in Southern Ethiopia,* 34(4) JOURNAL OF COMPARATIVE FAMILY STUDIES, 509 (2003).

[32] FREITAS, *supra note 2.*

[33] *Id.*

[34] *Id.*

- It deals with the "problem" of surplus women;
- It expands the range of a man's alliances so that he is able to maintain or acquire a position of leadership; and,
- It perhaps also provides sexual satisfaction to men, particularly in societies with lengthy post-partum sexual taboos.

The possible reasons recapitulated above are perceived to have economic, social and political benefits to the family or the husband living under such relationship.

On the other hand, there has recently been a growing opposition to the practice of polygamy around the world. Feminists regard it as another way of subjugating and violating women's rights. The findings of research conducted in Africa also show that polygamy is a possible cause for low saving rates,[35] high incidence of HIV/AIDS, high levels of child mortality[36] and of female depression.[37]

Many authors also challenge the view that polygamy brings benefits to the wife and children. For instance, Abdulraheem Nimah states that the older women in a polygamous relationship are neglected in favor of the newly married or younger wives.[38] One common consequence of overlooking one wife over the other is jealousy between the co-wives which is almost inevitable."[39] The most frequent cause is the resentment the wives felt from sharing the right of sexual access to a single husband. Unequal distribution of resources or any other special favors given to one wife over the others could be another cause for contention. He also stressed "feelings of jealousy may lead to persistent conflicts."[40] If one of the co-wives feels slighted or mistreated, she may try to attack the co-wife, her children or even the husband. Therefore, polygamy is suspected to create conflict, disharmony and perpetual strife within the families.

From the perspectives of the interests of children, polygamy creates burdens relating to their education, medical costs, clothing expenses, and so forth. In 2002, researchers conducted a review of all quantitative and qualitative studies that had been done on the effect of polygamy on children.[41] They found out that children from polygamous marriages were at greater risk of experiencing marital conflict, family violence and family disruptions, marital distress,

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[35] Marie Boltz Isabelle Chort, The Risk of Polygamy and Wives' Saving Behavior, (2014).

[36] M. Mswela, *Cultural Practices and HIV in South Africa: A Legal Perspective***,** 12(4) P.E.R, 180-181 (2009), See Riley Bove & Claudia Valeggia, *Polygyny and Women's Health in Sub-Saharan Africa*,68(1), JOURNAL OF SOCIAL SCIENCE & MEDICINE, 21-29 (2008).

[37] A.O. Adewuya, B.A. Ola, O.O. Aloba, A.O. Dada, OOA. Fasoto, *Prevalence and Correlates of Depression in Late Pregnancy among Nigerian Women*, 24(1), JOURNAL OF DEPRESSION AND ANXIETY, 15 (2007).

[38] Abdulraheem Nimah, *Law and Social Values: Polygamy or Extra-Marital Affairs?* At 12, retrieved from https://unilorin.edu.ng/publications/abdulraheemnm/LAW_AND_SOCIAL_VALUES.pdf, (Accessed on 13 August 2016).

[39] *Id.*

[40] *Id.*

[41] Mohammad Al-Sharfi, Karen Pfeffer & Kirsty A. Miller, *The effects of polygamy on children and adolescents: A Systematic Review*, 22(3) JOURNAL OF FAMILY STUDIES, 272-286 (2016). See also, W. Chikwature & V. Oyedele, *Polygamy and Academic Achievement-A Case of Johanne Marange Apostolic Sect* 4(5) EUROPEAN JOURNAL OF RESEARCH IN SOCIAL SCIENCES, 26-40 (2016).

particularly that related to high levels of unhappiness of women in polygamous unions, absence of the father and financial stress.[42] Abdulraheem underscored;

> Such relationship reflects patriarchal relation among the man and the women in a similar relationship. Hence, women are considered instruments for the production of offspring and means for the gratification of the man's desire. As a result, female genital mutilation is accepted and practiced in many polygamous societies and is a deep-rooted cultural and traditional value. It serves in large part to control a woman's sexual desire so that she remains faithful to her husband because a single husband cannot gratify the sexual desires of many more women belonging to him.[43]

Another author, Lotfy Al-Sherbiny, who has investigated the effects of polygamy on the first wife by taking a sample of 100 women, concludes that:

> The first wives in polygamous marriages tend to have certain demographic characteristics e.g. relatively older age, lower education, higher number of children and mostly being housewives. The initial reactions of the first wives to remarriage of the husband took the form of severe symptoms and sharp actions. Acceptance and adaptation to the new situation gradually takes place after 6 months in the average. Physical, psychological and social consequences continue to manifest for long time in polygamously married first wives. The most frequent symptoms were pain, psychological symptoms e.g. anxiety and irritability and tiredness.[44]

Even though there is great similarity, we have to notice that the negative effects of polygamy can vary from society to society due to many factors including social, cultural, economic source of the family. However, despite the diverse contexts in which polygamy occurs, the human experience of those who live this way of life tend to be similar in many aspects.

III. LEGAL RESPONSES TO POLYGAMY

From the foregoing discussion, it is clear that polygamous family relationships generate an entire chain of consequences leading to multiple violations of the rights of women. In view of such problems, it is proper to examine the legal responses given to polygamy.

It is true that laws are important instruments for shaping the behavior of society. Hence, they should be responsive to the rights of the vulnerable part of the society. This section is meant to explore and examine how the Regional and International Human Rights Instruments and Ethiopian legal system address polygamous family relationships.

A. The Status of Polygamy under the Human Rights Laws

The issue of polygamy is not explicitly addressed in the normative frameworks of the international human rights instruments. However, there are a plethora of human rights instruments that indirectly address the issue. Among others, Article 2 of the Universal Declaration of Human Rights (UDHR) recognizes to everyone all rights and freedoms set forth

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[42] Nimah, *supra note* 38.

[43] *Id*.

[44] Lotfy A.M. Al-Sherbiny, *the Case of First Wife in Polygamy*: Description of an Arabic culture-specific condition, 8 ARABPSY NETE. JOURNAL, 24 (2005).

in the Declaration without distinction of any kind including sex.[45] On the same vein, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR)[46] and Article 2 (2) of the International Covenant on Economic Social and Cultural Rights (ICESCR)[47] require the State Parties to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenants without distinction of any kind such as sex. All these human rights instruments contain a general non-discrimination clause which prohibit discrimination on the basis of sex. The ICCPR and ICESCR, in thier common Article 3, impose an obligation on the State Parties to ensure the equal right of men and women in the enjoyment of all the rights set forth in the respective Covenants.

Despite the absence of explicit legal provision regarding the prohibition of polygamy in the body of the human right treaties, different treaty monitoring bodies have tried to address the issue through an extensive interpretation of the rights in the treaties, especially the rights to equality, health and non-discrimination.

According to the CEDAW Committee, the practice of polygamy undermines the self-worth of women. It disregards all the basic tenets for which CEDAW stands for. In fact, the CEDAW committee has also considered the practice as a violation of women's right to health. In its General Recommendation No. 24, the committee stated that:

> As a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as polygamy may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases.[48]

This shows that the CEDAW Committee has considered the practice of polygamy as a violation of Article 12 of the Covenant which guarantees the right to health of women.[49] The CEDAW Committee has urged States to take measures to enforce the prohibition of polygamy within their territories.[50]

In its General Recommendation No. 21, the CEDAW Committee also noted that polygamous marriage contravenes women's right to equality with men and can have such serious emotional and financial consequences for her and her dependents and such marriages ought to be discouraged and prohibited.[51] The CEDAW Committee emphasized with great concern that State Parties who guarantee the right to equality under their constitution and which permit polygamous

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[45] *Universal Declaration of Human Rights,* adopted on 10 December 1948at New York, G.A. Res. 217A, U.N. GAOR, 3rd Sess, Pt. at 71, U.N. Doc. A/810 (1948) (herein after UDHR), Art. 2.

[46] *International Covenant on Civil and Political Rights*, adopted on 19 December 1966 at New York and entered into force on 23 March 1976.999 U.N.T.S. 171, Art. 2(1).

[47] *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966 and entered into force on 23 March 1976, 993 U.N.T.S.3., Art. 2(2).

[48] CEDAW Committee, General Recommendation No. 24: Article 12 of the Convention (Women and Health), adopted at the Twentieth Session of the Committee on the Elimination of Discrimination against Women, 1999, Para 18.

[49] *Id.*

[50] *Id.*

[51] CEDAW Committee General Recommendation, No. 21 on the Right to Equality of Women in Marriage and Family Relations, adopted on the 13th session of the Committee on the Elimination of Discrimination against Women 1994, art 15, Para 14.

marriage on the basis of personal or customary law are in effect violating the constitutional rights of women[52] and breach the provisions of article 5 (a) of CEDAW.[53] The CEDAW Committee, in its concluding observations with respect to Egypt, has also stated marrying an extra wife may put strain on resources that at times are already woefully inadequate for the man and his existing wife.[54]

Similarly, the UN Human Rights Committee in its general comment No. 28 on the Equality of Rights between Men and Women stated that:

> Because polygamy violates the dignity of women and is an inadmissible discrimination against women, it should be definitely abolished wherever it continues to exist. It can be also used as a tool by man to whip woman into toeing their line by threatening their wives that they will marry another wife. In this context, polygamy can be used to control and limit women's ability to assert their rights within marriage. To this end, it is clear that polygamy constitutes a veritable or actual assault on the intrinsic self-worth of women.[55]

The UN Human Rights Committee in its concluding observations on Kenya in 2002 observed that the persistence of polygamy is 'an affront or insult to the dignity of the human person and is discriminatory under the UN Covenants'.[56]

Moreover, the UN Commission on the Status of Women, which first met in 1947, agreed to work for freedom of choice, dignity of the wife, monogamy, and equal rights to dissolution of marriage.[57]The UN General Assembly in the Declaration of Commitment on HIV/AIDS has also addressed the issue of polygamy by reinforcing the idea stated by the CEDAW Committee on women's health. This declaration states implementation of national strategies for women's empowerment, the promotion of women's full enjoyment of all human rights and reduction of their vulnerability to HIV/AIDS through the elimination of all forms of discrimination, as well as all forms of violence against women and girls, including harmful traditional and customary practices [such as polygamy].[58]

In Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa that is issued to ensure the rights of women in particular tries to deal with polygamy in its article 6. It states that:

> States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that … monogamy is encouraged as the preferred form of marriage and that the

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[52] *Id.*

[53] *Id.*, para 41.

[54] Egypt's Obligations under International Law, the CEDAW Committee observation, *available at* https://www.hrw.org/reports/2004/egypt1204/8.htm, (accessed on 10 December, 2016).

[55] Human Rights Committee General Comment No. 28, Equality of rights between men and women, (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para 24.

[56] K*enya* UN HRCOR, UN Doc. CCPR/CO/75/YEM, 2002, para. 9.

[57] SONIA HARRIS-SHORT & JOANNA MILES, FAMILY LAW: CASES AND MATERIALS, (Juta and Co), 271-279 (2000).

[58] *UN Declaration of Commitment on HIV/AIDS*, G.A. Res. S-26/2, U.N. Doc.A/RES/S-26/2, adopted on its26th special session, *2001*.

> rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.[59]

Ironically, this provision does not prohibit the practice of polygamy unequivocally. Despite this fact, looking at polygamy in light of the International Human Rights Instruments and the interpretations given to them, one can safely conclude that polygamy is against the fundamental values of all the Covenants and Declarations. Thus, legalizing polygamy means violating the equality, dignity and the right to health of women. It also means allowing women to be degraded, humiliated, abused and exploited.

B. The Status of Polygamy under the Ethiopian Legal System

A glance at the Ethiopian legal system reveals that the federal Constitution appears at the apex of all laws with the effect of nullifying all laws, practices, cultures and decisions of government organs inconsistent with it.[60] The Constitutional provisions dealing generally with human rights and those specific to the rights of women have indirectly addressed the issue of polygamy. Important in this respect are articles 25, 34 and 35 of the Constitution. Conceptually speaking, these provisions contain the same content of protection to women as are provided under International Human Rights Instruments discussed above. For instance, article 25 of the FDRE Constitution states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race… sex…

The right to equality enshrined above has two aspects. These are equal protection of the law and equality before the law. *Equal protection of the law* connotes laws issued by the government should not discriminate among individuals or groups on ground such as 'sex'. Thus, issuing laws allowing polygamy or failing to give effective protection through laws to women from the adverse effects of polygamy is against the right to equality. The second aspect of the right to equality is *equality before the law* which literally means the laws issued by the legislature shall be enforced on the ground without any sort of discrimination. Thus, failing to enforce laws prohibiting polygamy, which violate the rights of women unlike men, is against the right to equality under the Constitution.

Article 34(1) of the Constitution, which is verbatim copy of Article 23 of the ICCPR, also deals with the rights of women as follows: "*Men and women, without any distinction … have equal rights* ***while entering into, during marriage*** *and at the time of divorce"* In other words, there shall not be any barrier, whatsoever, which hinders women from having equal rights while entering into marriage, during marriage and at the time of divorce.

Article 23 of the ICCPR has been given authoritative interpretation by the Human Rights Committee under its general comment number 28 and accordingly dwells on explicating what may be pointed out as factors that impose hurdles to the exercise of the equal right of women to

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[59] Jonas, *supra* note 7.

[60] The Federal Democratic Republic of Ethiopian Constitution, Proclamation No.1/1995, NEGARIT GAZETTE, Article 9(1).

marry and states how polygamy is incompatible with the right to equality of treatment in the following manner;

> Equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.[61]

Beyond its International duty, pursuant to article 35(5) of the FDRE constitution, Ethiopia has also constitutional mandate to abolish customs and practices that oppress or cause bodily or mental harm to women which among others includes polygamy.

Besides all these, when one explores the constitutional making history of the FDRE Constitution on the 'marital, personal and family rights', the Constituent Assembly had been overwhelmed with a number of questions that principally raised were on the implications of religious and customary laws on Article 34.[62] Among the topics of concern that underpinned the prolonged discussions was equality of men and women in marriage, the status of bigamy and its implications on marital property etc.[63]

Though the overall spirit of the discussion had been on the one hand to acknowledge and provide protection to spousal equality and on the other to leave wider space for religious and customary norms in family relations, there was, however, no concrete position taken on specific matters such as outlawing or permitting plural marriages.[64] In such instances, the author believes the constitution has to be interpreted in line with the international instruments which the country has ratified, particularly, pursuant to the authoritative interpretations given by the General Committees of the respective covenants.

Having said that, the next concern is to evaluate the constitutionality of the provisions dealing with polygamy under the subsidiary laws of Ethiopia.

Article 11 of the Federal Revised Family Code provides that "a person shall not conclude marriage as long as he is bound by bonds of a preceding marriage."[65] On the basis of this law, what is prohibited is marriage over marriage. It does not prohibit irregular union over marriage and the vice versa. However, Article 21 of SNNPR family code deals with bigamy in a much broader context by prohibiting one from entering into an irregular union if he has already a preceding marriage.[66] However, this code does not prohibit marriage over an existing irregular union.

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[61] Belachew Mekuria, *Bigamy and Women's Land Rights: The Case of Oromia and SNNP National Regional States*, 1 ETHIOPIAN JOURNAL OF HUMAN RIGHTS, 90-91 (2013).

[62] See the Ethiopian Constituent Assembly Minutes, Hidar 8-13, 1987 (E.C.), sections 000023-000044, Addis Ababa, as cited by Belachew Mekuria, *Id.* at .99.

[63] *Id*.

[64] *Id*.

[65] Revised Family Code, Proclamation No. 213/2000, FED. NEGARIT GAZETA, 6th Year No. 1, 2000, Article 11.

[66] The Family Code of South Nation, Nationalities and Peoples Region, Proclamation No. 75/2004, DEBUB NEGARIT GAZETTE, 2004, Art. 21.

In addition, article 650 of the Criminal Code of Ethiopia which states that "whoever, being tied by the bond of a valid marriage, intentionally contracts another marriage before the first union has been dissolved or annulled is punishable with simple imprisonment".[67] Nevertheless, the Criminal Code puts an exception to this rule under article 651. Article 651of the criminal code reads as "the preceding Article shall not apply where bigamy is committed in conformity with religious or traditional practices recognized by law." On the basis of the later provision of the Criminal Code, we can comfortably say that polygamy can be exercised where it is committed in conformity with religious or traditional practices recognized by law. However, pursuant to the Constitution, all cultures and religious practices are constitutionally recognized if they are consistent with it. The problem here is allowing the practice of bigamy in any form seems to contravene the Constitution and the International Human Rights Instruments which Ethiopia has ratified.

IV. THE ADVERSE EFFECTS OF POLYGAMY ON THE RIGHTS OF WOMEN IN GEDEO AND SIDAMA ZONES

A. The Prevalence of Polygamy

According to a research by Holden and Tewodros done in the SNNPR of Ethiopia, from the total sample size of 600 households, more than 12% of them are found to be living in polygamous relations.[68] When it comes specifically to the Gedeo and Sidama zones, accurate statistics are not available as to show its exact prevalence. However, informants underlined that these zones are among the regional zones where polygamy is predominantly practiced.[69] Of these, higher rates are found among less educated husbands and wives and among rural residents.[70] The researcher's discussion with members of the social courts of Sidama and Gedeo zones[71] and women's association representatives at the zonal and woreda levels revealed that polygamy is a common practice in the study area.[72] It is much common among economically better off but uneducated farmers.[73] Again, it is much common among the traditional community leaders compared to ordinary residents. Nonetheless, this does not mean that there is no polygamous life among the poor and people who still lead a destitute life practice polygamy.

[67]The FDRE Criminal Code, Proclamation No. 414/2004, FED.NEGARIT GAZETA, May 9, 2005, Article 650.

[68] Stein Holden and Tewodros Tefera, From being property of men to becoming equal owners? Early impacts of land administration and certification on women in Southern Ethiopia (UNHABITAT-Land Tenure and Property Administration (2008), as cited in Belachew Mekuria, *supra* note 77, at 97.

[69] Interview with experts of Women, Youth and Children's Office, Gedeo and Sidama Zones, Dilla, May 1, 2014, and Hawassa, December 12, 2014 respectively.

[70] *Id.*

[71] Focus Group Discussion with members of the social court judges while they are in training in Dilla University, on 15th February 2014.

[72] Focus Group Discussion made with the representatives of women in Gedeo and Sidama zones, Dilla University, on 10th and 21st February 2015.

[73] *Id*, and Focus group discussion, *supra* note 72.

B. Factors for the Prevalence of Polygamy

Informants contacted in the two zones indicated that there are several reasons for the prevalence of the practice of polygamy in the study area.[74] The inability of a wife to give birth, adultery and arranged marriages are told to be the major factors. In Gedeo and Sidama Zones, it is customary to establish a family on the basis of arranged marriages. However, when men get wealth or position, they also seek younger wives. Thus, the picture one gains is that the men often keep two or more wives, first 'the traditional' wife chosen by his family and later wife/wives justifying polygamy either by the first wife's failure to produce a male child or in order to have a love match.[75]

Moreover, the communities believe that larger family size gives greater power, influence and honor within the society. This perception is one of the explanations for the prevalence of polygamy as marrying many wives enhances the chance of having many sons, thus increasing the number of members in the family unit and amplifying one's honor and influence.[76] Socially and psychologically, then, polygamy and its large families are still associated with power and prestige despite the economic burden of supporting multiple households. This belief behind polygamous marriages have been supported by the opinions of husbands with plural wives in Sidama Zone. In almost all cases, the main reason stated was to increase the number of sons and through them strengthen the family.[77] Focus group discussion held with polygamous families in three woredas of Sidama zone unequivocally supported the idea that polygamy is needed for strengthening the family's honor and respect. All of the 9 polygamous husbands interviewed in Kochore, Wonago and Gedeb woredas of Gedeo Zone emphasized the advantage of having many more sons.[78] One interviewee from Wonago woreda explained the advantage of polygamous marriage in the following words;

> Having many sons is a blessing, they deter others who possibly quarrel or fight with the family for various reasons. Boys have power. I wanted to give power to my family; the first wife did not bring many sons, so I got her a backup.[79]

Another circumstance often associated with polygamy involves the need to take care of the widow and her children in the event of the husband's death. For instance, a polygamous man in Dara woreda of Sidama Zone justified his second marriage on such grounds. He stated that after his brother's death, his parents urged him to marry the latter's wife because there was no one who could take care of her and his little nephew.[80]

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[74] *Id.*

[75] Interview, *supra note 69*.

[76] *Id.*

[77] Focus Group Discussion with polygamous families in the three woredas of Sidama Zone on 19 & 20 December 2014.

[78] Interview conducted with 9 polygamous families, in Kochere, Wonago and Gedeb Woredas of Gedeo Zone, 5th and 6th January 2015.

[79] Interview with a man of three wives, in Wonago woreda, on 2nd May 2014.

[80] Interview conducted with a resident in Dara Woreda of Sidama Zone, 21st December 2014.

C. The Impact of Polygamy on the Rights of Women

On the basis of the backdrop of the above discussion, this sub-section deals with the impacts of polygamy on the rights of women in Gedeo and Sidama zones.

1. The Impact on the Right to Dignity and Body Integrity of Women

In view of the fact that polygamy is typically characterized by the union of a single man with two or more women, competition and jealousy among co-wives is commonly observed within plural marriage communities.[81] This seems predictable as co-wives likely to have very limited private time with the single husband they share. In such communities, having time with a husband is critical to a wife's status within the family and the community.[82] However, if the husband fails to visit his wife, her status in the society will be adversely affected and this will substantially disturb her personal dignity.

Starr and Brilmayer in the same manner revealed that jealousy between co-wives can escalate to intolerable levels resulting in physical injuries.[83] According to them, this is especially true for societies facing higher living expenses since polygamous families often cannot afford multiple residences for each of a husband's wives and her children.[84]

The practice in Gedeo and Sidama zones seem to substantiate the above stated facts. For instance, a public prosecutor in Wonago woreda who had long experience with polygamous families disclosed that there were women treated in Dilla hospital for physical injuries resulting from confrontations among co-wives.[85] He also stated that there was a woman who attempted to commit suicide as a result of domestic tension among co-wives. The negative consequences of co-wife rivalry might be particularly difficult for senior wives according to him. Interview with six senior wives in Gedeb, Aletachiko and Shebedino woredas revealed that senior wives within polygamous families are often less favored by their husbands.[86] They tend to have fewer economic resources and receive less conjugal support and attention from the husband.[87]

Discussion with justice officials at Yergachefe and Wonago woredas of Gedeo zone and Shebedino woreda of Sidama zone indicated that the rights of women in polygamous relations are often violated. Nevertheless, it has been subjected to public oversight and reaction for there are deeply rooted cultural values to the practice. A woman who was following her divorce case at Wonago First Instance Court claimed that both herself and her children have suffered physical and psychological abuses as her husband got his third wife in two successive years despite her fierce objections.[88] According to this informant, much of the resources of the family, time and attention of her husband went to the new wife. Overall, though there are still harmonious

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[81] Al-Sharfi, *supra note* 41.

[82] *Id.*

[83] Starr and Brilmayer, Family Separation as a Violation of International Law, 21(2) BERKELEY JOURNAL OF INTERNATIONAL LAW, 247 (2003).

[84] *Id.*

[85] Interview with public prosecutor in Wonago Woreda, on 1st June 2014.

[86] Interview with six senior wives in Gedeb, Aletachiko and Shebedino woredas, on 25 December 2014.

[87] Interview with an expert at the Gedeo Zone Women, Youth and Children office, on 1st May 2014.

[88] Interview with a womenin Wonago woreda, on 1st June 2014.

polygamous families, the overwhelming majority faces abuses and mistreatments from their husband and rivalry persists among the wives themselves. Children are also exposed to wide range of vulnerability.

2. The Impact on the Right to Equality of Women

One may ask whether a union in which two or more women sharing a common husband who, in turn, enjoys plural sexual partners ensure the right to equality between men and women. Fitnat Naa-Adjeleyin replies to this stating that "given the frequent competition among co-wives and patriarchal nature of polygamy, women lose the decision making power."[89] It is widely understood that the patriarchal nature of polygamy leads not only to women's subordination, but also to their sexual, physical and emotional abuse at the hands of their husbands.[90] Inequality lies at the core of polygamous marriages and this escalates the risk of spousal violence. Al-Krenawi further stated "there is some evidence to suggest that a husband's decision to take a subsequent younger wife will frequently cause women to suffer low self-esteem."[91] Women interviewed for a research on polygamy conducted in Mali expressed similar views.[92] Gage-Brandon Anastasia boldly asserted "inequality was an intrinsic part of polygamy since it inevitably led a husband to favor one wife, usually the youngest and more attractive, over others."[93] Hence, the potential for unequal treatment of co-wives by their husband is a factor that poisons social relationship and put the husband at an advantageous position.

Related to this issue, focus group discussion made under the study area revealed that polygamy destabilizes the household and the lives of children, and causes women to experience high levels of insecurity and uncertainty.[94] Although women feel devastated when their husband takes subsequent wives, they might feel that they have no choice but to accept this situation. Women who participated in this research as key informants disclosed that polygamy, many times, causes unhealthy relationships amongst themselves.[95] It creates inequality among co-wives and gives men boundless power and authority.[96] Such an experience coupled with the cultural prejudice against women substantially affects the equality of women and men in a polygamous relationship. However, this by no means should be considered to mean women in

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[89] Fitnat Naa-Adjeley Adjetey, *Reclaiming the African Woman's Individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture***,** 44 THE AMERICAN UNIVERSITY LAW REVIEW, 1351 (2005).

[90] *Id*.

[91]Al-Krenawi Alean, *Women from Polygamous and Monogamous Marriages in an Out-Patient Psychiatric Clinic*, TRANS CULTURAL PSYCHIATRY (2001).

[92] Madhavan Sangeetha, *Best of Friends and Worst of Enemies: Competition and Collaboration in Polygyny,* ETHNOLOGY, 41(1): 75 (2004)

[93] Gage-Brandon Anastasia, *The Polygyny-Divorce Relationship: the Case of Nigeria*, 54(2) JOURNAL OF MARRIAGE AND THE FAMILY, 291 (2011).

[94] Focus Group Discussion with women in polygamy in Aletachiko, on 19th December 2014 revealed that polygamy destabilizes the lives of women and children living in such relationship and this might, in turn, give raise to divorce.

[95] Interview and Focus Group discussion conducted in wonago, yergachefe and gedeb woredas of gedeo zone and dara, aletachiko and shebedino woredas of Sidama zone in different time periods of the 2014 and 2015.

[96] *Id.*

monogamous families do enjoy equal rights. Rather, it has to be understood that polygamy serves as additional factor which imposes burden on their empowerment and equality.

3. The Impact on Women's Economic Rights

Victor and Ezeh stated that polygamy deprives women of economic resources.[97] For example, they indicated that wives in plural marriage were more economically marginalized than their monogamous counterparts. Moreover, research related to the polygamous community of Bountiful and British Columbia also reached at the same conclusion.[98] Some other works even suggest that senior wives are at a particular disadvantage compared to the junior wives.[99]

The outcome of this study based on interviews with 18 women living in polygamous relationship in Gedeo and Sidama Zones, is particularly explanatory in this regard. Given the pervasive poverty and the adverse economic conditions that exist within the polygamous families, most of the women who are interviewed testified that they experience economic hardships because additional families share the already existing resource.[100] They further confirmed that senior wives experience significantly greater economic problems compared to junior ones. This is mainly because, according to them, first marriages are often prearranged between families whereas second and subsequent unions are more likely associated with love and affection. As a result, junior wives often get favored treatment by the husband not only with respect to providing economic support but also care and attention.

While the foregoing discussion chiefly indicated that polygamy endangers women's economic condition, there are also some people who suggested polygamy might actually be advantageous for women given the fact that polygamous husbands are financially able to sustain multiple families.[101] Nonetheless, it is good to diagnose this assertion with the existing reality in Gedeo and Sidama zones where economic prosperity has direct correspondence with large available agricultural land. But the Zones are among the most densely populated areas in Ethiopia.[102] In 2010/2011, while the crude population density of SNNPR was 154 persons per square KM, in the most densely populated zones of the region such as Gedeo, population density reaches 707 persons per square KM.[103] Hence, the distribution of the arable land to the total population is very minimal. In view of this fact, the existence of many children and wives cannot often be considered as an asset as the small land could only support few family members. Therefore, larger families would not be welcomed for enhancing economic strength. Rather due

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[97] Agadjanian Victor & Chika Ezeh, Polygyny, *Gender Relations and Reproduction in Ghana*, 31(2) JOURNAL OF COMPARATIVE FAMILY STUDIES, 81 (2000).

[98] Committee on polygamous Issues, Life in Bountiful: a Report on the Life Style of a Polygamous Community, (26-28)1993.

[99] Alean, *supra note* 91, at 191-192.

[100] Interview with 9 women from the three Woredas of Gedeo Zone living in polygamy, on 5th&6thJanuary 2015 and Interview with 9 women from the three Woredas of Sidama Zone living in polygamy, on 19 & 20December, 2014.

[101] *Id*.

[102] Ethiopian Demography and Health Survey, Southern Nations Nationalities and Peoples, *available at* http://www.ethiodemographyandhealth.org/SNNPR.html (accessed on 23September, 2017).

[103] Southern Nations, Nationalities and Peoples' Regional State Bureau of Finance and Economic Development, Annual statistical abstract 41 (2011).

to the fixed economic asset i.e. land, the wealth of even the most affluent husbands drains through time if the family numbers continue to increases as a result of polygamous relationship.

4. The Impact on Women's Health Rights

According to the 2016 EDHS report, the most common form of HIV transmission in Ethiopia is heterosexual relationships.[104] It also indicates the probability of HIV infection in Ethiopia were higher among adults who had 'multiple lifetime sexual partners' than individuals with only one lifetime partner. Where husbands have multiple sex partners, including wives, they increase their own risk of infection and their wives too. On this point, a research done by Bove and Valeggia found a strong linkage between polygamy and women's health in Sub-Saharan Africa.[105] This research affirms that the risk of transmission in polygamy is compounded by the fact that neither a husband nor his present wife can verify a prospective wife's HIV-status or guarantee her fidelity during marriage, particularly when the husband is away visiting other wives.

Another research done by Rebecca also concludes that "when wives transmit sexual diseases to their husbands or vice-versa, other co-wives, who cannot refuse their husband's sexual advances, are also exposed."[106] This research additionally states the risk of HIV/AIDS transmission in polygamous rural families is high because men are reluctant and wives are unable to insist on condom use during marital intercourse.[107] It is for these reasons that some called the continued legality of polygamy in some African countries as "the equivalent of an official license for men to transmit AIDS to their wives."[108] The link between polygamy and spread of HIV/AIDS is also put forward as a concern by the CEDAW in its General Recommendation No. 24 on Women and Health.[109]

Moreover, Al-Krenawi found that in a plural marriage, polygamous wives, and most importantly senior wives, face family stress and mental health more commonly than monogamous wives.[110] Senior wives expressed great psychological distress and a sense of mourning or loss when their husbands took second or subsequent wives. More specifically, they experienced feelings of failure and low self-esteem, mental health such as anxiety and depression more frequently than junior wives did. This sense of devastation and loss of confidence by a woman when her husband takes a subsequent wife is also reported by women living in other socio-cultural settings. A husband's marriage to a subsequent wife is often perceived as traumatic by preceding wives and their children.[111] This development results in a major change

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[104] EDHS report, *supra note* 27.

[105] Riley Bove and Claudia Valeggia, *Polygyny and women's health in sub-Saharan Africa,* XXX JOURNAL OF SOCIAL SCIENCE & MEDICINE, 1-9 (2008).

[106] Cook & Kelly, *supra note* 4, 20.

[107] *Id.*

[108] WENDY L. PATTEN & J. ANDREW WARD, RECENT DEVELOPMENTS: EMPOWERING WOMEN TO STOP AIDS IN CÔTE D'IVOIRE AND UGANDA, 213-214 (2013).

[109] General Recommendation No. 24, Women and health, UN CEDAW 20th Sess., UN Doc, A/54/38/Rev.1, 1999 at para. 18.

[110] Alean, *supra note* 91.

[111] *Id.*

in the family structure and a likely decline in the financial resources and attention that a man provides to his wives and children.[112]

Senior wives of a polygamous family interviewed in Gedeo and Sidama Zones also uncovered the fact that they experienced emotional challenges including depression and sense of lower self-esteem when their husband marries additional wives.[113] The SNNPR Annual Statistical Abstract also indicates that the patriarchal nature of family relationship in general and the polygamous relationships in particular have its own negative implications on the health of women who are most likely vulnerable.[114]

V. CONCLUSIONS AND RECOMMENDATIONS

The foregoing assessment on polygamy and its impact on the rights of women and children show that polygamy is against the rights of women. It violates the rights of women enshrined under some relevant International Human rights Instruments. Various Committees established to monitor the implementation of these human rights instruments clearly stated that polygamy violates the equality, dignity and health rights of women.

Moreover, a glance at the Ethiopian domestic laws reveals that there exist some discrepancies on the legal status of polygamy. On the one hand, the FDRE Constitution, at least through interpretation, prohibits cultural practices affecting the rights of women. On the other hand, polygamy appears to be somehow tolerated under subsidiary laws relating to family and criminal matters where it is justified on cultural and religious grounds. Hence, it is necessary to demonstrate to the legislative and executive organs the impact of polygamy on the rights of women from the realistic view point so that they will take necessary measures.

Accordingly, several previous studies carried out in different socio-cultures contexts and this empirical assessment in Gedeo and Sidama zones consistently show that polygamy has far reaching consequences to women. Specifically, it leads to co-wife jealousy, competition, unequal distribution of wealth and can generate hostility among co-wives. Polygamous relationships also increases the risk of exposing women to sexually transmitted diseases. It also causes mental and physical illness among women.

In light of the above conclusions regarding polygamy, the following recommendations are forwarded to tackle the existing gaps in law and practice in Gedeo and Sidama Zones:

- Ethiopia has responsibility to oversee family and community relationships, to ensure the promotion of equality and the protection of the vulnerable groups of the society. Therefore, to properly address the rights of women and implement the international obligations imposed on it by various human rights instruments, the Federal and SNNP Regional States should revisit their respective criminal and family codes to completely outlaw polygamy.

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[112] HASSOUNEH-PHILIPS DEAN, *Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America*, 22(8) Health Care for Women International, 740 (2001).

[113] Interview with 6 senior wives in Yergachefe, Wonago and Gedeb Woredas of Gedeo Zone, on 5 & 6 January, 2015 and in Aleta Chiko, Shebedinoand Dara Woredas of Sidama Zone, on 19th and 20thDecember2014.

[114] SNNPR, BoFED Annual Statistical Abstract 143 (2011), at.130.

- Outreach strategies should be designed to inform women and the society as a whole about the impact of polygamy on the rights of women. Particularly, information must be disseminated regarding the psychological, health and economic issues that women face in polygamous family relationships.

- Lastly, there has to be serious follow-up to educate women properly and that should be the long-lasting measure of empowering them economically, socially and politically and thereby create the level of consciousness and will to resist polygamy.

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HARAMAYA LAW REVIEW *Vol.* 6 (2017) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this note: Hakeem O. Ijaiya, *Note on Responsibility of Transnational Environmental Pollution under International Environmental Law*, HARAMAYA LAW REVIEW 6 (2017): 111-124

NOTE ON:

RESPONSIBILITY OF TRANSNATIONAL ENVIRONMENTAL POLLUTION UNDER INTERNATIONAL ENVIRONMENTAL LAW

Hakeem O. Ijaiya*

Abstract

The issue of transnational environmental pollution is a problem that poses threat to the existence of the world and its inhabitant. Concerted efforts have been made by the international community and individual States to curtail the effect of transnational environmental pollution. This note examines the liability of polluter States, and the legal challenges in establishing transnational responsibility for environmental pollution. Accordingly, effort is made to identify the effects and the measures put in place under international and national laws to checkmate transnational environmental pollution. It is found that some international laws require international arbitration; Pollutant State is required to undertake due diligence to prevent significant or substantial trans-boundary pollution harms and not strict liability; and that international laws creating State responsibilities for transnational pollution are not incorporated in national laws. This note brings the observation that international community should have taken proactive steps towards proper management of the environment. It further underlines consequences when companies and developed nations smuggle hazardous wastes to developing countries that do not have the capabilities to deal with the waste in an environmentally friendly way.

Keywords: Environment, trans-boundary pollution, environmental responsibility, State responsibilities, wastes.

I. INTRODUCTION

The industrial activities of a neighbouring State which generate substances in the air, water, and land sharing boundaries are felt across borders. The pollution emanating from this state gives raise to Transnational Environmental Pollution.[1] Transnational responsibility is embedded in the rule that a state takes liability for its activity within its territory which causes pollution across boundaries of its neighbouring states. The historical development of the responsibility of the State for pollution that affects neighbouring states can be traced to the Trail Smelter Arbitration

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[1] L. Kutner, *The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus*, *9* U. MIAMI INTER-AM. L. REV 257 (2015).

in which Canada was held liable for acts within its territory that affected the United States.[2] Trail Smelter arbitration was the first (and still only) adjudicative precedent from an international tribunal that directly addressed the substantive law of transnational pollution.[3]

The general substance of transnational pollution law provides a more balanced approach which requires "states to undertake due diligence to prevent significant (or substantial) transnational environmental harm from activities within their jurisdiction or control."[4]State responsibility is an age-old principle of international law that was developed to protect the rights of aliens.[5] It arises when a state commits an international wrong against another state.[6] This rule has now been elevated to the status of a general principle of international law. The international responsibility of state is a reflection of the limitation of external state sovereignty, in terms of establishing international responsibility when a state commits an internationally wrongful act, i.e. when it breaches an obligation undertaken with a treaty while causing loss or damage to another state.[7]

This note includes seven sections including the introduction. Section two explain the problem of transnational environmental pollution and the effects thereof, consecutively. While section three presents a brief account of several land mark cases related to the issue, section four deals with the legal framework, both at the national and international levels, regulating the conduct of the nations causing transnational environmental pollution. Section five is devoted to the discussion on the liability for causing transnational pollution.

II. TRANSNATIONAL ENVIRONMENTAL POLLUTION: EXPLAINED

Pollution is a transnational phenomenon.[8] Air and water pollution, and to a lesser extent groundwater contamination, can cross political boundaries.[9] One of the greatest problems that the world is facing today is that of environmental pollution, increasing with every passing year and causing grave and irreparable damage to the earth. Although pollution had been known to exist for a very long time (at least since people started using fire thousands of years ago), it had seen the growth of truly global proportions only since the onset of the industrial revolution during the 19th century.[10]

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[2] Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).

[3] See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 931–35 (1997); see also Agreement on Air Quality, supra note 1; notes 242–243 and accompanying text.

[4] See John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment,* 96 AM. J. INT'L L. 291, (2002), at 294.

[5] IAN BROWNLIE. SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY: PART 1 (1983), Oxford: Oxford University Press (1983), at 9.

[6] IAN BROWNLIE PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed, 1998), Clarendon Press, (1998) at 435–6.

[7] Milka Dimitrovska. *The Concept of International Responsibility of State in the International Public Law System.* JOURNAL OF LIBERTY AND INTERNATIONAL AFFAIRS 1(2), (2015) at 4.

[8] *See* Allen L. Springer, The International Law of Pollution: Protecting the Global Environment in a WORLD OF SOVEREIGN STATES 13 (1983) (stating that the "first type of internationally significant environmental change . . . [is] transboundary pollution")

[9] Merrill, *supra* note 3, at 935.

[10] The industrial revolution brought with it technological progress such as discovery of oil and its virtually universal use throughout different industries

Environmental pollution is a problem both in developed and developing countries. Factors such as population growth and urbanization invariably place greater demands on the planet and stretch the use of natural resources to the maximum. Pollution involves the introduction into the environment of material or energy that endangers or is likely to endanger human health, well-being or resources.[11]

Transnational pollution is pollution whose physical origin is situated wholly or in part within the area under jurisdiction of one [state] and which has adverse effects, other than effects of a global nature, in the area under jurisdiction of [another state].[12] Addressing transnational environmental pollution requires that nations co-operate where their interest will be better served and collectively deal with common environmental threat. Where an environmental hazard is caused by activities beyond national border and its effect transcend such borders, they become matters that require international and transnational concern.[13] Equally important is also the importance of domestic legal system that can address transnational pollution problems more effectively and efficiently through its environmental protection strategies, cost internalization, fairness, and equity.[14] Legal control of transnational pollution shares these aims, with the additional goals of respecting state sovereignty and preserving relations between countries.[15]

Hence, addressing transnational pollution requires both international and domestic law. Transnational pollution is an international problem that demands and deserves the attention of international legal mechanisms such as treaties, agreements, arbitration, and international management and governance. Diverse and potentially conflicting goals are best served by harmonizing transnational pollution management and dispute resolution under international and domestic law.[16]

Transnational environmental pollution can cause diverse human and resource damages among which are depletion of ozone layer, global warming, damage to human health, loss of biodiversity and decrease in agricultural productivity. An example of such impact is best explained by global warming, which is caused by transboundary air pollution. Global warming is the increase in the global average temperature.[17] It is caused by increases in atmospheric greenhouse gases concentration.[18] Rise in temperature will lead to outbreak of airborne and

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[11] Identification and control of pollutants of international significance, U.N. Doc. A/CONF.48/8.

[12] Noah D. Hall, *Transboundary Pollution: Harmonizing International and Domestic Law,* UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM, 40(4), 681-746, (2007) at 681.

[13] OJI UMOZURIKE UMOZURIKE. INTRODUCTION TO INTERNATIONAL LAW. Ibadan: Spectrum Book Publications (1993)

[14] Hall, *supra* note 12, at 681.

[15] The most prominent and significant cases on transnational pollution principles under domestic law in the United States Supreme Court are Missouri v. Illinois (Missouri II), 200 U.S. 496 (1906); Missouri v. Illinois (MissouriI), 180 U.S. 208 (1901); and Georgia v. Tenn. Copper Co. (Georgia II), 237 U.S. 474 (1915); Georgia v. Tenn.Copper Co. (Georgia I), 206 U.S. 230 (1907). These Supreme Court's decisions continue to provide legal and policy precedents governing state liability for transboundary pollution in the United States.

[16] Hall, *supra* note 12, at 282.

[17] Naomi Oreskes. *The Scientific Consensus on Climate Change,* SCIENCE. Vol. 306 no. 5702 p. 1686 DOI: 10.1126/science.1103618 (2004).

[18] *Id*. Other gases such as methane, CFCs, nitrous oxide are also responsible for global warming

waterborne diseases. It would also contribute to the rise in death caused by heat. Hence, global warming is a great threat to the flora and fauna of the earth.

Global warming makes some land areas (particularly coastal zones) less habitable or less agriculturally productive and also produce changes in ocean temperature that are harmful to invaluable coral reefs and fish populations on which humans depend. The geographical scale of these problems and their impacts combined with the international diffusion of more localized problems clearly constitute a globalization of environmental problems.[19]

An integrated and multidisciplinary approach to reduce the adverse health effects of climate change requires at least three levels of action. First, policies must be adopted to reduce carbon emissions and to increase carbon bio sequestration, and thereby slow down global warming and eventually stabilise temperatures. Second, action should be taken on the events linking climate change to disease. Third, appropriate public health systems should be put into place to deal with adverse outcomes.[20]

III. CASES OF TRANSNATIONAL ENVIRONMENTAL POLLUTION

For better understanding of the degree of transboundary pollution and some of the underpinning principles emerged therefrom, a brief discussion is made on sample cases brought before different tribunals from different jurisdictions.

1. United States and Canada

By far the most influential decision on transnational pollution in international law is the Trail Smelter arbitration**.**[21] The arbitration arose out of a controversy between the United States and Canada over sulphur fumes emitted by a smelter at Trail, British Columbia, which were blown by prevailing winds down the Columbia River valley into the northern part of the State of Washington. The dispute was initially submitted to the International Joint Commission (IJC) established by the Boundary Waters Treaty of 1909 between the United States and Canada.[22] The IJC (which has no binding powers of adjudications[23]) recommended that Canada pay $350,000 in indemnification to the U.S. for damages incurred through 1931.[24] The two countries eventually agreed to this recommendation, and also entered into a Convention establishing a special arbitration tribunal to determine whether damage has occurred since the first day of January, 1932 and if so what damages is to be paid.[25]

The tribunal further concluded that Canada was responsible under international law for the Trail Smelter's pollution:

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[19] Thoma'l J. Burns, Byron L. Davis, & Edward L Kick. *Position in the world-system and national emissions of greenhouse gases*. JOURNAL OF WORLD-SYSTEMS RESEARCH 3, 432–466 (1997).

[20] NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE. Cambridge University Press, Cambridge33 (2007).

[21] Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1938 (1949).

[22] Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, U.S.-Can., 36 Stat. 2448.

[23] See Maxwell Cohen. *The Régime of Boundary Waters-The Canadian-United States Experience*, 146 RECUEIL DES COURS 219, 258 (1975).

[24] See Trail Smelter, 3 R.I.A.A. at 1907.

[25] *Id*, at 1908.

> The Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.[26]

The Trail smelter tribunal required Canada to take responsibility for its pollution and pays damage to the injured U.S. The Tribunal also urged Canada to establish a regime to monitor and abate pollution from the smelter.

The *Trail Smelter* arbitration has assumed immense importance in the development of the customary international law on transnational pollution, primarily because it is the only adjudicative decision of an international tribunal that speaks directly to the substantive law of transnational pollution[27].

2. Cote d'Ivoire and Netherlands

In 2006 hundreds of tons of toxic waste was dumped in Abidjan from a ship named "Probo Koala" chartered by an international oil trader in the Netherlands.[28] This led to some new regulations which restricted the industrial nations from exporting hazardous waste to developing countries that do not have the capacity to deal with the waste in an environmentally friendly way.

3. Nigeria and Italy

In June, 1988, Nigeria experienced its first transnational environmental pollution with the dumping of 3,888 tons of toxic waste at Koko village in the then Bendel state by an Italian company. This generated a lot of diplomatic problem between Nigeria and Italy. The government of Italy evacuated the waste back to Italy. This prompted the government of Nigeria to promulgation of the Harmful Waste (Special Criminal Provision etc.) Act, 1988.[29]

4. United Kingdom/ Continental Europe and Scandinavia

In the late 1960s, the long-distance travel of sulphur dioxides from local sources, together with its transnational effects, was discovered.[30]Acidification of freshwater and its transnational effects on fish stocks were connected to airborne pollutants that travelled from the United Kingdom and continental Europe to Scandinavian rivers, lakes, and forest.

5. France and Netherland

In 1976 Netherland sought to ban the environmentally destructive industrial practices of French mining company. The French company was discharging its industrial waste into the Netherlands.

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[26] *Id* at 1965- 1966.

[27] *See* ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 125, 361 (1991).

[28] The waste caused damages to the health of almost 100,000 people. The oil trader (Trafigura) paid 200 million dollars to help with clean-up. The owner of the local company a Nigerian was responsible for disposing the chemicals in various places was given 20 years in jail.

[29] Mike Ikhariale. The Koko Incident: The Environment and the Law in F. SHYLLON (ED.) THE LAW AND THE ENVIRONMENT IN NIGERIA, Ibadan, Vantage Publishers (1989).

[30] Rolf Lidskog and Goran Sundqvist, *The role of science in environmental regimes: The Case of LRTAP*. EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS, 8(1), 77-101. (2002).

The European Court of Justice (ECJ) ruled that the French mining company's activities violated international law. The ECJ ordered the French company to pay restitution to the downstream parties.[31]

IV. LEGAL FRAMEWORK

Although there are over 800 international agreements dealing with environmental matters, only a few deal specifically with transnational pollution.[32] And with isolated exceptions, the transnational treaties that do exist are largely devoted to encouraging information- sharing and consultation, rather than establishing liability regimes or prescribing substantive limitations on polluting activity.

1. The Boundary Water Treaty, 1909 and the International Joint Commission

The Boundary Water Treaty of 1909 provided the foundation of international environmental law between the United States and Canada.[33] The Treaty was intended to "prevent disputes regarding the use of boundary waters…and to make provision for the adjustment and settlement of all such questions as may hereafter arise."[34] The key substantive provisions of the treaty are the anti-pollution standards and the limitations on diversions or uses of boundary waters "affecting the natural level or flow of boundary waters on the other side of the [border] line".[35]

International Joint Commission has played a critically important role in studying potential threats to the transnational environment and informing both the public and decision-makers in the United States and Canada.[36] However, while the International Joint Commission is regarded as objective and fair, its role and work is limited to references made by the two governments.[37]

2. The Stockholm Declaration

The Stockholm declaration concede to State the "sovereign right to exploit their natural resources pursuant to their environmental policies," but that States at the same time have responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or area beyond the limits of national jurisdiction.[38]

The Trail Smelter arbitration ruling was incorporated into the United Nations Conference on the Human Environment Stockholm Declaration of 1972, which provides in its Principle 21 that:

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[31] Glogal Change Instruction Programme. Protecting and Managing Transnational Watercourses", International Environmental Law. Available at https://www.ucar.edu/communications/acip/m3elaw/m3pdfcq.pdf (Accessed on Sept. 2017)

[32] Merrill, supra note 3, at 933.

[33] Treaty Relating to Boundary Waters between the United States and Canada, U.S.-Gr. Brit. (for Can.), Jan. 11, 1909, 36 Stat. 2448 [hereinafter Boundary Waters Treaty].

[34] *Id*, at 2448

[35] *Id*, at 2449

[36] Several commentators have noted the importance of the Boundary Waters Treaty and the International Joint Commission. See Sharon A. Williams, *Public International Law and Water Quality Management in a Common Drainage Basin: The Great Lakes*, 18 CASE W. RES. J. INT'L. L. 155, 178–79 (1986).

[37] See Daniel K. DeWitt, *Note, Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909*, 69 IND. L.J. 299, 306–07 (1993).

[38] U.N Conference on the Human Environment, U.N Doc. A/CONF.48/14.

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or beyond the limits of national jurisdiction.[39]

The Stockholm principle has since been reaffirmed in numerous other charters and declarations, most notably in Principle 2 of the United Nations Conference on Environment and Development Rio Declaration of 1992[40] and in section 601 of the Restatement (Third) of the Foreign Relations Law of the United States.[41]

However, the principle has not been applied to actually prohibit all trans-boundary harm. Instead, the principle is often considered to be limited to "significant or substantial" trans-boundary harm, and perhaps further limited to include only a duty by the source to "undertake due diligence" to prevent significant or substantial trans-boundary pollution harms.[42]

3. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) 1972

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) is the first global conventions to protect the marine environment from human activities and has been in force since 1975.[43] The main objective of the London Convention is to prevent indiscriminate disposal at sea of wastes that could be liable for creating hazards to human health; harming living resources and marine life; damaging amenities; or interfering with other legitimate uses of the sea. The 1972 Convention extends its scope over "all marine waters other than the internal waters" of the States and prohibits the dumping of certain hazardous materials. It further requires a prior special permit for the dumping of a number of other identified materials and a prior general permit for other wastes or matter.[44]

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[39] United Nations Conference on the Human Environment, Stockholm, Sweden, June 5–16 1972, Stockholm Declaration of the United Nations, 11 I.L.M. 1416, 1420 (June 16, 1972). The Stockholm principle has been reaffirmed in numerous other charters and declarations, most notably in Principle 2 of the United Nations Conference on Environment and Development Rio Declaration of 1992.

[40] See United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 3–14, 1992, Rio Declaration on Environment and Development, princ. 2, U.N. Doc. A/CONF.151/26, 31 I.L.M. 874, 876 (June 14, 1992).

[41] Restatement (Third) of the Foreign Relations Law of the United States § 601(1) (1987) ("A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.").

[42] Noah D. Hall, *The Centennial of the Boundary Waters Treaty: A Century of United States- Canadian Transboundary Water Management*, WAYNE LAW REVIEW, Vol. 54, p. 1417, 2008

[43] Tim Dixon et al., *International marine regulation of CO_2 geological storage. Developments and implications of London and OSPAR*, ENERGY PROCEDIA 1 (2009), 4503-4510. It entered into force in 1975. As of September 2016, there were 89 Parties to the Convention

[44] M.J. Mace, C. Hendricks and R. Coenraads, *Regulatory Challenges to the Implementation of Carbon Capture and Geological Storage within the European Union under EU and International Law*, INTERNATIONAL JOURNAL GREENHOUSE GAS CONTROL, 1 (2007), 253-260.

In 1996, the London Protocol was agreed to further modernize the Convention and, eventually, replace it.[45] Under the Protocol all dumping is prohibited, except for possibly acceptable wastes on the so-called "reverse list". The Protocol reflects the global trend towards precaution and prevention with the parties agreeing to move from controlled dispersal at sea of a variety of land-generated wastes towards integrated land-based solutions for most, and controlled sea disposal of few, remaining categories of wastes or other matter.

The most important innovations brought by the protocol is the codification of the "precautionary approach" and the "polluter pays principle. The Protocol is, so far, the most advanced international regulatory instrument addressing carbon capture and sequestration in sub-seabed geological formations and marine reengineering.[46]

The protocol has effectively moved the scope of the original London convention landwards, relating it to the policy and management issues of land as well as sea wastes disposal. Indicative for this shift are such elements as the codification of the precautionary approach and the establishment of requirements such as the "waste prevention audit," the identification and control of the sources of contamination for certain materials, and the collaboration with relevant local and national agencies that are involved in point and non-point source pollution control. In this context, Integrated Coastal Management (ICM) comes as a natural framework for effective implementation of the objectives of the protocol. Relaying on its vast ICM technical expertise, the National Ocean Service (NOS) is to contribute to the creation of the necessary foundation for the US accession to the Protocol and, further on, to the protocol's implementation. Through its International Program Office, NOS would also contribute to the international co-operation efforts towards meeting the objectives of the Protocol.

4. Great Lakes Water Quality Agreements, 1997

Great Lakes constitute part of the border between the United States and Canada. Under the Great Lakes Water Quality Agreements of 1997 (GLWQA), parties undertake to eliminate or reduce to maximum extent practicable the discharge of pollutants, to prohibit toxic discharges, and adopt water quality standards and regulatory measures consistent with the objectives set out in the treaty. In achieving this U.S. Canada International Joint Commission (IJC) was created.

Under the GLWQA, the United States and Canada were concerned about the grave deterioration of water quality on each side of the boundary to an extent that is causing injury to health and property on the other side, as described in the 1970 report of the International Joint Commission on Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River.[47]

The purpose of the GLWQA is to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem. In order to achieve this purpose, the Parties agree to make a maximum effort to . . . eliminate or reduce to the maximum

[45] The Protocol entered into force on 24 March 2006 and there are currently 48 Parties to the Protocol.
[46] Dixon et al, *supra* note 43.
[47] Great Lakes Water Quality Agreement, U.S.-Can., Apr. 15, 1972, 23 U.S.T. 301.

extent practicable the discharge of pollutants into the Great Lakes System.[48] Despite the lofty goals of the GLWQA, its implementation has been undermined by its sub-treaty status (it was never subject to approval in the U.S. Senate) and its failure to contain enforcement provisions.

5. Air Quality Agreement, 1991

The 1991 Air Quality Agreement between the United States and Canada was executed primarily in response to growing concerns over acid rain from sulfur dioxide air pollution, although the agreement covers all forms of transnational air pollution between the two countries.[49] The Air Quality Agreement provides for assessment and notification of transnational air pollution, cooperative scientific and technical activities and research, and the coordinated exchange of information.

The Air Quality Agreement is unique from the earlier agreement of its kind, because it engages citizens through its structure.[50] The Agreement creates an atmosphere of cooperation on transboundary pollution problems, and gives citizens a role in addressing these problems.

6. The Convention on Long-Range Trans-boundary Air Pollution (CLRTAP)

The Convention on Long-Range Trans-boundary Air Pollution (CLRTAP) was adopted in 1979[51] and its aims were to reduce emissions of airborne cross-boundary pollutants within the UN Economic Commission for Europe (UNECE) region.[52] The Convention was the first multilateral instrument addressing atmospheric environmental issues.[53]

The Convention covers Europe and North America and calls on countries to "endeavour to limit and, as far as possible, gradually reduce and prevent air pollution, including long range transboundary air pollution". The protocols under the Convention aim to reduce emissions of pollutants which can result in acid deposition and ground level ozone formation.

7. The Gothenburg Protocol (1999)

The 1999 Gothenburg Protocol is part of the stepwise process of the Convention on Longrange Transboundary Air Pollution (LRTAP) aiming in the long run at the achievement of protection of health and ecosystems by bringing deposition and concentrations of pollutants below critical loads and levels. As instruments, the Protocol employs national emission targets and sets of emission limit values that should accomplish by 2010 the agreed interim environmental

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[48] *Id*. See also Edith Brown Weiss, *Symposium on Prevention of Groundwater Contamination in the Great Lakes Region: New Directions for the Great Lakes Water Quality Agreement: A Commentary*, 65 CHI-KENT L. REV. 375, 377 (1989).

[49] Agreement on Air Quality, U.S.-Can., art. I(2), Mar. 13, 1991, 30 I.L.M. 676, 679 (1991)

[50] See Jeffery L. Roelofs, *United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems*, 26 CORNELL INT'L L.J. 421, 443–44 (1993)

[51] This Convention has been amended in 1984, 1985, 1988 and 1994 at the Protocol on Further Reduction of Sulphur Emissions.

[52] 29 European nation-states, the United States, Canada and the European Community signed the Convention.

[53] Marvin Sooros, Artic Haze and Trans-boundary Air Pollution in Oran R. Young and Gail Osherenko (eds.) in POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES, Cornell University Press (1993). The CLRTAP was later followed by protocols regulating specific substances. Today, 51 parties have ratified the Convention. CLRTAP is one of the oldest international environmental conventions.

objectives that are a step towards the long-term objective. Important criteria for the national emission targets in the Protocol have been cost-effectiveness, equity and environmental progress towards the long-term environmental objectives.[54]

The 1999 Gothenburg Protocol is to abate Acidification, Eutrophication and Ground-level Ozone to the Convention on Long-range Transboundary Air Pollution. The Protocol sets national emission ceilings for 2010 up to 2020 for four pollutants: sulphur (SO2), nitrogen oxides (NOx), volatile organic compounds (VOCs) and ammonia (NH3). These ceilings were negotiated on the basis of scientific assessments of pollution effects and abatement options. Parties whose emissions have a more severe environmental or health impact and whose emissions are relatively cheap to reduce have to make the biggest cuts.[55]

The Protocol also sets tight limit values for specific emission sources (e.g. combustion plant, electricity production, dry cleaning, cars and lorries) and requires best available techniques to be used to keep emissions down. VOCs emissions from such products as paints or aerosols also have to be cut. Finally, farmers have to take specific measures to control ammonia emissions. Guidance documents adopted together with the Protocol provide a wide range of abatement techniques and economic instruments for the reduction of emissions in the relevant sectors, including transport.[56]

Parties have to report on their emissions once a year. In addition, the Protocol requires Parties to provide projections of their future emissions. This provides a forward-looking way, through which emission trends can be better assessed. It can also help countries in managing air pollution by adjusting measures in case of projected exceedances.[57]

The Protocol was amended in 2012 to include national emission reduction commitments to be achieved by 2020 and beyond. Several of the Protocol's technical annexes were revised with updated sets of emission limit values for both key stationary sources and mobile sources. The revised Protocol is also the first binding agreement to include emission reduction commitments for fine particulate matter. Also for the first time, the Parties have broken new ground in international air pollution policy by specifically including the short-lived climate pollutant black carbon (or soot) as a component of particular matter. Reducing particulate matter (including black carbon) through the implementation of the Protocol is thus a major step in reducing air pollution, while at the same time facilitating climate co-benefits.

The revised Protocol also introduced flexibilities to facilitate accession of new Parties, mainly countries in Eastern and South-Eastern Europe, the Caucasus and Central Asia. Another novelty of the revised Protocol is a flexibility mechanism that allows Parties-under clearly

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[54] UN, Economic Commission for Europe, Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to abate acidification, eutrophication and ground-level ozone, December 1999. See Ger Klaassen at al. The Extension of the RAINS Model to Greenhouse Gases, IIASA IR-04- 015 (2004).

[55] Kevin E. Trenberth et al., *Global warming and changes in drought.* NAT CLIM CHANGE 4(1):17–22 (2013).

[56] R. Maas et al., Integrated Assessment - the tool, in J. SLIGGERS AND W. KAKEBEEKE, EDS: CLEARING THE AIR, 25 YEARS OF THE CONVENTION ON LONG RANGE TRANSBOUDARY AIR POLLUTION (United Nations, ECE/EB.AIR84, New York and Geneva, ISBN 92-1-116910-0) (2004)

[57] Kevin T. Trenberth, *Framing the way to relate climate extremes to climate change*. CLIM CHANGE 115(2): 283–290 (2012).

defined circumstances-to propose adjustments to their emission inventories or emission reduction commitments listed in Annex II of the amended Protocol, thus recognizing both the uncertainties inherent in estimating and projecting emission levels and the need for continuous scientific and methodological improvements under the Convention.[58]

8. The Rotterdam Convention (2004)

The Rotterdam Convention is a multilateral treaty to promote shared responsibilities and facilitate informed decision-making in relation to importation of hazardous chemicals.[59] It establishes a list of covered chemicals and requires parties seeking to export a chemical on that list to first establish that the intended importing country has consented to the import. It also requires that a party seeking to export a chemical that is not listed under the Convention but that is subject to a ban or severe restriction in its own territory must provide notice to the importing country of the proposed export.[60]

The Rotterdam Convention establishes a Prior Informed Consent (PIC) procedure to ensure that restricted hazardous chemicals are not exported to countries that do not wish to receive them. The PIC procedure does not ban or restrict any chemicals, nor does it mean that any individual country must automatically prohibit their import. Parties implement the PIC procedure through extensive information exchange, priority attention to national decisions on imports, and obligations related to export controls.

9. The Basel Convention on the Control of Transnational Movements of Hazardous Wastes and their Disposal

The Basel Convention on the Control of Transnational Movements of Hazardous Wastes and their Disposal was adopted in Basel, Switzerland, on March 22, 1989. The Basel Convention includes hazardous wastes that are explosive, flammable, poisonous, corrosive, or toxic. The Convention required the exporting states to give notice to the importing states and its consent obtained before transporting the wastes.

10. Bamako Convention

The Bamako Convention which was adopted under the auspices of the Organization of Africa Unity (OAU) prohibits hazardous waste import into Africa. It was adopted at the Conference of Environmental Ministers in Bamako, Mali, on 30 January, 1991.

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[58] Michael Jerrett et al., *Long-term ozone exposure and mortality.* N ENGL J MED 360(11):1085–1095 (2009).

[59] Formally, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

[60] Christine Full and Paul Whylie, The Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. E-Learning Centre on Industrial Chemical Management CSD 19, New York, USA (2011).

11. The Harmful Waste (Special Criminal Provision) Act

In the year 1970 the environment was described as the issue of the year throughout the world and the United Nations Conference on Human Environment was held in 1972.[61] Nigeria though signatory to so many of these multilateral treaties and was attendant at so many United Nation organized conferences did not come up with a viable environmental policy or strong legal framework for the protection of her environment until the occurrence of the unfortunate incident of dumping of toxic waste from Italy at Koko port in the then Bendel State in the 1988.[62] It is in the light of this reality that very interesting strides were taken by Nigeria government in the late 1980's to propel Nigeria in the enviable direction of positive environmental protection management and regulation towards sustainable development.

Following the dumping of toxic chemicals in Nigeria by an Italian company in 1988, the Nigerian government promulgated the Harmful Waste (Special Criminal Provision) Act, 1988 aiming at prohibiting the dumping of hazardous and harmful substances on Nigeria territory. The Act prohibits the carrying, depositing and dumping of harmful waste on any land, territorial waters and matters relating thereto. This aspiration culminated in the establishment of the Federal Environmental Protection Agency and its inspectorate and enforcement department in 1991.

The Act was enacted with the specific object of prohibiting the carrying, depositing and dumping of hazardous wastes on any land, territorial waters and matters relating thereto. The Act is essentially a penal legislation. The offences are constituted by doing any of the act or omission stated in the section 12 of the Act. The jurisdiction of the Act is far reaching as it sought to remove any immunity conferred by diplomatic immunities and privileges on any person for the purpose of criminal prosecution. It is however important to note that despite its far reaching jurisdiction, it focuses mainly on criminal prosecution of damage and does not provide compensation to the victim of the damage.[63]

Section 6 of the Act provides a very stringent sentence of life imprisonment and in addition the forfeiture of any aircraft, vehicle or land connected with or involved with the violation. However there is no decided case of any person whether natural or artificial prosecuted pursuant to the provision of the Act. It is equally presumptuous to hazard the assumption that no hazardous waste had found its way into Nigeria as contemplated by the Act since its enactment.

V. LIABILITY FOR TRANSNATIONAL ENVIRONMENTAL POLLUTION

The question of liability for transnational environmental pollution has generated a lot of debate. To appreciate the issues, it is imperative to take a hypothetical example, if a nuclear leakage in State A causes substantial damage in State B, then, who is to be held liable- the government of State A or the private party which owned the nuclear reactor? The manner in

[61] The United Nations Conference on the Human Environment was held in Stockholm, Sweden from June 5–16 in 1972

[62] Cecilia Chinwe Nwufo, *Legal Framework for the Regulation of Waste in Nigeria,* AFRICAN RESEARCH REVIEW. VOL. 4 (2) 491-501 (2010)

[63] *Id.*

which this question has been resolved in international law remains vague and ambiguous. There are two views to this question. The first is that the state is completely responsible for whatever happens within its jurisdiction. The other view is that the polluter should strictly be liable.

On the state liability, there is plethora of treaties and conventions which holds states responsible for causing transnational environmental pollution.[64] This principle has gained prominence in international law because it is every state's liability to protect other states from being injured. Nation state are to undertake due diligence so as to prevent environmental damage or harm being caused to other nation states.

Principle 21 of the United Nations Conference on Human Environment (Stockholm Declaration) accentuates upon states to ensure that damage is not caused to environment of other states.

The Trail Smelter case tries established state liability. The fact of the case was that due to mining smelter in British Columbia, pollution was being caused in Washington State. So as to resolve the dispute the case was referred to the international arbitration tribunal jointly by Canada and United States of America. It was held that:

> No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the cause is of serious consequence and the injury is established by clear and convincing evidence.

State responsibility is related to the precautionary principle which also demands States to take precautions against damage being caused to other nation states.

The polluter causing trans-boundary pollution may not be a state party but private persons. Private person's liability can be established through Polluter Pays Principles. The polluter pays principles imposes abatement costs on the polluter so that he is deterred from causing pollution as it leads to internalization of costs; it ferments the very fundamentals for liability; it ferments the very fundamentals for liability; it is essentially fault based liability which assumes that there is negligence on part of the offender.[65]

Responsibility is a principle of international law that any breach of an engagement involves an obligation to make reparations. To prove a case for state responsibility the conduct of a person or group of persons is also considered as an act of a state under international law where it is establish that such person(s) was in fact acting on behalf of the state and exercising elements of governmental authority, whether authorized or not.

The international law has no exclusionist principle, as all states are responsible in law for their illegal or wrongful acts. This is founded on the basis that all states, irrespective of its size, population and development, exist as equals in the international community. The Doctrine of

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[64] Tullio Scovazzi, *State Responsibility for Environmental Harm,* YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, Vol. 12 Issue 1 (2001).

[65] Principle 16 of the Rio Declaration provides that "national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment".

state responsibility is negated where the aggrieved state gives its consent, or the act was a counter-measure, or caused by necessity and self defence. Under international law, a state must meet relatively restrictive standards to attempt to invoke the responsibility. Injury suffered must be shown to attach to an interest that claimant state is legally entitled to protect.[66]

The two universally accepted methods of determining liability in relation to state responsibility for environmental pollution, that is, state to state correspondence, and third party dispute settlement mechanism as is done by arbitration and International Court of Justice (ICJ).[67] The state to state responsibility tends to produce compromise solutions intended primarily to resolve divisible international disputes rather than to promote environmental protection which is the intendment of any legislation, local or international treaties. The third party dispute settlement on its own part has limited jurisdiction and accessibility to non-state claimants.

Various methods and means have been adopted by the international community for the discharge of responsibility for environmental pollution. The breach of state obligations in respect of responsibility for environmental pollution is remedied through:

(a) Fines after prosecution where negotiations and arbitration may have been unable to resolve the problem.
(b) Restitution may be adopted except that in cases where permanent damage is done to health due to environmental pollution restitution becomes inadequate and insufficient and sometimes impossible.
(c) Polluter Pays Principle in which the body, be it individual, corporate or state that causes the pollution pays the cost of removal of the pollutant, and
(d) Cost to third parties in the form of compensation or reparation, restitution, or restoration.

VI. CONCLUSION AND RECOMMENDATIONS

A review of the international law mechanisms demonstrate the inherent limitations and weaknesses of international environmental law, especially the lack of enforcement rights for the citizens most directly affected by transnational pollution. The legal regime of transnational responsibility for environmental pollution will be in abeyance, if international laws creating State responsibilities for transnational pollution are not incorporated in national laws. Harmonizing accepted international environmental law principles with respected and independent domestic legal mechanisms could create a system that prevents and peacefully resolves transnational environmental disputes, without threatening state sovereignty.

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[66] Iain Scobbie, *The Innovation of Responsibility for breach of 'Obligations under Peremptory Norms of General International Law*. EJIL, Vol. 13 No. 5 (2002)

[67] J. Patrick Kelly, State Practice as Metaphor. A Reconciliation Approach, STATE PRACTICE AND INTERNATIONAL LAW JOURNAL (SPILJ), VOL. 1:1-16 (2014).

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Article 5

Scope of the Journal

The *Haramaya Law Review* (HLR) publishes original scholarly works on any topic relevant to the legal community, including analysis of domestic or international laws and cases, the African Union and other international organizations, challenges and lessons from domestic practice, and original field research.

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CHARLES DICKENS, BLEAK HOUSE 49-55 (Norman Page ed., Penguin Books 1971) (1853).

WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 5.4 (2d ed. 1986).

BAHRU ZEWDE & DIEGFRIED PAUSEWANG (EDS), ETHIOPIA: THE CHALLENGE OF DEMOCRACY FROM BELOW (United Printers, Addis Ababa, Ethiopia) (2006), at 17-18.

ABERRA JEMBERRE, LEGAL HISTORY OF ETHIOPIA – 1434 – 1974: SOME ASPECTS OF SUBSTANTIVE AND PROCEDURAL LAWS (Rotterdam: Erasmus Universiteit and Leiden: Afrika-Srudiecentrum) (1998).

PHILIP KYLE, PEOPLE AND PLACES, (Dante Press, Vol. 5, 2003).

Works in a Collection or Book Chapter:

- Book chapter or work in collection should indicate name of the author(s) and title of the chapter followed by the word '*in'* Vol # (if any), title of the book, page at with the chapter begins and referred pages, if any. Editors, translators, publisher and date appears at the end in parenthesis form.

John Adams, Argument and Report, *in* 2 LEGAL PAPERS OF JOHN ADAMS 285, 322-35 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

Institutional Authors

ENVIRONMENTAL PROTECTION AUTHORITY, ENVIRONMENTAL POLICY OF ETHIOPIA (1997).

2. Law Review Articles

- Should include author(s) full name, Title of the article, Volume (Issue) number, JOURNAL TITLE, page on which article begins, year of publication, specific page(s) cited
- If the article is co-authored by more than two authors, all co-authors should be listed.

Examples

Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 737-38 (1964).

Justice Richard J. Goldstone, *Women, Children, and Victims of Massive Crimes: Legal Developments in Africa*, 31 FORDHAM INT'L L.J. 285 (2007).

Fekadu Petros, *Underlying Distinctions between Alternative Dispute Resolutions (ADR), Shimglina and Arbitration*, 3(1) MIZAN LAW REVIEW 105-133 (2009).

Mulugeta Getu, *The Ethiopian Environmental Regime Versus International Standards: Policy, Legal, and Institutional Frameworks,* 1(1) HARAMAYA LAW REVIEW 43, (2012).

3. Magazines or Newspapers:

- Should contain Name of the author(s), Title of the Article or piece referred, Name of the Newspaper (Magazine), Date when the newspaper (magazine) was published, Page where the specific reference could be found.

Examples

Robert J. Samuelson, *A Slow Fix for the Banks*, NEWSWEEK, Feb. 18, 1991, at 55.

Damages for a Deadly Cloud: The Bhopal Tragedy, TIME, Feb. 27, 1989, at 53.

Habtamu Bazeze, *The Necessary Evils*, THE REPORTER, Dec. 28, 2014, at 10.

4. Treaties

- Include name of the document, date of signing and document number

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

African Charter on Human and Peoples' Rights, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982) (hereinafter African Charter), Art. 27(2).

5. Cases and Decisions:

- This at least should contain Case name (in most cases this would be the name of the parties to the case), Country and Court Name, Case number or file number, Date of the

decision (in parenthesis), Name of the case report or journal, Page where specific reference might be found.

Examples

W/t Tsedale Demissie Vs Ato Kifle Demisse, Federal Supreme Court, Cassation Bench, File No. 23632 (6 Nov 2007) Vol. 5, at 188.

Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres, Fed. First Instance Ct., Lideta Div., File No. 54024 (Decision of 3 June 2005) (26 *Ginbot* 1997 E.C.)

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

Kampanis v. Greece, 318 Eur. Ct. H. R. 29, 35 (1995).

6. Ethiopian Laws:

- Should include name of the legislation, legislation number, gazette name, number and year of publication.

Examples

CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETA, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 9(1) [when it appears for the first time], and then FDRE Constitution, Art. 40(3) subsequently.

The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings, Proclamation No. 3/1991, FED. NEGARIT GAZETA 50th Year No. 4, Addis Ababa, 12 August 1991.

CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No 165/1960, NEGARIT GAZETA, 19th Year No. 2, 5th May 1960, Addis Ababa [here after CIVIL CODE].

Electoral Law of Ethiopia (as Amended) Proclamation No. 532/2007, FED. NEGARIT GAZETA, 13th Year No. 54, 2007.

7. Online Publications and Internet Sources:

- It should at least indicate Author(s) Name, Title of the Manuscript, url address and last date it was retrieved.

Example

Heidi Goldberg, Center on Budget & Policy Priorities, State Supported Health Care 15 (2007), *available at* http://www.cbpp.org/11-8-01wel.pdf/ (Accessed on 23rd of January, 2013)

8. Unpublished Reports and Manuscripts

- References to unpublished manuscript of any type shall contain Author's name, Title of the manuscript, Date when the work was completed, The word "unpublished" (in parenthesis), Place of the work may be found (in parenthesis), Page referred to

Example

Tarekegn Tafesse, Effects of Traditional Family Arbitration and Legal Divorce on Divorcees and Their Children: The Case of Boloso Sore Wereda, Wolaita Zone, Southern Ethiopia, (Unpublished, MA Thesis in Social Works, Addis Ababa University, June 2015).

9. Interviews

- Reference to materials obtained in an interview should contain the phrase "interview with", Full name of the person interviewed, Position of the person interviewed, Date of the interview.

Example

(Telephone) Interview with Ato Regassa Dedefo, Director of Foreign Trade Alignment, Ministry of Trade, on 20th of July 2014.

10. Short citations:

- Use '*id.*' when referring to the immediately preceding citation/authority. Note also that "*id.*" is always *italicized* and followed by a period.
- Use '*supra'* when an authority has been fully cited previously but not the immediate preceding one. Note that '*supra'* is also italicized.
- Use 'hereinafter' for authorities/citations that would be cumbersome to cite with '*supra'* or *'id.'*, or shortened form may be established.
- Use 'et al' when referring to the previously cited material with more than two authors.

Examples:

(same as immediately previous citation) → *Id.*

(same as immediately previous source, but different page) → *Id.* at 53.

(same as citation earlier in article) → (Author's given/last name), *supra* note 12 [the footnote # where the authority appeared for the first time]; e.g. Tarekegn, *supra* note 13.

(same as citation earlier in article, but different page) → (Author's given/last name), *supra* note 12, at 23-26; e.g. Reich et al, *supra* note 54, at 78.

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ANNEX III: AUTHOR DECLARATION FORM

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(4) Guarantee that the authorship of this article will not be contested by anyone whose names are not listed by me as co-authors;

(5) Declare that the manuscript contains no defamatory, abusive, deceitful elements or other unlawful statement, and does not contain any personal or property rights of any other person or institution;

(6) Shall bear full responsibility for the submission on behalf of all co-authors; and

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