FREEDOM OF EXPRESSION IN ETHIOPIA: THE JURISPRUDENTIAL DEARTH

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Abstract

It is almost a decade and half since freedom of expression has been proclaimed as one of the fundamental rights and freedoms recognized in the FDRE Constitution. However, there is hardly any Ethiopian jurisprudence on freedom of expression to speak of at the moment. Although numerous cases (that clearly gave rise to issues implicating freedom of expression) have been entertained in our courts, we have yet to develop a body of standards, tests and doctrines pertaining to the scope, content and legitimate limitations of freedom of expression. This void of constitutional jurisprudence can indeed undermine freedom of expression.

Key words:

Freedom of Expression, FDRE Constitution, Ethiopia

Introduction

Freedom of expression is one of the fundamental rights guaranteed under the FDRE Constitution. Nevertheless, as is the case for most of the rights recognized in this Constitution, there is still no corpus of academic exposition and judicial doctrine developed to elucidate on such matters as the scope, content and limitations of freedom of expression. This article is not meant to fill this void. Rather, it is meant to establish the existence of this void, to explore its causes and possible implications.

The article starts with a brief overview of the traditional theoretical basis of freedom of expression. That will be followed by a cursory discussion of freedom of expression as provided under the FDRE Constitution. Then, some critical questions that might arise in relation to freedom of expression are discussed. The author argues that no authoritative answer has been given to these questions in the Ethiopian legal system and, as a result, there is a dearth of jurisprudence regarding freedom of expression in Ethiopia. An attempt is made to explore the cause for this jurisprudential dearth and some of its implications.

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1. Theoretical Basis of Freedom of Expression

Although not central to the principal objective of this article, which is to show the jurisprudential wasteland that freedom of expression has become in Ethiopia, in order to underscore the importance of the right, it would be helpful to explore the theoretical bases and underpinnings of freedom of expression. To this end, the main justifications that are often forwarded to establish the need to recognize and protect freedom of expression[1] need to be highlighted.

1.1- Freedom of Expression as a Prerequisite for the Search for Truth

One of the earliest and better known defenses of freedom of expression was presented by John Milton who wrote a pamphlet, titled *Areopagitica* in 1644, decrying a scheme of licensing publications (a system of censorship) introduced in England at the time. Depicting the system of *imprimatur* as a peculiar evil of the prelacy (playing on the anti-catholic sentiments that were prevalent in England then), unheard of in classical Greece and Rome and without support in Christian theology, Milton defended freedom of expression as a prerequisite for the already discovered truth to thrive and for undiscovered truth to be discovered. He argued that censorship will be "primely to the discouragement of all learning, and the stop of truth, not only by the disexercising and blunting our abilities in what we know already, but by hindering and cropping the discovery that might be yet further made both in religious and civil wisdom."[2]

This line of argument that defends freedom of expression as being a necessary precondition in the search for truth has been further developed by the utilitarian J.S Mill in his famous essay on 'Liberty'. Mill argued that without freedom of expression we might be deprived of the opportunity to learn the truth if we have not discovered it yet, and we cannot perfect our partial knowledge of the truth we have learnt, or will not have the opportunity to have a clearer

[1] One should bear in mind that there is an extensive body of literature on this subject, particularly emerging form the U.S and historically from English political philosophers of the enlightenment period. A review of this literature and its significance and relevance to Ethiopia merits a separate article. For a concise and up to date discussion of the theoretical justifications of free speech See, Eric Brandt(2005), *Freedom of Speech*, Second Edition, (Oxford University Press), pp 7-23, See also Alan Haworth, *Free Speech*, Routledge 1998.

[2] John Milton(1644,) *Areopagitica*, (The Harvard Classics. 1909–14), available at <http://www.bartleby.com/3/3/2.html>, last accessed on October 29, 2010.

understanding of received truths.[3] These philosophical views seem to have been judicially endorsed in the famous dissenting opinion of Justice Holmes of the U.S Supreme Court in *Abrams v. United States* wherein he forwarded the "market place of ideas" rationale for free speech.[4]

1.2- Freedom of Expression as a Pre Requisite for Self Governance

Another traditionally influential rationale of freedom of expression is the one expounded by A. Meiklejohn. This scholar and those who argue in favor of freedom of expression in a similar vein argue that the protection of free speech is justified since it is a prerequisite for self governance.[5] The proponents of this view claim that democracy, as a system of self governance requires that citizens be well informed of issues of public interest so they could make informed and intelligent decisions taking into account all available alternatives. While basically subscribing to this rationale of free speech, some believe that this rationale of free speech limits the scope of the freedom to political speech and communication only[6] while others are of the view that expressions that might not directly be characterized as being political such as art could be very influential in forming our political views and hence merit protection[7]. Although they might differ on the scope of protection, the proponents of both views seem to be in agreement that freedom of expression must be protected to enable citizens to govern themselves. Under Article 29(4) of the FDRE Constitution, it is provided that "the free flow of information, ideas and opinions… are essential

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[3] John Stuart Mill (1869), *On Liberty*, Chapter II: Of the Liberty of Thought and Discussion, available at < http://www.bartleby.com/130/2.html > and last accessed on October 29, 2010.

[4] *Abrams v. United States, 250 U.S. 616 (1919),* Justice Holmes opined "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas...that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."

[5] See in general, Alexander Meiklejohn (2004), *Free speech and its relation to Self-government,* (Law Book Exchange Limited).

[6] Robert H Bork(1971-1972), 'Neutral Principles and Some First Amendment Problems', 47 *Ind. L.J. 1*, pp. 6-28.

[7] Alexander Meiklejohn(1961), 'The First Amendment Is an Absolute', *The Supreme Court Review, Vol.* 1961*, pp. 245-266.*

to the functioning of a democratic order". This assertion seems to imply that the necessity of freedom of expression for democratic governance has been the most dominant theoretical justification for the provision of the right in the Constitution.

1.3- Freedom of Expression as a Prerequisite for Personal Development

The other line of reasoning that is adopted to justify the protection of speech is one that makes human autonomy, personal development and fulfillment contingent on a person's freedom to express one's self as well as make independent choices of what is right and wrong, what is in good taste or bad taste. The argument goes, without such freedom, human beings cannot fully develop their personality and be autonomous moral agents with self respect[8]. Therefore, regardless of whether or not freedom of expression helps in the search for 'truth,' and in addition to the utility of freedom of expression in facilitating democratic governance, free speech is seen as something that is justified because it makes autonomous personal fulfillment and development possible.

The above discussion only highlights the most widely known traditional justifications of freedom of expression presented by philosophers and jurists of the English speaking world. Therefore it obviously cannot be taken to be comprehensive and exhaustive. Be this as it may, the author hopes that it can serve as a prelude to the discussion below.

2. Constitutional Guarantees of Freedom of Expression in Ethiopia

Freedom of expression was for the first time given juridical recognition in modern Ethiopia by the Revised 1955 Constitution.[9] The Eritrean Constitution of 1952 had already recognized freedom of expression as a right of all residents of Eritrea prior to the adoption of the 1955 Revised Constitution which was influenced by the Federation with Eritrea.[10] Freedom of expression was also a

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[8] See Thomas Scanlon (Winter, 1972), 'A Theory of Freedom of Expression', *Philosophy and Public Affairs*, Vol. 1, No. 2, pp. 2015-226 and David A. J. Richards(Nov., 1974), 'Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment', *University of Pennsylvania Law Review*, Vol. 123, No. 1, pp. 45-91.

[9] See the 1955 *Revised Constitution of the Empire of Ethiopia*, Article 41.

[10] See The *Constitution of Eritrea*, Adopted by the Representative Assembly of Eritrea on July 10, 1952, Article 22(d). The fact that the Constitution of Eritrea recognized

right that was given recognition in the 1974 Draft Constitution.[11] The 1987 Constitution of the Peoples' Democratic Republic of Ethiopia, which had a clear socialist orientation, also gave recognition to freedom of expression.[12] Hence, at least on paper, freedom expression has been given recognition in Ethiopia for more than half a century. However, anybody who is familiar with modern Ethiopian history would know that these constitutional guarantees of freedom of expression were not effective in fostering political dissent and freedom of the press. On the ground, there was hardly any free press or freedom for political dissent despite what these constitutions provided.[13]

A dramatic change occurred as far as freedom of expression was concerned with the collapse of the 'Dergue'. Not only did the Transitional Charter recognize freedom of expression, [14] but freedom of the press and speech became a reality with an unprecedented proliferation of privately run newspapers and magazines.[15] The extent to which that freedom has subsisted till this day is a debatable issue, but what is certain is that in our constitutional history, freedom of expression was stipulated in the 1995 FDRE Constitution in the most elaborate manner.

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freedom of expression is obviously of interest here because at that point in time Eritrea was an autonomous unit federated with Ethiopia.

[11] See, *The Draft of the Proposed Ethiopian Constitution*, 1974(Presented to the Prime Minister on Hamle 29th, 1966 Ethiopian Calendar (August 9, 1974) and published on Addis Zemen Nehassie 4, 1966(August 14, 1974), Article 25(i). It provides that '…Every Ethiopian ….has the right to express any idea through the media of speech, press or any other medium. He has the right of access to the expression of others too.'

[12] See the *Constitution of the Peoples' Democratic Republic of Ethiopia (1987),* Article 47

[13] Be this as it may it is important to note that there were exceptional times even in modern Ethiopia in which dissent through the press and political speech were briefly tolerated prior to 1991. In the 1920's the progressive intellectuals who were infatuated with the then regent sharply criticized the 'old school' establishment and decried Ethiopia's backward state openly in the few newspapers that were in existence at that time. Furthermore, just before the 'Dergue' consolidated its hold on power during the 1974 Revolution, political dissent and views critical to the government on newspapers were the order of the day.

[14] See *Transitional Period Charter of Ethiopia* (1991), Article 1(a).

[15] See Shimelis Bonsa (2002), 'The State of the Private Press in Ethiopia', *Ethiopia The Challenge of Democracy from Below*, Edited by Bahru Zewde and Siegfried Pausewang, (Nordiska Afrikainstitutet, Uppsala and Forum for Social Studies: Addis Ababa), pp 184-165.

Article 29 of the FDRE Constitution provides for the 'Right of Thought, Opinion and Expression' in the following terms:

1) Everyone has the right to hold opinions without interference.
2) Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.
3) Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements: (a) Prohibition of any form of censorship; (b) Access to information of public interest.
4) In the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.
5) Any media financed by or under the control of the State shall be operated in a manner ensuring its capacity to entertain diversity in the expression of opinion.
6) These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honor and reputation of individuals.
7) Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.

In addition to enshrining freedom of expression as a fundamental 'democratic right', the Constitution stipulates that the third chapter of the Constitution (i.e. is its bill of rights) should be interpreted in accordance with the Universal Declaration of Human Rights (UDHR) and international human rights instruments ratified by Ethiopia. [16] Accordingly, one should always bear in mind that the relevant provisions of the UDHR, the ICCPR (International Covenant on Civil and Political Rights), the ACHPR (African Charter on Human and Peoples' Rights) and other pertinent human rights instruments ratified by Ethiopia should be read alongside this constitutional provision in order to have a full picture of the legal regime that is expected to accord protection to freedom of expression in Ethiopia.

[16] See FDRE Constitution Article 13(2), See also Gebremlak Gebregiorgis(2008), 'The Incorporation and Status of Human Rights Under the FDRE Constitution', *The Constitutional Protection of Human Rights in Ethiopia : Challenges and Prospects*, Ethiopian Human Rights Law Series Vol. 2, (AAU Law Faculty, AAU Printing Press), Girmachew Alemu & Sisay Alemahu (eds) pp 37-58.

3. Questions and Issues in Need of Answers

At the moment, there is a great deal of controversy as to the extent of the realization of the constitutional guarantee of freedom of expression in Ethiopia. Accusations by various human rights activists and 'champions' of freedom of the press relating to deliberate acts of stifling freedom of expression through unconstitutional and illegal means are vehemently denied by the government.[17] Yet leaving aside this controversy, there are a number of questions that need to be addressed when we come to limitations imposed on freedom of expression in Ethiopia through duly enacted laws. The questions that could be raised are not only pertaining to laws that have already been enacted but potential limitations that might be set in the future as well. In this section of the article, some of these questions are raised along with tentative answers. The objective of providing these answers is not to provide definitive and authoritative answers but to explore possible answers and provide a starting point for further inquiry and debate on the questions raised.

The first question relates to the implications of the characterization of freedom of expression as a 'democratic right' under the FDRE Constitution. The second question concerns the legitimate grounds for limiting freedom of expression under the FDRE Constitution. And the third question relates to the extent to which limitations on freedom of expression based on legitimate grounds can go in restricting the freedom. It should be underscored that these questions by no means provide a guideline for a comprehensive and systematic investigation of freedom of expression as enshrined under the FDRE Constitution. However, they are still questions worth dwelling upon, both from practical and academic points of view.

3.1- Freedom of Expression as a *Democratic* Right: Implications Explored

Freedom of expression is provided for under Chapter 3 of the FDRE Constitution, i.e. the bill of rights of the Constitution which embodies 'Fundamental Rights and Freedoms'. This chapter is divided in two parts. The first part provides for 'Human Rights' while the second part provides for

[17] See Freedom House, *Freedom of the Press 2008 - Ethiopia*, 29 April 2008, available at: <http://www.unhcr.org/refworld/docid/4871f602c.html> [accessed 16 January 2010], see also Committee to Protect Journalists (New York) Ethiopia: 2007 Press Freedom Summary, 5 February 2008, available at:

< http://allafrica.com/stories/200802060645.html > last viewed on January 16, 2009.

'Democratic Rights.'[18] This division of the fundamental rights and freedoms recognized by the Constitution obviously gives rise to a question as to the practical significance and implication of the division. The relevance of this question goes beyond freedom of expression and is also pertinent to all of the other rights embodied in the FDRE Constitution. The most relevant provision in this regard is Article 10 of the Constitution. This Article is found in Chapter 2 of the Constitution that lays down the 'Fundamental Principles of the Constitution'. Article 10(1) stipulates that 'Human rights and freedoms, *emanating from the nature of mankind*, are *inviolable and inalienable*' (emphasis added). It goes on to provide under Article 10(2) that 'Human and democratic rights of *citizens and peoples* shall be respected' (emphasis added).

Two things can be inferred tentatively from Article 10. The first tentative inference is that *human* rights and freedoms are derived from the nature of man and as such are universal. This is to mean that human rights are the rights of all human beings simply and merely by virtue of their humanity, as opposed to democratic rights which are the rights of citizens and 'peoples' derived from their juridical and political status. So this would seem to mean that in terms of the bearers of the right, human rights and democratic rights are different, the former being more inclusive than the later. The second tentative inference is that human rights are to be accorded a relatively more robust protection as 'inviolable and inalienable' rights as compared with democratic rights which are just to be 'respected'[19].

These tentative inferences are further reinforced when one consults the Minutes of the Council of Representatives of the Transitional Government during its deliberations on what was then the draft constitution. When one refers to this Minutes, one can see that the Chairperson of the Constitutional Drafting

[18] In the first part of the third chapter of the constitution, i.e. the part stipulating human rights, one would find the Rights to life, the Security of Person and Liberty, Prohibition against Inhuman Treatment, Right of Persons Arrested, Rights of Persons Accused, The Rights of Persons Held in Custody and Convicted Prisoners, Non-retroactivity of Criminal Law, Prohibition of Double Jeopardy, Right to Honour and Reputation, Right to Equality, Right to Privacy, Freedom of Religion, Belief and Opinion. In the Second part, i.e. the part providing for democratic rights, one finds Right of Thought, Opinion and Expression, The Right of Assembly, Demonstration and Petition, Freedom of Association, Freedom of Movement, Rights of Nationality, Marital, Personal and Family Rights, Rights of Women, Rights of Children, Right of Access to Justice, The Right to Vote and to be Elected, Rights of Nations, Nationalities, and Peoples, The Right to Property, Economic, Social and Cultural Rights, Rights of Labour, The Right to Development and Environmental Rights.

[19] Abadir Mohamed (2008), *The Human Rights Provisions of the FDRE Constitution in Light of the Theoretical Foundations of Human Rights*, (AAU Printing Press), p.85

Commission,[20] was of the opinion that a distinction should not and could not reasonably be made between the so called 'democratic' and 'human' rights since they are interdependent and inseparable.[21] He also argued that the idea that the two rights should be accorded a different degree of protection is inappropriate and contrary to what is provided in the international human rights conventions adopted under the auspices of the U.N.[22] A different view was forwarded by the then President and Chairperson of the Council, [23] who was of the opinion that human rights emanate from our humanity and cannot be subject to any limitations while democratic rights that arise out of citizenship and the status of people-hood or a membership in a particular group could be subject to limitations.[24] The views of the Chairperson of the Council won the day and were accepted by a majority of its members.[25] Unfortunately, the Minutes of the Constituent Assembly do not shed any light on the practical implications of the categorization of rights into human and democratic rights since the Constituent Assembly's discussion on the provisions in question did not take cognizance of the issue. [26]

One of the principal architects of the Constitution, while commenting on the Constitution, did not provide an explanation as to why it was necessary to make a distinction between 'human' and 'democratic' rights in the Constitution or what is the significance of the distinction. He noted that the classification of rights is "an accepted academic exercise", at times of some political and technical utility so long as "the indivisibility of human rights is kept in mind"; and asserted that "it is in this light that the constitutional categorization of fundamental rights and freedoms into human rights and democratic rights should be accepted."[27] This assertion of course gives no explanation as to the practical implications of categorizing freedom of expression as a "democratic right" as opposed to a "human right."

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[20] The late Kifle Wedajo, Chairperson of the Constitutional Drafting Commission

[21] See *Minutes of the 94th Regular Session of the Council of Representatives of the Transitional Government of Ethiopia* , Unpublished, p.23.

[22] *Ibid.*

[23] The President of the Transitional Government.

[24] *Id*., p.24.

[25] *Ibid.*

[26] See *Minutes of the Ethiopian Constituent Assembly* Vol. 2 (Unpublished) pp 12-13, Tikmit 30- Hidar 7, 1987, Addis Ababa.

[27] Fasil Nahum (1997), *Constitution for a Nation of Nations; the Ethiopian Prospect*, (Red Sea Press Inc.), pp. 111, 112.

A legal expert who served in the Transitional Government's Constitutional Drafting Commission which was responsible for the drafting of the FDRE Constitution, notes that although democratic rights enjoy lesser protection than human rights, the basis of the classification are unclear and ultimately the whole classification may be irrelevant.[28] However she did not elaborate in what respect "democratic rights" are to enjoy lesser protection than human rights.

According to an academic on Ethiopian constitutional law, "…all categories of rights are co-equally to be respected without having any superior claim to the other in terms of being prioritized or subordinated".[29] He goes on to note that "there isn't much of a method into the classification…" of rights in to democratic and human rights in the FDRE Constitution. [30]

Clearly, in light of the opinions above, there seems to be an agreement among the commentators who have addressed the issue at hand that the classification of rights in the FDRE Constitution into human and democratic rights is not based on any rational justification and that it does not have any practical significance. This view which is shared by the above quoted sources seems to be inconsistent with what is provided for under Article 10 of the Constitution and how that provision was understood by some of the key players in the adoption of the Constitution.[31]

As has been discussed above, one of the implications of Article 10 at least as understood by the Council of Representatives of the Transitional Government (who constituted a majority in the Council) seems to be that the constitutional protection of those rights that the Constitution categorizes as democratic rights does not extend to non citizens. This line of thought invites one to compare the distinction between fundamental freedoms belonging to everyone under Article 2 of the Canadian 'Charter of Rights and Freedoms' and democratic rights of citizens under Article 3 of the same charter. In this classification, the Canadian Charter stipulates that freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association are fundamental rights belonging to everyone and not limited to citizens.[32] It

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[28] Meaza Ashenafi (2003), 'Ethiopia: Process of Democratization and Development', in Abdullahi Ahmed An-Naim ed., *Human Rights under African Constitutions*, (University of Pennsylvania Press), p.34.

[29] Tsegaye Regassa(2009), *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, Mizan Law Review, Vol.3, No.2. p.303

[30] *Id*., 305.

[31] *Supra* note 21, p.23.

[32] See *Canadian Charter of Rights and Freedoms*, Article 2.

provides for the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein as rights belonging to Canadian citizens only.[33] Hence, one can note that the Canadian Charter reserves for its citizens only rights that should inherently and in their very nature be reserved for citizens. As opposed to this, the Ethiopian Constitution seems to imply that many rights like freedom of expression are applicable only to citizens despite the fact that there is nothing in the nature of these rights that warrants reserving these rights to citizens only.

Furthermore the assertion that 'democratic rights' like freedom of expression do not emanate from the nature of mankind and as such are less deserving of constitutional protection is, to say the least, at the very fringe of plausibility within the realm of human rights. In relation to this, it is interesting to note that one of the widely accepted rationales for the protection of freedom of expression is the belief that this freedom is crucial for human autonomy and self realization.[34] Such views assert the existence of a direct link between human nature and freedom of expression. The interdependence, indivisibility and interrelatedness of human rights will undoubtedly render unacceptable any attempt to make a distinction in terms of the degree of protection merited particularly by civil and political rights.[35] Therefore, in the opinion of this author, Article 10 of the Constitution and the categorization of rights under Chapter three of the FDRE Constitution as 'Democratic' and 'Human Rights' should be seen as a classification without significant impact as suggested by the

[33] *Id*. Article 3.

[34] See the discussion of rationales of freedom of expression in section I of the article and in general, Thomas I. Emerson(1963), 'Toward a General Theory of the First Amendment', *Yale Law Journal* 72 877–956, and Frederick Schauer (1982), *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press).

[35] See *Vienna Declaration and Programme of Action, World Conference on Human Rights*, Vienna, 14-25 June 1993, available at: <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?Open Document>, last viewed on January 15, 2010; See in particular paragraph 2 and Article 5 of the Declaration. The principle of universality, indivisibility, interdependence and interrelatedness of all human rights has also been endorsed by the African Commission on Human and People's Rights See *Purohit and Another v The Gambia*, 2003 African Human Rights Law Report 96 (ACHPR 2003) Paragraph 48, See also the Grand Bay (Mauritius) Declaration and Plan of Action (1999) adopted by the OAU Ministerial Conference on Human Rights, Article 1, Kigali Declaration (2003), Adopted by the AU Ministerial Conference on Human Rights, Article 1.

authorities whose views were discussed above.[36] This line of interpretation would preclude the absurd outcomes that contradict with the view commonly accepted among scholars and practitioners of international human rights.

Regardless of the position of this author and some of the commentators whose views were discussed above, the fact remains that the text of the Constitution is still susceptible to an interpretation that will construe freedom of expression and other rights found in the second part of the third chapter as rights of only citizens and as rights that deserve less protection than rights embodied in the first part of the same chapter. Though this implication has not been acted upon so far, the potential it bears should give rise to some concern since many Ethiopian born political activists in the Diaspora could be precluded from enjoying the freedoms of expression, association and so on. Perhaps, we can take the "Broadcasting Service Proclamation No.533/2007" and the "Freedom of the Mass Media and Access to Information Proclamation No. 590/2008"; both of which restrict participation in the ownership of media outlets to citizens only[37] as manifestations of a reading of freedom of expression as a right belonging to citizens only.

As has been noted already, another practical significance of Article 10 could be its not so subtle implication that democratic rights are to be accorded less protection than human rights. As far as freedom of expression is concerned since it often clashes head on with the right to honor and reputation[38], the right to privacy[39] and at times arguably against the freedom of religion of others[40], all of which are rights falling under the category of human rights of Chapter 3 of the FDRE Constitution, this could mean that whenever such a clash occurs,

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[36] The author concedes that the line of argument he is trying to push, even if supported by the authors cited above is not consistent with the original intent of some of the key players in the constitutional adoption process and as such it might be both problematic and mere wishful thinking.

[37] See Articles 23 of the Broadcasting Proclamation and Article 5 of the Freedom of the Mass Media and Access to Information Proclamation.

[38] See for example *Oberschlick (No 2) v Austria (1998) 25 EHRR 357 97/41, Lingens v Austria (1986) 8 EHRR 103 86/6* and, *New York Times Co. v. Sullivan, Supreme Court (United States).376 U.S. 254 (1964);* see also *Mogale and Others v Ephraim Seima*, The Supreme Court of Appeal of South Africa, Case No 575/04, see also Fred Khumalo *and others v Bantubonke Harrington Holomisa*, Constitutional Court of South Africa, Case CCT 53/01.

[39] See for example *Von Hannover v Germany* [2004] ECHR 294, European Court of Human Rights application no. 59320/00.

[40] See for example *Otto-Preminger-Institut v. Austria (1994)* ECHR, *I.A. v. Turkey*, Judgment of September 13, 2005; *Tatlav v. Turkey*, Judgment of May 2, 2006.

these rights should automatically prevail at the expense of freedom of expression. Unfortunately, though it has been more than a decade and half since the adoption of the FDRE Constitution, no jurisprudence has developed on the significance of the classification of fundamental rights and freedoms provided in the Constitution. The question will still persist until the emergence of a clear, authoritative and settled case law that affirms the formal equality of all fundamental rights and freedoms enshrined in the Constitution and that as a rule all such rights are to be enjoyed by 'everyone'. [41]

3.2- Grounds of Limiting Freedom of Expression

The first five sub-articles of Article 29 provide the rights associated with freedom of opinion and expression that are protected by the Constitution. Hence, these sub-articles tell us *what* is protected. Political speech, operating a press and expressing one's views and opinions through state media are among the various rights protected under Article 26. Sub-Articles 6 and 7 deal with the limitation of the rights enumerated in the preceding sub articles. While sub-Article 6 lays down the grounds and conditions for limiting freedom of expression, sub-Article 7 stipulates that "Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law".

If read by itself without taking sub-Article 6 into account, this article might be understood as saying that so long as a limitation of the right has a legal or statutory basis, it is acceptable. Such a reading is obviously very dangerous and must be rejected for two reasons. The first reason is the fact that such a reading will render sub-Article 6 meaningless and in effect negate it completely. If any limitation made in accordance with statutes was to be considered valid, then there would have been no need to provide grounds for limiting freedom of expression under sub-Article 6. This will render sub-Article 6 superfluous and will be contrary to the principle of positive interpretation.[42] Furthermore, such a reading will have to be rejected taking in to account international principles of human rights which the Constitution makes the benchmark for the interpretation

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[41] In fact, many of the provisions in the second part of the third chapter of the FDRE Constitution, including Article 29, i.e. the Article pertaining to freedom of expression stipulate the rights they are providing for as rights to be enjoyed by 'Everyone' or 'Every person'. Only Articles 33 (Rights of Nationality), Article 38 (The Right to Vote and be Elected) , Article 39 (Rights of Nations, Nationalities and Peoples), Article 40 (The Right to Property), Article 41 (Economic, Social and Cultural Rights) and Article 43 (The Right to Development) are provided for Ethiopian Citizens, the Nations, Nationalities and Peoples of Ethiopia.

[42] Akhil Reed Amar (1998/99), 'Constitutional Redundancies and Clarifying Clauses, Seegers Lecture', *Valparaiso University Law Review*, p. 2.

of its bill of rights.[43] These principles would require that we reject a reading of sub-Article 7 that will validate all limitations of freedom of expression prescribed by law.[44] Therefore, sub-Article 7 should be seen as complementing sub-Article 6 and reiterating that so long as a limitation of freedom of expression is based on a law that meets the requirements of sub-Article 6, it would be considered legitimate. Such understanding will make sub-Article 6 the central article that needs to be analyzed in discussing the legitimate grounds for limiting freedom of expression.

Sub-Article 6 has three clauses. The first clause provides what kinds of limitations of freedom of expression are impermissible in addition to stating that limitations of freedom of expression can only be made through law. It provides that limitations on account of the *content* or *effect of the view point* expressed are not allowed. The first part of these prohibitions is a prohibition of "content based" limitation and seems to have been inspired by the US jurisprudence on "content based discrimination."[45] The second prohibition is a proscription of limitations on freedom of expression based on the "effect of the view point" of the expressed opinion. Its inspiration does not seem to be as obvious as that of the first prohibition. But one might contend that it is also inspired by US free speech jurisprudence on 'view point discrimination'.[46] This contention is fraught with troubles since the *effect* of a viewpoint is something different from the *viewpoint* itself. Hence, one could still argue that the U.S free speech jurisprudence prohibiting restrictions on speech based on the viewpoint reflected

[43] Article 13(3) of the FDRE Constitution and Article 19(3)of the ICCPR

[44] See in general Nihal Jayawickrama (2002), The Judicial Application of Human Rights Law*; National, Regional and International Jurisprudence*, (Cambridge University Press), pp 182-202 for a concise discussion of the principles of limitation of rights as developed by various international, regional and national human rights tribunals and courts. In addition to being prescribed by law, limitations of right must be necessary in a democratic society to advance the general welfare or the rights and freedoms of others, public health, public moral, safety, order or national security in order to be considered legitimate.

[45] See Keith Werhan (2004), *Freedom of Speech: A Reference Guide to the United States Constitution*, (Praeger Publishers), pp. 73-74 for a concise introduction of the US free speech doctrine regarding content based restrictions. See also *The_Oxford Companion to the Supreme Court of the United States*, Editors, Kermit L. Hall, James W. Ely, Jr., Joel B. Grossman, (2005), Second Edition, (Oxford University Press) p. 949.

[46] See R. A. V. v. City of St. Paul, 505 U.S. 377 (1992) in which the US Supreme Court held that a restriction of speech based on the view point expressed as opposed to being based exclusively on the proscribe-able nature of the speech is not valid.

in the speech is different from the prohibition of limiting freedom of expression based on the effect of the viewpoint of the speaker.

Naturally, questions might arise in relation to these impermissible grounds of limitation as stipulated under sub-Article 6. As far as content based limitation is concerned, one could ask if it is an absolute prohibition that would proscribe even limitations that are aimed at limiting the dissemination of materials with obscene content. Fortunately the answer for this query is quite obvious. Given that protecting the well-being of the youth is provided as an acceptable ground for limiting freedom of expression in the next clause of the same sub-article[47] and also taking into account the experience of other jurisdictions on the matter, one can safely assert that in relation to expression which contains obscenity, an exception can be made to limit freedom of expression on account of the obscene content.[48]

In addition to speech with obscene content, a question might arise as to the permissibility of limiting freedom of expression on account of its defamatory, profane or blasphemous content. Article 29(6) stipulates that preserving the honor and reputation of others is an acceptable ground for limiting freedom of expression. Hence as far as defamatory content of speech is concerned, the question could be answered by relying on the stipulations of Article 29(6).[49]

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[47] See FDRE Constitution Article 29(6), Second sentence.

[48] See *Miller v. California, 413 U.S. 15 (1973)* in which the US Supreme court has ruled that obscene speech falls outside the protection of the First Amendment. The Free Speech Jurisprudence of the US is of obvious relevance in relation to the question dealt with above since there is a striking similarity between the terms used to proscribe certain forms of restrictions on freedom of expression under Article 29(6) of the FDRE Constitution and the free speech jurisprudence of the US Supreme Court. See also the *Handyside v. United Kingdom (5493/72,* a case decided by the European Court of Human Rights in which the Court has affirmed that protection of morals is a legitimate ground for limiting freedom of expression.

[49] This assertion might not be entirely accurate when one takes in to account the fact that despite the general agreement that the need to protect the honor and reputation of others is a valid ground for restricting freedom of expression, there is an equally well established view to the effect that when an expression or communicative act pertains to public officials and figures or matters of public interest there should be a greater tolerance of freedom of expression even at the expense of the individuals whose honor and reputation might be tarnished by the expression. See , *New York Times Co. v. Sullivan, Supreme Court (United States).376 U.S. 254 (1964);* see also *Fred Khumalo and others v Bantubonke Harrington Holomisa*, Constitutional Court of South Africa, Case CCT 53/01, See also Yonas Birmeta (2008), 'Freedom of Expression and Crimes against Honor Under Ethiopian Law: An assessment of their Compatibility', *The Constitutional Protection of Human Rights in Ethiopia:*

However, the question relating to profane or blasphemous content, particularly, whether or not such content justifies limiting freedom of expression can not readily be answered by simply referring to Article 29(6).

Comparative and international experience on the matter is divided. In *Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952),* the US Supreme Court has held that restrictions on 'blasphemous' speech is unconstitutional. Contrary to this, the European Court of Human Rights had upheld restrictions on blasphemous speech and expression of opinion by asserting that the freedom of religion requires such restrictions.[50] A Court in South Africa has also upheld restrictions on expression of sacrilegious views asserting that such restriction is required by the right to dignity of the believers.[51] Which approach to the issue best fits the letter and spirit of the FDRE Constitution and the needs of our society is an open-ended question.

The prohibition of restrictions on speech based on the *effect of the viewpoint expressed* is also another delicate question that arises in relation to Article 29(6). Does it mean that freedom of expression cannot be limited even when the view expressed by the speaker has the effect of unleashing ethnic or religious conflict and violence? Answering this question either in the affirmative or negative without any qualification would be dangerous. If we simply say 'yes' it would mean that we are sanctioning violence, death and chaos for the sake of protecting free speech. If we simply say 'no', we might accord constitutional validity to drastic and disproportionate limitations of freedom of expression by the sate regardless of how remote and unlikely the danger of violence is. There is also the risk of silencing critiques in the guise of limiting freedom of expression in the interest of public order.

The best way to deal with this dilemma would be to accept that the impermissibility of effect-based limitation has some exceptions. These exceptions to the rule will permit effect based limitation in relation to expression or speech having some predetermined effects. Common sense and the experience of even the most liberal jurisdictions support this view.[52] In the

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Challenges and Prospects, Ethiopian Human Rights Law Series Vol. 2, AAU Law Faculty, (AAU Printing Press), Girmachew Alemu & Sisay Alemahu(eds).

[50] *I.A. v. Turkey, Application no. 42571/98 of 13 September 2005.*

[51] *Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd and others*, a case before the High Court of South Africa (Witwatersrand Local Division).

[52] The position of the US Supreme Court in relation to fighting words is a case in point. See *Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942)* in which the US Supreme court held that fighting words or words that are likely to provoke the

Ethiopian context, the candidates for such exceptional treatment will be speeches or expressions that have the effect of causing ethnic or religious strife. Narrowly designing such limitation is important to make sure that the exception will not swallow the rule.[53]

However, the requirement as to the proximity and probability of the threat before a limitation could be legitimately imposed cannot in the Ethiopian context be set as high as the US Supreme Court's *Brandenburg* "incitement of imminent lawless action" standard.[54] Granting the legislature some latitude on such matters might be quite advisable. So long as the legislation in place is genuinely designed and applied in a reasonable fashion and out of good faith to limit the expression of opinions that could cause ethnic or religious strife, limitations on freedom of expression should be considered acceptable.

Once again it is important to remember that such effect based limitation is an exception that has been read into the constitutional text and should be strictly construed as an exception. Specially, care should be taken to make sure that expressions of opinions that are unpalatable for the powers to be are not stifled through this exception. The view to be expressed must be such that there is *a reasonable and demonstrable likelihood* for it to cause religious or ethnic violence *in the foreseeable future* for it to be legitimately limited. Any legislation or its application that is not designed to restrict speech that poses such a danger should be considered unconstitutional. This exception to the prohibition of effect based restriction should include speech that is likely to

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average person to retaliation, and thereby cause a breach of the peace are beyond the scope of protection of the law.

[53] See *Attorney-General v Dow* (2001) AHRLR 99 (BwCA 1992); to see the applicability of the rule that limitations of human rights should be construed narrowly.

[54] See *Brandenburg v. Ohio, 395 U.S. 444 (1969). In this case,* the US Supreme Court set the "incitement of imminent lawless action" test that should be employed in determining whether or not a speech is sufficiently inflammatory to justify restriction. The Court in this decision abandoned its earlier '*clear and present danger*' test. According to this new standard unless a speech, which is otherwise permissible (i.e. which is not illegal on account of being defamatory or obscene) cannot be forbidden unless it amounts to an incitement of imminent lawless action. Such a standard will be ill-suited in the Ethiopian context because of our ethnic and religious diversity which at times are sources of tension. One can easily imagine how any offensive remark about a certain religious or ethnic group, even if it does not qualify as an incitement to imminent lawless action, could easily result in violent conflict in our context.

provoke violence from collectivities like religious or ethnic groups, or that would trigger a violent reaction from a reasonable average individual. [55]

This approach that does not correspond with the 'clear and present danger' test or the 'incitement of imminent lawless action' test of the US Supreme Court[56] seems best suited for the Ethiopian context. The 'clear and present danger' test if taken quite literally, or the 'incitement of imminent lawless action' test as it is seems to be ill-suited in the Ethiopian context for two reasons. The first reason is the fact that the 'incitement of imminent lawless action' test is too exacting a standard to adopt in a country like Ethiopia. This is because according protection to speech that is not an incitement to imminent ethnic or religious violence but which still is an advocacy for such violence should not be tolerated. Obviously, tolerating such a speech will be a gravely irresponsible act. Making a distinction between advocacy and incitement seems to be playing with fire in light of the current reality of Ethiopia. Furthermore, the clear and present danger test with its convoluted history and excess baggage is clearly not advisable to be adopted in Ethiopia.

So far we have seen the clauses that provide the grounds which the FDRE Constitution has specifically singled out as being impermissible grounds of limiting freedom of expression. We have also tried to see what exceptions must reasonably be read into these clauses in light of the experience of other jurisdictions and the Ethiopian reality. However, limiting only, speech that could cause ethnic and religious violence does not seem to be reasonable. After all, there are other possible effects of speech that would justify limiting freedom of expression even in a democratic society. As far as these are concerned, the remaining two sentences or clauses of sub-Article 6 could give us a partial answer. The second clause provides that freedom of expression may be limited to protect the well-being of the youth and the honor and reputation of individuals. The third clause provides that any propaganda of war and the public expression of opinion intended to injure human dignity shall be prohibited by law. Hence, from these clauses it is clear that certain types of speech could be

[55] See *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942) in which the US Supreme court held that fighting words or words that are likely to provoke the average person to retaliation, and thereby cause a breach of the peace are beyond the scope of protection of the law.

[56] The South African functional equivalent of this test is the "reasonable and justified" test. According to this standard that emanates from Article 36(1) of the South African Constitution, to conclude that a limitation of freedom of expression is justified, it must be a reasonable and justified limitation of the right to freedom of expression in an open and democratic society. See for example the *South African National Defence Union v Minister of Defence*, South African Constitutional Court CCT 22/98.

or should be limited based on the effect they might have and also based on the intention of the speaker.

The third clause of sub-Article 6 imposes an obligation on the legislature to enact laws that prohibit propaganda of war and also speech that is intended to injure human dignity. These could be taken as exceptions to the effect and content based limitation prohibition of the first clause. On the other hand, the second clause gives the legislature permission to enact laws that would protect the well being of the youth and the honor and reputation of individuals. This difference between giving permission in relation to the well being of the youth and imposing a duty in relation to propaganda of war and human dignity, could have been intended to reflect the importance attached to human dignity and peace by the framers of the Constitution. When one takes into account the horrors of civil war and various atrocities that were in the background of the constitution making process, this is quite understandable. So, from the second and the third provisions, the need to outlaw propaganda of war, and the protection of the well being of the youth, and the honor and reputation of individuals emerge as legitimate grounds of limiting freedom of expression on account of its effect. Hence, these constitute additional exceptions to the prohibition of effect and content based limitations that are imposed as a principle in the first clause of sub-Article 6.

To recap the discussion so far, sub-Article 6 of Article 29 has three clauses. The first one requires limitations on freedom of expression through laws that are not based on account of the effect or content of the law. This principle is supposed to guide all limitations on freedom of expression. The second clause *permits* limitations on freedom of expression for the sake of protecting the well-being of the youth and the honor and reputation of individuals while the third clause *requires* limitations to proscribe propaganda of war and protect human dignity. In addition to these four grounds of limiting freedom of expression, we have also read into the Constitution the prevention of ethnic and religious conflicts as a legitimate ground of limiting freedom of expression.

The discussion in relation to speech or publications that could have the effect of causing ethnic and religious conflict shows that reasonably and out of necessity the list of grounds for limiting freedom of expression, expressly mentioned in the Constitution cannot be taken as an exhaustive list. Though the list might appear to be exhaustive, it leaves out some grounds of limitation that are usually considered as legitimate grounds of limiting free speech such as national security[57] and the need to uphold the integrity of the judicial process

[57] See New York Times Co. v. United States, 403 U.S. 713 (1971) and *The Observer and The Guardian v. United Kingdom* ("The Spycatcher Case") European Court of Human Rights 216 Eur. Ct. H.R. (ser. A) (1991), See also *The Johannesburg*

and the fair trial rights of individuals.[58] This implies that the list cannot reasonably be taken as exhaustive. The danger of this implication is that it seems to invite additions of other "reasonable" grounds of limitation which might at the end of the day result in a very long list that would jeopardize freedom of expression.

Therefore, when introducing or acknowledging any new ground of limitation as constituting a legitimate ground of limiting free speech, extraordinary care should be taken. For instance, any such ground should be aimed at the protection of the fundamental rights of others like the right to a fair trial or it should be aimed at protecting a compelling state interest like national security. Furthermore, such new grounds to be read into the text by way of interpretation should be grounds of limiting freedom of expression recognized in established democracies or international human rights instruments Ethiopia has ratified.[59] Given that the Constitution, in principle, precludes limitation of freedom of expression based on the content or effect of the opinion being expressed, it should always be remembered that any ground of limitation is an exception and that such ground should be read very narrowly both in its introduction and construction.

3.3- Quantum of Limitations

Once we have a fair idea of what constitute legitimate grounds of limiting freedom of expression, then the next question would be to what extent could the state go in limiting the rights based on these grounds. How far can the state go in protecting human dignity, individual honor and reputation or the integrity of the judicial process? There are some points that are worth noting in relation to this. First, we might end up in a situation in which excessive limitations based

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Principles on National Security, Freedom of Expression and Access to Information, available at <http://www.article19.org/pdfs/standards/joburgprinciples.pdf>, last viewed on January 15, 2010, These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by Article 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. These Principles have been endorsed by Mr. Abid Hussein, the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission on Human Rights, and referred to by the Commission in its annual resolutions on freedom of expression every year since 1996.

[58] See *Branzburg v. Hayes , 408 U.S. 665 (1972) and Gannett Co. v. DePasqual443 U.S. 368 (1979) and State v Mamabolo* CCT 44/00, *MidiTelevison v Director of Public Prosecution* Case No. 100/06.

[59] See Article 13(2) of the FDRE Constitution.

on legitimate grounds would severely undermine freedom of expression (even when there is a legitimate ground for limiting freedom of expression), unless some restrictions are set on the extent to which the state can limit freedom of expression. Therefore, some form of limitation on the limitations themselves is necessary.[60]

The text of the Constitution already sets a limitation on the form which the limitations can take. It provides that the limitations have to be made through law, and this rules out limitations that are not prescribed by the law even if they are based on a legitimate ground. Other than this formal requirement, the text of the Constitution does not provide any substantial restriction on limitations to be imposed on freedom of expression based on legitimate grounds. Hence, adopting some substantive restrictions on the limitations that could be set by the state on freedom of expression is necessary. That is why, in most democratic countries, the proportionality test/analysis (which requires that any limitation imposed on a right be proportionate to the legitimate aim being perused) is employed to distinguish acceptable and unacceptable limitations on human rights.[61]

There are also some other considerations that need to be taken into account, especially in relation to the purposes and nature of freedom of expression and also the specific Ethiopian context. It is very difficult to ascribe one single overriding purpose or function to freedom of expression. One cannot fail to acknowledge that debate on issues of public concern, facilitating self governance and the democratic process are some of the most important functions of freedom of expression.[62] In addition to these, freedom of expression seems to be of such a 'fragile' nature that limitations upon it could have an unintended "chilling effect" unless care is taken in designing and implementing laws limiting the freedom.[63] Particularly, in the Ethiopian context there is a need for being highly conscious of the nature and function of freedom of expression.

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[60] See the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984). Available at <http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/siracusa.html>, last viewed on January 15, 2010.

[61] Andrew Clapham (2007), *Human Rights: A Very Short Introduction*, (Oxford University Press) , p.99.

[62] See Article 29 (4) which provides that "…the fee flow of information, ideas and opinions …are essential to the functioning of a democratic order…" See also Meiklejohn (1961), *Supra note* 7.

[63] See Frederick Schauer (1978), 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect', *Boston University Law Review*, 58.

The political culture of Ethiopia is very intolerant of dissent and criticism in public.[64] A challenge or criticism of decisions (or policies), or questioning the competence of those in power had been considered as a rebellion and treason. This makes freedom of expression very fragile in Ethiopia and will also make the potential chilling effect of limitations on the freedom more pronounced. Hence, it's important to make sure that limitations, even those based on legitimate grounds will be carefully scrutinized when they relate to expression of opinions related with political matters. Such scrutiny must preclude the stifling of dissent while protecting the honor and reputation of individuals, national security and the like. Furthermore, given that it has the function of aiding self governance and facilitating the democratic process, a careful and critical scrutiny of the magnitude of restrictions on freedom of expression is crucial to protect people from various forms of interference and pressure in the exercise of their rights.

4. The State of the Freedom of Expression Jurisprudence in Ethiopia

The questions raised in the preceding sections are not simply of academic interest. The experience of the various jurisdictions that have been cited show that the questions are practical and require judicial answers, in addition to which academic discourse can have a significant contribution. These important questions do not have authoritative answers within our legal system. The present author has given some tentative answers as to how these questions should be addressed within our constitutional system. But these are tentative answers and there is hardly a body of case law or authoritative doctrinal writing that could be used to confirm or repudiate the answers provided above.[65] Neither the House of Federation (the body entrusted with the ultimate authority of interpreting the Constitution) nor the ordinary judiciary has developed settled and specific standards, tests and principles that could be used in resolving cases arising in

[64] *See infra* note 75.

[65] Of course, there is an impressive body of legislation (if not in terms of quality, at least in terms of volume) relating to freedom expression (See the "Freedom of the Mass Media and Access to Information Proclamation No. 590/2008" and the "Broadcasting Service Proclamation No.533/2007". Hence, one could argue that this corpus of legislation should be taken as part of an Ethiopian freedom of expression jurisprudence. However, such argument with all its merit is not convincing since the questions that arose in the previous section (Section 3), cannot be answered by referring only to the legislations in question. While conceding that these statues are important and could form part of an Ethiopian free speech jurisprudence, they will be quite inadequate by themselves.

relation to freedom of expression. In fact, the former has not yet rendered a constitutional interpretation that directly involves freedom of expression and so far it has not given any decision that would shed light on its position as far as Article 29 is concerned.[66] Furthermore, the ordinary courts which routinely entertain criminal and civil cases that have a direct bearing on freedom of expression have hardly addressed the questions raised above.

The author of this article will discuss the following few cases to illustrate the manner in which the ordinary courts have handled cases pertaining to freedom of expression without sufficiently taking into account the implications of Article 29.

In *Public Prosecutor v Asrat W.* (Cr. F.N 74910), the defendant was charged for failing to comply with Article 10(1), (2) (a) and 20 of the Press Proclamation No. 34/1992[67] and also Article 34(1) (a) of the Criminal Code.[68] The charges

[66] See *Journal of Constitutional Decisions* (Hamle 2000), Vol.1., Number 1, (House of Federations) in Amharic

[67] A Proclamation to Provide for the Freedom of the Press, Proclamation No. 34/1992. Article 10 of this Proclamation provides for the duty of the press to ensure the lawfulness of the contents of press products as follows; "(1) Every press has the duty to ensure that any press product it circulates is free from any content that can give rise to criminal and civil liability. (2) Without prejudice to the generality of sub-article 1 of this Article, any press shall have the duty to ensure that any press product it issues or circulates is free from: a. any criminal offence against the safety of the State or of the administration established in accordance with the Charter or of the national defence force; b. any defamation or false accusation against any individual nation/nationality, people or organization; c. any criminal instigation of one nationality against another or incitement of conflict between peoples; and d. any agitation for war. (3) Responsibility for carrying out the duties specified under sub-articles 1 and 2 of this Article shall lie as follows: a. in the case of a periodical press such as a newspaper, magazine or journal, on the concerned editor, journalists or publisher; b. in the case of press other than those specified under this sub-article 3(a), on the publisher; c. in the case any press product disseminated by radio or television, on the concerned journalist and program editor."

Article 20(1) of the same proclamation provides that;"Where any press is found to have failed to carry out its duties under sub-articles 1 and 2 of Article 10 of this Proclamation, the person liable pursuant to sub-article 3 of Article 10 shall, without prejudice to the liabilities and penalties under the Penal Code, be punishable with imprisonment for not less than one (1) year and not more than three (3) years or with a fine of not less than Birr ten thousand (Birr 10,000) and not more than fifty thousand (Birr 50,000) or with both such imprisonment and fine. "

[68] Article 34(1)(a) provides for ' Liability for Crimes Committed through the Mass Media' by stipulating that ' (1) Criminal liability for crimes committed through

arose in connection with a report published in a newspaper called *Seifenebelbal*. The report in question alleged that two individuals who were suspected of being OLF members and who were detained in secret prisons had died and their bodies had been thrown away in a certain locality in Addis Ababa. The accused argued that his newspaper has merely reported what was reported on the Voice of America Radio. The Court reasoned that, the accused as the editor-in-chief of the newspaper which carried this news had the ultimate duty to ensure the lawfulness of the content of whatever was published in the newspaper and particularly, he had the duty of taking into account the implications and potential effects of what was being published for the security of the state. Accordingly, the Court convicted the accused and sentenced him to one year of imprisonment.

It is interesting to note that the Court did not bother to ascertain what the exact criminal offense against the safety of the State or of the government or of the national defense force is? and whether all the factual elements of this offense have been fulfilled? Nor did the Court elaborate on the duty of the press to be conscious of the effects of what is being published on the security of the state. Particularly, the court did not raise any questions or shed any light as to the implications and compatibility of such a duty, i.e. the duty of newspapers and other publications to be mindful of their effects in line with the constitutionally guaranteed freedom of expression.

In the case of *Public Prosecutor v Takele K. and Daniel G.* (Cr. F.N 72175), the accused was charged with the violation of Article 10(1), 10 (2)(b) and 20(1) of the Press Proclamation No. 34/1992. The circumstances that constituted the factual ground for the charge relate to a report published on a newspaper called *Zarenew.* In this report it was alleged that a certain minister had asserted in a meeting that [measures] should be taken not only against members of the OLF armed forces but also all Oromos reflecting the organization's views. The defendant did not try to challenge either the factual or legal arguments presented against him, rather he informed the Court that he was only the nominal editor-in-chief and he was not involved in any capacity in the work of the news paper.[69] Accordingly, the Court convicted the accused although it suspended the sentence.

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periodicals shall be as follows: (a) a person who was registered as editor in chief or deputy editor when the periodical was published shall be liable…'

[69] Trying to avoid the not so infrequent arrest and charges brought against them, actual editor in chiefs of privately owned newspapers used to hire a nominal editor-in-chief (an editor-in-chief in title or name only) who will take the fall for them whenever charges are pressed in relation with what is published in the newspaper. The New

Once again, the Court did not raise any questions as to the compatibility of freedom of expression as embodied in the Constitution and restricting freedom of expression on a matter of public interest. The Court did not inquire if imposing a duty on reporters to guarantee complete factual accuracy of all their reports, a strict liability of sorts without any qualification and excuse, is in conformity with the letter and spirit of the Constitution. Obviously, if a member of the cabinet had expressed the sort of opinion that the minister in question was allegedly said to have expressed, then it is something news-worthy and deserving public debate. Naturally the public has an interest in being informed of and subjecting to scrutiny the opinions held by public official on matters of public interest. So the court should have inquired as to who should bear the burden of proving the falsity or truthfulness of the reported statement? In light of the public interest to be kept informed on matters of public interest by the press, should the press bear the heavy burden of guaranteeing the truthfulness of everything that they publish? What should happen if a press outlet publishes something that is not true under a mistaken assumption that what is being published is true after engaging in a reasonable, however unfruitful, effort to verify the veracity of the publication? All these questions were germane to the case at hand and crucial in developing a jurisprudence of freedom of expression. These questions were not raised by the court at all.

In *Public Prosecutor v Mesfin N.* (Cr.F.N 71556), the defendant was accused of violating Article 10(1), 10 (2)(b) and 20(1) of the Press Proclamation No. 34/1992. The public prosecutor alleged that the accused had intentionally defamed the private complainants in the case. The Court acquitted the defendant since he was able to show to the satisfaction of the court the truthfulness of the report in question through documentary evidence. Once again no flags were raised to interrogate the legal basis for the criminal charge in light of the Constitution. To some extent, the questions that were raised in the previous paragraph as being germane for *Public Prosecutor v Takele K. and Daniel G.* (Cr. F.N 72175) are also relevant in this case.

In *Public Prosecutor v Ibrahim M.* (Cr.F.N 71562), the public prosecutor's charge invoked Article 10(1), (2) (c) and 20(1) of the Press Proclamation No. 34/1992. The charges arose as a result of an opinion published in a religious newspaper called *Islamia*, the editor-in-chief of which was the accused. The article that was published in the newspaper accused the Minster of Education of harboring hatred against Ethiopian muslims and deliberately attempting to deny them their constitutionally guaranteed rights. These accusations were made in a rather colorful language and very strong words. The accused argued that the

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Criminal Code has provisions intended to put an end to this practice. See Article 43(1) (c) of the Criminal Code of the Federal Democratic Republic of Ethiopia.

prosecutor has not proved the falsity of what was asserted in the piece published by the newspaper. The accused further argued that he should not be found guilty since the author of the piece in question was exercising his freedom of expression when he wrote the article in question.

As opposed to all the cases discussed above, the judge engaged in an analysis of freedom of expression under the FDRE Constitution. She asserted that although freedom of expression is enshrined under Article 29 of the FDRE Constitution, the right is not an absolute right. She went on to point out that there are certain circumstances under which the right could be limited according to Article 29(6) of the FDRE Constitution. The judge went further and asserted, and with all due respect erroneously, that the content and effect of a viewpoint are stipulated as legitimate grounds for the limitation of freedom of expression under Article 29(6) of the FDRE Constitution. However, as it has been discussed above, this is clearly the exact opposite of what the Constitution provides. To say the least, the judge misread Article 29(6) of the Constitution and concluded that it allows what it explicitly prohibits. As astonishing as this might be, Article 29(6) was construed as having a meaning that is diametrically opposed to its plain meaning.

While these cases cannot be said to be sufficiently large enough to draw definite conclusions regarding the state of jurisprudence of freedom of expression in Ethiopia, they can shed some light on the situation and enable us to make some inferences. The first thing one can note in relation to the above cases is that, in most of the cases, the courts went on and applied the statutory provisions invoked by the public prosecutor without any attempt to attenuate the concerns that might arise in connection with the adverse implications of these provisions for freedom of expression and the press. With the exception of one case in which the defendant invoked freedom of expression as a defense,[70] in all other cases, freedom of expression and the concerns attendant to it in relation to press crimes were not given any consideration in the decisions of the courts. Even in the case where freedom of expression was given consideration in the disposition of the case, its consideration obviously left a lot to be desired. To start with, the Court read the prohibition set down by the Constitution as permission and accordingly concluded that what are provided as illegitimate grounds for limiting freedom of expression are legitimate grounds of limiting the freedom.

Therefore, in all the above cases, one cannot see the courts inquiring whether or not the interest being advanced by the statutes that were invoked by the public prosecutor are interests that could be taken as legitimate grounds for

[70] *Public Prosecutor v Ibrahim M.* (Cr.F.N 71562).

limiting freedom of expression in accordance with Article 29(6) of the Constitution. In the absence of such inquiry, it is no surprise that the courts have not proceeded to raise questions regarding the proportionality or the quantum of limitation. This is so because, reasonably, the judicial analysis of proportionality of limitations is always preceded by an inquiry as to the existence of legitimate grounds for limiting a right. Our courts seem to be oblivious to the need to inquire into the legitimacy of an objective meant to justify a limitation on freedom of expression; yet, one can hardly expect them to weigh the end to be served by a legislation with the intention of determining its proportionality with the degree or extent of limitation it imposes on freedom of expression.

Nevertheless, it should be noted that this observation is not being made out of ignorance of the fact that ordinary courts in Ethiopia have a limited role to play in interpreting the Constitution. However, even if we take the most conservative view on the matter, according to which the courts have no direct role in the enforcement of fundamental rights guaranteed by the Constitution, one cannot deny that ordinary courts can detect tensions that might exist between ordinary legislation and the Constitution and refer their queries to the House of Federation through the Council of Constitutional Inquiry.[71] Accordingly, even those who argue that ordinary courts are supposed to have a very passive role in enforcing fundamental freedoms will not deny the capacity and duty of courts to be sensitive to possible infringements of fundamental rights through ordinary statutes.

Despite this fact, the above cases show application of legislation without showing any regard to the apparent or real tension between the provisions being cited by a public prosecutor and the Constitution. For instance, in *Public Prosecutor v Ibrahim M.* (Cr.F.N 71562), the judge was clearly of the opinion that the legislation being relied upon by the prosecutor was one that imposed a limitation on freedom of expression based on the content of and effect of the viewpoint that is being expressed. Given that Article 29(6) of the Constitution rejects limitations on freedom of expression based on the content of and effect of the view point that is being expressed, the judge should have referred the matter to the Council of Constitutional Inquiry.

In light of this discussion, the most plausible conclusion is only one that underscores the dire state in which the jurisprudence of freedom of expression finds itself at the moment. Unfortunately, the judiciary, the Council of Constitutional Inquiry alongside the House of Federation, and the academia could not be said to have succeeded in giving meaning to Article 29 of the FDRE Constitution. The same could be said about many of the important

[71] Council of Constitutional Inquiry Proclamation *No.25012001,* Article 21 (1 &2).

provisions of the Constitution. But maintaining our focus on freedom of expression, we can observe the clear dearth of scholarly exposition and doctrinal writings that touch upon the questions raised in the preceding section of this article. Most unfortunately, the decisions of the ordinary courts and also that of the House of Federation and the Council of Constitutional Inquiry do not provide any consolation.

5. The Practical Implications of Our Jurisprudential Dearth in Freedom of Expression

The dearth, if not the virtual absence, of any case law and comprehensive doctrinal interpretation of freedom of expression that provide authoritative answers to the questions raised in Section 3 above is not to be lamented just because of the intellectual impoverishment that it indicates. This impoverishment has serious practical consequences that surpass the realm of juridical science. From a more practical point of view, this jurisprudential dearth means constant uncertainties as to what expressive conducts are protected and what is not protected under Article 29 of the FDRE Constitution. It also means lesser and weaker restraints on the state's ability to restrict freedom of expression. For the bearers of any civil and political right to fully enjoy their right, a strong guarantee of their right that seals off the core of the right from governmental interference is very crucial. Such strong guarantees can hardly be said to exist in the absence of a bright line that delineates the core of the protected sphere from the unprotected. The fact that we have not developed a meaningful freedom of expression jurisprudence in Ethiopia so far has meant that nobody can say for certain where this line is. This in turn makes freedom of expression more vulnerable to violation and it also has led to a situation where 'freedom of expression' has come closer to becoming a platitude rather than a concrete legal right.

As things stand today, like most provisions within the bill of rights of the FDRE Constitution, Article 29 appears to be a hazy and rosy assemblage of noble minded assertions the full potential of which has yet to be realized on the ground. A great deal of cynicism[72] surrounds these provisions of the Constitution because not so many seem to pay much attention to them except for the purpose of political rhetoric. They are not considered useful in resolving legal problems. Nor are they considered as giving rise to legally enforceable and tangible rights. Even in the circle of legal professionals, be it among

[72] Tsegaye Regassa (2009), 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia', *Mizan Law Review*, Vol.3, No.2. pp 305-306.

academics or practitioners, there is a view that human rights are a) the stuff of the naïve human rights activist who cannot be considered as a serious and hard nosed lawyer even if his professional training is in law; or, b) the stuff of the opportunist who is milking human rights for financial and political gain.

In the midst of all this skepticism that broods over freedom of expression and like liberties, the losers will be the bearers of these rights who are supposed to enjoy these fundamental rights. This loss might not be evident in material terms. However, the loss is immeasurable for those who believe that these freedoms originate from and are manifestations of the inherent worth and dignity of human beings.

Furthermore, the vulnerability of freedom of expression and its want of robust protection has obvious adverse implications for our democratic aspirations. The weak protection of freedom of expression inevitably and naturally results in an arrested democratic development. It stuns the emergence of a tolerant civic culture that prefers deliberation and dialogue over confrontation and violence. All these contribute to the persistence of violent conflicts and poverty in our society. The absence of public deliberation and discourse gives rise to many societal ills in every aspect of life.

6. The Causes Explored

When we inquire into the causes that might have resulted in the jurisprudential dearth we find ourselves in, many possible causes come to mind. One important cause that seems to have contributed significantly to the current dismal state of the jurisprudence of freedom of expression in Ethiopia seems to be the low threshold of tolerance that exist for political dissent and vocal critique in the country.[73] While the current government of Ethiopia has exhibited, relatively speaking, a greater deal of tolerance to political criticism and dissent compared with previous regimes, its level of tolerance still seems to fall short of what is provided under the FDRE Constitution.[74] The overwhelming dominance of the apparatus of power by one party means that the party's political imperative of prevailing over all opponents and critiques will lead to the suppression of freedom of expression.

[73] See *supra* note 17.

[74] See for example U.S Department of State, Bureau of Democracy, *Human Rights, and Labor 2008 Human Rights Reports: Ethiopia*, available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm> and last accessed on October 29, 2010.

Furthermore, the *dominant-state* political culture of the state, which is not entirely friendly to freedom of expression, also compounds the problem.[75] Even when a deliberate policy is not pursued towards silencing the most potent critiques and potential challengers, the deeply rooted culture of perceiving opposition as rebellion and equating dissent with treason does not provide the most favorable setting for the development of free speech jurisprudence. The dominant political culture is such that critique and dissent is to be manifested either in oblique double entendre or in outright rebellion in the battlefield.[76]

This cultural orientation, deeply embedded in the dominant Ethiopian political psyche naturally favors passive acceptance of any limitation on freedom of expression relying on the truism that the freedom is not an absolute one. Here it should be underscored that what is being indicted as intolerant of dissent is the *dominant-state political culture* in modern Ethiopia. This does not negate the fact that the existence of a democratic political culture among various Ethiopian ethnic groups. Unfortunately the *dominant-state political culture* in modern Ethiopia had been impervious to the inspiration and lessons that should have been drawn from the democratic practices and traditions of such groups.

In addition to the above factors, the uncertainty and confusion that bedevils the judiciary as to its role in the enforcement of fundamental rights enshrined in the Constitution is also another important factor that might have contributed to the current jurisprudential state of freedom of expression in Ethiopia.[77] In this confusion, a significant portion of members of the legal profession have come to believe that the Constitution is off limits as far as the judiciary is concerned and that constitutional provisions could not be invoked in ordinary courts. While there is no evidence that this is a view that is dominant or even widespread, the fact remains that the judiciary in Ethiopia is quite weary of being seen engaged in any exercise that could be construed as a usurpation of the House of Federation's power of constitutional interpretation. One can hardly overemphasize the extent to which the judiciary's reluctance to expound on

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[75] See Donald N. Levine (1965), *Wax and Gold: Tradition and Innovation in Ethiopian Culture*, (reprinted by Tsehai Publishers). See also, J. Abrink (2006), "Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia in and Its Aftermath", *Journal of African Affairs*, p.193, see also Sarah Vaughan and Kjetil Tronvoll (2003), "*The Culture of Power in Contemporary Ethiopian Political Life,"* (Sida Studies), pp.32-35.

[76] *Ibid.*

[77] See Yonatan Tesfaye, 'Whose Power is It Anyways: The Courts and Constitutional Interpretation in Ethiopia', *Journal of Ethiopian Law*, Vol. 22, No. 1 for a discussion of the debate regarding the proper role of courts in interpreting and enforcing the constitution.

constitutional rights , at least by mediating access to these rights through various international human rights treaties, is hindering the development of our own human rights jurisprudence.

Furthermore, another factor that might contribute to the rudimentary condition of the jurisprudence on freedom of expression in Ethiopia at the moment is the fact that members of the legal profession have very little familiarity with the rationale, content and scope of freedom of expression as a legal right.[78] Their stay in law school and their professional experience seems to have hardly offered most legal experts with a meaningful knowledge of the legal issues that arise in relation to freedom of expression.

Conclusions

In this article, we have raised some questions pertaining to freedom of expression under the FDRE Constitution. Alongside these questions, some tentative answers for the questions have been forwarded. At the same time, the author has tried to show through a discussion of some cases that these questions have yet to be answered in an authoritative manner. This in turn leads to a conclusion that there is a jurisprudential dearth in Ethiopia as far as freedom of expression is concerned. The author has also explored the practical implications and causes of this void.

It has been argued that the void in jurisprudence regarding freedom of expression has adverse implications for the enjoyment of the right, for the dignity of the bearers of the right and for the development of a democratic order and culture that could help us overcome many of the political and economic challenges we face as a society. Furthermore, the author has argued that the causes of the jurisprudential dearth could be the logic of political power, the undemocratic political culture of the Ethiopian polity, the limited constitutional role of courts in interpreting the Constitution and the low level of familiarity Ethiopian lawyers have with the intricate issues that arise in relation to freedom of expression. Hopefully, the situation will not remain so dire and will change for the better. Of course, this can happen only if those entrusted with the task of constitutional interpretation, the judiciary and the legal academia discharge the duty they owe to society. ■

[78] Hopefully, the inclusion of a course on media law in the new curriculum of legal education will address this problem. See the *JLSRI Syllabi Catalogue* (2008), Unpublished, p. 520.

FROM TENUOUS LEGAL ARGUMENTS TO SECURITIZATION AND BENEFIT SHARING:

HEGEMONIC OBSTINACY – THE STUMBLING BLOCK AGAINST RESOLUTION OF THE NILE WATERS QUESTION

Dereje Zeleke Mekonnen[♣]

Abstract

Resolution of the Nile waters question has proved, once again, to be an elusive task. Identifying the major hurdle which has bedeviled past cooperative initiatives and rendered current efforts mere Sisyphean ones is thus of paramount importance. The main thrust of this article is to identify this challenge which has thus far stifled almost all efforts at resolution of the Nile waters question in a fair and equitable manner. The consistently obstinate position Egypt has taken over the years to maintain its poignantly inequitable "share" of Nile waters forever is the heart of the problem which makes any settlement of the Nile waters question a virtual impossibility. Relying on its status as the basin's hydro-hegemon, Egypt has so far been able to not only defend the indefensible but has also been able to effectively hoodwink and contain the non-hegemonic riparians by engaging them in "cooperative initiatives" and a "benefit sharing" scheme it effectively is using as stalling tactics while aggressively pursuing giant hydraulic projects as instruments of resource capture. A real transformation and a breakthrough in this stalemate requires, of necessity, a change in the malign, oppressive nature of Egyptian hydro-hegemony into a benign, cooperative one, at least. The non-hegemonic riparian states have thus to adopt effective counter-hegemonic strategies in order to force Egypt back to the negotiation table, developing, in the mean time, the resource and technical capability that would enable them to resist and overcome the multifaceted pressure and influence the hydro-hegemon will inevitably exert to keep them in line; failure to do so would surely condemn them to live, ad infinitum, with the grotesquely inequitable *status quo.*

Key words:

Equitable utilization; Nile waters question; cooperative framework agreement; hydro-hegemony; securitization; benefit sharing; international water law.

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Introduction

Sharing trans-boundary resources in general and trans-boundary freshwater resources in particular is quite a difficult task. Found in the water-stressed hydrographic region of the Middle East and North Africa where "negative hegemonic configurations appear to predominate"[1] the Nile poses far more serious challenges to efforts aimed at sharing its waters in fairness and equity. The comparatively much smaller discharge which contrasts with its fame and majesty, the burgeoning population of the basin which has added a serious demographic challenge to the existing problems, the extremely poor and bellicose inter-riparian relationship and, more importantly, the prevalent hegemonic hydro-political configuration entrenched in the anachronistically lopsided treaty regime constituting the *status quo* make the just and equitable resolution of the Nile waters question a daunting task, if not an utter impossibility.

Ever since its official launch in February 1999, the Nile Basin Initiative (NBI) has been a source of much hope and optimism in a basin noted for aggressive competition, mutual suspicion and lack of rapprochement and, thus, long identified as a potential flashpoint, a future scene for a merciless water war.[2] In what may be considered a clean break from the past, the NBI managed to bring all Nile riparian countries together for the first time around a shared vision "to achieve sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water resources."[3] Realization of the lofty Shared Vision has been pursued primarily through the negotiation of a Cooperative Framework Agreement (CFA) which would provide the basin with a permanent legal and institutional framework

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[1] M. Zeitoun and J. Warner (2006), "Hydro-hegemony – a Framework for Analysis of Trans-boundary Water Conflicts", *Water Policy* (8) 435 – 460, at 439.

[2] J. Kerisel (2001), *The Nile and its Masters*: Past, *Present, Future* (A. A. Balkema, Rotterdam), p. xiv.

[3] NBI, *Shared Vision,* available at: <www.nilebasin.org>. In view of the extremely poor and dangerously bellicose nature of inter-riparian relations and the many other problems rife in the basin, one may understandably find the lofty Shared Vision too good to be true. The very adoption of the Vision has thus been dismissed rather as an act of supreme hypocrisy involving "the sweeping cooptation or invocation of seemingly progressive norms" by its authors – "officials representing governments that are internationally known for their repression of their peoples, gross violation of human rights and civil liberties, wanton corruption, and their limitless contempt for political dialogue and political pluralism." Okbazghi Yohannes (2008), *Water Resources and Inter-Riparian Relationships in the Nile Basin: The Search for an Integrative Discourse* (State University of New York Press, Albany), p. 25.

within which the benefits from the shared resource would be shared amongst all the riparians.

The result of this decade-long effort though has turned out to be a disappointing one as the much hoped for CFA has ultimately fallen prey to the hegemonic compliance producing mechanism of securitization creating, thereby, a hydro-political fault line between the seven upstream riparian countries and the two downstream ones.[4] The so-called benefit sharing approach still being pursued as an alternative solution to the Nile waters question is, it will be argued, yet another hegemonic ruse employed to hoodwink the other riparinas with a view to buying time for the basin hydro-hegemon to complete its giant resource capture projects. In terms of resolving the Nile waters question, it will be argued, benefit sharing offers nothing but a false hope and is thus doomed to failure. Having thus pointed out hegemonic obstinacy as the major stumbling block stifling efforts to resolve the intractable Nile waters question in a fair and equitable manner, the article points out the elements of an effective counter-hegemonic strategy which would help extricate Nile waters question out of the "water security/benefit sharing" morass and forge a realistic way forward to ensure the equitable and reasonable utilization of the waters in line with the precepts of international water law.

1. Background: The Hydro-Political and Legal Setting

River Nile possesses unique hydrological and hydro-political features which incessantly militate against the possibility for the equitable utilization of its much needed waters by all the riparians. The menacingly erratic nature of its flow, the fact of its being perceived for millennia as the veritable lifeline of Egypt and the attendant negative historical baggage and, above all, the grand British colonial design for the basin which brought into existence a malign hydro-hegemonic political configuration undergirt with a poignantly inequitable treaty regime have, in tandem, with the unfortunate post-colonial hydro-political reality of the basin which, save for a change of actors, is essentially a

[4] The Extraordinary Nile-COM meeting held on April 13, 2009 at Sharm el-Sheikh, Egypt was hoped to bring a breakthrough in the stalemated negotiations which would lead to the signing of the CFA and the launching of the Nile River Basin Commission. The meeting ended in failure as Egypt categorically refused to sign the agreement unless it is assured that its 55.5 billion cubic metre share of the Nile waters is maintained and a veto power over any new irrigation projects upstream is granted to it – a claim vehemently opposed by the upstream riparian countries: *Egypt News*, 14 April 2010, available at: <http://news.egypt.com/en/2010041410307/news/-egypt-news/nile-sharing-meeting-fails-egypt.html> (accessed on 19 April 2010).

continuation of the colonial era,[5] rendered resolution of the Nile waters question a hugely difficult task verging on the impossible.

Though not totally immune from the negative influence of the past which plagued previous cooperative initiatives to failure, the NBI indeed represents a milestone in the troubled history of inter-riparian relationship[6] and should thus be duly credited for the unprecedented breakthrough it has made in bringing all Nile riparians together under a lofty shared vision, and more importantly, for taking up, in unprecedented boldness, the sensitive issue of equitable reallocation of the Nile waters. The renewed hope and optimism the initiative had evoked has certainly made the last decade the most important epoch in the history of the basin. Whether this atmosphere of optimism, cooperation and positive rapport would survive the impact of the Sharm el-Sheikh fiasco and thrive once again is a tough question best answered by time.

The NBI has been pursuing the daunting task of resolving the Nile waters question through two strategies. The first and, arguably, by far the most important one is the negotiation and adoption of an inclusive Cooperative Framework Agreement (CFA) which would provide the basin with a permanent and equitable legal and institutional framework within which the benefits from the shared water resources of the basin would be distributed amongst all the riparians through a benefit sharing framework which, currently, is being worked out.

The much expected CFA has, however, been a colossal failure in terms of the objective it was designed to achieve – an inclusive, equitable and lasting legal and institutional framework governing the utilization of the Nile waters. The cause for the failure is, undoubtedly, the securitization of the issue in a bid both to perpetuate the inequitable *status quo* and contain the non-hegemonic riparians in an endless negotiation process giving them the false hope that they would, once the benefits sharing framework is complete and set in motion, receive their respective shares of the benefits from the Nile waters. It has now become abundantly clear that the Nile waters question has descended into a dead end exit from which seems to be unavailable unless the whole issue is taken back into the framework of international law from which it has been cunningly

[5] The obstructively unique hydrological, hydro-political and historical factors as well as the impact British colonial presence had on the prospect of equitable utilization and cooperative development of the Nile waters has been discussed at length in Dereje Z. Mekonnen (2010), "The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?", *European Journal of Int'l Law,* vol. 21 (2), May 2010, 421 – 440.

[6] *Ibid*., 423 – 427.

dislocated by the basin hydro-hegemon which, of course, took good advantage of the amateurish naiveté or sheer apathy of the other riparians.

That this is no cynical pessimism is evident from the simple fact that the entire annual flow of the Nile is allocated between Egypt and Sudan which consider their respective shares of 55.5 and 14.5 billion cubic metres as non-negotiable historic rights.[7] The Nile, in terms of its annual discharge, is a hydrologic dwarf, not "an inexhaustible manna from heaven."[8] The crux of the matter is, if "current uses" – a convenient euphemism for the entire flow – are said to be sacrosanct and non-negotiable, then logic dictates that the other riparians have no right to any consumptive use of the Nile waters, and the most they can make use of them would be hydropower generation in such a manner that does not diminish the flow.

In reality, what stands in the way of any breakthrough in the settlement of the Nile waters question is, therefore, what has always been there from time immemorial – the belief that Egypt "will have the right forever, *ad vitam aeternam,* to all of the water carried by the Nile, as at the time of the Pharaohs."[9] This apparently obscene claim though has been deceptively presented, over the years, under the veil of tenuous legal arguments and has, of late, picked up a much more sophisticated camouflage in the form of securitization and benefit sharing – two noted hegemonic compliance producing mechanisms currently at work in the Nile basin.

2. Tenuous Legal Arguments

The attempt to perpetuate the inequitable pattern of utilization of Nile waters is quite often made under a dubious factual basis and through tenuous legal arguments punctuated with occasional sabre-rattling. The crucial role the Nile has played in midwiving ancient Egyptian civilization which depended on the Nile floods for its very survival – a fact succinctly expressed in Herodotus'

[7] It is no secret that Egypt considers the 55.5 billion cubic metre share of the Nile waters it has granted itself under the 1959 agreement as its non-negotiable historic right. See, for instance, the uncompromising official Egyptian position demanding "an explicit approval by other signatories [of the CFA] of Egypt's historic right to 55.5 billion cubic metres of Nile water and … a veto over any projects implemented upstream." (Reem Leila, "Wading through the Politics", *Al-Ahram Weekly On*-line, 9 – 15 July 2009, Issue No. 955, available at: <www.weekly.ahram.org.eg/2009/955/eg2.htm>.

[8] Kerisel, *supra* note 2, p. 155.

[9] *Ibid.*, p. 139.

aphorism "Egypt is the gift of the Nile"[10] – provides, to-date, the historical and hydrographic backdrop for the claim of veritable ownership Egypt makes over 75 per cent of the river's annual flow.

Undeniably, Egypt depended, for millennia, on the Nile floods for its survival; it still depends on the Nile waters perhaps more than any other riparian does. The narrative which portrays the Nile waters as a veritable lifeblood even a slight reduction of which would bring mortal harm to Egypt though is a complete hoax, a total fabrication intended to bolster the untenable claim to endlessly perpetuate the poignantly inequitable utilization Egypt is making of the Nile waters. In fact, the myth of Egypt's mortal dependence on the Nile waters to an extent that would entail its virtual extinction in the event of a reduction or interruption of the flow has been effectively debunked in so powerful a manner that would render any attempt at paraphrasing it inappropriate; the fact of the matter is, thus:

> The assertion that 'Egypt is the Nile and the Nile is Egypt' entails two fallacies. Firstly, Egypt is not just the Nile, i.e. Egypt is not as dependent on the Nile as it used to be. The ancient Egyptian civilization was strongly associated with the development of Nile water resources and the Nile waters were the only 'internal' water resources. But this is no longer the case and the Egyptian economy is not as dependent on the Nile waters as in the past. The contribution of the agricultural sector in GDP, for example, moved from 20.1% in 1981 to 16.8% in 2006, while the proportion of the population involved in agriculture dropped from 55% in 1965 to its current figure of 31.5%. Furthermore, Egypt imports a significant proportion of its water in the form of virtual water 'trade' in food staples. However, 'Egypt continues to define its interests in the Nile much as it did in the 1950s, irrespective of the enormous changes since then in the Egyptian economy'. Egypt has been proportionately more dependent on the diversification of its economy than on its Nile waters in relation to the increase in its population (*in-text references omitted*).[11]

The second fallacy the assertion entails is the implied assumption that the Nile, inasmuch as it exists only for Egypt, it does exist entirely within Egypt as well. The truth, however, is that "the Nile is not just Egypt; [it] is an international basin shared by ten riparian states … [all of which] aspire to use a quota of [its]

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[10] While coining the aphoristic expression, Herodotus was referring not to the volume of water per se, but to the subsoil of the plain which the river brought with the annual floods (Kerisel, *supra* note 2, p. 36). Distorted through the years, the expression has now become a codeword for the mythical absolute dependence of Egypt on the waters of the Nile to such an extent that any reduction thereof would threaten the very survival of the country.

[11] Ana E. Cascao (2008), "Ethiopia – Challenges to Egyptian Hegemony in the Nile Basin", *Water Policy* 10 *Supplement* 2, p. 19.

water resources, although specific allocations are not yet defined."[12] Furthermore, dependence on a given trans-boundary watercourse of whatever degree is just one among the many factors to be taken into account while cutting a deal for the equitable and reasonable utilization of such resource,[13] not a title deed thereof. To assume that this fact is lost on the Egyptians would be a supremely naïve underestimation; to understand why they tenaciously cling to this narrative though is crucial to unravel the tenuous legal arguments they make in defense of the beleaguered *status quo*.

2.1. The 1929 Agreement and the Myth of its Continued Binding Force

Concluded on the 7th of May1929 in Cairo through the exchange of notes between the United Kingdom and Egypt, the Agreement on the Use of the Waters of the River Nile for Irrigation Purposes[14] is the bedrock on which the claim for the perpetuity of the iniquitous *status quo* is founded. Though profoundly inequitable even to Sudan itself in respect of the extremely lopsided

[12] *Ibid.*

[13] Article 6 of the 1997 UN Watercourses Convention lists out, non-exhaustively, the various factors to be taken into account while working out, a formula for the equitable and reasonable utilization of international watercourses within the meaning of article 5. The list includes: geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; the social and economic needs of the watercourse states concerned; the population dependent on the watercourse in each watercourse state; the effects of the use or uses of the watercourses in one watercourse state on other watercourse states; existing and potential uses of the watercourse; conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; and the availability of alternatives, of comparable value, to a particular planned or existing use. It is interesting to note that none of theses factors enjoys any inherent superiority and "In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole" (*ibid.,* sub-article 3). The only instance where a particular use might enjoy, in the event of a conflict between uses, a relative superiority is where that use pertains to "the requirements of vital human needs" (*ibid.,* article 10) which is strictly circumscribed to "sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation." (ILC, *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries thereto, Report of the ILC on the Work of its Forty-Sixth Session,* Doc. A/49/10, *Yearbook of International Law Commission* (1994), vol. 2, part 1, pp. 89 – 135, at 110.

[14] Text available at:< http://ocid.nacse.org/tfdd/tfdddocs/92ENG.pdf>.

22:1 ratio in which it allocated the Nile waters between Egypt and Sudan, the agreement, it is maintained still binds the former British colonies in the White Nile sub-basin – Kenya, Tanzania, Uganda – as the treaty was concluded by their common predecessor state of which they now are independent successor riparian states.

This tenuous argument though is devoid of any legal basis as it is rather based on a completely erroneous perception of the principles of international law governing the succession of states in respect of treaties. The argument for the continued binding force of the 1929 Agreement has its theoretical roots in the theory of Universal Succession which entails the compulsory transmission of all the rights and obligations of the predecessor state to its successors.[15] Accordingly, Kenya, Tanzania and Uganda are, as successor states, bound by the terms of the 1929 Agreement notwithstanding the demise of the British empire – their predecessor state. This proposition is, however, without any legal basis in international law which, in respect of newly independent states, rather applies the Clean Slate (*tabula rasa)* theory which relieves such states of any duty "to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the treaty was in force in respect of the territory to which the succession of state relates."[16] Accordingly, the successor state is regarded as original, and hence, deriving its authority from its own sovereignty, not from that of its predecessor.[17] Succession in such cases,

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[15] D. P. O'Connell (1967), *State Succession in Municipal Law and International Law,* vol. 1 (Cambridge University Press), pp. 9-14. The theory of Universal Succession was never fully applied in practice and had many variants such as the theory of Popular Continuity according to which the state is said to have two personalities – political and social – and only the former is affected by succession and hence obligations of a political character lapse with sovereignty while those of a patrimonial, social character remain unaffected; the theory of Organic Substitution which maintains that the state is no more than a "moral organism" the succession of which should be no different from that of any other social grouping or association, and hence, the successor state takes over all the rights and duties of its predecessor excluding only those that are essentially political; and the theory of Self-Abnegation which is based on the assumption that recognition is constitutive in international law and thus maintains that though the successor state is free to take over or reject rights and obligations of its predecessor, it is materially required, under the threat of non-recognition, to take over in the interest of realizing its own aims to permit only the least disturbance.

[16] Vienna Convention on Succession of States in Respect of Treaties (1978), Art. 16.

[17] Yilma Mekonnen, "State Succession in Africa: Selected Problems", 200 *Recueil de Cours international* (1986-V), pp. 107 – 108.

therefore, entails "discontinuity of all rights and obligations completely and automatically."[18]

The claim for the continued binding force of the 1929 Agreement is rendered far more tenuous by the historical fact that the newly independent riparian states allegedly bound by its terms did adopt a common position in respect of state succession commonly referred to as the Nyerere Doctrine.[19] Essentially in conformity with the Vienna Convention,[20] the doctrine totally repudiated the theory of Universal Succession which epitomized "an effort to minimize the disruptive effects of the liquidation of the colonial empires on vested economic interests of the colonial powers by binding the emerging states through some sort of legal gimmick."[21] The focus, thus, was to forge out a formula which would ensure the complete freedom of the new state from the colonial commitments the theory of Universal Succession would burden it with, and at the same time, making sure that there would be stability in the future international relations of the new state vis-à-vis the rest of the international community,[22] thereby forestalling the total disruption the adoption of the Clean-slate theory would entail. The independent riparian states of Kenya, Tanzania and Uganda have, through the adoption of the Nyerere Doctrine (also known as the Opting-in formula), rejected the theory of Universal Succession which

[18] *Ibid.,* p. 114.

[19] Named after the late President Julius Nyerere, the doctrine is a cogent reformulation of the Optional theory of succession prevalent then in state practice. Nyerere's prime concern was to make sure that a hard-won independence would not compromised by the continued weight of the colonial era legal reality without causing unmitigated disruption which would affect the stability of the country's future international relations. Nyerere's Opting-in formula thus declared that "Tanganyika shall not in the future be bound by pre-independence commitments which are no longer compatible with her new status and interests." (Nyerere's speech of 30 November 1961 before the National Assembly, excerpted in Yilma Mekonnen, *supra* note 17, p. 134).

[20] The Vienna Convention has established two distinct regimes on succession to treaties. In the normal case of succession not arising from decolonization, the governing principle is that of clean-slate as qualified and thus not applicable to boundary and other territorial regimes (arts. 11 and 12). With regards to newly independent states, however, the Convention has a separate part (Part III, arts. 16 – 30) and the optional theory is the governing theory.

[21] Yilma Mekonnen, *supra* note 17, p. 112.

[22] *Ibid*., p. 121

would entail the wholesale transmission of all the rights and obligations of the predecessor state and, with it, the 1929 Agreement.[23]

The claim is, furthermore, inherently self-contradictory as it is negated by the very nature of the treaty itself which, upon the conclusion of the 1959 Agreement, has also ceased to exist. The official Egyptian position regarding the 1929 Agreement was, contrary to the claim of its continued binding force, to rather consider it as a temporary arrangement put in place until the political future of Sudan would be determined.[24] It was, thus, only "a political armistice …, a practical working arrangement for the engineers to administer the Nile until the politicians could determine its destiny"[25] and was never meant, as Egypt has been unscrupulously claiming through the years, to bind the successor riparian states eight decades later and indefinitely beyond.

2.2. The 1959 Agreement: A further Blow to the Tenuous Claim

Signed on 8 November 1959 between Egypt and Sudan, the Agreement for the Full Utilization of the Nile Waters[26] represents a unique, "patently anomalous"[27] deal unparalleled in the history of international water treaties as it purports to allocate the entire annual flow of the Nile between the two downstream riparinas – Egypt and Sudan – thus leaving out all others, notably Ethiopia whence nearly

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[23] Tnganyika (now Tanzania) officially declared the 1929 Agreement not binding on it on 4 July 1964 in identical notes addressed to the governments of Britain, Egypt and Sudan; Uganda and Kenya did the same on similar grounds (C. O. Okidi (1980), "Legal and Policy Regime of Lake Victoria and Nile Basins", *Indian Journal of Int'l L,* vol. 20, p. 421; S. McCaffrey (2001), *The Law of International Watercourses, Non-Navigational Uses,* Oxford University Press, pp. 245 – 246).

[24] Dereje Z. Mekonnen, *supra* note 5, p. 433.

[25] Robert O. Collins, "In Search of the Nile Waters, 1900 – 2000", in H. Erlich and I. Gershoni (eds., 2000), *The Nile: Histories, Cultures and Myths* (Lynne Rienner publishers, London), p. 251. In fact, the 1929 Agreement was a political trade-off between the governments of Britain and Egypt; "[w]hen Egyptian nationalists, demanding the incorporation of Sudan into Egypt, murdered the British Governor-General of Sudan in 1924, the British responded by threatening unlimited Sudanese irrigation. Eventually, the British and Egyptian Governments agreed in 1929 on continued British control of Sudan with Sudan's water needs to be subordinated to Egypt's water needs." (J. Dellapenna, "The Nile as a Legal and Political Structure", in E. Brans *et al* (eds., 1997), *The Scarcity of Water: Emerging Legal and Policy Responses,* Kluwer Law Int'l, London, p. 125.

[26] Text available at: <http://ocid.nacse.org/tfdd/tfdddocs/230ENG.pdf>.

[27] Okidi, *supra* note 23, p. 429.

85 per cent of the flow comes.[28] Though it is the first ever treaty on the Nile waters concluded between two independent riparian states, it indeed is far worse, in substance, than all preceding colonial treaties as it sanctions a poignantly iniquitous allocation "contingent upon zero water use by upstream riparians."[29]

The central objective of the agreement was to fully control, through joint projects, and utilize the Nile waters which the 1929 Agreement had "provided only for the partial use … and did not extend to include a complete control of the River waters."[30] The agreement thus made possible the launching of Nile Control Projects which would significantly increase the flow of the river,[31] availing to the parties some 22 billion cubic metres of Nile waters. In allocating the entire annual flow to the parties, the agreement first reaffirmed the 48 and 4 billion cubic metres of water as the respective "acquired rights" of Egypt and Sudan[32] and the net benefit of 22 billion cubic metres, after a deduction of 10 billion cubic metres as a loss of over-year storage, was then divided between Egypt and Sudan which received 7.5 and 14.5 billion cubic metres, respectively.[33]

Despite the audacious grant of a right to the whole flow it has purportedly made to Egypt and Sudan, the 1959 Agreement has in fact significantly undermined the tenuous legal argument for the continued binding force of the 1929 Agreement the termination of which it has occasioned.[34] As Mageed has

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[28] The Ethiopian government of the day – the Imperial Ethiopian Government – commendably discharged its responsibility by making its concerns known, through an *aide memoir* circulated to the diplomatic missions in Cairo in 1957, over the country's exclusion from the negotiations and categorically reasserted the country's right to the waters of the Nile. Excerpt of the *memoir* is available in M. Whiteman, *Digest of International Law,* vol. 3 (Washington D.C.), pp. 1011 – 1012.

[29] J. Waterburry and D. Whittington (1998), "Playing Chicken on the Nile? The Implications of Micro-dam Development in the Ethiopian Highlands and Egypt's New Valley Project", *Natural Resources Forum,* vol. 22, p. 157.

[30] 1959 Agreement, preamble.

[31] Notable projects were the Sudd el Ali (Aswan High Dam) in Egypt and the Roseires in Sudan, Art. 2 (1) and (2).

[32] *Ibid.,* art. 1.

[33] *Ibid*., art. 2 (4).

[34] According to Art. 59 (1) (a) of the 1969 Vienna Convention on the Law of Treaties, "[a] treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and it appears from the later treaty or is

bluntly put it, "[a]s far as Egypt and the Sudan are concerned … the [1929] agreement is history, as it was superseded by the 1959 Agreement."[35] The pathetic claim that it "still binds the East African countries not to construct any works or modify the flow without consultation and agreement with the two downstream countries"[36] though is a logical fallacy of the highest order. If the agreement is admittedly history between the parties, that it, *a fortiori*, is so for the East African countries likewise cannot be lost on a sane mind.

Being a typical bilateral treaty indubitably subject to the *pacta tertiis nec nocent nec prosunt* rule of treaty law, the 1959 Agreement binds only Egypt and Sudan – its signatories.[37] The fact that the country from where nearly 85 per cent of the Nile flow comes – Ethiopia – is affected, legally, neither by the 1929 nor by the 1959 Agreements renders the tenuous arguments of little practical significance and the obstinate claim underpinned by the arguments, far more precarious. It was thus quite natural for the hydro-hegemon to tone down the obsolete and tenuous claims and shift to the more subtle hegemonic tactics which, with only a rhetorical commitment to equitable utilization as a concession, would provide it, in return, with more potent yet quite subtle instruments of coercion to stifle any breakthrough in the impasse and thus perpetuate the *status quo* without evoking the wrath or frustration of the non-hegemonic riparians.[38] Instead of relying on the use, for perpetuation of the

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otherwise established that the parties intended that the matter should be governed by that treaty".

[35] Yahia A. Mageed, "The Nile Basin: Lessons from the Past", in Asit K. Biswas (ed., 1994), *International Waters of the Middle East: From Euphrates-Tigris to Nile* (Oxford University press), p. 179.

[36] *Ibid*.

[37] This fundamental principle of treaty law is provided for under articles 34 and 35 of the 1969 Vienna Convention on the Law of Treaties.

[38] The apparently unprecedented positive transformation towards greater cooperation in the basin was, according to Brunnee & Toope, occasioned by "recognition of increasing resource limitations caused by population growth, environmental degradation, and the need to share water more widely; exploration of various modalities for cooperation that are not susceptible to hegemonic control; and understanding the changing normative framework that both renders past positions untenable and promotes positions that are more reflective of the basin states' collective concerns." (J. Brunnee and S. J. Toope, "The Changing Nile Basin Regime: Does Law Matter?", *Harvard Int'l Law Journal*, vol. 43 (1), pp. 143 – 144. In view of the unscrupulously stubborn and oppressively hegemonic positions of Egypt which has deadlocked any headways, one may legitimately conclude that the endorsement of the Shared Vision was only tactical, and the NBI was, like Undugu, a

status quo, of brute force and threats thereof, the basin's hydro-hegemon had to employ the far more subtle and cunning hegemonic mechanisms[39] to secure compliance by the other riparians with the beleaguered *status quo*.

3. Securitization and Benefit Sharing: Hegemonic Compliance Producing Mechanisms in Action

The patently iniquitous pattern of utilization of its waters, the comparatively smaller annual discharge, the extremely poor and bellicose nature of inter-riparian relationship, and the aggressive unilateralism and competition raging in the basin in the complete absence of an inclusive legal and institutional framework have led many observers to describe the Nile basin in apocalyptic terms as a hydro-political tinderbox prone to violent inter-state conflicts.[40] Defying all ominous predictions though, the basin witnessed an unprecedented

ploy to contain the non-hegemonic riparians and buy time for the malign hydro-hegemon to complete its giant resource capture projects.

[39] The framework of hydro-hegemony for the analysis of transboundary water conflicts was introduced by Zeitoun and Warner, *supra* note 1, pp. 435 – 460. The basic premise of the framework is the utilization by the hydro-hegemon of all the three dimensions of asymmetric power – structural, bargaining and ideational – it has to maximize its fluvial interests and maintain its hegemonic status to the detriment of the other co-riparians. Hence, the hydro-hegemon employs the water resource control strategies of *resource capture*, *containment* and *integration* and implements the same through the instrumentality of different compliance producing mechanisms to force its co-riparians to accept its preferred state of affairs. The compliance producing mechanisms at the disposal of the hydro-hegemon fall under four categories: (1) *Coercive compliance producing mechanisms* – which consist of military force, covert action and coercion-pressure (the threat of a military action, economic sanctions, political isolation, espionage and negative propaganda); (2) *Utilitarian compliance producing mechanisms* – which essentially are incentives for compliance with the hydro-hegemon's preferred state of affairs may take different forms such as trade benefits, diplomatic recognition and support, military protection, mutually beneficial shared-interest water projects, etc.; (3) *Normative compliance producing mechanisms,* i.e., treaties which, in effect, institutionalize the *status quo;* and (4) *Hegemonic compliance producing mechanisms* which encompass the mechanisms of securitization, knowledge construction and sanctioned discourse. The hydro-hegemon also makes use of such other coercive resources as international support, financial mobilization and the manipulation of time as may be appropriate.

[40] See Kerisel, *supra* note 2, p. 164 describing the Nile basin as one "doomed to be the hapless cause of future wars", whereas Okbazghi Yohannes, *supra* note 3, p. 1 describes it as being among "the ten flashpoints in contemporary international relations."

transformation in inter-riparian relations attended with heightened hope and optimism occasioned by the launching of the NBI.

In contrast to the long-established pattern of inter-riparian relationship the distinctive features of which had been bilateralism and focus on fringe technical issues with consistent eschewal of the crucial issue of equitable allocation,[41] the NBI represents a significant departure both in its inclusiveness and resolve to deal with the hitherto sidelined sensitive issue of equitable allocation. The NBI thus understandably kindled a rare light of hope and optimism as it ushered in new era signifying "a remarkable shift in the tone and substance state-to-state relationships along the Nile."[42] A decade later though, the optimist, positive tone in state-to-state relationships has given way to rancour and discord and the much touted NBI has become the target of scathing criticisms ranging from those which have already declared it a failure[43] to those deriding it as "a mere bureaucratic reorganization …"[44] – a shoddy fundraising scheme, "some kind of face saving diplomatic engagement" set up "for some kind of clearance from the World Bank in order to access funding sources from western donors or potential investors."[45]

Though the criticisms undeniably have some valid points, capitalizing on the shortcomings of the Initiative and vilifying the same without looking into the causes for its apparent failure to resolve the Nile waters question would be a dangerously naïve approach which may end up throwing the baby with the bathwater. Despite the various shortcomings it is maligned for, the NBI has attained important milestones for which it should be duly appreciated. It is an undeniable fact that under the auspices of the NBI, inter-riparian relationship in the basin reached an unprecedented, higher level in terms of inclusiveness and attained an equally unprecedented depth in terms of substance by taking up the hitherto shunned yet crucially important issue of equitable reallocation of the Nile waters. The NBI still presents the best opportunity to bring a lasting resolution to the intractable Nile waters question which the riparians can hardly

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[41] For a review of the nature and pattern of Nile riparian cooperation, see Dereje Z. Mekonnen, *supra* note 5, pp. 423 – 427.

[42] Brunnee and Toope, *supra* note 38, p. 132.

[43] Ana E. Cascao (2009), "Changing Power Relations in the Nile River Basin: Unilateralism vs. Cooperation?", *Water* Alternatives 2 (2), p. 263.

[44] Fasil Amdetsion (2008), "Scrutinizing the *Scorpion Problematique:* Arguments in Favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute", *Texas Int'l Law Journal,* vol. 44 (1), p. 38.

[45] Yakob Arsano (2004), *Ethiopia and the Nile: Dilemmas of National and Regional Hydropolitics*, PhD dissertation, University of Zurich, p. 58.

afford to squander. The Sharm el-Sheihk fiasco and the resultant discomfiture should thus in no way be pretexts for chastising it as both the failure to agree on and sign the much hoped for CFA as well as the subsequent deterioration in inter-riparian relations are only effects of a viciously cunning cause – the hijacking of the Initiative to serve the interests of the basin hydro-hegemon through the instrumentality of securitization and benefit sharing.

3.1. Securitization

The Extraordinary Nile-COM meeting held on 13 April 2010 in Sharm-el Sheikh, Egypt, was poised to be an historic event marking the last step in the signing of the CFA and thus bringing the decade-long strenuous effort to a victorious culmination. Unfortunately, it turned out to be a colossal failure as, after a marathon fourteen hours of deliberations, "the only agreement that was reached was on minutiae in order to avoid the pitfalls of the past."[46] The relatively harmonious cooperative atmosphere and rapprochement the NBI had forged over the decade soon crumbled as the seven upstream riparian countries, defying Egypt's threat and plea for the launching of the Nile Basin River Commission and further continuation of the negotiations, agreed to open the agreement for signature on the 14 of May 2010.[47] To Egypt's consternation, Ethiopia, Uganda, Tanzania and Rwanda signed the agreement the very day it was opened for signature[48] whereas Kenya did sign it a week later[49] creating, thereby, a huge hydro-political chasm, a fault line of the sort which might as well portend a future frontline.

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[46] Gamal Nkrumah, "Whose Water is It?", *Al-Ahram Weekly On-line*, Issue no. 994, 15-21 April 2010, available at: <http://weekly.ahram.org.eg/2010/994/eg10.htm> (Accessed on 23/04/10)

[47] The seven upstream riparians of Burundi, DR Congo, Ethiopia, Kenya, Rwanda, Tanzania and Uganda agreed to open the CFA for signature for a period not exceeding one year from 14 May 2010 – a position rejected by Egypt and Sudan as reflective only of the views of the seven states; NBI News, Ministers of Water Affairs end Extraordinary meeting over the Cooperative Framework Agreement, available at: <http://www.nilebasin.org/index.php?option=com_content&task=view&id=161&Itemid=70> (visited on 20/05/10).

[48] NBI News, Agreement on the Nile River Basin Cooperative Framework opened for signature, available at:

<www.nilebasin.org/index.php?option=com_content&task=view&id=165&Itemid=1> (visited on 20/05/10)

[49] Kenya Signs Nile Basin deal rejected by Egypt, *Kenya Broadcasting Corporation,* available at: <www.kbc.co.ke/story.asp?ID=64057> (visited on 22/05/10).

What happened at Sharm el-Sheikh and thereafter should not be a surprise at all as it was an inevitable outcome of what had taken place much earlier – a stealth securitization of the Nile waters question through the introduction of "water security" into the CFA. The fateful decision to include the treacherous concept of water security in the CFA was made in February 2002 by the Negotiating Committee[50] and it is now one of the general principles of the agreement in accordance to which "[t]he Nile River Basin and the Nile and the Nile River System shall be protected, used, conserved and developed."[51] That decision, one may certainly assert, marked the very unfortunate moment the CFA received the *coup de grace* which caused its demise made manifest at Sharm el-Sheikh.

The fateful decision though has been doggedly justified by some as an appropriate and ingenious solution to "the thorny issue of existing treaties" as the concept of water security allegedly "has the advantage of relegating existing treaties to the background in favor of the more dynamic and progressive principles of international water law."[52] That the non-legal, destructively elastic and conceptually amorphous "water security" notion was a hegemonic bait cunningly injected to lure negotiation of the CFA into a dead-end could not,

[50] Dereje Z. Mekonnen, *supra* note 5, p. 430.

[51] Art. 3, Draft on Cooperative Framework Agreement (on file with the author). The Draft Agreement lists out fifteen general principles under Art. 3: cooperation, sustainable development, subsidiarity, equitable and reasonable utilization, prevention of causing significant harm, the right of the Nile River states to use water within their territories, protection and conservation, information concerning planned measures, community of interest, exchange of data and information, environmental impact assessment and audit, peaceful resolution of disputes, water as a finite and valuable resource, water has social and economic value, and water security. Having seen such an unusually long list of "general principles" some of which are mere verbatim repetitions of the contents of some of the principles while others are mere elementary facts of common knowledge, one cannot help being baffled by the penury of the expertise that has gone into the formulation of this document.

[52] Girma Amare (2009), "Contentious Issues in the Negotiation Process of the Cooperative Framework Agreement on the Nile", Paper Presented at the National Consultative Workshop on Nile Cooperation, 12 – 13 February, Addis Ababa, Ethiopia, p. 5. The author also gives a second justification based on the "constructive ambiguity" mantra and maintains that the concept of water security will serve as a vehicle to transfuse into the CFA a measure of constructive ambiguity which will bring closer the divergent views held by the upper and lower riparians. The justifications and the flawed assumptions underpinning them have been elaborately discussed in Dereje Z. Mekonnen, *supra* note 5, pp. 429 – 439.

unfortunately, dawn on Nile riparians who, instead, sheepishly let the hydro-hegemon bewitch them until the very last moment.

Securitization is one of the plethora of coercive resources a hydro-hegemon may deploy to secure compliance with its preferred state of affairs. Such resources are classified into four categories.[53] *Coercive compliance-producing* mechanisms which form the first category include military force which is rarely used as a last resort; covert action which involves "undercover operations aimed at weakening the political, military or hydraulic apparatus of … competitor[s]" or making pact with others who would do this on behalf of the hegemon; and coercion-pressure – a commonly used, politically 'invisible' tactic involving threats of military action, economic sanctions or political isolation deployed to ensure that a riparian "drops its claims over the resource, or at least stops creating a (potentially compromising) row."[54]

Utilitarian compliance-producing mechanisms constitute the second category which is essentially comprised of variegated "[i]ncentives for compliance with the hydro-hegemon's preferred state of affairs" which may assume the form of "trade incentives, diplomatic recognitions, military protection, and … [m]utually beneficial 'shared interest' water projects."[55] In category three – *Normative compliance-producing mechanisms* – treaties are the sole instruments used by the hydro-hegemon to institutionalize the *status quo* to its advantage.[56] Under the fourth category – *Hegemonic compliance-producing mechanisms* – the hydro-hegemon wields the three potent instruments of securitization, knowledge construction and sanctioned discourse.[57] Expounding the meaning and implications of securitization, Zeitoun & Warner write:

> "Securitization" is the speech act that legitimises a state to take exceptional measures over an issue by propelling it into the realm of security. Promoting a project to a national-security concern equates criticism to treason, thus silencing critical voices in the bureaucracy and maintaining a form of hegemonic thought control. Securitization facilitates politicians' ability to "construct knowledge" around any water-related issue to fit other political interests. This approach is an example of what Plato refers to as a "noble lie" and reinforces Gramsci's proposition that beliefs are held by people who do not experience them as beliefs. In the name of national or water security, for example, Israel threatened to attack Lebanon over the relatively minor Wazzani

[53] Zeitoun and Warner, *supra* note 1, pp. 446 – 449.

[54] *Ibid*., p. 446 – 447.

[55] *Ibid*., p. 447.

[56] *Ibid*.

[57] *Ibid*., p. 448 – 449.

> springs project in 2002, while diverting its public's attention away from much more serious water-management issues.[58]

That the fateful decision to graft the treacherous concept of water security into the CFA is indeed a regrettable detour to a blind alley is evident from the implications of securitization whose purpose, in the case of the Nile waters, cannot be any different. As Hafney and Amer admit, "[t]he Egyptian concerns with regard to the Nile are … both a matter of national security and a life or death issue"[59] which should, of necessity, be securitized so that the hegemon would conveniently legitimize its obscene claim to a veritable ownership of the entire flow without necessarily being explicit about it. The colossal failure to agree on and sign the CFA with "water security" as its component, was, thus, an inevitability which had been in the making since 2002. The disgruntled and perplexed riparians which now find themselves ensnared in the "water security" trap have only their own inexcusable ineptitude to blame.

3.2. Benefit Sharing

In as much as sharing trans-boundary waters is difficult, designing the appropriate modality in which this arduous task would be carried out is as difficult and perplexing. Even in an ideal situation where the riparians are in full agreement on the core issue of the need to share, how this is to be done is often frustratingly difficult to sort out. Rooted in the principle of equitable utilization and forming part of its essential objective, determination in volumetric terms of the entitlement of every riparian is the most common approach often referred to as allocation or water-sharing. A relatively recent approach focusing on the allocation or sharing of the benefits thereof rather than the water itself has been propagated as a much easier approach with incomparably higher advantages especially in terms of efficient and sustainable utilization beneficial to the ecological integrity of the basin.

A closer reading of the Shared Vision of the NBI implies the adoption, though in a not so clear manner, of both approaches as the phraseology there speaks of equitable utilization and, by necessary implication, of allocation which is its essential element and alludes to benefit sharing as well as it speaks about the benefits from the common Nile water resources. What was alluded to in the Shared Vision was therefore made manifest later on with the inclusion of the Socio-economic Development and Benefit Sharing (SDBS) project among the

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[58] *Ibid*., p. 448.

[59] M. Hafney and S. Amer (2005), "Egypt and the Nile Basin", *Aquatic Sciences,* vol. 67, p. 44.

NBI's Shared Vision Programs[60] and the development, thereunder, of a Benefit Sharing Framework (BSF).[61]

The SDBS Project was launched in 2005 "with the main objective to enhance the process of integration and cooperation to further socio-economic development in the Nile Basin."[62] The BSF which is to be fully developed by the SDBS Project is comprised of two phases and three stages. The first phase which has been developed covers stage one "which provides the concepts and principles behind benefit sharing such that a basis (common understanding) for the steps towards trust and cooperation is established."[63] Phase two entails stage two "which will give the qualitative significance of a broad range of benefit sharing scenarios in a visual format such that the positive sum of outcomes can be identified and potential 'baskets of benefits' proposed;"[64] stage three will, then, complete the framework by giving "the quantitative magnitude of 'baskets of benefit scenarios' (and their related costs) under a range of modeled situations and portfolios."[65]

Thus, when completed and put into operation, benefit sharing will not only make possible resolution of the intractable Nile waters question but will, as an integrative and positive-sum approach, also provide a firm ground for cooperation which would avail to the riparian countries a wide spectrum of

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[60] The Shared Vision Program (SVP) constitutes one of the two complementary programs comprising of the Strategic Action Program of the NBI, and it focuses on basin-wide projects (Tesfaye Tafesse (2001), *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Perspectives,* Lit Verlag Munster, p. 109). Currently, the SVP includes 8 such projects dealing with applied training, confidence-building and stakeholder involvement, regional power trade, shared vision coordination, socio-economic development and benefit sharing, trans-boundary environmental action, efficient water use for agriculture, and water resource management (NBI, *Shared Vision Programs,* available at: <http://www.nilebasin.org/index.php?option=com_content&task=view&id=28&Itemid=116> (visited on 25/07/10).

[61] The SDBS Project developed the first phase of the Benefit Sharing Framework (BSF) for the riparian countries in June 2009. NBI News, "Benefit Sharing Framework for Nile Basin Countries Developed", available at <http://www.nilebasin.org/index.php?option=com_content&task=view&id=134&Itemid=102> (Visited on 25/07/10)

[62] *Ibid*.

[63] *Ibid*.

[64] *Ibid.*

[65] *Ibid.*

benefits in economic, environmental and political terms.[66] The huge economic potential which could be realized through cooperative full development of the basin is tantalizing. The annual economic value of cooperation involving limited infrastructure development in the Blue Nile has, for instance, been estimated, through the Nile Economic Optimization Model (NEOM), to be between US$ 1.15 and 1.97 billion whereas the "total (potential) annual direct gross economic benefits of Nile water utilization in irrigation and hydroelectric power generation are on the order of US $ 7 – 11 billion."[67] Cooperation, therefore, is not only a rewarding route promising enormous economic returns but is also an unavoidable one, a *sine qua non* for the equitable utilization, be it of the waters or the benefits thereof, and as such, is an obligation of the riparian countries sanctioned by international water law.[68]

The crucial question one has to pose here though is whether the benefit sharing approach would have any reasonable significance in resolving the Nile waters question where the decade-long effort to cut a deal on the subject has ended up in failure. Bluntly put, the crux of the matter is whether benefit sharing could lead to the equitable and reasonable utilization of the Nile waters and, in effect, resurrect the defunct CFA; or is it just another "noble lie", a hegemonic shenanigan to woo, until its inevitable demise comes to pass, the disgruntled riparians which must be contained.[69] The very essence of "benefit sharing"

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[66] Claudia W. Sadoff and David Grey (2002), "Beyond the River: The Benefits of Cooperation on International Rivers", *Water Policy* (4), pp. 389-403. The authors point out four major benefits of cooperation: *Benefits to the river* (pp. 393-395); *Benefits from the river* (pp. 395-397)*; Reducing costs because of the river* (pp. 398-399)*; and Benefits beyond the river* (pp. 399-400)

[67] D. Whittington, X. Wu and C. Sadoff (2005) "Water Resources Management in the Nile Basin: The Economic Value of Cooperation", *Water Policy* (7), p. 244, 249.

[68] The indispensable significance of genuine cooperation is evident from the structure of the 1997 UN Watercourses Convention which sets forth, as one of its general principles, the obligation of watercourse states to cooperate (Art. 8). The other general principles of the Convention are equitable and reasonable utilization and participation (Art. 5), factors relevant to equitable and reasonable utilization (Art. 6), obligation not to cause significant harm (Art. 7), regular exchange of data and information (Art. 9), and relationship between different kinds of uses (Art. 10).

[69] Containment is one of the water resource control strategies used by the hydro-hegemon which, when "[f]aced with the demands of a competitor and aware of customary law concerning the sharing of transboundary resources, … may find it more efficient to co-opt its weaker competitors, rather than trying to ignore or discredit their claims." Since the strategy requires engagement with competitors, the hydro-hegemon seeks, through bilateral or multilateral arrangements, "either to integrate the competitors or to contain them in as asymmetric a position as possible,

which is underpinned with fundamentally flawed assumptions and the malign, oppressive hydro-hegemonic configuration prevalent in the Nile basin, as will be pointed out, impel any reasonable observer to categorically write it off as a ruse.

The proponents of benefit sharing lavishly tout it as an integrative, positive-sum approach "that equitably allocate[s] the benefits derived from water, not the water itself"[70] and claim that it "allows for a positive-sum agreement, occasionally including even non-water-related gains in a 'basket of benefits', whereas dividing the water itself only allows for winners and losers."[71] The very notion of benefit sharing is thus underpinned by an erroneous and derisive characterization of the allocation approach as a zero-sum, rights based approach which allows only for winners and losers[72] in stark contrast to its own elevated status as the apotheosis of fairness and equity which "concerns the distribution of benefits from water use – whether from hydropower, agriculture, economic development, aesthetics, or the preservation of healthy aquatic ecosystems – not the water itself."[73]

The foundational principle of equitable utilization to which all Nile riparians have long committed themselves governs, primarily, the issue of allocation[74] and its function is to ensure that "each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."[75] Translating this into reality through an inclusive basin-wide or even sub-basin agreement is no easy task at all. Dismissing the indispensable allocation approach by derisively disfiguring it as one which "only allows for winners and losers" though is only a tactless chicanery. If application of the principle would entitle every riparian, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of a trans-

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through the use of coercive, utilitarian, normative or hegemonic compliance-producing mechanisms." Zeitoun and Warner, *supra* note 1, p. 445.

[70] Meredith A. Giordano and Aaron T. Wolf (2003), "Sharing Waters: Post-Rio International Water Management", *Natural Resources Forum,* vol. 27, p. 168.

[71] *Ibid*., p. 170

[72] *Ibid.*, p. 168, 170; see also Sadoff and Grey, *supra* note 66, p. 395.

[73] *Ibid*., p. 170

[74] S. McCaffrey, *supra* note 23, p. 325; X. Fuentes (1996), "The Criteria for the Equitable Utilization of International Rivers", *British Yearbook of Int'l Law,* vol. 67, p. 341.

[75] Charles B. Bourne, "Canada and the Law of International Drainage Basins", in P. Wouters (ed., 1997), *International Water Law: Selected Writings of Professor Charles B. Bourne* (Kluwer Law Int'l, London), p. 297.

boundary river, say the Nile, how such a result could still be discounted as total victory for some and total loss for others defies all logic and, thus, epitomizes a fallacy of the highest order.

The benefit sharing approach is, furthermore, fatally flawed as it draws a false dichotomy between the sharing of water and the benefits thereof as alternative approaches[76] despite the fact that "an explicit or implicit recognition or negotiation of property rights is a necessary precondition for the realization of a benefit sharing scheme."[77] The supposed reaping of benefits generated under such a scheme would thus only be an emotive incantation, a veritable pie in the sky as long as the scheme shuns or shies away from putting in place, at the same time, the yardstick or mechanism with which the share of the benefits every riparian is entitled to would be determined. That yardstick is, of course, provided by "equitable utilization which constitutes the basis of the specific right to certain volumes of water or the right to undertake certain activities on the watercourse."[78]

Effective and smoothly functioning benefit sharing presupposes also the launching of feasible and visible joint multi-purpose projects which would generate the benefits to be shared. The tragic fact though is that such projects are conspicuously absent[79] and the likelihood of their existence somewhere sometime is actively negated by the aggressive unilateralism raging downstream through giant hydraulic works being carried out in total disregard of the fact that "decisions to engage in serious dialogue about basin-wide cooperation represent irreversible commitments to forego unilateral development."[80] A functioning benefit sharing scheme also requires, of necessity, a conducive hydro-political configuration where the basin hydro-hegemon is willing and determined to play a positive, leadership role.[81]

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[76] Sadoff and Grey, *supra* note 66, p. 396.

[77] I. Dembrowsky (2009), "Revisiting the Potential for Benefit Sharing in the Management of Trans-boundary Rivers", *Water Policy* (11), p. 137.

[78] X. Fuentes (1998), "Sustainable Development and the Equitable Utilization of International Watercourses", *British Yearbook of Int'l Law,* vol. 69, p. 130.

[79] Tesfaye Tafesse (2009), "Benefit Sharing Framework in Transboundary River Basins: The Case of the Nile", Paper Presented at the National Consultative Workshop, 12 – 13 February, Addis Ababa, Ethiopia, p. 10 – 11.

[80] D. Whittington (2004), "Visions for Nile Basin Development", *Water Policy* (6), p. 15.

[81] Hydro-hegemony is said to be of a positive, leadership form where the riparians control have a shared control of the resource on the basis of an inclusive water-sharing agreement entered into by all; where, on the other hand, the hydro-hegemon

The reality in the Nile basin though is antithetical to this as the malign, oppressive hydro-hegemon – Egypt – has literally no propensity for such transformation. It would, thus, be delusional to hope or believe that Egypt would opt to act rather like a 'gentle giant' as has South Africa which "[i]n choosing to play the leadership role at the river basin level, … has attempted to create a positive-sum hydro-hegemonic configuration through the incentive of benefits-sharing."[82] The potential of benefit sharing to serve as a convenient modality for an equitable and sustainable utilization of a shared water resource notwithstanding, the principal purport of its pursuit in the Nile basin is, for the reasons put forth above, only one of deceit and manipulation as it indeed is a "ploy to delay the upstream countr[ies'] unilateral action, or a ruse to buy time [for those downstream] to pursue their own plans."[83]

4. What is to be Done?

If resolution of the Nile waters question sounds to be a frustratingly elusive, Sisyphean effort to any cautious observer, that is because it is so, indeed. This does not, however, mean that it is an absolute Gordian knot which requires an Alexander the Great to slice through it. Surely, Egypt would remain to be the basin's Alexander the Great for quite a while in view of the existing power asymmetry vis-à-vis the other riparians. Yet, the hydro-hegemon has its own vulnerabilities and it would be a heartening wisdom which would imbue the upper riparians with a renewed vigour and resolve to find the chink in the behemoth's armour.

One such chink in the armour of the hydro-hegemon is the grotesquely inequitable nature of the *status quo* which stands out in stark transgression of the fundamental principles of international water law. Egyptian hydro-hegemony being of the virulent, malign form maintained in utter disregard of the principles of international water law,[84] reliance on the principles of

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has already attained or seeks to attain and consolidate maximum control of the water resources through unilateral action, the particular form of hydro-hegemony is said to be of a negative, dominative, exploitative configuration; Zeitoun and Warner, *supra* note 1, p. 444.

[82] Zeitoun and Warner, *supra* note 1, p. 452. It is interesting to note that South Africa is the only hydro-hegemon which has signed and ratified the 1997 UN Watercourses Convention.

[83] Whittington, *supra* note 80, p. 11.

[84] M. Woohdhouse and M. Zeitoun (2008), "Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law", *Water Policy* 10 *Supplement* 2, p. 113.

international water law accords the hegemonized riparians with a potent power to deal with the hegemon and their counter-hegemonic strategy should thus be anchored in international water law. Apart from exposing the singularly iniquitous nature of the *status quo*, international law also endows the non-hegemonic riparians with enhanced structural power and improved bargaining position towards the hydro-hegemon.[85] It is, thus, incumbent upon Nile riparians to make a timely return to the framework of international water law by completely removing from the CFA the treacherous, hegemonic bait of "water security" which has derailed the whole process in the first place and caused the current stalemate.

Return to the framework of international law though is only the proper, crucial first step which may ultimately lead to a successful and lasting resolution of the Nile waters question. This hinges on the extent to which the substance and practical implications of international law are understood by all the riparians and, more importantly, the willingness of Egypt primarily and Sudan, also, to accept the consequences thereof. If all Nile riparians, Egypt and Sudan included, have committed themselves for over a decade now to the principle of equitable utilization through their endorsement of the Shared Vision, one should conclude that they all have undertaken to accept and live with the new reality the implementation of this principle would entail; obviously, equitable reallocation is the unavoidable reality as it indeed is the essence of the principle of equitable utilization which, in turn, constitutes the lynchpin of international water law.[86]

For the hydro-hegemon and its junior partner, the very idea of reallocation is an unwelcome anathema and they will for sure strive, as always, to eclipse it by bringing to centre stage such globally hegemonic trends in water governance as the river basin approach, multi-stakeholder platforms and the commonly prescribed "a-political and technically informed notion" of integrated water resources management.[87] It is thus imperative for Nile riparians to first break the sanctioned discourse so that the way for a return to the framework of international water law will be opened. "Sanctioned discourse" is an appellation of a hegemonic compliance producing mechanism used to impose constraints "upon those who may wish to speak or think *outside* of the discursive hegemony" so that the contention between alternative discourses with which

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[85] M. Daoudy (2008), "Hydro-hegemony and International Water Law: Laying Claims to Water Rights", *Water Policy* 10 *Supplement* 2, p. 94.

[86] McCaffrey, *supra* note 23, p. 325; Fuentes, supra note 74, p. 341; Bourne, *supra* note 75, p. 297; Fuentes, *supra* note 78, p. 130, and Dombrowsky, *supra* note 77.

[87] J. Warner, P. Wester & A. Bolding (2008), "Going with the Flow: River Basins as the Natural Units for Water Management", *Water Policy* 10 *Supplement* 2, pp. 121 – 123.

actors try to support their definition of reality "results in a prevailing discourse heard above the others – the sanctioned discourse, by definition endorsed by the more powerful side."[88] The reality of the Nile basin provides the quintessence of sanctioned discourse in full swing:

> [A] tactic of sanctioning the discourse in the world of water conflicts may serve to veil certain aspects of riparian relations (e.g. inequitable distribution) while emphasising others (e.g. the merits of technical cooperation). The official Egyptian discourse promoting the benefits of the Nile Basin Initiative, like the official Israeli discourse of cooperation through the Palestinian-Israeli Joint Water Committee, for instance, are regularly heard at international fora and in the journals. These discourses effectively drown out opposing viewpoints presented less frequently and eloquently by Ethiopian or Palestinian civil society outside the halls of power. The 'cooperative' tone of the more powerful actors' discourse can be expected to sit well with the international donor community, which thereby assists in sanctioning the prevailing discourse while excluding the alternatives.[89]

Nile riparains should thus break the sanctioned discourse and usher in a new reality of fairness and equity by actively charting out the proper, realistic route along which the Nile waters question could be resolved. Such a route should start with a determination, through a basin-wide or sub-basin agreement, as may be appropriate, of the respective share of every riparian as its sovereign entitlement in line with the principles of international water law. This does not and should not necessarily result in the abandonment of joint development efforts or benefit sharing schemes which, in the absence of such determination though, would only remain empty promises at best or deceptive hegemonic tactics at worst. A necessary and urgent measure of perhaps far more importance to the non-hegemonic riparians is to keep their houses in order by building a just, equitably inclusive and stable economic and socio-political order which would help create a strong human and material resource base to back up their national interest. As long as they remain poor, weak and unstable polities bogged in internal political bickering and strife though, the hydro-hegemon would not make even the slightest of concessions, and why would it?

Conclusion

Despite the latest unfortunate development which has overshadowed the optimism and cooperative atmosphere the NBI has brought about in the Nile basin, ensuring the equitable and reasonable utilization of the Nile waters is, still, not an impossibility. It has, undeniably, become far more difficult as a

[88] Zeitoun and Warner, *supra* note 1, p. 448.

[89] *Ibid.,* pp. 448 – 449.

result of the missteps taken in the course of negotiation of the CFA and the non-hegemonic riparians which have inadvertently allowed securitization to hold sway will have to row against the tide of hegemonic obstinacy. They should act, this time though, with understanding and foresight lest this arduous task should once again be another exercise in futility.

The crucial first step in this regard would be the complete removal of the hegemonic bait of "water security" from the CFA. Breaking the sanctioned discourse and bringing, instead, the cardinal question of equitable reallocation to centre stage is another task of no less importance. Circumscribing the wildly nebulous and unruly notion of benefit sharing within the confines of international water law (by reaffirming that it can only be a possible modality of cooperative utilization complementary to that of reallocation and never as its substitute) is yet another gargantuan task awaiting Nile riparians. The truth of the matter is that "[t]he most stable situation in terms of riparian relations is likely to be when the riparians share control of the resource, as the case whereby the hegemon has negotiated a water-sharing agreement that is perceived positively by all riparians."[90]

[90] Zeitoun and Warner, *supra* note 1, p. 444.

OPERATION AND EFFECT OF PRESUMPTIONS IN CIVIL PROCEEDINGS:

AN INQUIRY INTO THE INTERPRETATION OF ART 2024 OF THE ETHIOPIAN CIVIL CODE

Worku Yaze Wodage ♣

> *"Although presumption is not evidence and has no weight as such, it does make a prima facie case for the party in whose favor it exists and points out the party who has the burden of going forward […], but it must be remembered at all times that basic facts must be supplied before a presumption comes into existence, […], and it has a binding effect until successfully rebutted by the other party."*[1]

Abstract

'Presumption' is an ambiguous term that one often finds in substantive and procedural laws. The controversy regarding the operation and effect of '*presumption*' in civil proceedings has not yet been conclusively resolved despite efforts of scholars. In Ethiopia, it has been subject to different judicial interpretations. The Cassation Division of the Federal Supreme Court has adopted a binding interpretation of Art 2024 of the Civil Code on the presumption of payment of debts. Yet, the propriety of this authoritative interpretation has become contentious. This Article examines the operations and effects of presumptions in civil actions in general and inquires into the propriety of the precedent adopted by the Cassation Division. It argues that the Division's interpretation needs to be reconsidered when the issue arises in future cases.

Key words:

Presumptions, kinds of presumption, rebuttable presumptions of law, operation of presumptions, effects of presumption, persuasive & evidential presumptions.

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[1] Freeman, F (1971- 1972) 'A Trial Lawyer Utilizes the Concepts of Judicial Notice and Presumptions', 7 *Forum,* at 248.

Introduction

Since the re-amendment of the Federal Courts Proclamation[2] (which reintroduced the doctrine of *precedent* in Ethiopia[3]), the Cassation Division of the Federal Supreme Court has exercised its (statutory and constitutional) cassation and precedential powers.[4] It has reviewed cases it considered to have had fundamental errors of law[5] and rendered binding precedents. As per Art 2 (1) of the Proclamation, an "interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges *shall be binding on federal as well as regional (courts) at all levels."* (Emphasis added). It is, however, important to note that it is the *interpretation* of a given law (by

[2] Federal Courts Proclamation No.25/1996, Fed. Neg Gaz. 2nd Year, No.13.

[3] Since 1962 there had been, at least on paper, the principle of *stare decisis (or* doctrine of *precedent)* with regard to interpretation in the Ethiopian legal system. According to Art 15 of the Courts Proclamation of 1962, (Proclamation No. 195/1962, Neg. Gaz, 22nd year, No.7) decisions of superior courts on matters of law were binding on subordinate courts. This Proclamation was however repealed thirteen years later by the Administration of Justice Proclamation No. 52/1975, Neg. Gaz. 35th Year No. 2. Ethiopia once again re-introduced the doctrine of *precedent* into her legal system in 2005 by the Federal Courts Proclamation Re-amendment Proclamation No. 454/ 2005, hereinafter, the Proclamation. This Proclamation entered into force as of 14 June, 2005/ Sene 7, 1997 E.C.

[4] By virtue of Art 80-(3) (a) of the Constitution of the Federal Democratic Republic of Ethiopia, hereafter the Constitution, and Art 10(1), (2), and (3) of the Federal Courts Proclamation, the Federal Supreme Court is empowered to review final court decisions in *cassation*. It is clear that this court has statutory and constitutional power of cassation today. Such practice of reviewing in cassation is believed to have been introduced into Ethiopia for the first time during the era of Emperor Menilik II in 1908. (See Yohannes Heroui (2009), 'Brief Notes about Cassation Power and its Procedure', (in Amharic), *Ethiopian Bar Rev. Vol 3, No. 1*, at 132. Since 1987, Ethiopia adopted clear legal frameworks regarding cassation power of the last resort court in the country. During the Dergue era, Arts 4 & 5 of the Supreme Court Establishment Proclamation No. 9/1987 expressly gave cassation power to the Supreme Court. Following the overthrow of the Dergue by the EPRDF (Ethiopian Peoples' Revolutionary Democratic Front) in 1991, this was replaced by Art 12 of the Central Government Courts Establishment Proclamation No. 40/1993 (Neg. Gaz. 52nd Year.No.25) of the Transitional Government of Ethiopia. This was again followed by the above cited provisions of the FDRE Constitution and the Federal Courts Proclamation. At this juncture, it is essential to bear in mind the inherent differences that exist between *cassation power* and *precedential power* of a court.

[5] See the decisions of the Cassation Division of the Federal Supreme Court of Ethiopia, published in various volumes. According to the above-mentioned articles of the Constitution and the Federal Courts Proclamation only cases that allegedly contain *fundamental* or *basic errors of law* can be reviewed in cassation.

the Cassation Division in the presence of five or more judges) that is binding, and not the *case decision* as such. Case precedent, *per se*, enables courts to derive case law from the principles enshrined in the case analysis and decision, while binding interpretation is half-way between a purely statutory regime and a case law system because it does not require lower courts to use case law, as such. It rather obliges them to be bound by the cassation interpretation given to a law (i.e. statutory provision) in a certain fact situation so that the interpretation can be binding when similar issues and comparable fact situations are involved.

By exercising its judicial powers, the Supreme Court Cassation Division is playing a decisive role in ensuring the consistent application of national laws across the country and enhancing predictability of outcomes in court litigation. However, some of the interpretations that the court rendered in a few of the cases have, arguably, triggered controversy.[6] A binding precedent of the Cassation Division which has provoked such a controversy is the legal interpretation it adopted in the *Agency for the Administration of Rented Houses v Mr. Bironi Atikpo* case.[7] The case involved various issues that pertain to presumptions, particularly presumptions of law, and burdens of pleading and proof. Issues such as *nature of presumptions*, *operation and effect of presumptions*, relationship of *burdens of proof* and *presumptions of law etc,* were at the forefront of the judicial analysis and exposition.

There was no unanimity of opinion regarding the *nature of presumptions of law* and *how they come into operation.* They were divided on whether Art 2024 of the Civil Code (1960) applies to a case where a defendant appears in court but *does not deny* plaintiff's allegation of *non-payment* of a debt that is more than two years overdue or in the case of an *ex-parte proceeding*. They disagreed on whether it is necessary to follow *special rules of procedure* and *evidence* if litigation involves a presumption of law such as the one embodied under Art 2024 of the Civil Code. The binding precedent in the case was rendered by a close majority of 3 judges to 2 judges.

The majority's exposition of presumptions of law, operation and effect of such presumptions, the alleged roles and responsibilities of litigating parties and courts in such a case, their subsequent interpretation of Art 2024 of the Civil Code as well as the contrary exposition by the minority, etc., evoke a couple of

[6] See for example Mekbib Tsegaw *(2007*), 'Contracts relating to an immovable and Questions of Form', (in Amharic), *Ethiopian Bar Rev. Vol.2. No. 1;* Yohannes Heroui *(2008*), 'Registration of Immovables under the Ethiopian Civil Code: An overview in Comparative perspective', *Ethiopian Bar Rev. Vol. 2 No. 2*; Mehari Redae *(2008*)**, '**Case Comment; Dissolution of Marriage by Disuse: A Legal Myth', *J. Eth. L. Vol. 22, No. 2.*

[7] File No 17068, Supreme Court Cassation Division decided on 19/11/1997 E.C.

questions. A careful reading of the majority and the minority opinions of the court evokes the following questions: 'What are presumptions?' 'Are they items of evidence?' How does a given presumption of law come into operation in a given proceeding? How is such operation related to burdens of pleading and proof? What legal consequence(s) follow from an operation of a given presumption of law? Does the operation of any presumption of law in a given case require courts to follow special rules of evidence and procedure to resolve a dispute in litigation? These and related issues, of course, were the core themes in the case mentioned above.

Other subsequent cases bearing similar allegations of non-payment of matured debts falling under Art 2024 of the Civil Code have triggered the same issues. These cases were resolved in accordance with the majority's interpretation of Art 2024 of the Civil Code in the *Agency for the Administration of Rented Houses v. Bironi Atikpo* case.[8] A minor deviation was shown only last year in *Commericial Bank of Ethiopia v Liyew Chekol & Million Mengistu* wherein seven sitting judges unanimously observed that the type of presumption under Art 2024 of the Civil Code is a restrictively rebuttable presumption.[9]

The judicial interpretation in the cases mentioned above and other cases (both in lower and appellate courts) and the academic debate that ensued demonstrate the difficulties in establishing a proper link between *presumptions of law* and *burdens of proof*, on the one hand, and *burdens of pleading, burdens of proof* and *presumptions of law,* on the other. It is also clear that there is ambiguity in grasping the true nature of presumptions, in identifying the mode of operations and legal effects of the various presumptions. The Cassation cases mentioned above substantiate this fact.

In view of such divergence of opinion among judges and lawyers relating to presumptions in general and presumptions of law in particular, and also in view of such uncertainties about their operation and effects, an in-depth research on this area of the law is essential. The frequent appearance of civil cases that involve issues of presumption necessitate an extensive research. This Article is an attempt in that direction. Yet, its scope and depth are limited. It aims at giving a general overview of the concept, and canvassing the various types of presumptions along with their operations and legal effects. The Article assesses

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[8] See for instance the following cases: *Dr. Daniel Alemu V W/ro Romanework Yemanebirhan* et al (File No.14047), *Agency for the Administration of Rented Houses V Sossina Asfaw* (File No.15992), *Paoulos Rumicho V Chaltu Merdassa* (File No.15493), and *Riesom G/Medihin V Almaz G/Michael* (27697). These indicate the recurrence of cases bearing similar issues in our courts.

[9] Refer to Cassation File No 29181; this was rendered on 20 Tahisas 2002 E.C. Incidentally one learns the recurrence of cases bearing similar issues in our courts.

the propriety of the binding precedent adopted by the majority in the *Bironi Atikpo* case, which represents the current binding interpretation. The Article focuses on civil proceedings although criminal proceedings are marginally touched upon in a few instances with a view to enhancing the clarity of ideas.

The first section of the article briefly highlights concepts and definitions. Sections 2 and 3 deal with types, operations and legal effects of various categories of presumptions. Section 4 briefly raises the issue of interrelationship between burdens of pleading, burdens of proof and rebuttable presumptions of law. Section 5 focuses mainly on the binding precedent adopted in the *Agency for the Administration of Rented Houses v Bironi Atikpo* case. This section and the sixth section probe whether the Court's interpretation of Art 2024 of the Civil Code is valid. Particular attention is given to examining the propriety of the Cassation Court's holdings relating to *operation and effect of presumptions of law*. Sections 5 and 6 also inquire whether the operation of any rebuttable presumption of law in a given civil proceeding really requires following of *special procedural* and *evidentiary rules* as the majority in the Cassation Division maintained. Finally, the author suggests that the Cassation Division of the Federal Supreme Court needs to revisit its legal interpretation of Art 2024 of the Civil Code in a future case that involves a similar issue as envisioned under Art 2(1) of Proclamation No. 454/2005.[10]

1. Concept and Definitions: An Overview

The term *presumption* is one of the most ambiguous and slippery terms in the whole corpus of the law.[11] Yet, it is one of the most commonly employed terms in the legal literature, in law making and court decisions. Writing half a century ago, Laughlin noted that the Corpus Juris Secundum listed about 113 so-called presumptions.[12] Writers on law of evidence, commentators, judges and law

[10] See that Art 2 (1) provides: "…The cassation division may however give *a different legal interpretation* some other time."

[11] Fisk, Otis H. (1921), *Presumptions in the Law,* A suggestion, Reprinted in 1997,William S. Hein &Co. Inc. Buffalo, New York, at 1-2; Andrews, John A. & Hirst, M. (1992), *Criminal Evidence***,** 2nd ed., at 99; Elliott, D.W(2001), *Phipson & Elliott Manual of the Law of Evidence,* 2nd ed.(New Delhi: Sweet & Maxwell Limited), at 75-77; Emson, Raymond (2004), *Evidence,* 2nd ed.(New York: Palgrave Macmillan), at 457; Strong, John William (1992), *McCormick on Evidence*, 4th ed., at 578; Morgan, Edmund M. (1938-1939), 'Techniques in the use of Presumptions', *24 Iowa L. Rev.*, at 414, hereinafter to be cited as Morgan, Techniques. See also Fenner, G. M. (1991-1992), 'Presumptions: 350 Years of Confusion and it has come to this', *25 Creighton L. Rev. at 383 ff;*

[12] Laughlin, Charles V. (1953-1954), 'In Support of the Thayer Theory of Presumptions', 52 Mich. L. Rev. at 195. The same author observes that the term has

makers both in the continental and common law countries have been using this term in varied senses and contexts.[13] That loose employment of the term to signify different things has brought about uncertainties which transcend jurisdictions and times. Inaccurate use of the term has resulted, says Belton, in confusing and incongruous attempts to apply a presumption analysis in inappropriate situations. Since early times, especially from the twelfth until the nineteenth century many legal scholars made attempts to bring clarity to the various ideas of presumptions. It was in the course of such academic pursuits that Morgan, albeit figuratively, remarked, "Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness, and has left it with a feeling of despair."[14]

Notwithstanding the complexities of the issues involved and variety of senses, legal scholars and commentators from the Civil law tradition such as Tancredus, Alciati, Cujas, Domat, and Pothier, and from common law traditions such as Best, Gilbert, Greenleaf, Phillips, Starkie, Thayer, Wigmore, Morgan, McCormick, McBaine and others have examined the nature, operations and effects of presumptions.[15] These efforts have brought about appreciable achievements and some degree of clarity of the concept. Thayer and Wigmore in particular are credited for their contribution towards semantic and conceptual clarity by narrowing down the senses in which the term 'presumption' has to be employed.

In spite of positive achievements toward the reduction of the degree of ambiguity, the term has still continued to connote different ideas. In an article written at the beginning of 1980s Allen expressed that the longstanding controversy over the nature and proper rule of presumptions in civil actions has continued undiminished in America[16] and, for that matter in other jurisdictions as well, as it is the case in Ethiopia today. Emson has recently opined: "confusingly, the word 'presumption' is used in the law of evidence to describe

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been so promiscuously used as to be devoid of much of its utility and that it has become a *magic word*. (Id.)

[13] Id; Read also Shain, M. (1944), 'Presumptions under the Common and the Civil Law', 18 S. Cal. L. Rev., at 92 ff; and, McBaine, J.P (1937-1938), 'Presumptions: Are they evidence?' 26 Cal. L. Rev., at 522 ff.

[14] Morgan, E. M. (1937) 'Presumptions', 12 *Wash. L. Rev. & St. B. J,* at 255, hereinafter, to be cited as Morgan, Presumptions.

[15] For a brief historical reference read the two articles written by Shain and McBaine, note 13.

[16] Allen, Ronald J. (1980-1981), 'Presumptions in Civil Actions Reconsidered', 66 Iowa L. Rev. at 843.

a number of different concepts which have little in common."[17] And as many authors including Hecht and Pinzler observed, there is great disagreement among legal writers, court judges, lawyers, academics and legal commentators as to the scope of the term and its operation in court trials.[18]

The term *presumption* is an English translation of the Latin term *"praesumptio*". It originated from the Roman law of the Middle Ages.[19] As Fisk noted, in the earlier days of Roman law, there have been *praesumptio juris* and *praesumptio hominis*. Shain adds *praesumptiones juris et de jure*. Fisk observed that "*Praesumptio juris* means a presumption (inference) of fact made by law: *praesumptio hominis* means a presumption (inference) of fact made by man."[20] This does not tell us what the term presumption is. So, what is a presumption? Is it a type of evidence? Is it a substitute for evidence? Or is it a rule of law, or an argument, or a fact? Or is it all of these things? As the literature shows, particularly since the publication of Thayer's book entitled *A Preliminary Treatise on Evidence at the Common Law* in 1898, many authors have raised these questions and tried to provide answers.

The 7th edition of Black's Law Dictionary considers *presumption* as a "*legal inference* or *assumption* that a fact exists based on the known or proven existence of some other fact or group of facts" and it states that "[m]ost presumptions are *rules of evidence* calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." (Emphasis added). In other words, presumptions signify legal inferences or assumptions that trigger the drawing of conclusions from proved facts.

According to Fisk, presumption can be defined as *: "A process of reasoning* by which something not already deemed proved by pleadings or by admissions in court outside the pleadings or by judicial notice is deemed proved."[21] Thayer

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[17] Emson, note 11, at 457.

[18] Hecht, Neil S. and Pinzler, William M (1978), 'Rebutting Presumptions: Order out of Chaos', 58 B. U. L. Rev., at 527-528.

[19] Shian, note 13, at 92.

[20] Fisk, note 11, at 4. This same author further said that the two Latin expressions could have properly been translated into English as "presumption by law" and "presumption by man", respectively, but incorrectly translated as "presumption of law" and "presumption of fact".

[21] Id, at 9. The process, whether required and made by law or by judges, Fisk maintained, is an inference by legal reasoning or human reasoning (logic); it is a process of proving something by inference from something else proved or deemed proved.

observes that "[p]resumptions are *aids to reasoning and argumentation*, which assume the truth of certain matters for the purpose of some given inquiry."[22] Laughlin enumerated some eight diverse senses[23] and preferred to take the eighth sense as useful to his context. Thus he took presumption as meaning *a rule of law that shifts burden of proof*. These definitions substantiate the view that most presumptions are rules of evidence, and not evidence, *per se*.

Klotter regards presumption as "*a rule of law* that attaches definite probative value to specific facts or draws a particular inference as to the evidence of one fact, not actually known, arising from its usual connection with other particular facts that are known or proved" and he considers it as "a *legal principle* whereby the court accepts the existence of one fact from other facts already proven."[24] Belton has a related idea. [25] On the other hand Ashford and Risinger define presumption as a "*legal device* which *imposes the burden of introducing evidence* as to a given issue upon the opponent of the party who has the burden of persuasion as to that issue."[26]

Morgan states that "[p]resumptions may properly be used to designate the *assumption of the existence of one fact*, which the law requires the trier of fact to make on account of the existence of *another fact or group of facts*, standing

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[22] See McBaine, note 13, at 525.

[23] Laughlin, note 12 at 196-209. These are: 1) As indicating a general disposition of courts; 2) As an authoritative reasoning principle; 3) As a rule of substantive law; 4) As a rule fixing the burden of persuasion; 5), As a permissible inference; 6) As a statutory prima facie case; 7) As a proposition of judicial notice, and 8) As a rule shifting the burden of producing evidence.

Laughlin mentions that professors Morgan and Maguire enumerated four senses in which this term is used. These are: (1) As synonymous with *permissible inference*, (2) as *establishing a case sufficient to permit the judge to decide that the presumed fact exists* (3) as requiring the *acceptance of the presumed fact until certain specified conditions are met*, and (4) as a conclusive presumption or *rule of substantive law*. (Id- therein at footnote 1.)

[24] Klotter, John C. (2000), *Criminal Evidence*, 7th ed., at 106. Klotter has presented another definition which considers presumption as "*an inference* that common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidence of facts and circumstances with each other."Id.

[25] Belton, Robert (1981), '*Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*,' 34 Vand. L. Rev., at 1222. He holds that presumption is "a *rule of law* that deals with the *assumption*-at least temporarily- of a certain factual situation based upon proof of other usually logically related facts."

[26] Ashford, Harold A. & Risinger, D. Michael (1969), 'Presumptions, Assumptions and Due process in Criminal cases: A theoretical overview', 79 Yale L. J. No.2, at 172.

alone."[27] Elliott regards presumptions "as a *conclusion*, which may or must be drawn in the absence of contrary evidence"[28] while Andrews and Hirst, in a relatively recent edition, note that 'presumption' "properly describes *the process whereby, on the proof of one fact (the basic fact) another fact (the presumed fact) may be inferred*."[29] Having observed that the term is used loosely in the law of evidence, Dennis has reached a similar conclusion. [30] Hecht and Pinzler share the same view with Maguire regarding the standard definition of 'presumption' which is said to exist when a designated basic fact or aggregate of facts exists. This envisages the existence of another fact or aggregate of facts, called the presumed fact or fact(s) that must be assumed in the absence of adequate rebuttal.

Presumption may thus mean an inference, or an assumption of fact, or a conclusion drawn from another fact, or a rule of law that fixes burden of persuasion, or a rule of law that shifts burden of production of evidence, etc. As a result, there is no agreement among legal scholars as to the correct and single definition of the term. [31] For most scholars and commentators, true presumptions mean more than mere inferences. It will thus be inappropriate to employ the term to mean a rule of law that fixes persuasive burden or to use it as a substantive rule of law that results from proof of a given fact.[32]

In spite of such variations on the meaning of the term, most legal scholars today generally agree on one aspect of the term. In the words of Ashford and Risinger most agree "that a presumption is a *legal mechanism* which… deems one fact to be true when the truth of another fact has been established." In the strict and proper sense, therefore, the term presumption is used to refer to the process whereby one fact *must* be inferred from the proof of another basic fact. The fact which must be deemed proved is identified as the *fact presumed* while the other fact whose truth must be established before the fact presumed will be deemed true is referred to as the *preliminary or basic fact*.[33] Hecht and Pinzler

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[27] Morgan, Edmund M. (1930-1931), 'Some Observations Concerning Presumptions', 44 Harv. L. Rev, at 906; hereinafter to be cited as Morgan, Observations.

[28] Elliott, note 11, at 75.

[29] Andrews & Hirst, note 11, at 99.

[30] Dennis, I.H. (2002), *The Law of Evidence*, 2nd ed., (London: Sweet & Maxwell Limited), at 401& 419. He notes that presumption "… properly refers to an inference of fact, the 'presumed' fact that may or must be drawn from proof of another fact, often called the 'basic' fact."

[31] Ashford. & Risinger, note 26, at 165. They hold that "[t]here is no agreement among legal writers as to exactly what a presumption is…."

[32] Andrews & Hirst, note 11, at 99; Belton, note 26, at 1222; McBaine, note 13, at 526-530.

[33] Ashford and Risinger, note 31, at 165; See also Dennis, note 30, at 419.

state that "[t]he fact that may be deemed proved by the operation of a presumption is called the "presumed fact" and the fact whose truth must be established before the presumed fact will be deemed true is called the "basic fact."[34]

As can be understood from the discussion above, a presumption is neither a *fact* nor *evidence*. We know that *fact,* unlike presumption, refers to an occurrence or event or state of affair which is perceptible through our sense organs. We also know that in the strict legal parlance *evidence* refers to that thing or circumstance or data that establishes or proves the existence or otherwise, the falsity or truthfulness of a fact under inquiry. It refers to one of the means of proof. It consists of oral, documentary and real evidence. But presumption is a different thing. It is not a kind of oral or documentary or real evidence. It may, however, be treated as one other mechanism of proving of facts under inquiry like evidence, formal admissions, or judicial notice - without being confused with any of the latter. To this end, McBaine stresses that it is wrong to treat presumptions as *evidence* or as *something that is equivalent to evidence*.

Moreover, presumption is neither *argument* nor *an item of evidence*.[35] Argument refers to the persuasive propositions of material facts, issues, laws, analysis, reasoning, conclusion and relief submitted by litigating parties while presumption is not. An item of evidence pertains to probative material which consists of oral testimony of witnesses or contents of documents (including electronic and digital data,) or appearance or state of conditions of physical objects while presumption is entirely a different thing. Belton and many others conclude that presumption is not even a substitute for evidence; it is a *rule of law* or a *legal mechanism* that operates to affect the evidential and persuasive burdens of litigating parties one way or the other. Belton writes: "[t]he weight of authority holds that genuine presumptions are neither evidence nor substitutes

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[34] Hetcht & Pinzler, note 18, at 529.

[35] See Morgan, Observations, note 27, at 908; McBaine, note 13, at 526-530. Klotter writes, "Some courts [in the USA] argue that a true legal presumption is in the nature of evidence and is to be weighed as such. Others hold (probably more properly) that a presumption is not evidence, but is a substitute for evidence."See Klotter, note 24, at 106. McBaine wrote: "Though a presumption accomplishes the purpose of evidence …it does not follow that it is evidence." In other pages he concludes that legal rebuttable presumptions (the true presumptions) are not evidence. They are rather rules of law in which, under certain circumstances, facts are deemed to be established until the contrary is proved. Note that McBaine made it clear that so-called presumptions of fact and irrebuttable presumptions of law are not true presumptions. The first are inferences drawn from evidence while the second are misnomers as they are substantive rules of law.

for evidence, but are merely *procedural devic*es that shift the burden of producing evidence to the party against whom it operates."[36] He maintains that they are *burden-shifters.*

As most scholars including Morgan, Laughlin, McBaine, and Belton (cited above) correctly stated, the *true presumptions* are *rebuttable presumptions of law*. And rebuttable presumptions of law are *neither evidence nor substitutes for evidence*. Rather, they are *rules of law* that require judges to draw conclusions about the truthfulness or falsity or the existence or otherwise of facts based upon other proven facts unless the adversely affected parties disprove the conclusions with evidence of any admissible kind.

Nevertheless, problems in drafting coupled with the semantic ambiguity in the usage of the term 'presumption' have brought about problems in various legislative formulations in Ethiopia.[37]A cursory look at of some of the Ethiopian laws proves that the term presumption is used to refer to a number of things in different contexts.[38] It is thus necessary to identify the particular context in which this term is used in our laws.

In particular, one should not confuse the context in which the term is used in provisions which do not envisage a prior establishment of a given fact such as the constitutional presumption of innocence in criminal proceedings (until proven guilty) or the presumption of capability in civil proceedings (unless found otherwise). Under these contexts, the term is used without a precondition. Most presumptions that we find in our laws, however, presuppose the proving of some basic facts. Even then, there are basic distinctions that Ethiopian legal professionals need to explore, a theme which will be briefly addressed in the following section.

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[36] Belton, note 25, at 1222.

[37] For a better understanding one may read McBaine's article cited at note 13. One may find that *presumption* was listed as one type of evidence in the 1967 Draft Evidence Rule of Ethiopia. But it should be underlined that evidence is a means or device that helps establish a disputed matter of fact. And we have three types of evidence, viz., testimony, documentary evidence and real evidence. Presumption does not fit into any of these kinds of evidence. It is an idea that stands for something(s) or rule(s) different from any of these as shown so far. Discussion that pertains to Art 2002 of the Civil Code of Ethiopia is made under Section 6 below. Suffice here to mention McBaine's conclusion that it is an "absurd and mischievous fallacy" to say that true presumptions, i.e., rebuttable presumptions are "evidence".

[38] One may check this fact by making a swift reading into any of the country's codes or other laws. E.g. Art 20(4) Constitution; Arts 3, 4, 22, 196, 341, 342, 344, 346, 1162, 1193, 1195, 1196,1200, 1201, 1259 of the Civil Code; Arts 63, 71, 97, 106, 126-129, 148, 157, 169-172 of the Federal Revised Family Code of Ethiopia.

2. Types, Operation and Effect: Presumptions Without and With Basic Facts

In the looser or broader sense, presumptions can be classified into two broad categories: *Presumptions without basic facts* and *presumptions with basic facts.* There is also another broad classification: *presumption of fact* and *presumption of law*.

2.1. Presumptions without Basic Facts

Presumptions without basic facts are said to be presumptions that arise without proof of any particular fact.[39] In such cases we do not have preliminary (basic) facts and presumed facts to be drawn or inferred from basic facts. The law simply says that something shall be presumed until the contrary is proved. No precondition is set for the operation of such so-called presumptions. Truly speaking, such presumptions without basic facts are *rules of substantive law* that allocate or fix the place of burden of proving or legal burden of proof.[40] It is regrettable that such rules are described in terms of presumptions.

Presumptions without basic facts do not need any prior fact to activate a particular presumption to come into operation. In Elliott's words "no basic fact is needed to activate the presumption which applies in every case."[41] They arise, Emson maintains, without the need to prove any basic fact in advance. The presumption of innocence under Art 20 (3) of the Constitution, presumption of capability under Art 192 of the Civil Code, presumption of sanity and

[39] Elliott, note 11, at 75; Emson, note 11, at 457.

[40] If such a presumption of law exists it means that one party bears the legal burden of proof or *the burden of persuasion*. So, the presumption of innocence that exists in modern criminal proceedings obliges the prosecution to prove, with the required degree of proof, the accused's guilt. This presumption of innocence exists to favor and protect any criminally accused person without the need to establish any preliminary fact beforehand. Similarly, the presumption of criminal responsibility or the presumption of sanity refers to the accused's legal burden of proving of his irresponsibility or insanity. The prosecution is not required to prove in each case that the accused is responsible for the criminal act alleged to have been committed by him or that the particular accused is sane. The law assumes that any person is responsible and sane thus shouldering the burden of proving the contrary. *Legal burden* of proof (also referred to as the persuasive burden or the risk of non-persuasion or the burden of proof on the pleadings) is one of the various burdens that parties to litigation bear. Unlike the burden of pleading and burden of production of evidence, legal burden of proof refers to the obligation that lies on one of the litigating parties to prove an issue of fact or law to the satisfaction of the court.

[41] Elliott, note 11, at 75.

presumption of criminal responsibility under Art 48 of the Criminal Code (2004), etc…are examples in this regard.

2.2. Presumptions with Basic Facts

P*resumptions with basic facts,* on the other hand, are presumptions that arise after the initial establishment of some other basic fact. Such presumptions with basic facts only arise *when some basic fact is first established*.[42] No presumed fact will come into the scene for judicial inquiry without such prior establishment of a basic fact. It is impossible for anyone to bring such a presumption into operation without securing that prerequisite. If W/ro A, for example, institutes a paternity case against Ato B alleging that the defendant is the father of Mamush who denies the existence of marital status and his paternity to the child, the court *must* draw the conclusion that Ato B is the father of Mamush by virtue of Art 126 of the Revised Federal Family Code[43] if W/ro A can prove the existence of the marriage, and secondly if she can prove that the child was born or conceived during the marriage. The court arrives at this conclusion because plaintiff has proved two basic facts that compel drawing of the presumed controversial fact. The two basic facts are: that there was marriage between plaintiff and defendant, and that Mamush was born while the marriage was intact. The presumed fact that the court *must* draw is: that Ato B is the father of Mamush.

The beneficiary of such presumption with basic fact has to first prove the existence, truthfulness or occurrence (or the contrary) of some basic fact(s). That is usually done by introduction of *evidence* - be it oral, documentary, or real evidence or a combination of any of these- in support of that basic fact alleged to exist. It is also possible to establish such basic fact by the *formal admission* of the other party, by agreement of the parties, or by *judicial notice* of such fact, if the fact alleged is part of the common knowledge or can be easily verified from indisputable sources.[44]

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[42] Id; Dwyer, Stephen I. (1975), 'Presumptions and Burden of Proof', *21 Loy. L. Rev*, at 390. Dwyer writes that "the existence of this basic fact is a prerequisite to the existence of the resultant "presumed fact". As Professor Morgan stated, the basic fact of a given presumption may be established by evidence, or by judicial notice, or by pleadings or by stipulation of parties. Read Morgan, Edmund M. (1952-1953), 'How to Approach Burden of Proof and Presumptions', 25 *Rocky Mntn. L. Rev*, at 44.

[43] See Revised Family Code Proclamation No. 213/2000.

[44] In cases of *formal admissions* and *judicial notice,* a litigating party may, partially or wholly, be exonerated from the burden of proving a particular fact under investigation by the court.

In the case of presumptions with basic facts, once certain basic facts are established or proved, other facts *may* or *must be taken as proved in the absence of contrary evidence*[45] *or must be taken as proved conclusively*.[46]According to Emson, presumptions that require initial proof of basic facts are of three types:[47] (i) presumptions of fact, (ii) irrebuttable presumptions of law, and (iii) rebuttable presumptions of law. For Dennis such presumptions can be sub-classified into: (i) provisional presumptions or presumptions of fact, (ii) evidential presumptions, (iii) persuasive presumptions, and (iv) conclusive presumptions.

There is no basic difference in these further classifications. They all are varieties of presumptions with basic facts; they all fall within that broad categorization of presumptions into presumptions of fact and presumptions of law. It is the latter that is further sub-classified into rebuttable and irrebuttable, or into evidential, persuasive and conclusive presumptions. The evidential and persuasive presumptions are subdivisions of rebuttable presumptions of law. And conclusive presumption is another expression for irrebuttable presumption.

3. Types, Operation and Effect: Presumptions of Fact and Law

3.1. Presumptions of Fact

Presumptions of fact also termed as provisional presumptions denote a conclusion which *may* be drawn from proof of the basic fact of the presumption, but the court is under no obligation to draw the conclusion, even in the absence of any rebutting evidence.[48] For example if a person refuses to submit himself/herself to medical examination (that does not involve any danger) which a court needs to prove or disprove an allegation invoked in a statement of claim, the Court can, by virtue of Art 22 of the Ethiopian Civil Code, consider the fact under inquiry as established.

Courts *may* draw inference about certain facts from other proven facts or circumstantial evidence. Emson notes that "to say a presumption of fact has arisen is simply to state that as a matter of common sense it would be permissible to draw an inference from a *proved* or *admitted basic fact*." [49]

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[45] Elliott, note 11, at 75.
[46] Emson, note 11, at 457.
[47] *Id*. It is common to classify such presumptions into presumptions of fact and presumptions of law. The latter consists of irrebuttable and rebuttable presumptions of law.
[48] Dennis, note 30, at 420.
[49] Emson, note 11, at 458.

Drawing of such common sense inference from other proven facts is within the discretion of courts. They are thus referred to as permissive presumptions or permissive inferences. Most legal writers label this process of drawing of a conclusion as *inference* rather than as presumption.

Though judges of courts are under no obligation to draw conclusions or inferences in the presumptions of fact, it is likely that they will draw relevant conclusions in real cases accepting presumed facts as true if the opposing other parties do not challenge their existence. Such presumptions impose 'provisional' or 'tactical' burden on the party against whom they are operating.[50] Tactical burden is a burden that requires the party against whom the inference is operating to respond by adducing some evidence that could rebut the presumed fact. The operation of such a presumption of fact in a given case simply casts upon the opposing party a *tactical burden* to adduce evidence to the contrary.[51] In the example of the medical examination mentioned above, the person against whom the claim is brought may refute the inference by submitting himself/herself to the medical examination ordered by the court.

Strictly speaking, a tactical burden does not as such entail burden of proof, be it legal or evidential, on the opposing party. Yet, it is to the advantage of such party to adduce evidence in rebuttal rather than simply hope that the court will not find in favor of the party that benefits from the presumption[52] because there is a *possibility* for the court to rely on the inference and decide on the issue if this opposing party fails to adduce evidence that contradicts it. Emson maintains that "[p]resumptions of fact say nothing about the incidence of the legal burden of proof, nor do they give rise to an evidential burden," and further notes that "[o]nce a basic fact has been proved or admitted, the tribunal of fact may (but need not) infer another fact, the presumed fact, in the absence of any or any sufficient evidence to the contrary.[53]

3.2. Presumptions of Law: Irrebuttable and Rebuttable

A presumption of law is what the law requires a court to make where certain facts are established. Such presumptions may be irrebuttable or rebuttable.

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[50] Dennis, note 30, at 420.

[51] Emson, note 11, at 458. A *tactical* or *provisional burden* to adduce evidence is different from burden of persuasion and burden of production of evidence. It simply requires the party against whom a factual inference is taken by the court to adduce some evidence that contradicts the conclusion drawn by the court.

[52] Id

[53] Id

3.2.1. Irrebuttable presumptions of law

Irrebuttable presumptions of law /*praesumptio juris et de jure*/ refer to conclusions that must be drawn by a court on proof of a basic fact.[54] Here, once a basic fact is established, the court *must* draw a conclusion about the existence or non-existence, truthfulness or falsity of the presumed fact. And it is not open for any other party or for the court to rebut the presumed fact; i.e., no rebutting evidence is allowed to the contrary.[55] Since no rebutting evidence is admissible at any rate, irrebuttable presumptions of law are referred to as *conclusive or absolute presumptions*. In a paternity case for example, if Ato D admits marriage but argues that the child was conceived after divorce without refuting W/ro C's evidence that the child was born on the 210th day from the date of divorce, the court is bound to draw a conclusion that Mimi is conceived in wedlock. This is because Art 128(1) of the Federal Revised Family Code provides that a child shall be deemed to have been conceived in wedlock if she is born within 300 days after the dissolution of marriage. In this case it is not possible to adduce any evidence with a view to disprove the date of conception. Sub (2) of the article proclaims: "No proof to the contrary shall be admitted."

As many scholars in this area observed, irrebuttable presumptions fall outside the scope of the law of evidence. Such presumptions are, properly speaking, parts of the substantive law. As Dwyer stated, "conclusive presumptions allow no proof which might contradict them. They thus provide an absolute basis for judgments in certain fact situations. Such presumptions are therefore more accurately matters of *substantive law* than of procedural or evidentiary law because of their definitely decisional nature."[56] (Emphasis added).

3.2.2. Rebuttable presumptions of law

The other types of presumptions which are taken as *true presumptions* are the *rebuttable presumptions of law*.[57] In rebuttable presumptions of law, once a basic fact is proved, the court *must* draw a conclusion about the existence, truthfulness or otherwise of the presumed fact. This drawing of a conclusion about the existence of the presumed fact is, however, *susceptible to rebuttal evidence* by the party against whom that presumption operates. In different jurisdictions, the legislature determines whether such party against whom a rebuttable presumption operates can rebut freely with any type of evidence or with some limited type of evidence. If one can rebut what is presumed to exist

[54] Dennis, note 30, at 421.
[55] Emson, note 11, at 457, 460-461; Elliott, note 11, at 75-76.
[56] Dwyer, note 42, at 390; See also Elliot, note 11, at 76. Thus, scholars express that the expression "irrebuttable/ conclusive presumption" is a misnomer.
[57] Andrews and Hirst, note 9, at 104.

with *any type of evidence* that type of (rebuttable) presumption is referred to as *freely rebuttable presumption*; if one is restricted with some *identified type of evidence*, the type of (rebuttable) presumption is referred to as *presumption of law that can be rebutted with limited evidence* or *restrictively rebuttable presumption*.[58] What Arts 97, 106 and 169 of the Revised Family Code provide in respect of disproving of marriage, irregular union and sexual intercourse, respectively, can be cited as examples of the first type of rebuttable presumptions of law. The same is true under Arts 1147, 1200, 1201, and 2132 of the Civil Code. Again, Art 2025 & 2026 of the Civil Code on presumptions of payment are, as we are going to see, good examples of the second type of rebuttable presumptions of law.

a) Persuasive rebuttable presumptions of law

Rebuttable presumptions of law are either *persuasive presumptions* or *evidential presumptions*. Persuasive presumptions of law denote a conclusion that *must* be drawn by a court on proof of the basic fact of the presumption *unless and until the party disputing it disproves the conclusion*.[59] Here, if a proponent of a basic fact establishes this basic fact with admissible evidence or if the basic fact is admitted by the opponent or if the court can take judicial notice of the alleged basic fact, the court *must* draw the conclusion on the existence or otherwise, truthfulness or falsity of the presumed fact. And then, it is up to the party against whom that presumption is drawn to satisfactorily disprove that established basic fact with admissible evidence and to prevent the court from considering the presumed fact as established.

It is not sufficient for the party against whom this presumption is operating to introduce rebuttal evidence. To win on that issue, this party has to *convincingly* disprove the alleged basic fact with *sufficient degree or quantum* of proof. It is not sufficient to create *balance of probability*, or to put the fact at an *equilibrium* state of condition in a civil proceeding. This party has to prove with a preponderant *degree* of persuasion showing that his version is true. If it is a criminal proceeding relating to the elements of the crime under inquiry it is, of course, sufficient if the defendant brings or spreads some *reasonable doubt* against the prosecution's established basic fact.

Unlike the civil proceedings, it is always the public prosecutor that bears the legal burden of proof on the elements of crime. In civil cases, however, an operation of a rebuttable presumption of law may bring about change of incidence of legal burden of proof. The party against whom such a presumption

[58] See Brigadier General Tatek Tadesse (1997 E.C), *Basic Principles of the Law of Evidence*, (in Amharic), (Addis Ababa: Addis Ababa University Book Center), at 76.
[59] Dennis, note 30, at 421. Read also Elliot, note 11, at 78; Emson, note 11, at 461- 462.

is invoked bears the legal burden of proof; or else, it cannot persuade the court. Thus Emson says: "If a presumption is persuasive, the opposing party in civil proceedings bears a legal burden of disproof on the balance of probabilities."[60] Persuasive rebuttable presumptions of law thus operate to *place a legal*, as opposed to evidential, burden on the party challenging the existence or otherwise, truthfulness or falsity of the presumed fact.[61]

b) Evidential rebuttable presumptions of law

Evidential rebuttable presumptions of law, on the other hand, signify a conclusion that *mus*t be drawn by a court upon proof of the basic fact of the presumption *in the absence of any evidence to the contrary*.[62] As in persuasive rebuttable presumptions of law, evidential rebuttable presumptions of law first come into the picture in any lawsuit *after* the initial establishment of basic facts in the litigation process. It is such establishment of the basic fact(s) that activate or bring into operation this type of presumption.[63]

Once such a presumption has come into the scene following the proof of the basic fact(s), it has its own legal consequence different from that of persuasive presumptions of law. That effect is to put the incidence of the *evidential burden*, i.e., *burden of going forward with evidence,* or simply, *burden of adduction of evidence*, on the party against whom that presumption applies.[64] This simply pertains to the party that has to move to adduce or present admissible evidence under the pain of losing on that particular issue(s) if the case stops at that point. Of course, mere adduction of some evidence by the party against whom this presumption is operable is not sufficient: rather, it is necessary to adduce sufficient evidence that contradicts the existence of that presumed fact. Yet, this party, unlike the party that bears legal burden, is not expected to *convince* judges about the truthfulness of the fact under investigation on his side as compared to his opponent because bringing the minds of judges to the state of equilibrium is sufficient to win on the issue under inquiry. In short, evidential presumptions do not affect the incidence of legal burden of proof.[65]

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[60] Emson, note 11, at 462.
[61] Dennis, note 30, at421.
[62] Id, at 420.
[63] Read Morgan, Observations, note 27, to know more about the point of time in which a given presumption, including those of persuasive and evidential presumptions, comes into operation in the course of civil proceedings. Read also Morgan, Presumptions, note 14, to know more about effects of operations of presumptions and related issues.
[64] Read Elliot, note 11, at 78; Emson, note 11, at 461; Dennis, note 30, at 421.
[65] Id.

Whether a given rebuttable presumption of law is of a *persuasive* or *evidential* nature has to be checked from the express or implicit gist of the law. One has to check by asking the following two questions. (1) Which of the two opposing parties in the litigation risk losing on an issue of fact under inquiry, in the face of an operable rebuttable presumption of law, if the case stops at a given point? (2) Which of the two opposing parties in the litigation risks losing on an issue of fact under inquiry, in the face of an operable rebuttable presumption of law, if the *cogency of evidence* produced on both sides remain at equilibrium?

4. Relationship between Burdens of Pleading, Burdens of Proof and Rebuttable Presumptions of Law

There is some ambiguity with respect to the operations of rebuttable presumptions and this traces its roots to conceptions regarding the nexus between burdens of pleading, burdens of proof and types of presumptions. This is indeed manifest in the decision of the Cassation Division in *Agency for the Administration of Rented Houses v Mr. Bironi Atikpo* mentioned earlier in the introduction.

In an adversarial procedural system such as ours, parties to disputes in civil cases start with preparations and presentations of their respective pleadings to courts. That is made at the pleading and pre-trial stage. The plaintiff has to state all material facts and grounds of claim that constitute his/her cause of action, i.e., s/he must allege facts to support his/her claim. An adversary system of justice imposes such an obligation or burden of pleading upon plaintiff.[66] The defendant also bears another burden of pleading, preferably called burden of response, to what is alleged by plaintiff. Sedler notes that defendant *must respond* to each allegation of fact contained in a statement of claim, *admitting* or *denying* it.[67]

When the written pleadings are over, courts normally proceed to examine parties orally and determine if there are issues that should be further taken to the next phase to be resolved in a full scale trial. At the trial stage, litigating parties introduce their respective evidence as provided in the Civil Procedure Code. In the normal course of things, each of the parties to such dispute bear some *burdens of proof* (- evidential or legal or both). As can be gathered from Arts

[66] Read Belton, note 25, at 1212-1217. To the Ethiopian context, refer to Arts 80- 91 *cum* Arts 222- 227 of the Civil Procedure Code of the Empire of Ethiopia (1965).

[67] Sedler, Robert Allen, *(*1968), *Ethiopian Civil Procedure,* at 2-6, 120, 199-203 ff. and Fisher, Stanley Z. (*1969)*, *Ethiopian Criminal Procedure: A Sourcebook, at 135.* Also read Arts 234 – 240 *cum* Arts 80- 91 of the Civil Procedure Code.

258- 260 of the Civil Procedure Code, the plaintiff *must* adduce evidence to support his allegations and defendant *must* adduce his own countering evidence under pain of loss of one's case on an issue of fact or certain issues of facts. Apart from what Art 258 provides, the determination of the party entitled or obliged to begin to introduce evidence is to be identified from the pleadings of parties, and /or from the substantive law.

In case, however, the legislature has provided presumptions of law in favor of one or the other party in respect of some facts (which is usually based on some public policy grounds), it suffices if that party establishes only the basic fact(s) alleged in the pleading. Once such party establishes the basic fact(s), the court has the duty to draw the presumed fact stated in the pleading. Hence, one clearly observes the nexus that exists in some instances between burdens of pleading, burdens of proof and rebuttable presumptions of law.

Once a rebuttable presumption of law comes to be operative in the course of litigation as described above, it is necessary to know how it affects the respective legal and evidential burdens of proof of parties.

In the case of evidential presumptions of law, once a basic fact is established, the court is duty bound to draw a conclusion about the existence (or absence), the truthfulness (or falsity) of a disputed matter of fact *in the absence of evidence to the contrary.* This "shifts"[68] the burden of adduction of evidence from the party who bears the burden to the opposite party against whom that presumption is operating. As the court is legally required to give a decision on the basis of the presumption in the absence of evidence to the contrary, this party, therefore, bears the burden of adduction of sufficient evidence- evidence that is sufficient to raise doubt against the conclusion that should be drawn in its absence. This party's rebuttal evidence must be strong enough to justify a finding in his favor if the case stops at that point. If his evidence brings equal probability, or puts the matter in equilibrium at the end of the litigation process, or if the court is left in doubt at the conclusion of all the evidence, the party with the evidential burden wins on that issue. That is because the party in favor of whom the presumption is operating, i.e., the beneficiary of the presumption, still bears the burden of persuasion. If the party fails to adduce preponderant

[68] Strictly speaking there is no *shift* of burden, be evidential or persuasive. An evidential or legal burden can rest on only one party in respect of an identified issue. The term shift, a commonly employed term, must be referring to the other party's burden to adduce evidence, and to persuade with that evidence to establish *another fact* that contradicts or disproves what had been made out by the party that carried the evidential or legal burden.

evidence, he/she loses on that specific issue. In this regard Emson writes the following:[69]

> An evidential presumption does not affect the incidence of the legal burden of proof but places an evidential burden upon the opposing party once certain basic facts have been proved or admitted. The party relying on the presumption still bears the legal burden of proving the presumed fact but this burden will be deemed to have been discharged, and the tribunal of fact will be obliged to accept its truth, if the opposing party has failed to adduce sufficient evidence to suggest the contrary. If the evidential burden has been discharged, the tribunal of fact will have to weigh in the balance the probative value of the evidence adduced by the opposing party against that of the basic facts and any other evidence adduced by the party bearing the legal burden, in order to determine whether the legal burden has been discharged.

In the case of persuasive presumptions of law, however, the court is duty bound to draw a conclusion about the existence or otherwise of the fact in dispute unless such conclusion is *disproved by the other party disputing it*. Such presumptions operate to place a *legal burden* on the party challenging the presumed fact. Here, unlike evidential presumptions, the legal burden of proof "shifts" from the beneficiary of the presumption to the party against whom that presumption is operable. Hence it is not sufficient for this latter party to adduce some evidence. It is necessary for this party to adduce evidence that convinces judges of the truth on his side with greater probability. Putting the matter at equilibrium will not be sufficient for this party. Emson states:[70]

> A persuasive presumption is effectively a rule, which places the legal burden of proof on a particular party once certain basic facts have been proved or admitted. The basic facts give rise to the presumed fact, and it is for the opposing party to prove the contrary. The presumed fact has no evidential value of its own but merely lays down the rule as to the incidence of the legal burden of proof. [….] If no or no sufficient evidence is adduced by the opposing party to discharge the burden of proof (that is, to rebut the presumption) the tribunal of fact must accept the truth of the presumed fact.

5. Presumptions of Payment and the Cassation Court's Binding Interpretation of Art 2024

Arts 2020 - 2024 of the Civil Code deal with presumptions of payment of contractual debts. The Code provides presumptions that arise from different types of *conduct* of creditors and from *lapse of time*.[71] We have thus

[69] Emson, note 11, at 461-462.
[70] Id.
[71] Incidentally, one may see the public policy preference that the Ethiopian legislature adopted in creating these presumptions of payment of debts instead of stipulating

presumptions of payment that arise from handing over of document of title by creditor to a debtor (Art 2020) [72], from entries made by creditor (Art 2021)[73], from a receipt given by a creditor in respect of prior or concomitant debt (Art 2022),[74] and, from the lapse of six months since those specific debts fell due (Art 2023)[75] and from the lapse of two years since those other specified debts fell due (Art 2024).

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isolated periods of limitation or prescriptions as was the case in the French Code Civil. See Planiol, Marcel (1939), Treatise on Civil Law, Vol. 2, Part 1 (11th ed.; Translated by the Louisiana State Law Institute), Chapter IX- Prescription, at 342-357, most of the matters provided under Arts 2023 & 2024 of the Ethiopian Civil Code have had different periods of prescription in France. Creation of different prescription periods of thirty years, twenty years, ten years, five years, three years, two years, one year, six months, three months, and one month for various contractual civil actions in the French system was criticized as being unwise and inconvenient. Perhaps, the drafter of the Ethiopian Civil Code, René David, decided not to import that inconvenient approach into the Ethiopian system and thus preferred to prepare a draft with one general prescription period of ten years (which we find under Art 1845 of the Civil Code) and left other contractual relationships that require timely enforcement to be sanctioned by such presumptions of payment. This author feels that it would be helpful if scholars do some inquiry on the historical background of these provisions of the Ethiopian Civil Code. It should be clear that presumptions of law and period of limitation (prescription) are entirely different concepts and rules of law. The Cassation Division has rightly maintained that distinction in those cases under discussion. Ato Mekbib Tsegaw has also examined the basic distinctions between the two. (See Mekibib Tsegaw (2009) 'Presumptions of payment: Are they rules of Limitation or Evidentiary Rules? And Related Issues'*, Ethiopian Bar Rev.,* Vol. 3, No. 2, (in Amharic) at169-178.)

[72] Art 2020 goes: "The handing over of the document of title to the debtor shall raise a presumption that the debt has been discharged."

[73] Art 2021 runs: "Entries made by the creditor at the end, in the margin or at the back of a document of title, which remained at all times in his possession, shall be conclusive evidence although not signed or dated by him, where they tend to establish the debtor's release."

[74] Art 2022 provides that:

(1) In the case of interests or other periodical dues, the creditor who gives a receipt for a given period, without making any reservation, shall be deemed to have collected the dues for the previous periods.
(2) Where the creditor gives a receipt for the principal, the debtor shall be deemed to have paid the interest.

[75] According to Art 2023, the following debts shall be deemed to have been paid where six months have elapsed since they fell due:

(a) debts in respect of wages owed to clerks, office employees, servants, daily workers and workmen;
(b) debts due to masters or teachers in respect of lessons given monthly;

The focus of this section is presumptions of payments embodied in Art 2024 of the Civil Code.[76] Before an analysis of the presumptions contained in this provision, let us examine how our courts understand and apply those presumptions. Almost all issues raised in court cases that involve Article 2024 of the Civil Code are currently being resolved in accordance with the binding interpretation rendered by the Cassation Division of the Federal Supreme Court in the *Agency for the Administration of Rented Houses v Mr. Bironi Atikpo* case. Only recently did the Division attempt to make some departure in *Commercial Bank of Ethiopia v Ato Liyew Chekol & Ato Million Mengistu*.

Agency for the Administration of Rented Houses v Bironi Atikpo's case relating to operation and effect of the presumptions contained in Art 2024[77] indeed deserves careful analysis. The case was first submitted to the Federal First Instance Court in Addis Ababa. The Plaintiff, *Agency for the Administration of Rented Houses,* sued defendant *Mr. Bironi Atikpo* stating that he failed, *inter alia*, to pay rent- debts due in respect of a house he leased from plaintiff. After stating its cause of action, plaintiff requested the court to decide against defendant declaring that he should pay the debts that were due. As the defendant failed to appear to defend the suit, despite summons duly served, the case proceeded *ex-parte*. Eventually the court held that the defendant should pay the debt that fell due for the last two years. But, it dismissed plaintiff's claim of the alleged debt due for more than two years maintaining that defendant is *presumed* to have paid as per Art 2024(d) of the Civil Code.

(c) debts due to hotel keepers, inn-keepers or managers of boarding-houses in respect of lodging and food;
(d) debts due to merchants in respect of goods and foodstuffs supplied by them to private persons for consumption or common use.

N.B. The conjunction "and" from sub (a) through (d) is omitted as it appears that it is a result of poor drafting.

[76] According to this provision, "[t]he following debts shall be deemed to have been paid where two years have elapsed since they fell due:
(a) Debts due to physicians, surgeons, dentists, midwives, pharmacists or veterinary surgeons in respect of professional services or supplies;
(b) Debts due to advocates, notaries or other members of the legal profession in respect of professional services;
(c) Debts due to handicraftsmen in respect of work done by them;
(d) Debts due in respect of rents for houses or agricultural estates;
(e) Arrears of periodical dues;
(f) Interest on loans and generally any sum payable annually or at shorter periodical intervals."

[77] Also, refer to Mekbib Tsegaw's brief Note (about the operation of the presumptions under Art 2023 & 2024), cited at footnote 71 above, at 179-180.

Partly aggrieved, the plaintiff appealed to the Federal High Court. This Court, however, confirmed the decision of the lower court. The court held that appellant's claim of the rent debt that fell due for more than two years is not acceptable as it is presumed in law to have been paid.

Ultimately, the plaintiff took the case to the Cassation Division of the Federal Supreme Court stating, *inter alia,* that the lower courts committed a fundamental error of law in applying the rule of presumption of payment. The appellant contended that the presumption contained in Art 2024 of the Civil Code is not applicable in *ex-parte* cases; and that courts should not raise period of limitation on their own. It argued that the lower courts also committed basic error of law for basing their decisions on *presumption* which has not been invoked by the defendant as the case was being adjudicated *ex parte*.

The Cassation Division, which consisted of a panel of five judges, examined the case in the absence of the respondent.[78] The issue framed by the Cassation Division was "*whether it is possible to apply the presumption contained in Art 2024 of the Civil Code in the circumstance where a defendant did not deny the alleged money debt or in the circumstance where the case is proceeded ex-parte.''*

Before directly going to the main issue, the Division primarily went on to give analysis of the nature, operation and legal effect of presumptions of law in general and presumptions of payment of debts in particular. It first tried to show differences that exist between presumptions of law and period of limitation. In this regard all the judges unanimously held the following:

> As the *presumption* contained in the Civil Code is different from that of the *period of limitation* found in Art 1845 (and in other articles) of the Civil Code, the contention of the petitioner that the trial court erred in invoking the presumption under Art 2024 without its invocation by defendant is not acceptable. While period of limitation bars courts from entertaining cases on their substantive merits, on the other hand, presumptions of law (including that, which is found under Art 2024 of the Civil Code) entail *only shift of burden of proof*.[79] Unlike cases where courts are not allowed to invoke period of limitation on their own, it is possible to see the merits of the case brought by plaintiff. The fact that defendant did not invoke the operation of the presumption under Art 2024 does not bar courts from applying it. Petitioner

[78] Since respondent did not appear to defend the case at that level after proper notice (as was the case in the First Instance Court), the Cassation Division examined the petitioner's case in the absence of the respondent.

[79] The Amharic version reads: "…**የማስረዳት ሸክምን ከአንድ ወገን ወደ ሌላው የማስተላለፍ ውጤት ብቻ ያለው በመሆኑ**…. *''*

> confused presumption with period of limitation. That is contrary to the spirit, goal and express content of the law and thus is not acceptable.

However, there was no unanimity among the justices regarding the following points:

- Regarding the interpretation and application of Art 2024 of the Civil Code, i.e., *whether the presumptions apply in a situation where the defendant did not appear and deny the claim brought against him;*
- on the *relevance and applicability of Art 89 of the Civil Procedure Code* of Ethiopia (1965) to the case, i.e., whether this article of the law has *relevance to the case* at hand, and if relevant *whether it relieves defendant from burden of pleading;*
- *whether the existence of a presumption of law in a given case requires special rules of procedure and evidence to follow;*
- *whether presumptions are evidence or not*; and
- whether the failure of the defendant to appear before the court to defend the claim brought against him in that case can be taken as an *admission* of plaintiff's claim.

The Division was thus divided into the majority (three judges) and the dissenting minority (two judges). The Cassation Division proceeded to address the main theme of the case.[80] The majority opinion held the following with regard to presumptions of law:

> Presumptions of law have substantive and procedural aspects[81]. The presumption contained in Art 2024, found in that part of the Civil Code devoted to *Proof in relation to Contracts*, is one of the numerous presumptions that we have in the Ethiopian substantive laws. It is one of the provisions that deal with presumptions of payment of contractual debts. The article lists the types of contractual debts that should be presumed as paid where two years have elapsed since they fell due. Debts due in respect of rents for houses are among such debts (Art 2024 (d)).

With regard to the rebuttability or irrebuttabilty of the presumption, the majority opinion held the following:

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[80] The theme was once again restated:
''Under what circumstance is the presumption provided under Art 2024 of the Civil Code applicable? Can it be applied in a situation where defendant didn't appear before the court and deny the claim(s) brought against him?''

[81] One wonders what that really means. Is it true that an operation of a given presumption of law has substantive and procedural aspects?

> Though the basic effect of presumptions of law is to shift burden of proof from one party to the other, the legal framework in which a party against whom a presumption operates *rebuts the presumption of law*[82] varies.…
>
> It is understandable from the reading of Art 2026 (1) that the presumptions contained in Arts 2020- 2024 are irrebuttable. By providing that 'No proof shall be admitted to rebut the presumptions laid down in Arts 2020- 2024' this sub-article made it clear that the party against whom the presumption operates cannot in principle adduce any rebuttal evidence. It is only by requiring the opposite party to take an oath that one can rebut the presumption. A party who intends to carry out its burden of proof should expressly indicate this in accordance with Art 83 of the Civil Procedure Code.

The substantive –versus- procedural nature of Article 2024 and the issue whether Art 2024 could have been invoked by the lower courts in an *ex parte* adjudication were also addressed in the majority opinion:

> Courts should enforce these articles contained in the Law of Contracts, as they are parts of the substantive law. … They are provisions, which the courts should enforce as any provisions in the Law of Contracts whether any of the parties to the litigation invoke them or not. … Therefore, any court, which finds facts covered under Art 2024 in a case before it, is duty bound to presume that the facts are proved.
>
> What is found in the Civil Procedure Code relating to presumptions of law is the same as that which is embodied in the Civil Code. According to the Civil Procedure Code, any factual claim of the plaintiff that is not expressly denied by defendant is presumed to have been admitted. … However, where the defendant is a beneficiary of legal presumptions, one is relieved of such an obligation as Art 89 of the Civil Procedure Code expressly provides. …[83] This provision shows that any party who is a beneficiary of presumptions of law has no obligation to expressly deny those facts that are within the presumptions. Any defendant is not required to deny specifically the facts falling within presumptions. Therefore, no court can give judgment against defendant taking that his failure to deny such fact specifically amounts to admission.
>
> As this is the legal framework regarding presumptions of law, courts should give decisions based on such understanding. Further, it is inevitable that courts should have to follow special rules of procedure and evidence different from

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[82] The Amharic goes: "...**ሸክሙ የዞረበት ወገን የህግ ግምቱን ማፍረስ የሚችልበት የህግ ሁኔታ ይለያያል።**"

[83] The English version of Art 89 of the Civil Procedure Code (which is not different from the Amharic version) provides the following:

"Art 89. –Legal Presumptions

Neither party needs in any pleading allege any matter of fact which the law presumes in his favor or as to which the burden of proof lies upon the other party, unless the same has first been specifically denied."

> the normal proceedings when they find a defendant who is the beneficiary of presumptions of law: That also holds true to the decision-making process.[84]
>
> Therefore, as long as there are facts falling within presumptions of law, courts should enforce such presumptions irrespective of the content of defendant's defense- whether defendant denies or not, it does not produce different outcome in respect of such a fact.[85] That the case proceeded *ex-parte* does not bring any difference in this regard; defendant is not required to deny specifically and expressly such facts falling within presumptions of law; failure on this should not be taken as an admission.

The majority opinion thus concluded that "[i]t is clear from petitioner's memorandum that it is requesting payment of house rent bills that fell due over two years. As this is the case, it is proper and it is in accordance with Art 2024 of the Civil Code to presume that the alleged debt is paid even where the defendant did not invoke the provision or in situations where the case is proceeded *ex-parte.*"[86] The Cassation Division thus confirmed the decisions of the lower courts.

The minority opinion held a different position regarding the five issues mentioned above. First, they maintained that "the presumptions of law that are found in Chapter 7 of the Civil Code, […] including the presumption embodied in Art 2024 should be taken as a type of evidence like documents, witnesses, a party's admission or oath; Art 2002 supports that." They further held that, with regard to disproving of presumptions, Art 2025 reinforces the assertion that these presumptions of law constitute evidence. Thus, they concluded that the presumptions contained in Chapter 7, Section 3 of the Civil Code, including the one embodied under Art 2024, are presumptions of evidence and not of presumptions that the law takes on facts.

Secondly, they said that a defendant who failed to deny expressly a claim brought against him would be taken as admitting that claim as per Arts 83, 334 (1) (d) and 335 of the Civil Procedure Code.[87] They concluded that Art 2024 of the Civil Code is not applicable under such circumstances.

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[84] In Amharic it goes: "ተከሳሹ የህግ ግምት ተጠቃሚ በሚሆንበት ወቅት [ፍ/ቤቶች] የሚከተሉት ሂደትና የሚሰጡት ውሳኔም በሌሎች በመደበኛ የሙግት ሂደት ከሚከተሉአቸው የሥነ ሥርዓትና የማስረጃ ደንቦች የተለዩ መሆናቸው የማይቀር ነው።"

[85] "…የቀረበላቸው ፍሬ ነገር በህግ ግምት እስከተሸፈነ ድረስ ፍርድ ቤቶች ተከሳሹ ካደም አልካደ የህግ ግምቱን ተፈፃሚ ማድረግ ይጠበቅባቸዋል።"

[86] "…ክስ ከቀረበበት የኪራይ ክፍያ በከፊል መጠየቅ ከነበረበት ከሁለት አመት በላይ የሆነው ስለመሆኑ ከከሳሽ ክስ መረዳት ይቻላል። ይህ ከሆነ ደግሞ ተከሳሽ ባያነሳውም ወይም በሌለበት ቢታይም በፍትሐብሔር ህግ ቁጥር 2024 ያለውን የህግ ግምት ተፈፃሚ ማድረግ ዕዳው እንደተከፈለ መቁጠር ተገቢ ነው።"

[87] Next, they contended that the court should give a decision against the defendant on the basis of his admission as per Art 242 of the Civil Procedure Code if,

Thirdly, the minority opinion states that the presumption contained in Art 2024 of the Civil Code applies where a defendant claims to have paid the alleged debt. If defendant raises such a defense, he would (by the operation of the presumption under Art 2024) be relieved of adducing any other evidence in support thereof. It would be the burden of the plaintiff to disprove this presumption by requesting defendant to take an oath and explain the fact.

Fourthly, the dissenting judges observed that the defendant did not appear to deny petitioner's claim; so, they maintained, there was no issue to be framed - in such case Art 2024 could not be applicable. They stated that the court should give decision in favor of plaintiff by taking defendant's failure to appear as amounting to admission.

Fifthly, noting that Art 89 of the Civil Procedure Code has no relevance to the case at hand they said that it is wrong to maintain that the defendant is relieved from the burden of pleading by virtue of the said article. Lastly, they held that the existence of presumptions of law, including that which is found under Art 2024 of the Civil Code, in a given civil proceeding does not require special rules of procedure and evidence different from other normal proceedings. As the defendant did not appear and deny the debt claimed by plaintiff, they concluded that he should be liable to pay the house rent arrears that fell due for the period before two years as well.

6. Other Court Cases involving the presumptions of payment under Art 2024: General Observations and Comments

The Cassation Division of the Federal Supreme Court itself has cited the interpretation in *Bironi Atikpo*'s case as *precedent* in subsequent civil cases.[88] For example, in *Paoulos Rumicho v Chaltu Merdasa,* the Cassation Division held that the debt that the defendant owed to her lawyer fell due for more than two years, and is thus presumed to have been paid under Art 2024 of the Civil Code.[89] Furthermore, the Cassation Division pursued a similar line of interpretation and conclusion in *Daniel Alemu v. Romanework Yemanebirhan et al*.[90] Some part of the dispute in *Agency for the Administration of Rented Houses*

- he appears and admits the debt that fell due for over more than two years, or
- He fails to deny expressly the claim brought against him.

[88] See for example *Ato Paoulos Rumicho V W/ro Chaltu Merdasa case*, Supreme Court File No. 15493, decided on 29 Hamle, 1997 E.C.

[89] Defendant didn't allege that she paid the debt, but argued that the case is barred as it is more than two years since it fell due.

[90] Here also defendants didn't allege an affirmative defense of payment.

v Sossina Asfaw was also related to presumption of payment of debt due in respect of rents of a house and was thus partly entertained in similar fashion.

The *Agency for the Administration of Rented Houses v. Bironi Atikpo* case was different from the other cases mentioned above because it was adjudicated *ex-parte*. In the other cases, the defendants had at least appeared before the first instance courts and submitted their respective defenses. Except in *Agency for the Administration of Rented Houses v. Sossina Asfaw* case, all first instance courts recognized the existence of valid contracts between the disputing parties.[91] But, none of the defendants mentioned raised an *affirmative defense of payment* of alleged contractual debts.

It has been widely acknowledged that the Ethiopian litigation system, both in the civil and criminal proceedings, is basically adversarial in nature.[92] An adversary system has its own unique features and major premises. One of these is that courts start with no prior knowledge of the existence of a controversy between litigating parties in a case; judges do not know about any disputable fact before parties properly present and prove it to them.

Thus, a plaintiff to a lawsuit in Ethiopia who seeks justice in a civil case should take the initiative of following the prescribed steps to bring his/her opponent before a court. As s/he is the one who seeks to change the *status quo*, the plaintiff bears the *burden of pleading*[93] of facts that constitute the *cause of*

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[91] In the *Agency for the Administration of Rented Houses V W/t Sossina Asfaw* case, it is the Cassation Division that pronounced the existence of valid contractual relationship between the parties by reversing the decisions of the lower courts.

[92] See for example the views of Sedler, note 67*,* at 2-6, 120, 199-203 ff. and Fisher, Stanley Z. (*1969)*, *Ethiopian Criminal Procedure: A Sourcebook, at xii.*

[93] Burden of pleading is one of the various burdens that parties to a lawsuit bear to successfully present, prove and eventually win or defend their respective facts in issue, relevant facts or collateral facts or generally their respective cases, as maybe the case. There are a series of legal burdens, other than the usual evidential and persuasive burdens, that parties have to undergo in the way of achieving certain legal results. The burden of initiating is one such burden and includes burdens of suing, filing, applying, etc. Burden of pleading may be included in this burden. The party with this burden has to prepare a legally sound claim or cause of action, or depending on the nature of the proceeding and stage of the process to prepare a legally sound defense or counter-claim. For some background information read the following: Sedler, note 67, at 120- 138; Belton, *note 25*, at 1205-1223; Cleary, Edward W. (1959- 1960), '*Presuming and Pleading: An Essay on Juristic Immaturity*,' 12 Stan L Rev. at 5-28; Wexler, Stephen and Effron, Jack (1983- 1984), '*Burden of Proof and Cause of Action*,' 29 McGill L.J. at 468- 480. Cleary wrote, "Since plaintiff is the party seeking to disturb the existing situation by inducing the court to take some

action. The plaintiff should thus present the material propositions of fact that constitute the subject matter of a dispute and should annex evidence to support the assertions in the statement of claim.[94] A defendant, on the other hand, is expected to respond to such an allegation brought against him/her by *admitting or denying* the truth of each allegation.[95] As is the case for the plaintiff, the defendant *must allege* material propositions that constitute his/her defense.[96] In other words, the defendant bears another burden of pleading, more appropriately *burden of response*. As Sedler notes "primary responsibility rests with the parties [even if] the court has some responsibility for developing the case", and, in effect, each party "must present his version of the case to the court, that is, he must allege facts to support his claim or defense and introduce evidence that will prove the existence of those facts.[97]

In responding, a defendant may deny each claim and avoid liability- this is what is referred to as "avoidance" in the common law tradition. A defendant in a contractual case, for example, may, deny the existence of the alleged contract or may, *inter alia*, argue that the alleged contract is not valid. Or, defendant may admit some or all allegations of the plaintiff and plead additional facts that deprive the admitted facts of adverse legal effects- this is referred to as "confession and avoidance". In contractual cases such defenses may include *counter-claim*, *set-off, force majeure, mistake, defect of consent, payment* or other *grounds of extinction of obligation*. In other cases defendant may admit all or part of the claim thereby accepting full or partial liability.[98]

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measure in his favor, it seems reasonable to require him to demonstrate his right to relief."(at 7.) Professor Belton also wrote:

> The burden of pleading imposes upon a party the obligation to notify his opponent and the court, in the appropriate manner, of the elements upon which he intends to rely either to sustain or to defeat liability. The policy behind the pleading burden is to provide notice to the courts and to the other party of the nature of a claim or defense upon which evidence will be presented to the court. (at 1216.)

[94] See Arts 80, 222-228 0f the Civil Procedure Code.

[95] See Art 234 (1) particularly (d) - (f) Civil Procedure Code.

[96] Art 247 (2) of the Civil Procedure Code provides:

> "Material propositions are those propositions of fact or law which a *plaintiff must allege* in order to show a right to sue or a *defendant must allege* in order to constitute his *defense*."

[97] Sedler, note 67, at 120.

[98] E.g. in a contractual claim of 60,000 birr for house rent brought by plaintiff, defendant may respond saying 'yes I have agreed to pay 5,000 birr per month for the house I leased from plaintiff; yet I paid 50,000 birr for the last ten months and I'm left to pay 10,000 birr only.'

If the defendant fails to appear with his/her statement of defense, after being duly served of the summons, the court should proceed *ex-parte*.[99] In failing to appear with his statement of defense, defendant has *waived his right to raise any ground of defense and the opportunity to rebut plaintiff's evidence*. It is at his risk if s/he fails to respond, to give relevant factual data to the court and to present rebuttal evidence. In such instances the court should examine plaintiff's case and evidence, and if it is satisfied that the plaintiff has a valid claim and has suffered some injury or damage, it should give judgment in his favor against defendant.[100]

As shown above, the *Agency for the Administration of Rented Houses* sued the defendant for failing to pay the debt he owed to it. It based its cause of action on the contract of rent of a specified house, and claimed that the defendant is in breach of contract by failing to perform his obligation. By virtue of Art 2001 (1) of the Civil Code this plaintiff bears the burden of proof in respect of the existence of the alleged obligation. Whether the defendant appears with his defense of any kind or not, the burden of adduction of evidence to show the existence of the alleged contract ought to have been borne by the plaintiff.[101] It appears from the case that the existence of the alleged contract, which was a basis for the plaintiff's right to relief and of defendant's obligation, was not disputed (or plaintiff must have produced documents that prove its existence).

Plaintiff alleged that defendant failed to pay monthly rental bills. As plaintiff pleaded and proved the existence of the obligation that defendant was bound to honor, it had no further obligation under the circumstances.[102] By virtue of Arts 247 (2) and 234 of the Civil Procedure Code it was the responsibility of the defendant to respond against this allegation. Depending on the facts on the ground, defendant (if willing) could have either admitted this allegation or could have raised grounds of defense, if any.[103] It was the responsibility of the defendant to plead grounds of defense such as payment - an affirmative defense, which should be alleged to avoid liability. Whether defendant did pay the claimed debt or not, could not be a subject matter of judicial notice. It is also clear that the court could not play a defendant's role; it could not raise such defenses as nullity, variation, or extinction of that proved contract or it could not

[99] See Arts 233 and 70 (a) Civil Procedure Code.
[100] Sedler, note 67, at 163-164.
[101] In case of formal admission, plaintiff would be relieved of such burden.
[102] If it were not able to show the existence of valid claim, the court should have given judgment in favor of defendant and against plaintiff at that stage.
[103] See Arts 80 - 89 Cum Arts 234-237 of the Civil Procedure Code about the burden, or obligations of the defendant, if he wants to avoid the risk of losing on an issue of fact or on the whole of the case.

speculate and raise any other defenses such as force majeure, counter-claim or set-off. In this writer's opinion, the majority in the Cassation Division and the judges in the lower courts should not have invoked Article 2024 and raised an affirmative defense of payment of money on their own.

According to Art 2001(2), a person "who *alleges* that an obligation is void, has been varied or is extinguished shall *prove the facts* causing such nullity, variation or extinction." It is thus the responsibility of the defendant to raise any of these allegations or defenses. At the pleading and pre-trial stage, we do not talk about the party that bears the burden of proof, be it evidential or legal burden.[104] The issue of burden of proof comes into the picture at the *trial stage* of the proceeding. And it comes into the picture at that trial stage if there is at least one contentious issue of fact, which the court has framed in accordance with Art 246(1) of the Civil Procedure Code.

In the case at hand, whether defendant did pay the debt claimed by plaintiff or not *was not at issue* as defendant did not appear and submit such a defense. Nor was it framed as such by any of the courts that entertained the case from first instance through appeal and then at cassation level. As the minority in the Cassation Division properly observed in this regard and as Art 246(2) of the Civil Procedure Code provides, there was no issue to be framed. Judges of lower courts and the majority in the Cassation Division reached at a wrong conclusion because they merely and wrongly focused on burden of proof of the fact of payment as if it was a fact in issue. The holding of the majority that plaintiff did not express his intention to rely on the sworn statement of defendant as per Art 83 of the Civil Procedure Code is a result of this wrong focus on burden of proof on a party that did not bear the said burden.

As defendant did not raise any defense, there was no single fact in favour of defendant, which the court could have established. Defendant did not allege a fact that could be *established/proved* by drawing a conclusion from another *alleged* and *known* (that could be *judicially noticed) or admitted or proved fact*. There was *no basic fact*; and there was *no presumed fact* alleged by defendant that the court had to deduce from. As shown before, presumption of law envisages certain conditions. There are no ideal facts that exist in the vacuum. There had to be an *asserted fact*, the truthfulness or otherwise of which could be established by proving a related basic fact. In the case at hand, there was no fact, or circumstance that commands calling for and applying any presumption of law in favor of the defendant.

As made clear in Section 4 above, there is some link between certain presumptions and some rules of burden of pleading. As Art 89 (titled 'Legal

[104] See Sedler, note 67, at 120-122.

Presumptions') provides, "[n]either party needs in any pleading allege any matter of fact which the law presumes in his favor or as to which the burden of proof lies upon the other party, unless the same has first been specifically denied."

This provision does not stipulate about the exemption of a party's burden of pleading as such. It rather provides for an exception to the rules of pleading embodied in Articles 80 to 88 of the Civil Procedure Code. This pertains to the *exception rule* whereby a party to a lawsuit may be exempted under certain circumstances from pleading *some facts* in preparing his statement of claim or defense. *The facts that may fall within this exception are those that the law presumes in favor of one,*[105] *and those other facts that the other party to a dispute bears burden of proof*.[106] In such instances, the party that bears burden of pleading is not required, in principle, to plead specifically alleging such facts which the law presumes to exist in one's favor or which the law imposed the burden of proving on the opponent. Again, this exception will not be applicable if such fact is already specifically denied by the other party in his pleading. By providing the exceptional situations where parties may be exempted from burden of pleading of some facts, the provision clearly states the need to allege other facts in pleadings. There hardly exists a principle of law or rule of positive law or case law that entirely relieves a party to a dispute from his burden of pleading on the assumption that a given rebuttable presumption of law will be applicable in the case.

The Civil Code does not presume the fact of payment of debts as such in favor of any defendant. Unlike the presumption of common property among spouses or the presumption of equal share of joint owners, there is no presumption of payment in the contractual relations of parties. Payment is one possible affirmative defense which can be invoked only by defendants. In the case at hand, this affirmative defense should not have been put on the judicial plate for it was not specifically pleaded by defendant.[107] It was not, and still is not, one of the facts that the law presumes in favor of a defendant in a contractual case; it is not a fact whose burden of proof rests on plaintiff.

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[105] See for e.g., presumption of common matrimonial property (Art 63(1) Revised Family Code) or equality of shares in joint ownership of property (Art 1259 Civil Code).

[106] See for e.g., burden of proof of will (Arts 896 & 897 of the Civil Code).

[107] If courts are allowed to raise such defenses by their own, it appears that summoning of defendants would be unnecessary in many cases. And if such court initiatives are proper, there would be no reason to prohibit courts from raising issues such as set-off or merger or novation, or variation of the contract.

This author is of the opinion that the First Instance Court should have given judgment on the case in accordance with Art 254 of the Civil Procedure Code since plaintiff and defendant were not at issue as the minority maintained properly. The author however does not agree with what the minority maintained regarding the implication taken from defendant's absence. As mentioned before, the two dissenting judges took defendant's absence as amounting to admission. The dissenting opinion did not cite any provision/s of law to substantiate its position. A careful reading of Articles 82-89 in conjunction with Arts 235, 240-243, and Art 252 of the Civil Procedure Code, show what *statement* or *conduct* amounts to formal admission.[108] Defendant's absence is not listed therein. There is no justifiable reason for us to assume admission and to relieve the plaintiff from its evidential and persuasive burdens in such occasions. The opinion of the majority in this regard is proper, sound and in accordance with the law.

What the Criminal Procedure Code (1961) provides for under Arts 160 *ff* in respect of an accused person whose case is to be tried in abstentia can indeed substantiate what the majority maintained. In criminal trials conducted in *abstentia* the court (in the absence of plea of guilt) assumes that the defendant has pleaded not guilty, and orders the prosecution to produce evidence. Similarly, the absence or the non-appearance of the defendant in *ex parte* civil adjudication cannot be presumed as admission of the factual allegations stated in the statement of claim.

The principal basis of the decisions of the lower courts and of the Cassation Division is Art 2024 of the Civil Code. This provision is found under Section 3, Chapter 7 of the Civil Code, which deals with *Proof in Relation to Contracts*. As one can gather from this title and the sub-titles in the subsequent three sections, Arts 2001–2026 are *evidentiary rules* applicable to contractual disputes (and other non-contractual obligations by virtue of Art 1677/1).[109] Art 2024 is

[108] These are: Admitting expressly the facts alleged by the other party in one's pleading (*a contrario* reading of Art 234 (1)(e)) & Art 242; Admitting expressly the facts alleged by the other party during oral examination (Arts 241 & 242); Taken as admitting the other party's allegations when one fails to deny specifically or by necessary implication in ones pleading (Arts 82-89 & 235) ; Admitting documents, contents of documents or other related things upon notice to admit (Art 240); Agreement with the other party on some or all facts of the case (Art 252); Admitting when testifying as a witness (Art 124 (2) or Art 261(2)).

[109] It is not unlikely for evidentiary principles and rules to be incorporated in substantive and procedural laws of Ethiopia. That is a common occurrence until this day. It suffices here to remind our readers that the incorporation of such principles and rules for example in the Law of Property part of the Civil Code, in the Revised (Federal) Family Code, in the Anti-Terrorism Proclamation, etc. This is the case despite the dominant adversarial/accusatorial feature of the country's system of litigation.

one of the five provisions that provide for presumptions of payment of money debts.

All the presumptions in these five provisions are presumptions of law available in favor of parties that assert payment of debts. Although these provisions are incorporated in the substantive Civil Code, they are applicable when there are points or circumstantial facts that call for their operation. It is wrong to maintain that these presumptions are applicable in every civil proceeding without first checking the existence (or absence) of circumstances that may allow their operation. One should rather bear in mind that pleadings of parties to civil cases provide the basic foundation for the operations of *presumptions with basic facts*. It is only *presumptions without basic facts* that do not depend on pleadings of parties and proof thereof. Also, one needs to recognize that evidential and persuasive burdens usually follow the pleadings of parties which in turn may impact upon the operations of presumptions in some circumstances.

The majority opinion in the Cassation Division has thus erred in holding that presumptions of law operate against plaintiffs in civil cases irrespective of defendants' pleadings whether it is one of admission or denial. Rather, no presumption of law can be applicable against the plaintiff, for example, if defendant admits the plaintiff's allegations. Such presumptions of law as those indicated in Arts 2020-2024 of the Civil Code rather presuppose assertion of some affirmative defense and counterclaim by defendants. No such presumption will be applicable without the prior allegation and subsequent establishment of some basic facts. For stronger reasons, such presumptions do not come into operation if the cases proceed *ex-parte*.

However, the lower courts and the Cassation Division have failed to recognize that the existence of a basic fact is a prerequisite to the existence of the resultant presumed fact, both of which should be found in the pleadings of parties becoming contentious. This author is of the opinion that the presumptions of payment under Arts 2020- 2024 of the Civil Code are not applicable in circumstances where (i) defendants admit alleged debts, (ii) defendants fail to specifically deny alleged debts, and (iii) the cases are entertained *ex-parte*.

The presumptions in the five articles of the Civil Code are not types of evidence but are *rules of law.* The minority in the Cassation Division erred in treating the presumptions of law as types of evidence. Of course, Art 2002 seems to give the impression that presumptions are evidence or types of evidence. This provision titled "Means of Evidence", (rather it ought to have been "Means of Proof"), recognizes writings, witnesses, presumptions,

admissions of parties and oath, as means of proof, and its content provides for *means of proof*[110] *of* factual disputes. Evidence, which consists of testimony, documentary evidence and real evidence, is one of the *means* utilized to prove or disprove disputed facts.[111] As made clear in earlier sections of this Article, a given presumption of law, on the other hand, imposes burden of adduction of evidence or burden of persuasion or both on the other party provided that the beneficiary of the presumption proves certain other basic fact(s).

As discussed earlier, a rebuttable presumption of law comes into operation after establishment of a basic fact. In the case at hand, defendant did not plead the fact of payment. As he did not allege this fact, the judges that adjudicated the case had no legal ground to investigate about the truthfulness or falsity of this fact. Had defendant pleaded the fact of *payment*, the court could have framed this issue: *Can the defendant be presumed to have paid the claimed debt or not?* If that was the case, in principle, the defendant was the party that carried both burden of adducing supportive evidence and burden of proving the asserted fact to the required standard of proof (Art 2001(2) of the Civil Code).

But, defendant could have relieved himself of the evidential burden as the plaintiff gave a formal admission of one basic fact -i.e., plaintiff admitted that the debt had been due for more than two years. This could have forced the operation of a rebuttable presumption of law under Art 2024 of the Civil Code in favor of defendant.[112] From this lapse of more than two years, the court could have necessarily presumed payment of the debt. If that was the case, plaintiff could have been under evidential burden- the burden of persuasion imposed on

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[110] Strictly speaking, *evidence* and *proof* are not synonymous terms. While evidence refers to the data or input that goes to establish the existence or non-existence, the truthfulness or falsity of an alleged matter of fact, proof refers to the end result, which we obtain in the process. Evidence is one of the means that take us to this end result. Others include admission of the other party, drawing of inference, ocular observation of judges, legal presumptions and statement of the other party given under oath.

[111] In the earlier times means of proving could include battling or fighting with dangerous animals or the adversary party or his representative; or, it could be requiring one of the parties to undergo an ordeal process such as capturing red-hot iron, or drowning in a big water body; or it could be requiring a party to swear in the name of God or any other supernatural force, i.e., oath, and later on system of compurgation.

[112] All the presumptions from Arts 2020-2024 are rebuttable presumptions of law. Because the party against whom these presumptions are operating can rebut the presumptions by proving either of the facts under Art 2025 or by requiring the other party to take oath and tell the truth. Of course, one may say that these are rebuttable presumptions of law that do not allow free rebuttal.

defendant by virtue of Art 2001(2) of the Civil Code. All these were not required in our case, as defendant did not plead payment of the alleged debt. Hence there was no point to raise the issue of presumption of payment.

Furthermore, it is wrong to say that a given presumption of law has both substantive and procedural aspects. As shown above, irrebuttable presumptions of law are rules of the substantive laws; legal presumptions without basic facts are also rules of substantive law that allocate legal burden of proof. The rules of presumptions of payment from Arts 2020 – 2024 of the Civil Code are clearly evidentiary rules incorporated in the Code. That classification of presumptions of law into rebuttable and irrebuttable should not be confused with a sub-classification of rebuttable presumptions of law into freely rebuttable ones and restrictively rebuttable presumptions of law.

The rules of presumptions of payment embodied in Arts 2020-2024 of the Civil Code are clearly presumptions of law. Whether these presumptions of law are irrebuttable (or rebuttable) presumptions of law can be checked from Arts 2025 and 2026. In the case of irrebuttable presumptions of law there is no chance or loophole for courts or adversely affected parties to rebut presumed facts. On the other hand, in the case of rebuttable presumptions of law it is clear that adversely affected parties can rebut the existence not only of basic facts but also of presumed facts. The scope may of course vary depending upon the elements of specific provisions. A reading of Arts 2025 and 2026 shows that a party against whom a presumption of payment is taken can rebut the existence of the presumed fact.[113] Nevertheless, the type of evidence and the means of rebuttal are limited by the legislature. The observation of the Cassation Division, which states that the rules of presumptions of payment from Arts 2020-2024 are basically irrebuttable is thus contrary to the explicit readings of Arts 2025 and 2026.[114]

The effects of presumptions in civil proceedings entail some legal consequences which vary greatly depending on the types of presumptions and on the strength of evidence that establish basic facts. Entailing "shift" of evidential or persuasive or both burdens are cases in point in this regard. Both the majority and the minority have wrongly maintained that the only effect of

[113] Beware, what is to be rebutted or disproved is not the rules of law existing in the Civil Code; only basic and presumed facts are to be an object of rebuttal.

[114] It is possible to rebut the presumptions of payment by proving *acknowledgment of debts in writing,* or by proving the *institution of proceedings o*n the subject matter prior to that time which serves as a basic fact to the presumption, or by proving through the *sworn statement of defendant*. The Cassation Division has recently modified this in *Commercial Bank of Ethiopia v Ato Liyew Chekol & Ato Million Mengistu* case.

presumptions is the shift of burden of proof from one party to the other. The presumption of payment of a contractual debt under Art 2023 or Art 2024 of the Civil Code, for instance (assuming that it entered into operation following a specific assertion of payment of alleged debt that elapsed the time indicated in the articles of the law), do not entail shift of burden of persuasion. If the cogency of the evidence introduced by defendant and plaintiff in such a case appears to be at equilibrium, the plaintiff wins the case since defendant bears persuasive burden under Art 2001 (2) of the Civil Code.

The majority in the Cassation Division also held that the operation of presumptions of law requires the pursuance of special rules of procedure and evidence. This holding does not, however, indicate the 'special rules' that should be followed. As far as this author knows, there is no single rule of procedure or evidence in Ethiopia or in any other country that compels courts to follow special procedure or evidentiary norm if they are faced with cases involving some presumptions of law. Furthermore, there is no unique decision-making process due to presumptions of law. The operations of presumptions entail various consequences: some presumptions entail shift of tactical burden; others impose evidential burden on the adversely affected party; there are also some limited presumptions that determine the persuasive burden to be borne by the adversely affected party, etc. No special rule of procedure or evidence is thus necessary under all these circumstances as the minority properly maintained.

Conclusions

The main focus of this article has been on cases of true presumptions of law, i.e., rebuttable presumptions of law. These presumptions clearly presuppose the establishment of basic facts before courts resort to drawing conclusions regarding the presumed facts. Such basic and presumed facts must be part of the allegations of the parties in dispute. It is the assertions of facts in the pleadings that provide the foundation for evidential and persuasive burdens. Mere allegations of facts may not force the coming into operation of such presumptions of law because proving of basic facts is indeed a requirement. Admission of such basic facts by an opponent may relieve the proponent from the burden of establishing the asserted basic fact. This is also true if the basic fact alleged is of a kind which courts may take judicial notice of. Otherwise, it is hardly possible to see the coming into operation of such presumptions.

The holding of the Cassation Division in *Agency for the Administration of Rented Houses* v *Bironi Atikpo* substantiates this point. As it stands now, the decision of the Cassation Court is the authoritative interpretation of Art 2024 of the Civil Code in respect of the operations of the presumptions. The binding precedent seems to give a function to courts to assume the role of the defendant

in raising affirmative defense of payment. This is a phenomenon that goes against common sense and the essence of our 'predominantly adversarial' system.

This line of interpretation is not only erroneous but it can also have adverse effects on economic, social and contractual transactions. A case in point can be difficulties that can be encountered by parties who seek judicial remedies from contracting parties in default. In other words, plaintiffs may be hindered from instituting lawsuits against defaulting contracting parties, because such suits can be considered as lacking cause of actions. The interpretation pursued by the Cassation Division gives definitive effects to rebuttable presumptions of law which is even stronger than the provisions on periods of limitation which at least should be raised by the defendant. This seems to be contrary to the intention of the legislature and perhaps to the wise formulation of René David in devising such open affirmative defenses which debtors can invoke against 'lazy' creditors.

Thus, this author submits that the Cassation Division of the Federal Supreme Court reconsider its binding interpretation of Art 2024 of the Civil Code in the light of the unique features of rebuttable presumptions of law and the justifications behind such presumptions in our substantive law. The author also hopes that the legislature will recognize the injustice that this interpretation can entail against honest creditors, and duly address the potential 'ambiguities' that are susceptible to erroneous interpretation. ■

THE ROLE OF ETHIOPIAN COURTS IN COMMERCIAL ARBITRATION

Hailegabriel G. Feyissa[♣]

Abstract

The role of arbitration in settling disputes which involves national and transnational commercial transactions is steadily growing in this era of globalisation. International and national rules governing various aspects of commercial arbitration have contributed to the effectiveness of arbitration as an alternative to litigation. The involvement of national courts is crucial to the overall efficacy of arbitration, both domestic and international. Instances calling for court intervention may appear at all stages of the arbitral proceedings. There is, however, a need to maintain a balance between the level of court involvement and the smooth functioning of arbitration – which is a contractual alternative to judicial dispute settlement. This article deals with the legal and practical role of Ethiopian courts during the three stages of arbitral proceeding, i.e., at the beginning of arbitration, during the arbitral proceedings, and after the end of the arbitration. And finally, I argue in favour of judicial restraint particularly during the first two stages of arbitral proceedings.

Key words:

Commercial Arbitration, Ethiopian courts, arbitral proceedings, judicial restraint

Introduction

Arbitration is seen here as a non-judicial dispute settlement mechanism whereby parties to a dispute resort to a third party (or parties) whose determination over the dispute is as binding as comparable court decisions. Depending on various factors, one can distinguish different types of arbitration.[1] For instance, a distinction can be made between international and domestic arbitration.[2] Within

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[1] See, e.g., Kröll, S. (2006) Arbitration, in Smits J. (ed.), *Elgar Encyclopaedia of Comparative Law*. Cheltenham, Edward Elgar Publishing Limited, p. 78 [hereinafter Kröll].

[2] See n. 29 *infra* and the accompanying text.

the domain of international arbitration, one may further distinguish between investment arbitration, commercial arbitration and arbitration between states.[3]

For the purpose of this article, *commercial arbitration* stands for arbitration of commercial disputes between private parties to either domestic or international transactions. I intend to use *international commercial arbitration* to refer to arbitration between Ethiopians, on the one hand, and private parties from foreign nations, on the other.[4]

This article mainly focuses on commercial arbitration – both domestic and international. Particularly, it deals with the role played by Ethiopian courts in commercial arbitration. It argues that Ethiopian courts should maintain a friendly attitude towards commercial arbitration.

The first section of the article highlights the different approaches regarding the role of courts in arbitration and examines the reasons why Ethiopian courts should retain a minimalist approach regarding commercial arbitration. The second and third sections deal with the historical and present state of the Ethiopian legal regime on arbitration. And, the fourth section takes us through the crux of the research, i.e. the practical role Ethiopian courts have thus far played in commercial arbitration and its impact on the efficacy of the latter.

1. The Interaction of Courts and Arbitral Tribunals: The Competing Approaches

Arbitration as a dispute settlement device has a history dating as far back as ancient civilisations in Egypt and Greece.[5] Literature indicates that arbitration predates litigation.[6] The gradual prominence of governmental dispute settlement bodies led to a period of judicial hostility towards arbitration. In what are now "arbitration friendly" jurisdictions like the USA, Great Britain and France, there was a long-standing jurisprudence against arbitration.[7] The main reason for the

[3] Kröll, *supra* n. 1, p. 78.
[4] But see n. 29 *infra*.
[5] Barrett, J. (2004) A *History of Alternative Dispute Resolution*. San Francisco, Jossey-Bass, pp. 1 *et seq*.; Zekos, G. (2008) *International Commercial and Marine Arbitration.* London, Routledge- Cavendish, pp. 9 *et seq*. [hereinafter Zekos].
[6] Zekos, *ibid*, p. 9.
[7] Martinez-Fraga, P. (2009) *The American Influence on International Commercial Arbitration*. Cambridge, Cambridge University Press, pp. 6-14[hereinafter Martinez-Fraga]; Navarro, P. *Challenges of awards vis-á-vis the finality of international arbitration*, pp. 11. Available from: <www.consulegis.com> [last accessed 31 Oct., 2010][hereinafter Navarro]; see also n. 45 *infra*.

hostility between courts and arbitration was, *inter alia*, the belief that arbitration goes against public policy.[8]

Amidst this judicial attitude, however, the use and advantage of arbitration gained gradual ascendancy. Crucially, judicial prejudice against commercial arbitration has gradually faded away as the business sector "needed greater speed and flexibility for the settlement of their disputes than that provided by courts."[9] Moreover, neutral venues in the form of international arbitral tribunals have been in demand as international trade grew dramatically after World War II.[10] This in turn led to gradual judicial accommodation of arbitration.

The traditional scepticism of arbitration now appears to have given way to remarkable judicial restraint. Yet, states have always kept arbitration under a certain level of court control. The desirability of a level of judicial assistance to and control over arbitration is now well understood.[11] Nonetheless, a comparative analysis of national rules on commercial arbitration would reveal that the level of interaction between courts and arbitral tribunals varies from jurisdiction to jurisdiction.[12]

The most prevailing international trend confines judicial intervention to a minimum.[13] This minimalist approach is represented by the United Nations Commission of International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law) and other comparable national arbitration laws. Aspects of this approach include the enforcement of arbitration agreements, the recognition of the principles of severability and competence-competence (*Kompetenze-Kompetenze*), the upholding of the finality of arbitral awards subject to certain fairness standards, the relative autonomy of arbitration from judicial intervention during the arbitral proceeding, and the enforcement of arbitral awards. Whereas, the maximalist approach is characterised by, for instance, the subjection of arbitral awards to

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[8] In the common law jurisdictions, for example, arbitration was perceived to be against public policy for it "ousted otherwise competent courts of their jurisdiction"; see Martinez-Fraga, p. 7.

[9] Zekos, *supra* n. 5, pp. 16-20.

[10] Craig, W. (1995) "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration," *Texas International Law Journal*, (30), p. 2 [hereinafter Craig].

[11] See generally discussions under section 4 *infra*.

[12] See generally Zekos, *supra* n. 5 for an excellent comparative analysis of the role of English, US, Greek and Belgian courts in commercial arbitration.

[13] See, e.g., Gu, W. (2009-2010) "Judicial Review Over Arbitration in China: Assessing the Extent of the Latest Pro-Arbitration Move by the Supreme People's Court in the People's Republic of China", *Wisconsin International Law Journal*, (27), pp. 225-231; Kröll, *supra* n. 1, p.78.

broader judicial review and the wider court intervention during the proceedings of the arbitration.

The challenge of maintaining a fair balance between "excessive judicial interference and necessary intervention" looks like an ever-ending endeavour as the minimalist-maximalist debate still continues with regard to judicial review of certain awards involving the application of such areas of law as antitrust.[14]

In this article, it is argued that Ethiopian courts must avoid excessive judicial interference with regard to commercial arbitration for the following reasons. First, arbitration is a method of dispute settlement which is based on the consent of parties to avoid litigation. Courts must not frustrate the parties' freedom of contract by interfering in the arbitration process and thus making the latter redundant. Second, arbitration – unhampered by excessive court interference – is a desirable input for Ethiopia's attempt to actively participate in international trade and attract foreign investment.[15] Third, courts themselves may benefit from abstaining from unnecessary intervention in commercial arbitration.[16]

2. The Commercial Arbitration Regime of Ethiopia: Historical Overview

The Ethiopian legal framework for modern arbitration was laid down by the codifications of the 1950s and 60s. Before that, arbitration was only known within the context of traditional dispute resolution processes. For the major part of Ethiopian legal history, non-judicial dispute settlement methods played a significant role in resolving disputes in a traditional Ethiopian society. *Shimguilina* is one of the many traditional Ethiopian dispute settlement devices which could be approximated to what is now known as arbitration.[17]

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[14] Navarro, pp. 11 *et seq.*; see also Blanke, G. (2007) "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards: A Never Ending Saga", *Stockholm International Arbitration Review*, (2), pp. 51-78.

[15] Asouzu A. lists numerous reasons why commercial arbitration is "an option of necessity and convenience for Africa in general; see Asouzu, A. (2001) *International Commercial Arbitration and African States: Practice Participation and Institutional Development*. (Cambridge: Cambridge University Press), pp. 27-50 [hereinafter Asouzu].

[16] Arbitrators should be seen as partners of judges in the administration of justice. They have a role to play in making the judiciary efficient by enabling the latter to avoid the unnecessary diversion of the limited judicial resources and time away from matters that require particular judicial attention.

[17] Tilahun Teshome (2007), "The Legal Regime Governing Arbitration in Ethiopia." *Ethiopian Bar Review*, 1(2), pp. 117-118 [hereinafter Tilahun]; Brietzke, P. (1974)

Nonetheless, *shimguilina* seems a much wider concept than the modern notion of "arbitration". The former combines aspects of different ADR mechanisms including mediation, conciliation, compromise and, of course, arbitration.[18]

Shimguilina, along with other forms of traditional dispute settlement processes, was well-liked by people living in rural Ethiopia – where access to state law enforcement organs used to be very limited.[19] Apparently, it has also survived the transplantation of Western dispute settlement processes. Studies show that many people, including urban merchants, had widely used *shimguilina* "to save time and expense and to preserve business relations," even well after the transplantation of Western-style dispute settlement systems.[20] This traditional alternative dispute settlement device is still popular among the 21st century Ethiopian businesses, which often rely on it to settle disputes.[21] Hence, arbitration has not been unknown to the traditional Ethiopian society.

The modern concept of commercial arbitration had, however, been alien to Ethiopia until at least mid-20th century, when Ethiopia developed most of its current codes on private law. Some provisions were made for arbitration in the 1960 Civil Code and the 1965 Civil Procedure Code (CPC). Articles 3325 to 3346 of the 1960 Civil Code govern the enforcement of agreements to arbitrate

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"Private Law in Ethiopia," *Journal of African Law*, 18(2), p. 158 [hereinafter Brietzke].

[18] Tilahun, *ibid*, pp. 117-118; Fekadu Petros (2009), "Underlying Distinctions between ADR, Shimglina and Arbitration" *Mizan Law Review*, 3(1), p.124 [hereinafter Fekadu].

[19] For a fair discussion on the prominence of non-judicial dispute settlement mechanisms among the traditional Ethiopian societies and the uneasy attempt of the State to impose modern legal institutions, see, e.g., Singer, N. (1970-1971) "A Traditional Legal Institution in a Modern Legal Setting: the Atbia Dagnia of Ethiopia", *UCLA Law Review*, 18, pp. 308 *et seq*.; Alula, Pankhurst & Getachew Assefa (2008) *Grass-roots Justice in Ethiopia: the Contribution of Customary Dispute Resolution.* Addis Ababa, CFEE [hereinafter Alula & Getachew].

[20] Brietzke, *supra* n. 17, p.158.

[21] See, e.g., a report by USAID (2007) *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic*, p.60 [hereinafter USAID Report]; Mintwab Zelelew & Mellese Madda (2008) *Alternative Dispute Resolution in Addis Ababa: the Case of Markato*, in *ibid*, Alula & Getachew, p. 250.

in the form of either arbitral clauses or submissions.[22] CPC, for its part, provides rules on some procedural aspects of arbitration.[23]

Ethiopia is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[24] Unlike many of its sub-Saharan counterparts, however, Ethiopia has not yet ratified the 1965 Convention to which it was one of the first signatories. Moreover, Ethiopia is yet to join the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[25] As a result, the two codes, both of which predate the modern international arbitration legislation represented by UNCITRAL Model Law, are for now[26] the major sources of arbitration law in Ethiopia.

Ethiopia's arbitration law seems "to be basically designed for domestic arbitration."[27] The pertinent provisions of the Civil Code and CPC do not distinguish, except in the context of execution of foreign arbitral awards,[28] between domestic and international arbitration. It may thus appear that the Codes' provisions on arbitration do not apply to "international"[29] arbitration.

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[22] Appointment and replacement, disqualification, removal, competence and function of arbitrators along with effects of non-performance of arbitration agreement are generally governed by the 1960 Civil Code of Ethiopia [hereinafter Civil Code].

[23] In particular, procedure before arbitration tribunal, making of an award, appeal from, setting aside and execution of an award are governed by rules of the 1965 Civil Procedure Code of Ethiopia [hereinafter CPC].

[24] See the list of member states on the website of ICSID at <www.worldbank.org/icsid>.

[25] Optimism on the eventual membership of Ethiopia to both the ICSID and New York Conventions surfaces as Ethiopia is now a member of regional trade zones which directly or indirectly encourage the adherence to such international conventions; see, in particular, Asouzu, p. 337.

[26] To the best of my knowledge, a new law on arbitration is set to be promulgated in the near future.

[27] Bezzawork Shimelash (1994) "The Formation, Content and Effect of an Arbitral Submission under Ethiopian Law" *Journal of Ethiopian Law*, 17, p. 90 [hereinafter Bezzawork].

[28] Note, however, that *foreign arbitral award* is not synonymous to *international arbitral award*. International arbitral awards may of course be domestic for the purpose of enforcement if the arbitral tribunal rendering the award has sat in the very jurisdiction where enforcement is sought.

[29] It is now uncommon for states to have two separate regimes of domestic arbitration and international arbitration. Initially, there was no distinction between international and domestic arbitration. According to one theory, the distinction has become relevant only after "the courts of various countries became involved in the conduct of arbitration and enforcement of arbitral awards". The jurisprudence in many jurisdictions indicates that the nationality of the parties, the international nature of the

Such an argument would, however, be weighed down by the practical applicability of the Codes' provisions *vis-à-vis* international arbitrations sited in Ethiopia.[30]

Incidentally, the term *commercial* which appears important in contemporary understanding of international commercial arbitration is irrelevant in so far as Ethiopian law on arbitration is concerned. For one thing, there is no law reserving arbitration to only commercial disputes as was the case in some traditional civil law countries. For another, Ethiopia is not a signatory to international treaties[31] on recognition and enforcement of arbitral awards that allow commercial reservations – which would have necessitated a definition of *commercial* for that purpose.

A wider utilization of modern arbitration in Ethiopia has been delayed due to historical reasons. The reception of western style arbitration was not as revolutionary as the introduction of the law itself.[32] First, one of the main reasons in the West for resorting to arbitration – the search for a dispute settlement mechanism other than the widely used courts – was initially missing in Ethiopia.[33] Secondly, the poor utility of modern arbitration which ensued for

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transaction and the place of arbitration are factors considered in deciding whether arbitration is international or not. Thus, international arbitration entails arbitration between (1) parties from different nations, (2) parties to an international transaction, or (3) parties to an arbitration agreement according to which a foreign place of arbitration is designated; see, e.g., Tweeddale, A. & Tweeddale, K.. (2005) *Arbitration of Commercial Disputes: International and English Law and Practice*. Oxford, OUP, at § 2.27-2.28 [hereinafter Tweeddale & Tweeddale]; Chiasson, E. (1999) A Comparison of International Arbitration Rules: the Practical Perspective. In: Campbell, D. & Birkeland, B. eds. *Lawyering in International Market*. New York, Transnational Publishers Inc., pp. 339-341.

[30] See further discussions in section 4 *infra*.

[31] Such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[32] See generally Beckstrom, J. (1973) "Transplantation of Legal Systems: an Early Report on the Reception of Western Laws in Ethiopia", *American Journal of Comparative Law* (21), p. 567 [hereinafter Beckstrom]; and Sedler, R. (1967-68) "The Development of Legal Systems: the Ethiopian Experience", *Iowa Law Review* 53 [hereinafter Sedler].

[33] In an article published few years after the 1960s codification, Robert Allen Sedler implicitly noted that Ethiopia was not as ready as its Western counterparts for arbitration or similar dispute resolution processes introduced by the law. He posits: "[unlike in Ethiopia], it is interesting to note that in countries with highly developed legal systems the trend is toward removing disputes from the courts and submitting them to arbitration and/ or giving jurisdiction to administrative tribunals"; see Sedler, p. 608.

some decades may also be attributed to "gross unfamiliarity"[34] with modern arbitration.[35]

Fortunately, recent developments show that Ethiopia has gradually developed an interest for alternative dispute settlement mechanisms including arbitration.[36] Arbitration, along with other ADR[37] mechanisms, is now a popular dispute settlement process among businesses – international or domestic. *Inter alia*, economic and time factors justify the growing popularity of ADR and arbitration. Litigating commercial disputes in courts is less favoured by parties because its financial burdens coupled with possible administrative barriers and corruption can "lead to distrust of courts".[38] In particular, judicial settlement of *international* commercial disputes is usually unattractive to at least one of the parties who might find submitting disputes to national courts unpleasant.[39]

[34] Bezzawork states "...despite the fact that, we have elaborate and modern laws on arbitration (since 1960), there is still gross unfamiliarity with the meaning and application of arbitration"; see Bezzawork, *supra* note 27 p. 69.

[35] In so far as international commercial arbitration is concerned, there has, however, long been a practice (among Ethiopian enterprises) of referring disputes [between them and counterparts in international commercial transactions] to renowned international arbitral bodies like the International Chamber of Commerce (ICC) in Paris. In particular, government enterprises submit their contractual disputes to arbitration; see, e.g., *Re Baruch-Foster Corporation v Imperial Ethiopian Government*, reproduced in EACC Reports of Arbitral Awards, Vol.1 (EACC, Addis Ababa, 2008), at 1-11; *Re Imperial Highway Authority v Solel Boneh Ltd*., Supreme Imperial Court, Civil Appeal No.670/57, reproduced (in Amharic and English) in 2 Journal of Ethiopian Law 2 (1965) at 261-266.

[36] See, e.g., USAID Report, *supra* note 21, pp. 66 *et seq*.

[37] Arbitration is distinguished from ADR (alternative dispute resolution) mechanisms. In particular, arbitration – unlike such ADR mechanisms as mediation – results in the production of a legally binding award. Yet, there are some who regard arbitration as a form of ADR; see, e.g., Goode, R., Kronke, H. & Mckendrick, E. (2007) *Transnational Commercial Law: Text, Cases, and Materials*. Oxford, OUP, at § 17-12 [hereinafter, Goode et al.]; Fekadu, *supra* note 18, pp. 105 *et seq.*

[38] Satarkulova, I., (2006) "International Commercial Arbitration in the Kyrgyz Republic", *Vindobona Journal of International Commercial Law & Arbitration*, 10, pp. 319-320; See also Redfern, A. et al. (2005) *Law and Practice of International Commercial Arbitration*. London, Sweet & Maxwell, at § 1-51[hereinafter Redfern]; Garnett, R. et al. (2000) *A Practical Guide to International Commercial Arbitration*. New York, Oceana Publications, p. 14 [hereinafter Garnett].

[39] The choice of a neutral forum and tribunal matters a lot to at least one of the parties in international commercial dispute. Presumably, the home court of one party is not such a forum because the procedure, the language, and the lawyers are all alien to the other party; see Redfern, supra n. 38, at § 1-42.

Improvements with respect to, for example, institutional arbitration are also indicative of the current trend toward a better utilisation of arbitration in commercial disputes. Two arbitral institutions – the Ethiopian Arbitration and Conciliation Centre (EACC) and the Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectorial Associations (AACCSA) – have been established.[40] These arbitral bodies primarily target at the business community as potential clients for their services. Moreover, as both institutions work under modern rules of arbitration and accept cases involving foreigners,[41] they can eventually perhaps play a significant role as an alternative centre for commercial arbitration that involves transnational transactions as well.[42]

3. Aspects of the Existing Arbitration Regime

As noted above, the Ethiopian arbitration law is mainly based on the Civil Code and the CPC. While Title XX of the 1960 Civil Code contains the substantive rules on arbitration, the CPC carries rules of procedural importance. For our purpose, we may generally classify the rules as relating to (1) arbitration agreements, (2) the arbitral process, and (3) challenge and enforcement of arbitral awards.

3.1- The Law on Arbitration Agreements

The basis for arbitration, unlike litigation, is a contractual agreement between disputants. In the absence of an arbitration agreement, there would be no arbitration, except in situations where national laws prescribe mandatory arbitration.[43]

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[40] USAID Report, *supra* n. 21, p. 70; Tilahun, *supra* n. 17, p. 140; note, however, that the second of the two has recently suspended its arbitration activities.

[41] *Ibid.*; see also *Re Ethiopian Privatisation Agency v Atilla Yildrim*. In: EACC (2008) Report of Arbitral Awards, Vol.1.

[42] There has been dissatisfaction among Africans in general over the Eurocentricism of international commercial arbitration (see, e.g., Seznec, G. (2004), "The Role of African States in International Commercial Arbitration," *Vindobona Journal of International Commercial Law & Arbitration*, 8, pp. 219-220; Assante, S. (1993), "The Perspective of African Countries on International Commercial Arbitration", *Leiden Journal of International Law*, 6, p. 350). Ethiopia cannot be an exception in this respect since numerous international arbitrations involving Ethiopian interests are often referred to institutions in Europe, often at the inconvenience of Ethiopian parties; see, e.g., The World Bank (2004) *Ethiopia: Legal and Judicial Sector Assessment*, p. 38.

[43] Under Ethiopian law, certain disputes are compulsorily arbitrable. For instance, a 1998 Proclamation on Cooperative Societies requires the compulsory submission of

Though modern arbitration legislation refers to arbitration agreements generally,[44] some national arbitration laws still distinguish between two forms of arbitration agreements, i.e., arbitral submission and arbitration clause. The dichotomy between arbitral submission and an arbitration clause is known in Ethiopia as well.[45] While the former is understood as relating to existing disputes, the latter contemplates future disputes that might arise in the course of the performance of contractual obligations.[46]

Arbitration agreements usually deal with a range of issues including types of arbitration, seat of arbitration, choice of law, composition of arbitral tribunal, language of the arbitration, scope of the arbitration agreement, and the like.[47] Also, arbitration agreements are normally subjected to statutes that prescribe substantive and formal requirements. Compliance with the statutory requirements is crucial, for the validity of the arbitration agreement may depend on it.[48] Hence, due attention must be given to statutory requirements while drafting arbitration agreements.

Ethiopian law requires the fulfilment of certain substantive and formal requirements. The general substantive requirements relating to consent, capacity, and offer and acceptance are obviously relevant to arbitration

certain enumerated disputes to arbitration. See Art 49 of the Ethiopian Cooperatives Societies Proclamation No.147/1998.

[44] Sanders, P. (1999), *Qui Vadis Arbitration? Sixty Years of Arbitration Practice*, (The Hague, Kluwer Law International), p. 155 [hereinafter Sanders].

[45] Even though the English version of the Civil Code confusingly and consistently employs the term "arbitral submission" to generally refer to arbitration agreements, there are authorities that the English term "arbitral submission" is in fact a mistaken translation of the term "la convention d'arbitrage" from the initial French master text of the Civil Code. Besides, some articles in Chapter Two, Title XX of the Code expressly mention "arbitration clauses", hence, affirming the Civil Code's difference from its traditional civil law counterparts including the French Civil Code which used to deny enforcement to arbitration agreements over future disputes, i.e., arbitral clauses; see Bezzawork, p. 70; David, R. (1985) *Arbitration in International Trade*. Deventer, Kluwer Law Publishers, at §211[hereinafter David]; and Art 3328 of Civil Code.

[46] Redfern, *supra* n. 38, at § 3-02.

[47] Often, however, parties simply refer to institutional arbitration rules instead of including all these details in their arbitration contract.

[48] See, e.g., the decision of a Norwegian Court (cited in Redfern, *supra* n. 38, at § 3-09) that refused recognition to a foreign arbitral award due to the non-fulfilment of some formality requirements relating to the underlying arbitration agreement.

agreements.[49] Apart from these substantive requirements, the test of "arbitrability"[50] and the "capacity to arbitrate"[51] need to be satisfied.

Formal requirements in arbitration agreements usually relate to the question of whether the agreement is oral or written. The universal rule requires commercial arbitration agreements and commercial transactions to be in writing.[52] Though oral arbitration agreements are rare in international commercial transactions,[53] some jurisdictions including Ethiopia[54] are ready to recognise them.[55]

According to Art 3326 (2) of the Civil Code, arbitration agreements are required to be drawn in the form required by the law for disposing of the right to which the arbitration agreement relates.[56] Applying the theory of Art 3326 (2) of the Civil Code, some arbitration agreements must, under the pain of nullity, be (1) written, (2) signed by the parties, and (3) attested by capable witnesses. For instance, an arbitration agreement with a certain administrative body[57] need to be (1) in writing,[58] (2) attested at least by two witnesses,[59] and (3) registered with a court or notary. Understandably, such formality requirements are not good incentives to arbitral settlement of disputes involving administrative bodies.

Incidentally, written arbitration agreements which may be valid for the purpose of the UNCITRAL Model Law or the 1958 New York Convention may not necessarily be valid under Ethiopian law. As Ethiopian law requires written agreements to be attested by two witnesses under the pain of invalidity, arbitration agreements contained in telex or other means of communication

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[49] Tilahun, *supra* n. 17, p. 119.

[50] See further discussions on the issue of arbitrability under section 4.1 *infra*.

[51] See, e.g., *Ethiopian Mineral Development SC v JTT Trading*, Federal Supreme Court, Cassation File No. 30727/2000.

[52] The 1958 New York Convention, which is widely adhered to, requires arbitration agreements to be in writing to support easy universal recognition and enforcement of the same. Also, the UNCITRAL Model law and numerous national arbitration laws prescribe this formality requirement; see, e.g., Sanders, pp.155-158.

[53] Bezzawork, *supra* n. 27, p. 77.

[54] The *a contrario* reading of Art 3326(2), Civil Code.

[55] Sanders, *supra* n. 44, pp. 155-158; Redfern, *supra* n. 38, at § 1-09.

[56] Art 3326 (2) of Civil Code: "the arbitration [agreement] shall be drawn in the form required by law for disposing without consideration of the right to which it relates."

[57] Art 1724 *cum* Art 3326 (2), Civil Code.

[58] The law, for instance, requires agreements involving the following transactions to be written: immovable properties, guarantee, insurance, and vessels; see Arts 1723, 1725(a), 1725(b), Civil Code, and Art 7, the 1960 Maritime Code of Ethiopia.

[59] According to Art 1727 (2) of Civil Code, written agreements are of no effect unless attested by two witnesses.

which provide a record of the agreement are most likely to be invalid unless they relate to transactions which are not under the law required to be in writing.[60]

Overall, arbitration agreements fulfilling the above discussed substantive and formal requirements are generally enforceable. Non-performance of a valid and enforceable arbitration agreement by one party entitles the other to either demand performance or consider the arbitral agreement to have lapsed.[61]

3.2- The Law Relating to Arbitral Process

3.2.1- Selection and Appointment

Ethiopian law recognises the importance of the principles of party freedom and equality in the appointment of arbitrators. Parties are normally free not only in appointing arbitrators, but also in determining the identity, the number, the qualification, and jurisdiction of the same.[62] And, any arbitration agreement must, under the pain of nullity, confer each party equal right regarding appointment of arbitrators.[63]

The procedure for the appointment of arbitrators usually commences when a party to an arbitration agreement specifies disputed issues and appoints the arbitrator(s). Subsequently, the other party to the arbitration agreement is given notice to exercise his right to appoint arbitrators. Parties, however, may abuse their right to appoint arbitrators by ignoring a call to appoint arbitrator(s) without delay. If the arbitration agreement contains detailed provisions regarding time limits within which the later party is bound to designate arbitrator(s), the matter is dealt with in accordance with the contractual provisions. Otherwise, the gap is usually filled by either institutional arbitration rules referred to in the contract or national laws that usually contain default rules.

The default rule in the Civil Code[64] sets the time limit at thirty days – which begins to run from the day when notice is given to either the concerned party or to the person entrusted with the task of appointing arbitrators. After the expiry of the 30 day period, a court shall, upon request, appoint arbitrators.[65]

Another statutory default rule relates to the number of arbitrators. The Ethiopian default rule on the number of arbitrators is two.[66] The Ethiopian Civil

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[60] See, e.g., Bezzawork, *supra* n. 27, p. 77.
[61] Art 3344, Civil Code.
[62] Art 3331, Civil Code.
[63] Art 3335, Civil Code.
[64] Art 3334 (1), Civil Code.
[65] *Ibid.*
[66] Art 3331 (3), Civil Code.

Code does not render an uneven number of arbitrators mandatory, and in effect, duly recognises the freedom of parties to opt for an even number of arbitrators.[67] Statutory provisions dealing with cases where an even number of arbitrators fail to reach consensus on the award are, therefore, desirable. Accordingly, Art.3332, Civil Code, suggests the appointment of a presiding arbitrator where there is an even number of arbitrators.[68]

3.2.2- Challenge and Disqualification

The Civil Code contains rules entitling parties to challenge arbitrators. According to Art 3340, an arbitrator is disqualified, upon challenge by a party, where (a) there is doubt on the impartiality or independence of the arbitrator, (b) the arbitrator is not of age, sound mind or health, (c) he is unable to discharge his functions properly and within a reasonable time, (d) he is absent or convicted of a criminal offense. As a rule, a party cannot challenge an arbitrator chosen by him unless it is attributable to a reason arising subsequent to the appointment or for reasons he had knowledge of only after the appointment.[69] An unsuccessful challenge for disqualification of an arbitrator is appealable to the court of law within ten days.[70] This may at times be abused because the right of appeal may be used by parties to delay the proceedings on the merits.[71]

3.2.3- Severability and Kompetenze-Kompetenze

Often, the jurisdiction of arbitrators is defined in the arbitration agreement. Apart from the arbitration agreement, mandatory statutory provisions set limits on the competence of arbitrators.[72] Currently, however, there are few limits on the power of arbitrators to rule on a range of issues, both preliminary and core. In particular, numerous jurisdictions allow arbitrators to rule on their jurisdiction, subject to judicial review *only* after an award on the merits has been rendered; hence the principle of *Kompetenze-Kompetenze*.[73] This approach is

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[67] Art 3331 (2), Civil Code.

[68] Art 3332, Civil Code. Note that some jurisdictions solved the problem by mandatorily requiring an uneven number of arbitrators or through the appointment of an umpire (See Sanders, *supra* n. 44, pp. 232-233).

[69] Art 3341, Civil Code.

[70] Art 3342(3), Civil Code.

[71] Yet, there are some rules that remedy the downsides of the appeal right. See n. 127 *infra* and the accompanying text.

[72] Such limits take the form of, for example, legally inarbitrable matters.

[73] David, at § 309; Redfern, *supra* n. 38 at §5-41.

widely praised for it saves arbitration proceedings from unnecessary delays due to "premature" court intervention.[74]

Apart from the principle of *Kompetenze-Kompetenze*, the principle of severability works in favour of a broad arbitral jurisdiction. Where recognised, the theory of separability allows arbitral tribunals to consider an arbitral clause – based on which they assume jurisdiction – separable from the containing contract which is allegedly invalid. This, in turn, empowers arbitrators to decide on the validity or otherwise of the contract notwithstanding the fact that it is allegedly invalid.[75] The principle is crucial in international commercial arbitrations which are more often based on arbitral clauses than arbitral submissions.[76]

The two concepts are often interlinked, even sometimes confused.[77] A complete *Kompetenze-Kompetenze* doctrine would, however, embrace the principle of separability.[78]

Ethiopian law recognises contractual freedom of parties – to an arbitration agreement – to authorise arbitrators to decide on disputes relating to their jurisdiction.[79] Yet, the law provides two caveats. First, contractual provisions relating to the jurisdiction of the arbitrator shall be interpreted restrictively.[80] Second, and most importantly, parties to an arbitration agreement may in no case authorise arbitrators to decide on the validity of the arbitration agreement. The second qualification apparently ousts arbitrators from jurisdiction regarding matters relating to the validity of arbitration agreement. Put in other words, the Ethiopian version of *Kompetenze-Kompetenze* is qualified by the doctrine of

[74] Gaillard, E. (2006) Reflections on the Use of Anti-Suit Injunctions in International Arbitration. In: Mistelis L. & Lew J. eds. *Pervasive Problems in International Arbitration.* Alphen aan den Rijn, Kluwer Law International, at § 10-21[hereinafter Gaillard]; David, *supra* n. 45, at § 309.

[75] However, the last word on the issue of validity would be given by courts who at a later stage may review the decision of the arbitrators on the matter.

[76] Redfern, *supra* n. 38, at § 3-02.

[77] David, *supra* n. 45, at § 209; Redfern, *supra* n. 38, at § 5-42.

[78] Barceló, J. (2003) *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, Vanderbilt Journal of Transnational Law, 36, p. 1122; Redfern, *supra* n. 38, at § 5-41 – 5-42; Tweeddale & Tweeddale, *supra* n. 29, at§ 9-18.

[79] Art 3330 (2), Civil Code.

[80] *Ibid*, Art 3329.

"inseparability" – which allows initial judicial scrutiny of issues regarding the validity of arbitration agreements.[81]

3.2.4- Procedure before an Arbitral Tribunal

The main rules governing the procedure of arbitration are contained in Art 317 of CPC. The first paragraph of Art 317 of CPC requires a degree of similarity between the procedure in arbitration and court proceedings. Mindful of the merits of avoiding any interpretation that would disturb the relative informality of the arbitral proceedings, scholars have long considered Art 317 as imposing a soft requirement of similarity designed only to ensure procedural fairness in arbitration.[82] Elaborating on what particular similarity is required to exist between the procedure before an arbitration tribunal and a civil court, Art 317 (2) of CPC provides that arbitral procedure must at least be as fair as to enable parties to present their case and evidence.

3. 3- The Law Relating to Challenge and Enforcement of Arbitral Awards

An arbitral award is legally required to be made "in the same form as a judgement."[83] Accordingly, an arbitral award must be in writing and signed by the arbitrators.[84] The award must also contain the points for determination, the decisions thereon, and the reasons for such decisions.[85] Where the award has been rendered by a majority decision, the minority must state in writing the decision which it thinks should be made together with the reasons thereof.[86] The reading of Art 318 (2) *cum*. Art 182 (1), CPC, implies arbitrators must always give reasons irrespective of the parties' agreement that no reasons are to be given.[87]

Under Ethiopian law, parties to arbitration may appeal from awards. Art 351 of CPC provides a list of grounds based on which appeal from an award may lie. Conditions and grounds of appeal may also be laid down in the arbitration

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[81] The UNCITRAL Model Law and numerous national laws on international arbitration recognise the jurisdiction of arbitrators to rule on their own jurisdiction, including any objections with respect to the existence and validity of the arbitration agreement.

[82] See, e.g., Sedler, R. (1968) *Ethiopian Civil Procedure.* Addis Ababa, Haile Selassie I University Press, p. 388 [hereinafter Sedler on Procedure].

[83] Art 318 (2), CPC.

[84] *Ibid*, Art 181(1) *cum*. Art 318(2).

[85] *Id*., Art 182(1).

[86] *Id.*, Art 181(2).

[87] In contrast, the UNCITRAL Model Law allows parties to agree that no reasons are to be given in the award, in which case the arbitral award need not contain the reasons upon which it is based.

agreement.[88] Parties may either expand or exclude any basis of appeal from an arbitral award that would otherwise apply as a matter of law.[89] It is to be noted, however, that Art 351 of CPC which, as a rule, allows broad judicial review of arbitral awards is unsuited to commercial arbitration with respect to which reduced judicial review is sought.[90]

Ethiopian law also recognises nullity actions[91] as another means of recourse against arbitral awards. According to Art 356 of CPC, an award may be set aside where it is established that (1) the arbitrator decided matters not referred to him or made his award pursuant to a submission which was invalid or had lapsed; (2) the arbitrators, being two or more, did not act together; or (3) the arbitrator delegated any part of his authority whether to a stranger, to one of the parties, or to a co-arbitrator.[92] Unlike agreements to exclude appeal from an award, an agreement to exclude a nullity action against an award is invalid.[93]

An award (other than foreign awards) that is tenable under Arts 351 and 356 of CPC[94], may be executed without any prior condition in the same manner as an ordinary court judgement after application for homologation and execution of the award.[95] Recognition and enforcement of foreign arbitral awards are governed by the rules contained in Art 461 of the Civil Code. Accordingly, a foreign arbitral award which passes the five tests relating to reciprocity, arbitrability, public policy, procedural fairness, and valid arbitration agreement would be enforced. However, a written application for the enforcement of a

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[88] Art 350 (1), CPC.

[89] According to Art 350 (2), CPC, parties may waive their right of appeal. Yet, such waiver is of no effect unless made "with full knowledge of the circumstances". See further discussions on this point under section 4.3 *infra*.

[90] The philosophy of arbitrator autonomy and the "implicit realisation that arbitration is a unique method of dispute settlement which is a substitute for, rather than a part of, litigation" drive the present-day worldwide trend towards reduced judicial scrutiny of arbitral awards; see, e.g., Sanders, *supra* n. 44, pp. 318 *et seq*., Redfern, *supra* n. 38 at § 7-01 *et seq*., Garnett, *supra* n. 38, p. 113; and Evans, C. & Ellis, R. (1973), "International Commercial Arbitration: a Comparison of Legal Regimes", *Texas International Law Journal*, 8, pp. 24-25 [hereinafter Evans & Ellis].

[91] Note that a nullity action is the only legally available recourse against arbitral awards under the UNCITRAL Model Law and numerous modern national arbitration laws.

[92] Art 356, CPC.

[93] Art 355(1), CPC.

[94] An award remitted to arbitrators for reconsideration may also be enforced; see Art 354 (3), CPC.

[95] Art 319(2) *cum.* Art 461, CPC; international arbitral awards rendered by tribunals sited in Ethiopia are presumably enforced in the same manner.

foreign arbitral award must be made to the Federal High Court.[96] The Federal High Court then gives opportunity to the party against whom enforcement is sought to present his observations within such time as it discretionarily fixes.[97] No hearing is conducted unless the court for some special reason to be recorded decides to hear the parties.[98] Normally, the court allows or refuses to allow execution on the basis of the application unless it decides pleadings are to be submitted. If the application is allowed, "the foreign award is executed in Ethiopia as though it had been rendered in Ethiopia."[99] The characterisation as Ethiopian of foreign awards is crucial, for it accords the foreign arbitral award *res judicata* status.[100]

4. The Role of Ethiopian Courts in Commercial Arbitration

The involvement of national courts is crucial to the overall efficacy of arbitration, both domestic and international. Instances calling for court intervention may appear at all stages of the arbitral proceedings. Yet, there is a need to maintain a balance between the levels of court involvement and the smooth functioning of arbitration – which is a contractual alternative to judicial dispute settlement. In this section, we discuss the role of Ethiopian courts during the three stages of arbitral proceeding, i.e., before the commencement of the proceeding, during, the proceeding and after the rendition.

4.1- Before and at the Beginning of the Arbitration Proceeding

One of the issues that may initially call for court intervention is related to the enforcement of the arbitration agreement. It is the task of courts, not arbitrators, to enforce the arbitration agreement should one of the parties (1) bring an arbitrable dispute to a court of law or (2) refuse to perform the acts required for setting the arbitration in motion.[101]

Where a party insists on arbitration, Ethiopian courts have practically declined to assume jurisdiction on the merits and, accordingly, referred disputes to arbitration. This judicial practice has a long history dating at least as far back

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[96] Read cumulatively Art 11(2) (c), Federal Courts Proclamation, Proclamation No. 25/1996 and Arts 456-457, CPC. According to Art 457, CPC, the application must be accompanied by (1) a certified copy of the award to be executed; and (2) a certificate signed by the arbitrator or the registrar of the institution [in case of institutional arbitration] to the effect that the award is final and enforceable.

[97] *Ibid*, Art 459.

[98] *Id*., Art 461 (1).

[99] *Id*., Art 460 (3).

[100] *Id.,* Art 461 (2) *cum*. Art 460 (3) *cum*. Art 5.

[101] Art 3344 (1), Civil Code.

as the early 1960s. In *Highway Authority v Solel Boneh Ltd*,[102] the then Supreme Imperial Court of Ethiopia affirmed the decision of the High Court ordering the government agency to comply with a clause of its contract with Solel Boneh Ltd that provided for submission of all disputes under the contract to arbitration. In a similar case involving a government agency,[103] the Federal Supreme Court of Ethiopia denied a motion by the appellant government agency against enforcement of an arbitration agreement.

Numerous cases related to the enforcement of arbitration agreements involve government agencies. This is particularly because government agencies – the most notable Ethiopian participants in international commercial arbitrations – often try to take advantage of the unsettled Ethiopian law on arbitrability of administrative contracts. In *Highway Authority v Solel Boneh Ltd,* for example, the Imperial Highway Authority argued that Art 3194(1) of the Civil Code, which provides "the court may not order the administrative authorities to perform their obligation," sets a limit on the enforceability of arbitration agreements regarding administrative contracts. The Court, however, ruled against the Authority. In so doing, the Court reasoned that Art 3194 (1) of the Civil Code does not exonerate a government agency from referring to an arbitrator since this particular provision is qualified by other supplementary provisions contained in the same Code.[104]

The holding of the Court, however, faced serious challenge upon the enactment of CPC, whose Art 315 (2) reads "no arbitration may take place in relation to administrative contracts ... or in any case where it is prohibited by law."[105] Government agencies are now provided with an alternative statutory provision to avoid arbitration of disputes. And, this provision has successfully been invoked by government agencies to challenge enforcement of arbitration agreements and awards. For instance, the High Court of Addis Ababa[106] rejected enforcement to an international arbitral award against an Ethiopian administrative agency.

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[102] See n.35 *supra.*

[103] *Water Resource Ministry v Siyoum & Ambaye General Contractors*, Federal Supreme Court, Civil Appeal Case No.19659/1997.

[104] In particular, the court mentioned the Code's provisions on administrative contracts are incomplete and as such supplemented by other provisions of the Code including those on arbitral submission of disputes, i.e., Art 3325-3346, which do not expressly limit arbitral submission of matters regarding administrative contract.

[105] Note that the decision of the Court in *Highway Authority v Solel Boneh Ltd* came only *before* the enactment of CPC in 1965.

[106] *Water Supply and Sewage Authority v. Kundan Singh Construction Limited*, Addis Ababa High Court, Civil File No. 688/79.

Apparently, Art 315 of the CPC is explicit in stating the inarbitrability of administrative contracts. However, this has not dissuaded some from invoking the same provision, and in particular paragraph four reads "nothing in this chapter [Arts 315-319 of CPC] shall affect the provisions of Arts 3325-3346 of the Civil Code." The text of Arts 3325-3346 of the Civil Code – which accordingly overrides the provisions of Art 315 (2) – is silent as to whether disputes involving administrative contracts are arbitrable or not. This statutory silence has been taken by some[107] as indicative of arbitrability, as opposed to inarbitrability, of administrative contracts.

In *Water Supply and Sewage Authority v. Kundan Singh Construction Limited,* the High Court of Addis Ababa, however, rejected the argument of the Indian party that "Art 315 (2) of CPC should not be given effect since the overriding substantive law is silent as to the inarbitrability of issues arising out of administrative contracts." The court's decision has been seen by some commentators as an unconvincing attempt to "get around the strong point" under Art 315 (4) of CPC.[108]

The controversy regarding the arbitrability of administrative contracts survived the 20th century. In *Water Resource Ministry v. Siyoum & Ambaye General Contractors*,[109] the government agency argued the contract in which the arbitral clause was contained was an administrative one, in respect of which arbitration was prohibited by law. In deciding the matter, the court went on to define, in light of the principles of Ethiopian administrative contract law, which contracts are administrative and which are not. Eventually, it adopted a narrow definition of administrative contracts which resulted in the exclusion of the contract at issue from what might constitute an administrative contract for the purpose of Ethiopian law. Then the court concluded:

> "The appellant's argument that the matter should not be referred to arbitration is based on the theory that the matter, though contractually arbitrable, is inarbitrable in law as it relates to an administrative contract. But, the referred contract does not qualify as administrative one in respect of which Art 315 (2) of CPC prohibits arbitration. Accordingly, disputes arising out of it may be referred to arbitration pursuant to the contractual stipulation."[110]

The case is an instance of apparent judicial approval of the view that matters of administrative contract are inarbitrable under Ethiopian law.

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[107] Bezzawork supra note 27, p. 85; Zekarias, Keneaa (1994) "Arbitrability in Ethiopia: Posing the Problem" *Journal of Ethiopian Law*, 17, p. 120 [hereinafter Zekarias].

[108] Zekarias, *ibid*, p. 120.

[109] See *supra* n. 103

[110] Translation mine.

Nonetheless, in *Zemzem PLC v Illubabor Zone Education Department*,[111] the Federal Supreme Court's Cassation Division appeared to unsettle the above interpretation.[112] The issue involved the interpretation of Art 24 of the contract entered into between the disputants. This article provided for the arbitral submission of disputes involving the parties with, of course, the possible alternative of judicial settlement of the same. The provision interpreted by the lower courts as warranting judicial settlement of the dispute as the concerned contractual provision had not excluded, but rather contemplated, litigation. The Federal Supreme Court's Cassation division, however, interpreted the contractual provisions as only allowing arbitration, not litigation. Unlike in many of the cases cited above, the government agency did not invoke Art 315 of CPC which apparently exonerates it from arbitration. Nonetheless, the Cassation Bench should have dealt with it notwithstanding the failure of the Zone Education Department to invoke Art 315 (2) since arbitrability or otherwise of the dispute at issue is a public policy one.[113] The failure of the Court to specifically deal with the issue coupled with the final ruling which compelled an administrative agency to arbitration led to a remark that the Bench's holding as "hammering the final nail on Art 315(2)'s coffin" thereby heralding the enforceability of arbitration agreements over administrative contract matters. The ruling of the Cassation Bench seems to reinforce the dominant academic view[114] that matters relating to administrative contracts are arbitrable. However, I think it is too early to conclude that that *Zemzem PLC v Illubabor Zone Education Department* settles the status of the controversial Art 315 (2) of the Civil Procedure Code as the Cassation Bench has not directly addressed the issue.[115]

The enforceability of procedural agreements by the parties is unclear. The *a contrario* reading of Art 317(2) of CPC indicates that parties are free to agree over procedural matters.[116] In particular, they may exempt arbitrators from

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[111] *Zemzem PLC v Illubabor Zone Education Department,* Federal Supreme Court, Cassation File No.16896/ 1998.

[112] For more on this, see Tecle Hagos (2009), "Adjudication and Arbitrability of Government Construction Contracts", *Mizan Law Review* 3(1), pp. 1-32 [hereinafter Tecle].

[113] *Ibid*, p. 24.

[114] Tilahun, *supra* n. 17, at 126; Zakarias, *supra* n. 107, at 120 *et seq*.; Bezzawork, *supra* n. 27, at 83 *et seq*.

[115] Tecle, *supra* n. 112, who holds a different view also concedes the decision of the Bench does not finally settle some issues regarding arbitrability of administrative contracts; see Tecle, pp. 24-26.

[116] Perhaps, this article may allow arbitration by way of composition, i.e., amiable compositeur. See, however, Bezzawork, *supra* n. 27 (at 80) who argues that the

complying with the statutory rules relating to hearing and taking of evidence. However, Art 351 of the same Code, which lists procedural irregularities as a ground for challenging arbitral awards, casts doubt on the unqualified enforceability of some procedural agreements. Moreover, it is argued the Amharic version of Art 3325(1) of the Civil Code, which appears to generally require arbitration to be conducted "in accordance with the law," qualifies the provisions of Art 317 (2) of CPC[117]. The simultaneous existence of all these statutory provisions makes the intention of the legislator *vis-à-vis* the autonomy of parties to agree on procedural matters unclear. On the one hand, the law appears to allow parties to even agree over the inapplicability of the statutory rules on fair hearing. On the other, irregularities in the arbitral proceedings – which may, for example, result from the inapplicability of the statutory rules on fair hearing – can be invoked as valid grounds for challenging arbitral awards. However, it may be fair to argue that Ethiopian law allows parties to agree over procedural matters subject to the provisions of Art 351 of CPC and Art 3325 of the Civil Code. Accordingly, it seems likely that Ethiopian courts would be unsympathetic toward procedural agreements that aim to do away with statutory rules on fair hearing.

Apart from enforcing valid arbitration agreements, appointing members of the arbitral tribunals is another area where courts may participate during an early stage of arbitration.[118] As per Art 3344(1) of the Civil Code, a party to arbitration agreement may demand judicial enforcement of the arbitration agreement if the other party refuses to perform the acts required for setting the arbitration in motion (e.g. appointing arbitrators). And, courts who are called upon to enforce arbitration agreement may appoint arbitrators on behalf of the defaulting party. The scope of the power of the court called to appoint an

stipulation under Art 317 (2) of CPC is qualified by the substantive law on arbitration, particularly Art 3325 (1) of Civil Code.

[117] Bezzawork, *supra* n. 27, p. 80.

[118] Art 3334(1) *cum.* Art 3343, Civil Code; for more on this, see Zakarias, Keneaa (2007) "Formation of Arbitral Tribunals and Disqualification and Removal of Arbitrators under Ethiopian Law", *Journal of Ethiopian Law*, 21, pp.143-145.

arbitrator is however unclear. Put in other words, it is imprecise[119] whether the function of courts in appointing arbitrators is administrative.[120]

In practice, the role of Ethiopian courts in appointing arbitrator appears to be a judicial one. For instance, in *Ethiopian Mineral Development SC v JTT Trading,*[121] where a party to an arbitration agreement approached the Federal First Instance Court to appoint arbitrators on behalf of the other party which allegedly failed to perform its contractual obligation to appoint arbitrators, the Court reviewed the validity of the arbitration agreement. Although the court finally found that the arbitration agreement was valid, it did not appoint arbitrators on behalf of the defaulting party; rather it simply ordered the party to appoint its own arbitrators.[122] Moreover, appeals from the decision of the court culminated in the Federal Cassation Bench which held that the arbitration agreement is invalid and hence unenforceable.[123]

This practice is not ideal for commercial arbitration in general and international commercial arbitration in particular. Even though the role and power of the court in appointing arbitrators is the subject of disagreement elsewhere,[124] the prevailing view with regard to international arbitration is that judicial appointment of arbitrators is merely an administrative function which

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[119] Art 3334(1) of Civil Code, as per which courts intervene to appoint arbitrators, reads: "Where the other party or the person required to appoint an arbitrator fails to do so within thirty days, the court shall appoint such arbitrator." Though one would tempt to argue that the provision limits the role of courts to *only* appointing arbitrators, the article does not expressly prohibit courts from verifying – which they in fact do – the underlying arbitration agreement.

[120] If it is an administrative one, courts do nothing but appoint arbitrators without any judicial review of the validity of arbitration agreement. In contrast, if it is a judicial one, courts may review the validity of the arbitration agreement before they appoint arbitrators.

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

[122] Note however that the court had the power and in fact the duty to appoint arbitrators in such cases; see Art 3334 (1), Civil Code.

[123] For a critique of the decision of the Federal Cassation Bench, see Hailegabriel, Gedecho (2010), Managers' Power, Ultra vires and Third Parties under Ethiopian Law: a Critique of Ethiopian Mineral Development SC v JTT Trading," *Bahir Dar University Journal of Law*, 1(2) [forthcoming].

[124] See, e.g., Sen, A. (2000) "The Role of Courts in the Appointment of Arbitrators –an Analysis with Reference to the Supreme Court of India's Decision in S.B.P. v Patel Engineering", *Vindobona Journal of International Commercial Law and Arbitration*, 10, p. 46 [hereinafter Sen].

does not require the exercise of judicial power by courts.[125] It is commendable if Ethiopian courts decline jurisdiction to incidentally determine the validity of arbitration agreements when they are called to appoint arbitrators.[126]

Ethiopian courts may also decide over preliminary challenges to arbitration, e.g., application for the disqualification of appointed arbitrators. Under Ethiopian law, an unsuccessful challenge for disqualification of an arbitrator is appealable to the court of law within ten days.[127] Though the ten-day period seems to lessen the adverse effects of the appeal right, it does not rule out the possible utility of the appeal right to delay proceedings on the merits. The undesirability of the application of this rule to cases of international commercial arbitration – where dilatory intervention by national courts is worth avoiding, has long been recognised.[128] As one writer notes:

> "The party making the challenge should bear a heavy burden of proof, and challenges should not be sustained merely to avoid controversy, lest they be used for *ad terrorem* effect. Once decided within the arbitral regime the matter should be final and not subject to interlocutory judicial review. Even after the award has been rendered the challenge should not be subject to further litigation in a reviewing court, unless it can be shown that the direct result of the decision rejecting the challenge was a seriously tainted award."[129] [Emphasis added].

Moreover, Art 3342 (3) of the Civil Code allows judicial review of application for disqualification. CPC provisions on appeal from and setting aside of arbitral awards may apparently serve a similar purpose, albeit at a later stage.

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[125] *Ibid*, 52; note also that the trend elsewhere is to reduce judicial intervention in the earlier stage of arbitration. Thus, the principle of *competence-competence* empowers arbitrators to assume jurisdiction over jurisdictional matters including those related to the existence and validity of the arbitration agreement.

[126] Nonetheless, a marginal review of the arbitration agreement before appointing arbitrators is necessary to save parties from future costs related to arbitration under invalid arbitration agreements. Besides, Ethiopian law reserves the power to rule over the validity or otherwise of arbitration agreement to courts (see discussions under 4.2). Yet, it is submitted that this can expediently be done at a later stage, e.g., during appeal and setting aside procedures, so that premature judicial intervention will be reduced.

[127] Art 3342 (3), Civil Code.

[128] David, *supra* n. 45, at § 287; for a detailed analysis on the role of courts and current trends thereto, see Redfern, *supra* n. 38, Chapter 7.

[129] Tupman, W. (1989) "Challenge and Disqualification of Arbitrators in International Commercial Arbitration", *The International and Comparative Law Quarterly*, 38, p. 52 [hereinafter Tupman].

In a fairly recent case,[130] the Federal Supreme Court denied an appeal from an unsuccessful challenge for disqualification as the appeal was brought only after an award by the challenged arbitrator was rendered. The Court's ruling looks consistent with the spirit of Art 3342(1) of the Civil Code, which requires application for disqualification to be made before the giving of the award and as soon as the challenging party knew of the grounds for disqualification.[131]

A scenario that needs to be taken note of is a situation where a challenge, rejected by an arbitral tribunal, is appealed to a court. The issue that arises would be whether arbitrators, perhaps including the challenged arbitrator, can proceed with the arbitration process pending final court decision on the matter? Literature reveals the answer is not the same everywhere. In some jurisdictions, arbitrators are not bound to suspend the proceeding, whilst numerous countries oblige arbitrators to suspend hearing until the court has the last word on the application for disqualification.[132] René David underlines the merits of the former approach, especially where cases of international arbitration are involved.[133] Albeit risky,[134] allowing the continuation of the arbitral proceeding by postponing any judicial review to only after an award has been made is recommended.[135]

Interlocutory judicial review of an application for disqualification is legally possible in Ethiopia.[136] Nonetheless, there is no clear legal authority for a court to suspend the arbitration proceeding until its final decision on the matter.[137]

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[130] *Siemens PLC v Berta Construction PLC*, Federal Supreme Court, Civil Appeal File No.12648/96.

[131] Under Ethiopian law, challenge can be brought as late as any time before the giving of the award. Yet, late challenges should be based on grounds that have only recently come to the attention of the party; see Art 3342(1), Civil Code.

[132] David, *supra* n. 45, at § 287.

[133] *Ibid*.

[134] The independence of arbitration from "premature" court intervention does not always guarantee efficiency. Although saving the arbitral process from early judicial intervention contributes to the prompt settlement of disputes, it is sometimes neither cost- nor time-effective for at least the party dragged to the arbitration. Yet, it is now widely believed that the downside of the independence (from premature judicial intervention) of arbitration would be lessened by such procedures as setting aside; see, e.g., Tupman.

[135] David, *supra* n. 45, at § 287.

[136] For more on this, see discussions in 3.2 *infra*".

[137] Yet, one would possibly argue courts do have the inherent power to order the suspension of arbitral proceedings whenever they think appropriate. Even more, the power of courts to order provisional remedies including temporary injunctions may used to justify judicial intervention at the preliminary stage of arbitration; see, e.g.,

Practically, however, Ethiopian courts have ordered the suspension of an arbitral proceeding pending judicial review of an application for disqualification.[138] Such suspension orders – widely known as "anti-arbitration injunctions" – have been rebuffed by the concerned arbitrators[139] and some scholars.[140]

Generally, Ethiopian courts play a positive role in enforcing valid arbitration agreements. Yet, their role in setting precedent over the controversial matter regarding arbitrability of administrative contractual matters has been elusive. Moreover, the much looked-for judicial restraint regarding interlocutory matters like challenges to jurisdiction is absent in Ethiopia.

4.2- During the Arbitration

Arbitration is a method of dispute settlement which is alternative to, not part of, court litigation.[141] It is widely held that court intervention, especially during the proceeding of the arbitration, is undesirable as it may frustrate and disrupt this alternative dispute settlement process.[142] Many jurisdictions have thus (1) relegated the role of courts, during this stage, to that of a supportive one[143] and (2) recognised the procedural autonomy of parties and their arbitrators.[144] Arbitrators are accordingly empowered to, for example, award preliminary interim measures and relief, including interim relief in respect of parallel proceedings; and they are not under obligation to seek the assistance of the courts.[145]

Art 155-156, CPC. Note also that the CPC's provisions on stay of proceedings might be of relevance.

[138] *Salini Costruttori Spa v the Federal Democratic Republic of Ethiopia, Addis Ababa Water & Sewage Authority*, ICC Arbitration Case No.10623/AER/ACS (2001) [hereinafter Salini].

[139] *Ibid*, § 125-178; more on the case will follow in the next section.

[140] See, e.g., Bachand, F. (2005), "Must an ICC Arbitral Tribunal Comply with an Anti-suit Injunction Issued by the Courts of the Seat of Arbitration?", *Mealey's International Arbitration Review* 20(3), pp. 47 *et seq*.[hereinafter Bachand]; Gaillard, *supra* n. 74, at § 10-21; Scherer, M. & Giovannini, T. (2005), "Anti-Arbitration and Anti-Suit Injunctions in International Arbitration: Some Remarks Following a Recent Judgement of the Geneva Court," *Stockholm International Arbitration Review*, 3, pp. 209-211[hereinafter Scherer & Giovannini].

[141] Evans & Ellis, *supra* n. 90, p. 24.

[142] *Ibid.*; Redfern, *supra* n. 38, at § 7-10.

[143] *Ibid*.

[144] Petrochilos, G. (2004) *Procedural Law in International Arbitration.* Oxford, OUP, at § 3-73 *et seq*. [hereinafter Petrochilos].

[145] Sanders, *supra* n. 44, at 271 *et seq*.; Tweeddale & Tweeddale, *supra* n. 29, at § 9-12 – 9-87.

The autonomy of commercial arbitration from national court supervision is not, however, absolute even in Model Law countries where mandatory rules on independence and impartiality of arbitrators and party equality enjoy a complete free rein.[146] Accordingly, the competence of courts, for instance, to entertain challenges to arbitrators' jurisdiction *before* any award has been issued is recognised.[147] This is particularly important to address the concerns of parties, who should not be forced to go through the whole process of arbitration which may be deemed a nullity afterwards.[148]

Pending the arbitral proceeding, the autonomy of arbitration does not preclude a party to an arbitration agreement from applying to the court in order to preserve his rights. The right of parties to apply to the court for assistance is imperative as arbitrators lack actual power – though not legal power – to compel parties to, for example, arbitrate and give evidence.[149] For instance, court-issued summons are needed subsequent to a witness's failure to appear in answer to the summons issued by an arbitral tribunal.[150]

Ethiopian law allows a fair degree of arbitral autonomy. It, for instance, empowers arbitrators to initially decide on their jurisdiction,[151] to grant orders in relation to interim measures of protection and measures relating to the attendance of witnesses, etc.[152] Arbitrators are the masters of their own procedure as long as they guarantee procedural fairness.[153] Arguably, they can

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[146] Petrochilos, *supra* n. 144, at § 3-78; Art 18-19, UNCITRAL Model Law.

[147] Redfern, *supra* n. 38, at § 5-47; Art 16, UNCITRAL Model Law.

[148] Petrochilos, *supra* n. 144, at § 4-65; but see, Redfern, at § 5-47.

[149] In some jurisdictions, arbitrators rely on the principle of adverse inference to sanction compliance with their interim orders; see Tweeddale & Tweeddale, at § 9-67.

[150] Art 317(3), CPC.

[151] Art 3330(1)-(2), Civil Code. As seen earlier, however, this principle seems to be limited by a substantive rule contained in Art 3330(3). This provision expressly prohibits parties from authorising arbitrators to decide on the validity or otherwise of an arbitration agreement. It is thus the power of courts, not arbitrators, to decide on the [in]validity of arbitration agreements. See n. 81 *supra* and the accompanying text.

[152] The absence of express statutory provisions prohibiting arbitral tribunals from awarding preliminary or interim reliefs coupled with some inference from such provisions as Art 317(3) of CPC reflect the legislative policy of permitting arbitrators to award preliminary or interim reliefs. See also Tilahun, p. 137.

[153] Procedural unfairness results in the annulment/setting aside or judicial review of the award afterwards; see Art 351 and Art 356, CPC; also *Re Gebrehiwet Debesai v Fondiaria Fire Insurance Co.,* Supreme Imperial Court, Civil Appeal No.134/56[reported in Journal of Ethiopian Law, 2(2), pp. 267-275].

be flexible in the realm of procedural fairness if they are authorised to do so by the parties,[154] subject to the duty to respect the fundamental principle of equality of the parties.

Ethiopian law also recognises the importance of the right of parties to arbitration to apply for court assistance whenever appropriate.[155] Such applications will neither be considered a breach of agreement to arbitrate nor a waiver of the agreement to arbitrate.[156]

Parties to an arbitration agreement approach courts, *inter alia,* seeking interim relief enjoining a pending arbitral proceeding. One of the pervasive problems in commercial arbitral proceedings relates to such relief which, when granted, potentially disrupts the arbitral proceeding. While courts in developed arbitral jurisdictions cautiously exercise self-restraint towards applications for relief enjoining a pending arbitration, i.e., anti-arbitration injunctions,[157] a comparable caution is reportedly lacking in some jurisdictions like Ethiopia.

It has been reported[158] that Ethiopian Federal Supreme Court accepted a party's application to restrain an international arbitration proceeding pending court decision on a preliminary objection to the jurisdiction of the arbitrators. The application was brought based on Art 3342 (3) of the Civil Code which allows appeal against an application for disqualification turned down by the arbitrators. Though there is no express legal authority – within the pertinent provisions of the Civil Code and CPC – for courts to suspend the arbitration until they finally give a decision on the pending application for disqualification, Ethiopian courts have practically done so with the help of the CPC's provisions on temporary injunctions and stay of proceedings.[159] Such court injunctions, which unduly interfere with the arbitral process, have widely been dismissed as incompatible with the universally recognised principle of competence-competence and the overall efficacy of arbitral settlement of disputes.[160] More frequently, arbitral tribunals against whom anti-arbitration injunctions were issued by courts in the seat[161] state refuse to suspend the arbitration.[162]

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[154] The phrase "unless by the submission it has been exempted from doing so" in Art 317(2) of CPC warrant such an argument.

[155] Art 317(3), CPC; Art 3344(2), Civil Code.

[156] *Ibid*.

[157] Redfern, *supra* n. 38, at § 7-33 *et seq.*; Gaillard, *supra* n. 74, at § 10-15 - 10-16.

[158] *Salini*, *supra* n. 138, § 75 *et seq*.

[159] *Ibid.,* § 76 and 121.

[160] *Id.*, § 177; See Gaillard, at § 10-21; Scherer & Giovannini, *supra* n. 140, p. 218.

[161] Seat is the place where arbitral proceedings are undertaken. Note that in almost all cases, the seat is the place designated as such by the parties. As a matter of practice, however, arbitral proceedings may actually be held outside the designated seat. For

In *Salini*,[163] the ICC Arbitral Tribunal, which was ordered by the Federal Supreme Court to suspend the arbitration pending judicial decision on the qualification/jurisdiction of the arbitrators, declined to do so. The tribunal reasoned its decision on (1) purported duties it owed to the parties in the arbitration, (2) its duty to make every effort to render an enforceable award, and (3) a theory that a state or state entity cannot resort to the state's courts to frustrate an arbitration agreement.[164] The tribunal particularly held that "its duty to the parties," which according to it "derived from the arbitration agreement must be followed even if that requires non-compliance with a court order."[165]

Many arbitration practitioners and scholars seem to sympathise with the findings, or at least the merits, of the arbitration tribunal.[166] Yet, there are some who argue that injunctions issued by Ethiopian courts, which in the case at hand assume supervisory jurisdiction, must be honoured.[167] Though unmoved by the argument of the ICC Tribunal that "it must follow its own judgment, even if that requires non-compliance with orders from the supervisory court",[168] it is regrettable that Ethiopian courts went so far in undesirably and, of course, unsuccessfully[169] challenging (1) the principle of competence-competence,

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instance, some arbitral proceedings wherein Ethiopia is the seat may in fact be undertaken in France. For more on this, see Rubino-Sammartano, M. (1999) *International Arbitration: Law and Practice*. 2nd ed. The Hague, Kluwer Law International, pp. 563-570; Redfern, *supra* n. 38, at § 2-14-15.

[162] See, e.g., *Himpurna California Energy Ltd v Republic of Indonesia* [reported in Yearbook Commercial Arbitration. (2000) Vol. XXV, pp. 186-215; Mealey's International Arbitration Report (2000) 15(1), pp. A-i].

[163] See n.138 *supra*.

[164] *Salini, supra* n. 138, § 125-178.

[165] *Ibid.,* §142.

[166] E.g., Gaillard, *supra* n. 74, at § 10-21; Bachand, *supra* n. 140, at 47; Scherer M. & Giovannini, *supra* n. 140, at 218.

[167] E.g., Mohtashami, R. (2005), "In Defense of Injunctions Issued by the Court's of the Place of Arbitration: A Brief Reply to Professor Bachand's Commentary on Salini Costruttori S.p.a. v. Ethiopia", *Mealey's International Arbitration Review*, (20)5, p. 44; Partasides, C. (2004), "Solutions offered by Transnational Rules in Case of Interference by the courts of the place of arbitration", *Transnational Dispute Management*, 1(2), pp. 8 *et seq.* [hereinafter Partasides].

[168] I sympathise with the argument of Partasides that (1) enforcing the arbitration agreement must also involve recognising the supervisory jurisdiction chosen by the parties and (2) that the fact that one of the parties to an arbitration agreement is a state agency of country X does not vacate, or invalidate, the parties' agreement that the courts of country X have supervisory jurisdiction.

[169] The suspension order by the Ethiopian court was not actually successful in vacating the arbitrator from jurisdiction; the arbitrators rather defied the court order and

which is arguably[170] incorporated under the national arbitration law and (2) the efficient utilisation of arbitration.

4.3- After the Arbitration: Setting Aside, Appeal, and Enforcement of Awards

To a varying degree, the role of courts in controlling the outcomes of arbitration – international or domestic – is universally recognised.[171] Two important functions are undertaken by courts during this stage: entertaining challenges to arbitral awards and applications for enforcement of the same.

4.3.1- Challenging Arbitral Awards

Appeal is one way of challenging arbitral awards under Ethiopian law. Four general grounds of appeal are listed in Art 351 of CPC. Accordingly, appeal is allowed where:

(1) the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact;
(2) the arbitrator omitted to decide matters referred to him;
(3) irregularities[172] have occurred in the proceedings; or
(4) the arbitrator has been guilty of misconduct.[173]

Additional conditions and grounds of appeal may also be laid down contractually. As a result, broad judicial review of arbitral awards is possible. However, Sedler in his *Ethiopian Civil Procedure* posits "an award is not subject to review [to] the same extent as a judgement".[174] For him:

> "the decision of the arbitrator on [a] question of law or fact is not reviewable as such. It is only where the decision is patently incorrect, e.g., where he

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continued the proceeding which resulted in an award that may perhaps have a limited chance of enforcement in the seat state; see Redfern, *supra* n. 38, at § 7-37.

[170] See n.79-81 *supra* and the accompanying texts.

[171] Redfern, *supra* n. 38, at § 7-41.

[172] Such irregularities include (1) failure to inform the parties or one of them of the time or place of the hearing or to comply with the terms of the submission regarding admissibility of evidence; or (2) refusal to hear the evidence of material witness or taking evidence in the absence of the parties or one of them (See Art 351(c) (i) – (ii), CPC). Note, however, that this provision is not compatible with Art 317 (2) of the same Code which apparently recognises parties' right to exempt arbitrators from complying with some procedural matters.

[173] According to an illustrative list under Art 351(d), misconduct of arbitrator include situations where the arbitrator (a) heard one of the parties not the other, (b) is unduly influenced by one of the parties, whether by bribes or otherwise, or (c) acquired an interest in the subject matter of dispute referred to him.

[174] Sedler on Procedure, *supra* n. 82, p. 390.

> enforced an oral contract, which the law requires to be in writing that is subject to review... Irregularities or misconduct by the arbitrator justify review only where they are such as to prevent a fair hearing or demonstrate that the arbitrator did not render an unbiased judgment ... it is important to remember that an arbitral award may not be reviewed on the same ground as a judgement."[175]

Sedler's view that arbitral awards may not be reviewed as widely as judgements is consistent with the jurisprudence elsewhere.[176] Yet, the practice in Ethiopian courts does not support such a view. Inconsistent with what Sedler holds, courts have shown their willingness in practice to review awards on the merits when they are appealed.[177] Moreover, courts do not have difficulties in proceeding to review the merits of arbitral awards as Art 351 (a) of CPC clearly allows judicial review of awards which are wrong in matters of law and fact.

Parties to an arbitration agreement may waive their right of appeal.[178] According to Art 351(2) of CPC, such waiver would be valid only when made "with full knowledge of the circumstances."[179] This provision is interpreted as prohibiting waiver (of appeal right) in arbitration agreement, since "at the time the agreement was prepared parties could not have had full knowledge of the circumstances".[180] Practically, however, courts have enforced finality clauses – which are waivers of appeal rights beforehand.[181] Even more, the Federal Supreme Court Cassation Division has recently established a precedent that finality clauses bar otherwise possible review by the Cassation Bench of the Federal Supreme Court.[182] Hence, wider judicial review of arbitral awards may be denied if parties, in their arbitration agreement, waive their right of appeal.

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[175] *Ibid*.

[176] Most modern arbitration legislations do not permit judicial review of arbitral awards on issues of fact and law; see, e.g., Redfern, *supra* n. 38, at § 9-44.

[177] See, e.g., *Re Matt Construction Works Consultants Plc and Tambo International Plc v. Abu Dhabi Establishment,* Federal Supreme Court, Civil Appeal Case No.16021/1997[hereinafter *Matt Construction*] and *Re Gebrehiwet Debesai v Fondiaria Fire Insurance Co.*(cited in n.153 *supra*).

[178] Art 350(2), CPC.

[179] *Ibid.*

[180] Sedler on Procedure, *supra* n. 82, p. 389.

[181] See, e.g., *Re Disaster Prevention and Preparedness Commission v Heirs of Ato Feleke Getahun*, Federal Supreme Court, Civil Appeal Case No.351/88; *Re Getu Geletu v Rina International Investment Ltd*, Federal Supreme Court, Civil Appeal Case No.9440/1994; *Re National Motors Corp. v General Business Development*, Federal Supreme Court Cassation Bench, Cassation File No.21849/1997[hereinafter *National Motors Case*].

[182] *Ibid,* National Motors Case.

Instead of reviewing the arbitral award themselves, courts have sometimes remitted awards for reconsideration by the arbitrators.[183] Remission, a procedure which enables the arbitrators to cure a certain defect, is however available only where the arbitrators either (1) omitted to decide matters referred to them or (2) erred on matters of law or fact.[184] Courts cannot remit awards to arbitrators if arbitrator misconduct and procedural irregularities are involved.[185]

Apart from appeals, application for annulment is possible under Ethiopian law.[186] Yet, the grounds for annulment do not include what in many other jurisdictions are recognised as such. For instance, procedural irregularities and arbitrator misconduct do not constitute grounds for setting aside an arbitral award. Of course, procedural irregularities, along with arbitrator misconduct, may justify appeal from an award.[187] Nonetheless, issues can be taken with Ethiopian law which allows only appeal, not nullity action, to challenge arbitral awards rendered by, for example, improper conduct of arbitrators. Annulment, rather than judicial review, of awards seems the most sensible remedy for challenges based on grounds such as misconduct of arbitrators and procedural irregularities.[188] More alarmingly, since parties may contract out of any statutory grounds of appeal, courts could be left without an effective means to enforce mandatory rules on procedural fairness.[189] This is particularly dangerous as Ethiopian courts are now vigorously enforcing finality clauses.[190]

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[183] See, e.g., *Matt Construction.*

[184] Art 354(1), CPC.

[185] *Ibid.*

[186] See the discussion in section 3.3 *supra*.

[187] See Art 351(c)-(d), CPC.

[188] The law, perhaps in partial admission of the inappropriateness of the procedure under Art 351 to challenges based on grounds like procedural irregularities, differentiates between two sets of grounds of appeal – grounds (1) that trigger remission and (2) that do not (see n.183-185 *supra*). It is, however, unclear why the legislator, apparently cognisant of the unsuitability of procedural irregularities and arbitrator misconduct as triggers to procedures related to appeal, failed to further simplify the regime by, for example, including them under the most appropriate list in Art 356. Note that under the UNCITRAL Model Law and many other modern legislations, procedural irregularities and possibly arbitrator misconduct are grounds for setting aside – the only recourse against arbitral awards. See n.91 *supra*; Art 34, UNCITRAL Model Law; Art. V, New York Convention, Redfern, at §9-34.

[189] In principle, procedural unfairness results in the annulment/setting aside or judicial review of an award (see Art 351 and Art 356, CPC). Yet, as "arbitrator misconduct" and "procedural irregularities" are not specifically mentioned under Art 356 as grounds for annulment, setting aside is not apparently possible. The two are, however, among grounds of appeal from an award under Art 351. Still, parties may contract out the two as grounds of appeal from an award (see Art 350 (2)). In such

There seems to be some conceptual ambiguity in various Ethiopian court decisions regarding the difference between appeals from arbitral awards vis-à-applications for setting aside arbitral awards. Though the two procedures of challenging awards are different, some courts have erred in taking the setting aside procedure as another procedure justifying judicial review of arbitral awards on the merits.[191] In my opinion, courts need not review arbitral awards when a party to arbitration applies for annulment/setting aside of an arbitral award. The task of the court called to set aside an arbitral award should be strictly limited to either granting or denying the application for annulment.[192] Judicial review of arbitral awards with a view to vary, reverse, or even confirm the same is however presupposed when an appeal – based on the grounds listed under Art 351 – lies from an award.

Generally, the practical role of Ethiopian courts in entertaining challenges to arbitral awards is not as negative as their role in dealing with preliminary arbitral matters such as challenges to the jurisdiction of arbitrators. Moreover, as witnessed in *National Motors Corporation v General Business Development*, Ethiopian courts are moving towards a new direction of enforcing finality clauses, perhaps at the expense of some public policy.[193] Seen from the perspective of commercial arbitration, however, the courts are less parochial. Arguably, the precedent set in *National Motors Corporation v General Business Development* may take Ethiopian law to the level of modern arbitration legislations which permit arbitrators to act as *amiable compositeure* with the

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cases, courts may not have excuses to justify either review or annulment of an award rendered (1) by a misbehaving arbitrator or (2) following procedural irregularities. Perhaps, courts may find some way out within the provisions of Art 350(2) that subject the validity of contractual waiver of the right of appeal to a certain condition; but see n.173-174 *supra*.

[190] See n.178-182 *supra* and the accompanying texts.

[191] In *Disaster Prevention and Preparedness Commission v Heirs of Ato Feleke Getahun,* for example, the Federal Supreme Court reasoned that it would have reviewed the decisions of the arbitrators irrespective of the finality clause had the applicant based its appeal on the grounds mentioned under Art 356, instead of those under Art 351! An identical reasoning is spelt in the judgement of the same court in *Getu Geletu v Rina International Investment Ltd.* Though the court is correct in holding finality clauses do not waive the right to apply for annulment under Art 356, it is wrong to take the grounds listed under Art 356 as alternative grounds of appeal.

[192] Art 357, CPC.

[193] See, e.g., **ዮሐንስ ኀሩይ** (2009)፣ "**ስለሰበር ሥልጣንና ስለሥርዓቱ ጥቂት ማስታወሻዎች**" *Ethiopian Bar Review*, (3)1, pp. 131-148.

agreement of the parties.[194] Incidentally, much of the limitations regarding challenge of arbitral awards have to do with the law, not courts.

4.3.2- Enforcement and Recognition of Awards

As seen above, commercial arbitral awards rendered by tribunals seated in Ethiopia are generally enforced (without any prior condition) in the same manner as an ordinary court judgement.[195] Here, we are only concerned with *foreign*[196] awards whose enforcement, according to Art 461 of CPC, is subject to some five tests.

Ethiopian law on enforcement of foreign arbitral awards is comparable with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In particular, most of the grounds of refusal to enforce under Ethiopian law are similar to those recognised under the Convention. However, the latter unlike the former is pro-enforcement. The phrase in Art 461 CPC which provides that "*foreign arbitral awards may not be enforced in Ethiopia unless...*" sounds anti-enforcement in the sense that it makes enforcement conditional on the fulfilment (and presumably on the production of evidence to that effect) of all the conditions laid down in the law.[197] In other words, unlike in most modern arbitration legislations, it seems that foreign arbitral awards are enforceable only exceptionally,[198] not as a rule.

Art 461 is titled *enforcement of foreign awards* and omits *recognition* – which, under comparable national and international laws,[199] is addressed together with enforcement. The omission, coupled with the absence of specific statutory provisions governing the recognition of foreign awards, invites a query

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[194] Modern arbitration laws allow amiable compositeur (See Tweeddale & Tweeddale, *supra* n. 29, at § 9-12). Yet, the status of Ethiopian law regarding amiable compositeur is unclear and, hence, subject to diverse opinion (see, e.g., Tilahun, *supra* n. 17, p.138, Bezzawork, *supra* n. 27, p. 80). Given the recent decision of the Federal Cassation's *Chilot* in *National Motors Case*, it may however be argued that Ethiopian law allow amiable composition. Crucially, the insistence of Ethiopian courts to honour party agreement excluding judicial review is a strong evidence that courts may tolerate arbitrators who, *with the agreement of the parties*, acted as *ex aequo bono* or in equity.

[195] See n.95 *supra*.

[196] Note that "foreign arbitral award" is not necessarily synonymous with "international arbitral award"; see n.28 *supra*.

[197] An ideal pro-enforcement provision would rather, for example, read: "foreign arbitral awards are enforced in Ethiopia unless..." or, like in Art.V of the New York Convention, "recognition or enforcement may be refused only if..."

[198] The way Ethiopian courts interpreted this statutory provision affirms this view; see n. 202 *infra* and the accompanying text.

[199] For example, the 1958 New York Convention.

whether the provisions of Art 461 apply to recognition of foreign awards as well. The answer to be given, though not always important,[200] is of particular concern with respect to types of awards which demand only recognition, i.e., which are defensive in nature. Given the absence of separate statutory guidelines on the grounds for refusal of recognition, it would be ideal if courts simply extended the application of the rules on enforcement to cases involving recognition.[201]

Under Ethiopian law, reciprocity is one of the grounds for refusing enforcement of foreign arbitral awards. Moreover, the onus of proving reciprocity is on the applicant as Ethiopian courts have practically declined to presume reciprocity. In the *Paulos Papassinus* case,[202] the Federal High Court and, on appeal, the Federal Supreme Court denied an application for enforcement of a certain Greek judgement only because the applicant failed to prove reciprocity, i.e., that Ethiopian judgements are enforced in Greece. As the Ethiopian statutory rules on enforcement of foreign judgements and awards are not mutually exclusive, it is almost certain that the court would reach at similar conclusion *vis-á-vis* enforcement of foreign awards as well.[203] In contrast, under the general international practice shaped by the New York Convention[204] reciprocity plays a meagre[205] role and the onus of proof is hardly ever on the party seeking enforcement.[206] After all, reciprocity is not included among the list

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[200] As enforcement often presupposes recognition, the omission of the term *recognition* in Art 461 may not be a big deal in cases where recognition is sought with a view to subsequent enforcement; see, e.g., Ibrahim, Idris (1999) "Ethiopian Law of Execution of Foreign Judgments", *Journal of Ethiopian Law*, 19, p. 21[hereinafter Ibrahim]; Redfern, *supra* n. 38, at § 10-10 – 10-12.

[201] This would make Ethiopian law compatible with the international practice set by the 1958 New York Convention, under which grounds for refusal of enforcement of foreign arbitral awards are equally applicable to cases involving recognition.

[202] *In the Matters of Paulos Papassinus,* Federal High Court, Civil Case No.1623/1980; and *in the Matters of Paulos Papassinus,* Federal Supreme Court, Civil Appeal Case No.1769/88. In particular, the courts reasoned that Ethiopian courts are not bound to execute judgements rendered in Greece as there is no treaty of judicial assistance between Ethiopia and Greece.

[203] Particularly, Art 461 (a) expressly cross-refers to Art 458 (a) – the very article on reciprocity exception *via-á-vis* execution of foreign *judgmen*t. Also, Art 461 (2) authorises the analogical application of the provisions on execution of foreign judgments when the enforcement of a foreign award is sought.

[204] As of October 2010, 145 states are members to the New York Convention.

[205] According to leading authorities in international arbitration, reciprocity is rather "becoming a relic"; see Redfern, *supra* n. 38, at § 10-27.

[206] Art V(1), New York Convention reads "recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that

of grounds of refusal of enforcement.[207] It would be a ground of denying enforcement only if states opt for the reciprocity reservation under Art.I(3). Even then, it may only be invoked against awards rendered in a non-contracting state.[208] Award from these states, however, may still avoid rejection when, for example, the rendering non-contracting state has a law allowing enforcement of awards rendered in the state where enforcement is sought. In addition, the presumption of reciprocity means foreign awards are in principle enforced, unless a defendant who challenges enforcement pleads and proves that a similar award from the enforcing state would not be enforced in the rendition state.[209]

In denying enforcement for a foreign judgement on grounds of absence of proof of reciprocity, both the High Court and the Supreme Court are hindering the very purpose of reciprocity.[210] The absence of any presumption that Ethiopian judgements/awards are enforced in a certain foreign state has in effect led to the refusal (by Ethiopian courts) of execution of judgement from a state that would actually allow enforcement of judgments/ awards rendered in Ethiopia.[211] According to a certain critic, this may have far reaching implications, as it may well result in miscarriages of justice and negative impacts on the economy of Ethiopia:

> "[T]he person who has obtained a judgement abroad at considerable expense and inconvenience [would be] subjected to another piece of litigation in Ethiopia on the same facts and issue...[U]nder the current mode of application of the principle by Ethiopian Courts, the mishap is bound to recur almost in every case. This makes the country a safe haven to judgment-debtors against successful litigants... [F]oreign businessmen may [also] avoid entering into transactions with their Ethiopian counterparts or they will simply increase

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party *furnishes* to the competent authority where the recognition and enforcement is sought, *proof* that..."[emphasis added].

[207] See Art V, New York Convention.

[208] Redfern, *supra* n. 38, at § 10-27.

[209] After all, Model Law countries recognise and enforce arbitral awards irrespective of reciprocity! See Redfern, *supra* n. 38, at § 10-27; Arts 35-36, Model Law; and Art V(1), New York Convention.

[210] The main purpose of the reciprocity is to ensure that states enforce judgements and awards rendered in the enforcing state; also, it is maintained that such purposes are not served at the expense of innocent judgement-creditors who seek enforcement of the same (see Ibrahim, *supra* n. 200, pp. 23-24). The importance attached to this principle is, however, in decline; see n.205 *supra*.

[211] At the time the Ethiopian courts refused enforcement to the Greek judgment, Greece was a party to the New York Convention and had already had a modern law that in principle allows enforcement of Ethiopian judgements and awards; see Campbell, D. & Campbell, C., eds. (1995) *International Civil Procedure*. London, Lloyd's of London Press Ltd., p. 357 *et seq*.

> 'the transaction costs of doing business' in Ethiopia by demanding advance payment, guarantee and so on. In both cases, the business initiatives of Ethiopians would be damaged"[212]

The other downside of refusing enforcement to foreign judgments/awards only because reciprocity is not established relates to the judiciary itself:

> "That Ethiopian courts deny *res judicata* effect to foreign [awards] means that they will retry the case all over again. This surely entails an unnecessary waste of the scarce resources and judicial time on foreign disputes."[213]

As a matter of international practice, recognition and enforcement of a foreign arbitral award may be refused if a court in the country (where recognition or enforcement is sought) finds that the subject matter of the difference is not arbitrable under the law of that country.[214] Inarbitrability (of the matter addressed in a foreign arbitral award) is one of the grounds of refusal of enforcement in Ethiopia as well.[215] Yet, the uncertainties[216] on a range of issues involving arbitrability under the Ethiopian legal system make Ethiopia an unsuitable jurisdiction for easy enforcement of foreign awards against administrative agencies, to say the least.

As seen earlier, the Ethiopian jurisprudence on arbitrability of administrative contracts is less than settled. And, government agencies, the most regular Ethiopian participants in international commercial arbitration, have often taken advantage of the situation.[217] For instance, in *Water Supply and Sewage Authority v Kundan Singh Construction Limited,*[218] a government agency successfully moved the High Court of Addis Ababa to deny enforcement of an international arbitral award under the guise of inarbitrability of administrative contractual matters.[219] On the other hand, the Federal Cassation's *Chilot* has arguably set a precedent that matters arising out of administrative contracts are arbitrable.[220] Though the precedent favours the enforcement of foreign and/or

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[212] Samuel, Teshale (2000), "Reciprocity with Respect to Enforcement of Foreign Judgements in Ethiopia: A Critique of the Supreme Court's Decision in the Paulos Papassinuos Case", *The African Journal of International and Comparative Law*, 12, pp. 573-574.

[213] *Ibid.*

[214] Art V(2)(a), New York Convention.

[215] Art 461(1)(e), CPC.

[216] See the discussion in Section 4.1 above. Also, see Zekarias, *supra* n. 107, p. 120 *et seq*.

[217] *Ibid.*

[218] See *supra*. n.106

[219] See *supra* n.107 and the accompanying text; see also Zekarias, *supra* n. 107, p. 120.

[220] See n.111-115 *supra* and the accompanying texts.

international awards relating to administrative contracts, the actual impact of the newly set precedent is yet to be seen.

Concluding Remarks

States benefit from an efficient regime of commercial arbitration. This is mainly because, the arbitral settlement of disputes better suits the business community by reducing the transaction costs of trade involving individuals, property, and business situated in different jurisdictions thereby facilitating trade and investment. Cognisant of this and other benefits of arbitration, numerous states – including Ethiopia – have put in place regimes that facilitate the utilisation of this alternative dispute settlement scheme.

As arbitration involves dispute settlement by private judges lacking public authority, the involvement of national courts is crucial to the overall efficacy of the process. However, the intervention of courts in this private dispute settlement process needs to be modest and consistent with the interest of the parties to relieve themselves from prolonged and costly judicial dispute settlement.

The role of courts in Ethiopia appears to be more than modest. Although they play a positive role in, for example, enforcing valid arbitration agreements and finality clauses, Ethiopian courts have generally assumed extended roles with regard to commercial arbitration which is supposed to function with minimal court intervention. In this regard, they are obviously assisted by the national arbitration law which, *inter alia*, licences (1) premature judicial intervention during arbitral proceedings; (2) broader judicial review of awards except when parties preclude the same through, for example, finality clauses; and (3) over-stringent thresholds (which are nearly equivalent to refusal) in the enforcement of foreign arbitral awards.

It is submitted that courts should rather adopt an approach that fosters efficient arbitral settlements in local and international commercial disputes as Ethiopia normally benefits, rather than loses, from the same. A permanent solution would, however, likely be legislative rather than judicial, since the law appears particularly handy in developing jurisprudence hostile to commercial arbitration. Particularly, the statutory rules that allow wider interlocutory judicial review of application for disqualification along with the rules that tolerate broader judicial review of arbitral awards must be updated with a view to minimising judicial intervention in arbitration. Moreover, the anti-enforcement rules of Art 461 of CPC indeed require review so as to facilitate easier enforcement of foreign arbitral awards in Ethiopia. Finally, the Ethiopian law on the setting aside of arbitral awards vis-à-vis an appeal from arbitral awards should be revised so as to provide courts with effective means of enforcing procedural fairness. ■

UNDUE EQUATION OF 'SAVINGS' WITH 'COMPENSATION FOR SERVICES': CASE COMMENT

Belachew Mekuria Fikre ♣

Introductory note

Individual employer-employee relations are regulated by a regime called 'employment law'. Despite the inadequate semantic clarity in our legal system regarding the usage of the words '*employment law*' and '*labour law*', the latter is 'understood as the regime that governs workers' efforts to advance their own shared interests through self-organisation and collective protest, pressure, negotiation and agreement with employers.'[1] Among the numerous benefits accorded to an outgoing employee is severance payment that somehow provides an interim income during transition from one engagement to another. And this form of benefit represents one variety of the 'third wing' within the regime of labour relations that are legislatively determined 'minimum labour conditions'. These are conditions which are subject to neither individual nor collective negotiations to their detriment. While we moved on from an indiscriminate entitlement regime to a selective approach towards who may (or may not) get this form of benefit, the exact contours of application still remain contested. This comment addresses a trend that is currently being entrenched in the practice of the labour benches whereby they deny severance pay in case a discharged employee is a beneficiary of a scheme known as 'provident fund' or *vise versa*. This of course has been legislated upon by the labour (amendment) proclamation and is being practiced by our courts. This comment is a critical appraisal of that practice based on the *dictum* of the Federal Supreme Court on the matter.

1. Case summary

The case, *Awash International Bank v. Ato Ephrem Newayemariam*,[2] was initially instituted at the Federal First Instance Court by the present respondent

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[1] See Sachs, Benjamin I. (2008), 'Employment as labour law', *Cardozo Law Review*, 2689 Vol. 29, No. 6, 27 May 2008, p. 2701

[2] Federal Supreme Court, Cassation Division, Awash *International Bank P.L.C. v. Ato Ephrem Newayemariam*, File No 35197, decided on Tikimt 13/2001 Eth. Cal.

whereby he brought a claim to severance payment and interest with an aggregate amount of Birr 24,873.18. The employee had been working at the bank since Yekatit 1987 Eth. Cal. (Feb. 1995) and had resigned voluntarily. The bank paid to the respondent all the necessary dues including provident fund though it failed to effect severance payment. Accordingly, the applicant at the lower court pleaded for the payment of the severance pay based on the relevant law. The court, however, denied the claim relying on Proclamation 494/2006, which restricts severance payment to instances, among others, 'where he has no entitlement to a provident fund or pension right and his contract of employment is terminated upon attainment of retirement age stipulated in the pension law.'[3] Aggrieved by this verdict *Ato Ephrem* took the case to the Federal High Court by appeal where he obtained a reversal of the lower court's decision.

The present applicant brought the matter to the cassation division of the Federal Supreme Court by invoking basic error of law committed by the Federal High Court to which the court gave a leave for reviewing the matter. After evaluating both sides of the arguments once again, the Supreme Court framed the following issue for its deliberation and decision: 'would an employee be paid severance pay where he is entitled to provident fund?' Before delving into the evaluation of the reasoning and final verdict of the Supreme Court, I shall first discuss the precursors to both severance payment and provident fund within the Ethiopian legislative framework.

2. Background: terminologies and concepts

It is worth putting a few lines by way of explaining what we mean by *severance payment* and then *provident fund*. This would offer a ground work for our discussion on the case. Henry Black defines *severance payment* in the following words:

> 'Money (apart from back wages or salary) paid by an employer to a dismissed employee. Such a payment is often made in exchange for a release of any claims that the employee might have against the employer. Also termed *separation pay; dismissal compensation*.'[4]

The important definitional element of severance payment is thus, similar to provident fund; it presupposes termination of the engagement for it to be due. In other words, it is meant to compensate the severance of the relationship that the parties to the employment contract have had for the past period of time, the length of which shall, together with the salary, determine its amount. Under

[3] See Labour (Amendment) Proclamation No. 494/2006, particularly Article 2(2)(g).
[4] Bryan A. Garner (Ed), (2004), '*Black's Law Dictionary*', Deluxe Eighth Edition, Thomson West, p. 1406

Ethiopian law, this form of payment had been for the first time given recognition under the 1964 minimum labour conditions regulations.[5] Article 9 of the regulations stipulated the following:

> Where an employer, without good cause, terminates a contract of employment which has lasted for more than one year, the employee shall be entitled to compensation equal to thirty times the average daily wage received by or due to him during the six immediately preceding periods of payment during which he has been in the service of his present employment.[6]

It is interesting to note that this provision (though titled severance payment) speaks of compensation for service. This was meant to replace the 'fair compensation' rule of the 1960 Civil Code under Articles 2573 & 2574 for cases of unjustified discharge[7] with a liquidated amount. This vague merger of the two, i.e., severance payment and compensation for services, was cleared under the 1975 labour proclamation that considered the two as distinct entitlements. According to this proclamation, severance payment was made available only for cases of justified terminations as a result of bankruptcy or lay-off measures.[8] The amount was without any progression and amounted to two months' salary payable only in cash. Compensation for service, however, was due as an entitlement to all workers whose contract of employment was cancelled on the legitimate grounds provided under the proclamation and it appears that those mentioned as beneficiaries of severance payment would again benefit from this form of compensation as well.[9]

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[5] Regulations issued pursuant to the Labour Relations Proclamation 1963, Minimum Labour Conditions Regulations, *Legal Notice* No 302/1964.

[6] *Ibid*, Article 9(1). The provision further stipulated the progression of this payment by 25% for each year of continuous employment.

[7] See Article 9(3) of this Regulations.

[8] See Labour Proclamation No 64/1975. Article 16 which provides 'only a worker whose contract of employment is cancelled under Art 14(1) (e) (which is about termination on grounds that the undertaking ceases operation because of bankruptcy or any other reason) or (f) (which is about cancellation of the contract of employment where the worker becomes redundant as a result of the reduction in the volume of work and it is not possible to transfer the worker to another undertaking).

[9] One might wonder then what would be the special entitlements of those workers whose contract of employment had been unjustifiably cancelled and the answer would be quite simple. Since the legislation provided a single most important effect of unjustified discharge, i.e., which was reinstatement, there was no need of providing any form of monetary compensation for unlawful termination cases. See particularly Article 14(3) which provided 'when the undertaking dismisses the worker for reasons other than those provided in sub-article 1 of this article, the contract of employment shall not be deemed cancelled.'

As can be observed from this brief historical backdrop on severance payment, it was meant to compensate specific forms of terminations and not an entitlement in all cases where the contract of employment comes to an end. A striking similarity, however, existed in its nature because it was strictly related to termination of the employment contract and the amount was paid exclusively from the employer's pocket.

Under the labour proclamation which was issued by the transitional government of Ethiopia in 1993, however, the approach to severance payment changed fundamentally from the former ones in basically two points: the entitlement to severance payment was meant for every worker whose contract of employment had been terminated, justly or otherwise; secondly, there had been a reverse approach in the sense that compensation came only in exceptional cases of unjust dismissals while severance payment is considered as compensation for service in general than for unjust dismissals only.[10] The only circumstance that would have displaced this payment was entitlement to pension allowance upon termination.[11]

Finally, C158 on termination of employment in the Convention of the ILO provides severance allowance as one of the most important income protections of a worker upon termination by the employer and it makes, in principle, no segregation based on reasons of termination for this payment to be due.[12] Under Article 12, this Convention stipulates that 'a worker whose employment has been terminated shall be entitled…to [a] severance allowance or other separation benefits, the amount of which shall be based, *inter alia*, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions'.[13] Down the line, the provision permits some form of legislative exclusion under the national law of the member states particularly 'in the event of termination for serious misconduct.'[14]

Contrary to this, however, the 2003 labour proclamation and its subsequent amendment have come up with important deviations whereby entitlement to

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[10] Article 39 of this proclamation provided 'a worker who has completed his probation and whose contract of employment is terminated under the provisions of this proclamation shall be entitled to receive severance pay from the employer' and further Article 43 provided that compensation in lieu of reinstatement shall be paid, in cases of unlawful termination, together with severance payment making this form of payment an entitlement both during just and unjust dismissal cases. Labour Proclamation No 42/1993.

[11] This was inserted by a later Labour (Amendment) Proclamation No 88/1997

[12] See C158, *Convention concerning termination of employment at the initiative of the employer*, adopted on 22nd June 1982, Geneva; entered into force on 23 Dec 1985. Ethiopia has ratified this convention on 28th Jan 1991.

[13] See Art 12(1)(a) of C158, ibid

[14] See Art 12(3) of C158, ibid

severance payment is to exist only selectively. The instances of terminations that result in the entitlement to severance payment are termination due to bankruptcy or any other cause (mentioned under Article 24(4); during unlawful termination of employment contract and where reinstatement has not been ordered by the court or not accepted by the employee; termination as a result of reduction of work force under Article 28(2) cum 29; during extra-ordinary resignation for reasons either of abuses committed on the employee's human dignity by the employer or consistent failure by the employer to discharge the duties under the employment contract (Article 32(1) (a) &(b)); termination because of medically certified disability (arguably a termination under Article 24(5); termination because of retirement and where no entitlement to pension allowance or provident fund exists;[15] voluntary resignation after a minimum of five years of service and where there are no contractual obligations for extended service; termination because of sickness,[16] or death; and finally where the contract is terminated as a result of a special type of sickness, i.e., HIV/AIDS.[17]

When it comes to provident fund, a single most important definition existed under the 1962 labour relations decree no 49. Article 2(p) of this legislation defined 'provident fund' as 'any fund established by any employer or any organisation having as its purpose the aid and relief of its members in time of need.'[18] Thus, during those early days in the development of labour conditions, this form of fund was meant to be a form of social security scheme that would have guaranteed aid and relief during the unlucky days of a worker. It even anticipated the establishment of this fund by 'any organisation' implying that

[15] This remains to be a very significant move, albeit its being vague, incomplete and unreasonably cumbersome on the outgoing employee as shall be discussed in the next sections of this contribution.

[16] This must be referring to a situation where the employment contract is terminated because of the inability of the worker to continue working after the exhaustion of the maximum period of sick leave and the contract of employment terminates by operation of the law. This, however, is not explicitly mentioned under Article 24 of the labour proclamation that speaks of termination grounds by operation of the law. Nonetheless, if we have to give proper effect to the sick leave limits provided under Article 85 of the labour proclamation, which is six months in a year either taken consecutively or separately, then we need to interpret it to imply termination once the maximum ceiling has been reached. Moreover, the civil servants' regime might also be of some assistance which expressly provides 'where a civil servant is unable to resume work within the time specified under Article 42(2) & (4) (which are provisions that stipulate about the maximum sick leave to be given to a civil servant) of this proclamation, he shall be deemed unfit for service and be discharged.' See Federal Civil Servants Proclamation No 515/2007, particularly Article 79(1)

[17] These are all grounds listed under Article 39(1) of the labour proclamation and Article 2(2) of the amendment proclamation infra note 24 and supra note 3, respectively.

[18] See Labour Relations Decree No 49/1962.

this scheme has a wider purpose than strictly as an employment benefit. Nonetheless, the provision remains to be vague on few counts such as whose duty it would be to contribute to this fund, to whose 'aid and relief' it would be coming- the employer, the employee or both. These matters remained unsettled under this piece of legislation.[19]

Under this statute the establishment of a provident fund was made to be discretionary and it was provided under Article 22(f) in the following way:

> 'Employers shall have the right to establish and maintain provident funds. Such funds shall be segregated and maintained separately from all other funds of the organisation, and shall not be reached in bankruptcy for any debts of the organisation.'

Notably, therefore, there had been a clear distinction in approach between a provident fund and severance pay. While the former was one variety of saving for times of distress to be kept separately from the assets of the undertaking, the latter is a payment from the assets of the undertaking to be effected during termination of the employment contract.

Under the 1975 labour legislation, some of the matters were clarified and there was a redefinition of the term 'provident fund' as well. According to Article 2(20) of the Proclamation, 'provident fund shall mean, except in instances where a pension scheme is in effect, a fund to which the worker and the undertaking contribute regularly and is payable to the worker when the contract of employment is terminated.'[20] From this wording, it was apparent as to who contributes, to whom the benefit belongs and when the payment shall be due.

However, as in the earlier legislation, the manner of collection, administration and custody of this fund remained vague under this proclamation. It was observed in practice that the undertaking would 'utilise the fund for capital investment purposes and unilaterally appropriate profits accrued from it.'[21] That notwithstanding, the 1975 legislation restricted the possibility of establishing this form of fund only to those undertakings where there existed no pension scheme and accordingly, it was a matter for private establishments to discretionarily provide for this bilateral contribution system. Implicit in this exclusion was surely the apparent, if not exact, similarity that exists between a pension scheme and a provident fund. The well entrenched social security scheme in Ethiopia is the pension contribution which is raised through 4%/6%

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[19] See Daniel Haile, '*Reading Materials on Labour Law*', Nov. 1985, AAU, Law Faculty, page 11

[20] See Proclamation 64/1975, *supra* note 8

[21] See *supra* note 19

financing by the employee and the employer.[22] Thus, this provision tells us that a pension scheme and a provident fund scheme could not co-exist. It is no wonder that the law had prohibited the parallel existence of the two schemes as they have resemblance in their nature and purpose.

There had been no express mention of the provident fund under the 1993 labour proclamation and it can be asserted that this scheme is primarily a contractual arrangement that the employees (either individually through the employment contract or collectively through a collective agreement) and the employer decide to establish. It was when the approach to severance payment had changed under the 2003 labour proclamation and its subsequent amending legislation that provident fund became a contentious matter.[23] Under the new approach, gone are those old days where everyone, (presumably even a delinquent employee) would have benefited from the payment of severance pay[24] and the provident fund came as one of the displacing factors to this entitlement. Since there is no definition of this term under the 2003 labour proclamation, we can only rely on the particular arrangement's understanding of the matter and how it had been treated under the previous statutes.

3. The Supreme Court's reasoning and comments

While reversing the Federal High Court's decision (highlighted in Section 1 above) and reincarnating the Federal First Instance Court's position, the Supreme Court reasoned as follows:

> 'It can be understood from [Article 2(2)(g) of proclamation No 494/2006] that an employee who is covered by provident fund and whose contract of employment is terminated cannot get severance payment from the employer. In other words, both provident fund and severance payment cannot be claimed from the same pocket at the same time. As it is well understood, the main objective of severance payment is to mitigate the financial strains of an employee during his search for new job. This is not different when it comes to provident fund too. If their objective is similar asking the payment of both at the same time and from the same pocket would only amount to a 'double jeopardy' on the employer and thus

[22] It was in 1963 that this share of contribution had been legislated and remained unaltered to-date. See, the proclamation to provide for the payment of contributions towards the cost of pensions for public servants and members of the Armed forces, Proclamation No 199/1963, Articles 3 & 4

[23] This, however, should not imply the absence of academic discourse over the issue before the coming into force of these laws, and it can even be asserted that the legal positions were taken following the controversies that abound the matter. While Article 39(1) of proclamation No 337/2003 innovatively came up with lists of inclusions/exclusions for entitlement to severance pay, the amendment proclamation No 494/2006 enlarged that list further by adding three conditions as discussed above.

[24] See Labour Proclamation No 337/2003.

> unjust. Accordingly, when the legislature denied the payment of severance pay where there is an entitlement to provident fund, its intention must be presumed to avoid such form of double-payment and nothing else.'[25] (*Author's translation*).

Reasonable deduction could have it that where it was the severance which was paid instead, this same justification would have been invoked to deny the payment of the provident fund.[26] The decision, with all its brevity and vagueness errs on many counts. Primarily, the conclusion reached by the court in equating the justificatory grounds of the two forms of benefits is, at best, unconvincing. Severance payment is one type of minimum labour conditions and thus cannot be rendered defunct contractually.[27] This form of payment, as discussed above has a purpose of providing financial support to an employee whose contract of employment has been terminated and who probably might be looking for another job at the moment. I argue that this is not the only justification. An undertaking's asset is something that accumulates throughout the production process and the production process comprises three important elements, which Karl Marx once called '*the trinity formula*'.[28] These three elements are 'Capital-profit (profit of enterprise plus interest), land-ground-rent, labour-wages.'[29] He then succinctly argues that wages of labour, or price of labour, is but an irrational expression for the value, or price of labour-power' as it is the single most important source of wealth to the enterprise. This is because capital, if not laboured on can only yield interest, which is meaningless as a social production process and land too provides a constant amount of yield depending on its fertility and the labour invested on it. Thus, what remains to be important in all the processes is labour and where an employee is leaving the establishment for

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[25] See the part of the decision at paragraphs 6 & 7, *supra* note 2

[26] Of course this is a minor, though not that simple, issue which the amendment proclamation failed to address with utmost clarity. If there is a difference in amount between the two payments, whether we would have to follow 'the best interest of the employee' logic or not is a matter left for the courts to workout. This is unlike what we had seen above under Article 17 of Proclamation No 64/1975.

[27] Because of the well-known asymmetry in bargaining powers of the two parties in an employment relation, the state has invariably maintained its traditional role of intervening into this 'contractual marriage' through its labour legislation that primarily aims at laying down the minimum conditions of labour which would withstand any contractual terms that go below them. One such minimum condition is payment during severance of the relationship the amount of which is specified by the law, though only to those specific forms of termination. One can, however, argue that those legal restrictions may even be lifted by favourable terms in a collective agreement or employment contract the application of which would have arguably prevailed over the law based on the relevant provisions of the labour proclamation.

[28] See Karl Marx (First German Edition, 1894), '*Capital: A Critique of Political Economy*', Vol III, Edited by F. Engels, Foreign Languages Publishing House, Moscow 1962

[29] *Ibid*, page 794.

good, some level of benefit-sharing should exist which would not be adequately captured just by the periodic wages he had been earning during the life of the engagement.

Even the manner of calculation supports this view which is dependent up on the years of service and the periodic wages he was getting while the relationship was intact.[30] When the transitional government changed the socialist-oriented labour legislation, it has omitted the title 'compensation for service' of Article 17 and substituted it by 'severance pay' without changing its contents, i.e., as an all-benefiting entitlement during termination and payable progressively based on earnings and years of service. When the subsequent proclamation changed the approach, it only imposed restrictions on who may benefit from the scheme of severance payment and not the other matters. Nonetheless, at least no one would convincingly argue that the justifications have been changed altogether.

Even under the 2006 amendment legislation, Article 2(2)(g) mentions an entitlement to severance payment for an employee who has resigned and where s/he fulfils two conditionalities. These are, first serving for five years, and secondly, the non-existence of any contractual obligations for serving more.[31] This underscores the justification to be, not just providing 'palliative' support during transition, but also a consideration of severance payment as a form of compensation for service.[32]

The fundamental confusion that reigns over this matter emanates from Article 2(2)(g) of Proclamation 494/2006 which reads:

> [A worker who has completed his probation] 'where he has no entitlement to a provident fund or pensions right AND his contract of employment is terminated

[30] By some unknown reason to this writer, the 1975 labour legislation, while providing a liquidated sum under the heading of 'severance pay' it had stipulated a progressive sum of payment by way of 'compensation for services' under its Articles 16 & 17, respectively. While the former is only applicable exceptionally to few forms of termination, the latter would have benefited all outgoing employees. Apparently, what can at least be judged from the overall conceptual and practical understanding of the terms is that compensation for services, whether we call it severance payment or otherwise, is an important minimum labour condition that should be made available to an outgoing employee.

[31] See *supra* note 3

[32] Similar arguments could also be made for many of the listed instances under Article 39(1) and also the amendment law and to remain brief I optimistically leave that for further build-ups to this contribution.

> upon attainment of retirement age stipulated in the pension law…[shall have the right to get severance pay from the employer].[33] (Emphasis added).

This, as mentioned above, is what the Federal Supreme Court relied on to deny all employees the payment of both provident fund and severance payment in parallel, and for reasons mentioned in the case at hand. While denying severance payment for those employees who have been covered by the pension scheme is an old subject, this provision is innovative with regard to the scheme of provident fund. Primarily, the provision envisages two situations and it implicitly speaks of their similarity as well. These are the pension scheme and the provident fund which are mutually exclusive and where either exists would displace severance payment. Secondly, the provision strictly provides the form of termination too and thus it must be a termination because of the attainment of retirement age as that is one of the lawful grounds to severe the employee-employer relationship.[34] Ordinarily, pension scheme applies to 'public servants' by whom we refer to 'a person permanently employed in any 'public office', and includes a government appointee, member of the defense force and the police.'[35] By public office too we are referring to 'an office wholly or partly run by government budget, and includes public enterprises.'[36] That being the scope of application of the pension scheme, it does not apply, therefore, to private undertakings. However, the fact that they are not covered by the pension scheme would not warrant the assertion that retirement age may not be used as a legitimate ground for termination. This has been once an issue before the cassation division of the Federal Supreme Court by which the Court had given an authoritative interpretation of Article 24(3) in such a way that it also applies to private undertakings.[37]

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[33] I had to combine the texts of Proclamation 377/2003 and the amending legislation so that together they would give full sense without, obviously, adding anything than what exists in the law.

[34] See Article 24(3) of the labour proclamation, supra note 24

[35] See Public Servants Pension Proclamation No 345/2003, *Federal Negarit Gazeta*, 9th Year, No 65, Addis Ababa, 8th June, 2003, Article 2(1)

[36] *Ibid*, Article 2(2)

[37] In this case, the respondent was dismissed from his employment upon attaining his 60's and then pleaded before the Federal First Instance Court for declaration of the act of termination as unlawful, which the First Instance Court denied. However, the High Court, accepting the application of the applicant reversed the lower court's decision. The Supreme Court, on its part reasoned that even if there is no clear legislation that stipulates about the retirement age for private undertakings, the purpose of retirement is applicable irrespective of the nature of the establishment as private or public. And the purpose is first when people become older in age, there is a tendency of reduction in productivity and on the other hand there will be increased medical risks thereby increasing the expenses. Therefore, it is legitimate to analogise the retirement age determined for the public

In this sense, I believe that the provident fund has a purpose different from severance payment, and it probably shares a closely similar purpose with that of a pension scheme. The court's reasoning is indeed flawed when it said 'from the same pocket and at the same time' because it is not the case when it comes to provident fund, just like pension allowance. While severance payment, as mentioned above, is one of the *minimum labour conditions*,[38] provident fund, on the other, is a form of *social security* scheme to which both parties would contribute, which exists only where they have contractual agreement to that effect and which is payable upon the termination of the employment contract.[39]

This unique feature of provident fund was acknowledged by the Supreme Court itself in another case.[40] At issue in this case was the applicable period of limitation to claim the payment of provident fund to which the lower courts had identically responded based on Article 162 of the labour proclamation saying that it shall be barred unless brought within the short period of time specified in this provision.[41] Upon appeal, the Supreme Court reversed the decision by particularly taking into account the special features of provident fund:

> 'The source of [Provident fund] is not exclusively the employer. Included in the accumulated fund is the employee's 5% wage which was deducted every month. Its objective is to provide to the employee and his family with social security benefits where the contract of employment is terminated either because of dismissal or resignation.'[42]

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servants as similarly applicable to private undertakings too. See the case of *St. Josef School v Ato Girma Mersha*, Supreme Court Cassation division decision, File No 22130, decided on 29th Tir 1998 (E.C.)

[38] See also Ato Mehari Redae (2008), '*Notes and Materials on Employment Law*', Justice and Legal System Research Institute, Addis Ababa (Unpublished)

[39] It is worth noting also that there are arrangements in practice by which the employees might be able to withdraw some percentage of this fund even before the termination of the employment contract as interest-free loan. After all, this is a saving and it is not reasonable to object to this form of arrangement, especially considering the purpose of provident fund which is meant to come into the 'aid and relief' of the worker in times of need.

[40] See the case of *Ato Girma Shiferaw v Christian Relief and Development Aid (CRDA),* Federal Supreme Court Cassation Division, File no 32545, decided on 14th Ginbot 2000 (E.C.)

[41] Because of the special nature of claims related to employment relations such as effecting outstanding dues, reinstatement, certificate of service, etc, the law has come up with very limitative periods that apply only to labour relations. See generally Article 162 of the proclamation supra note 24

[42] See *supra* note 41, para 3 of the case. Based on this reasoning, the court declared that Article 162 of the Labour Proclamation shall not bar the claim of provident fund and it cannot be left for an indefinite future either. Based on Article 1677, the applicable period

If one compares this reasoning with that of *Ato Ephrem's* case, it is evident that they contradict and it appears that the Supreme Court has come back-in to the rightful understanding of the nature of provident fund in the later case. Where a contribution has been made bilaterally and saved for and in the name of the employee, it is unjust to equate it with severance payment and consider them mutually exclusive. On this point, I will have to regrettably disagree with *Ato Mehari* who follows, with numbered reasons, the Supreme Court's approach. Among others, he relies on the ILO Convention C158 and on a more pragmatic reason in support of his position.[43] For him, the ILO Convention that I mentioned above envisages the source of the separation payments to be either the employer alone or a fund to which the employer has contributed.[44] However, this must not be understood to imply a fund the type of which we are discussing here, i.e., provident fund. This is because provident fund is neither severance allowance nor separation benefits that the Convention envisages under its Article 12. If we have to stick to our understanding of severance payment strictly as one of the minimum labour conditions, then it is at least distinct from provident fund which is sourced from both parties. The Convention, by referring to a fund, must be understood to refer to some form of social benefits scheme that is meant to support employees during unemployment. If it is a contribution to which the employee had also made, then it cannot be called an employment benefit, at least for the purpose of Article 12 of C158.

Ato Mehari's second point is of course a practical one and states that requiring an employer to pay twice for a single termination might discourage undertakings in the future to establish the provident fund scheme altogether. This surely is a proper concern. However, considering that private undertakings are not within the pension scheme which would have resulted at least to the compulsory contribution of 6% of every employee's salary to the social security scheme, we cannot foretell that employers might end up being possessed by such greed, particularly in this increasingly liberalised economy where labour mobility is becoming relatively easy and competition comparably stiff. Thus, the other side of optimism is as much a possibility.

Unless we go contra to the unlawful enrichment proscriptions of the extra-contractual liability law, therefore, even the legal stipulation under the amendment proclamation in itself could remain tenable. This is because unlike the old approach under Proclamation No. 64/1975, if we assume that the

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of limitation to provident fund shall, therefore, be Article 1845, which is 10 years from the date it has come due.

[43] See *supra* note 38, page 47, where he foot notes at length his views on the issue at foot note 25

[44] See *supra* note 12

employee had higher amount of severance payment than provident fund, we would have to deny him all the money that had been accumulated, which also includes his own contributions. Thus, to the extent the undertaking is permitted to keep that part of the employee's contribution, we are but tolerating the enrichment of the employer's estate unlawfully.[45]

In the case at hand, the court applied this provision to deny severance payment for *Ato Ephrem* whose contract of employment has come to an end by voluntary resignation.[46] Apart from the unwarranted labelling of the justifications of the two to be the same, the court also failed to look at the provision which strictly singles out retirement to be the form of termination for displacing severance payment in favour of pension scheme or provident fund, whichever is available. In cases of resignation, however, we already have Article 2(2)(h) of the same Proclamation 494/2006 which in principle requires a minimum of five years service, among others, for a resigning employee to benefit from severance payment.

In this case, the court's rather expansive interpretation would exclude an employee from being entitled to his provident fund because he had already taken his severance payment. In effect, what is implied would be that so long as there is provident fund, under no circumstance could an employee be entitled to severance payment and thus, an employee can only take his provident fund at the expense of loosing his severance payment.[47] However, the fact that the legislature excludes severance payment in situations of termination as a result of retirement and in the availability of provident fund significantly indicates the distinct nature of the two, rather than their similarity. This is because, severance payment is meant to fill an interim gap between termination and finding another job and an employee who is retiring cannot, in principle, be presumed to be a

[45] Article 2162 of the Civil Code provides, 'Whosoever has derived a gain from the work or property of another without just cause shall indemnify the person at whose expense he has enriched himself to the extent to which he has benefited from his work or property.'

[46] I use the term 'voluntary resignation' to distinguish it from the other variety of resignation, which is involuntary under Article 32 of the proclamation.

[47] For example, an unlawfully dismissed employee whose reinstatement is not ordered by the court and who had taken his severance pay as he will be entitled to that under Article 39(1)(b) cannot, in this awkward sense, request to be paid his provident fund. I had an informal discussion about this matter with one Justice from the Supreme Court and he enlightened me on the reasonable interpretation of this legislation. Accordingly, if the law prohibits the payment of both for an employee who is retiring, it is reasonable to deduce that the legislature had intended to deny same for those who are resigning, for instance, after serving as little as five years. So, for him, the stipulation under Article 2(2)(g) is meant to lay down the principle of the mutually exclusive nature of provident fund and severance pay in all circumstances, and not just in instances where the employment contract is terminated as a result of retirement.

job seeker. So, what the retiree is presumed to need is a form of social security scheme for old age; and the provident fund, if present, is considered to fill this gap.

Concluding remarks

Severance payment is a form of compensation for service and a support system while an employee is in transition. It is thus duly prescribed as one of the *minimum labour conditions*. On the other hand, a provident fund is a variety of *social security* scheme that involves the fund gathered from the contributions of both the employee and the employer, and it is meant to exceed minimum labour conditions. It is rather a form of saving that cannot properly be equated with severance payment. However, the Supreme Court Cassation Division's assertion that the two have identical purpose and are sourced from the same pocket needs careful review as it will be followed by the lower courts based on Proclamation No. 454/2005 that re-amended the Federal Courts proclamation.[48] The legal provision relied upon excludes entitlement to severance payment only under two situations (i.e. termination of employment upon retirement and the availability of provident fund). Thus, there needs to be restraint from denying a right which emanates from a person's entitlement to *minimum labour conditions*; and this indeed necessitates a restrictive rather than an unduly expansive interpretation.

[48] See Federal Courts Proclamation Re-amendment Proclamation No 454/2005, *Federal Negarit Gazeta*. See particularly Article 2(1) which provides 'Interpretation of a ***law*** (erroneously written as 'low') by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional ***courts*** (again mistakenly written as 'council') at all levels, The cassation division may however render a different legal interpretation some other time.

INTRODUCTORY CONCEPTS ON SOCIOLOGICAL JURISPRUDENCE: JHERING, DURKHEIM, EHRLICH

Elise Nalbandian[♣]

Introduction

In his concept of Law, Hart describes his enterprise as being a study in "descriptive sociology" all the while explaining the rules according to which people in a society act and react. While undeniably a positivist theory of Law by his own admission, Hart's theory tends to lean on and allude to concepts of sociological theory whose main and pervasive message is that "law is a social phenomenon". To further clarify this concept, sociological jurists tend to focus on studying how law comes into existence and the manner of its operation and its impact on those to whom it applies. In so doing this school of thought goes beyond simply looking at the nature of law in legal terms but rather closely examines the workings of society in general by relying heavily on social sciences such as sociology, history, political science and economics to build a fuller picture of the workings and nature of law.

Sociological Jurisprudence has a long and distinguished history and can be traced as far back as the writings of Hume who in "*A Treatise on Human Nature*" argued that law's origin did not lie in a peculiar common conception of human nature at all. According to Hume, law owes its origins to social conventions and was in itself a developing social institution. In addition to Hume's start on describing law as a social phenomenon, Montesquieu put forward the idea that law originated out of social custom and good laws therefore had to be in accordance with the spirit of the society. Other jurists over the years like Weber, Durkheim, Pound, Comte and many more also contributed to this school of thought forwarding various views on how law can be understood in the wider context as a social phenomenon theoretically, but also drawing on real and independent studies of society.

There is no consensus and common thinking that can readily be identified as the central approach to sociological jurisprudence because of the wide range of areas of studies that have influence on the development of this school of thought. However, there are some core basic assumptions which characterize the thinking of a good proportion of sociological jurists including the following ideas:

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- Law is only one of a number of methods of social control and as such it is not unique in its function and place in society.
- Law must be seen as being open to modification through the influence of various social factors as law is not a closed system of standards and structures that are purely legalistic.
- Sociological jurists tend to emphasize more on the actual operation of the law arguing that this is where the real nature of the law may be seen rather than in theoretical and academic sources.
- Sociological jurists disagree with the approach of the *Natural Law* schools that rely on absolute values as the basis of law. Instead the *Sociological Jurists* take a relative approach and regard law as a socially constructed reality.
- Sociological jurists also disagree with the command notion of law favored by the analytical jurists who see law as a set of enforceable norms set down by an identifiable sovereign. As far as most sociological jurists are concerned, law bases itself in social customs that governments must enforce.

So, there are numerous worthwhile theories that can be looked at and common features that can be observed. For the purposes of this note, certain prioritization has to be made to cover some of the core theories within the school of thought. It is therefore necessary once more to select proponents of sociological jurisprudence to study the development of the theories. The theories advanced by Rudolph von Jhering, Emile Durkheim and Eugen Ehrlich will be introduced in this note, and a further note will address Dean Roscoe Pound and Max Weber. However, the rationale for selecting these sociological jurists lies in the fact that they all viewed sociological jurisprudence as describing and explaining how the law changes in society and advanced some of the most influential concepts in this school of thought without which any discussion of the theory would be inadequate.

Rudolf von Jhering: Law and Social Purpose

Generally credited as being the father of sociological jurisprudence, Jhering's theory of law bases itself on social interests. In short, for Jhering, law exists to serve social interests. Law according to Jhering is:"the sum of conditions of social life in the widest sense of the terms as secured by the power of the state thorough the means of external compulsion".

Jhering highlights the role of coercion (external compulsion) in securing the purpose of the law which is the condition of social life. For Jhering, law consists of those rules laid down by society that have coercion. This notion of coercion is similar to the notion emphasized by command theorists. Since the state is the sole possessor of coercion in society, it is the only source of law. The criterion

that distinguishes law from ethics and morality is therefore lies in the fact that Law is recognizable and realizable due to the force of the state.

However, unlike command theories, Jhering goes further in identifying coercion as the outer side of law while he states that norms make up the inner element of law. The norm is a proposition of a practical kind (or rule) in as much as it is a direction for human conduct and Jhering describes it as an abstract imperative. Abstract imperatives in the ethical world order which Jhering describes are social imperatives such as law, morality, ethics etc. However, laws are regularly laid down by the state. The legal imperatives are directed to the organs of the state that are entrusted with the management of coercion. Thus norm is a purely formal element leading to the core concept of the coercion which is central to Jhering's theory.

As both norms and coercion are formal elements of law as per Jhering, they do not inform the reader of the specific contents of the law. It is however through the content of law that the purpose served by law in society may be revealed. While a key consideration, this therefore means that the content of law is infinitely varied and relative to the different societies. There is thus the possibility of describing the contents of law and social conditions of life. It is vital to highlight that for Jhering, law cannot make the same regulations for all the time and for all the people. It must adapt them to the conditions of the people to their degree of civilization and to the needs of the time. The standard of law is not *truth* (which is an absolute) but *purpose* which is relative (even if they may on occasion resemble each other) and this purpose is to secure conditions of social life.

Conditions of social life include the condition of physical existence as well as those goods and pleasures that give one's life its true value in his judgment. All legal principles for Jhering can be reduced to the security of condition of social life. The conditions of social life as related to the attitude of law toward them are three types: (1) extra-legal, (2) mixed legal, and (3) purely legal. Extra-legal condition of life belongs to nature and man receives them without expending any effort. Law has nothing to do with man in nature. The *mixed-legal* condition belongs exclusively to man and includes preservation of life, reproduction, labor and trade corresponding to his instincts of self-preservation, sex and acquisition and law comes to assist these instincts when they fail. The purely legal conditions are those that depend entirely on legal command for e.g. the command to pay debts or taxes.

Jhering insists that the realization of the law by the state enables the individual to desire the common interest as well as his own individual interest, thus individual interest becomes part of social purpose by connecting one's purpose with the interests of others/the society. The reconciliation between the interests of the individual and those of the society is achieved through the levers

of social motion. Society acts upon individuals through two basic motives of egoism and altruism. The egoistic levers (of social motion) are made up of reward and coercion while the altruistic levers are made up of feelings of duty and love.

Jhering clearly indicates the place of law in fulfilling a clear social purpose of advancing the interests of society. But his critics believe that he fails to clarify or determine a way in which one can deal with conflicting purposes and interests thereby making his theory such that there will be a heavy reliance on the concept which does not allow for a proper balancing of interests between the individual and collective interests. To clarify, it is in fact likely that the social motions of the levers of reward and coercion can subjugate individual interests instead of reconciling them. Moreover to say that deeply abiding conflicts of interests can be eliminated by feelings of duty and love seem inadequate in truly providing for mechanisms for balancing interests.

Another area of weakness of the theory may lie in the fact that while the main concern of his theory is to consider those conditions of man and society that are independent of law, or those conditions that emerge prior to law and that define law's function and goals, it would be reasonable to expect an inquiry into extra-legal sources of law in detail. However, Jhering's subsequent inquiry confines itself to analyzing concepts and techniques of law instead of clarifying objective conditions and purposes that call for the application of law and define the functions which makes the theory somewhat too limited compared to the wider scope that would be expected from a theory of this nature.

Emile Durkheim: Social Solidarity

Emile Durkheim, a French sociologist, is widely considered to be the father of sociology. While clearly not a lawyer or a student of law, Durkheim wrote on legal issues ranging from criminal process to the law of contracts. His contribution to sociological jurisprudence is undeniable. In his various works, and particularly the book titled "*Division of Labor in Society*" he deals with the issue of law in society. He asserts that law was the standard by which any society could be evaluated since "law reproduces the principal forms of social solidarity". To clarify this statement, he makes a distinction between two types of such social solidarity:

- *Mechanical solidarity*: According to Durkheim, mechanical solidarity prevails in small scale homogeneous societies. Durkheim assumes that most laws in such societies would be of a penal and repressive nature since the entire society would take an interest in criminal activity and would seek to suppress and deter it. In short, the focus of law in societies that form mechanical solidarity is more on criminal law rather than civil law and is more concerned with punishment and suppressing anti-social activities.

- *Organic solidarity*: Durkheim states the organic solidarity is found in more heterogeneous and differential societies where there is a greater division of labor as well as greater differences between individuals. This more pronounced division of labor means that people advance/are positioned in society based on merit. Moreover, in such societies there is less of a common societal reaction to crime as the people come from many different backgrounds and so law becomes less repressive and more restitutive.

Durkheim's ideas of social solidarity like the idealist and natural law methodologies is capable of being filled with whatever content one wishes of it, ranging from liberty to the suppression of liberty, from social progress to social reactions and so on. This makes the theory somewhat too ambiguous in one sense where clearer parameters would have been useful.

Eugen Ehrlich: Law in the Inner order of Human Association

For Ehrlich, the center of legal development lies not in legislation or juridical science, or judicial decision but in society itself. It is the inner order of association not legal proposition that determines the fate of man. The explanation for social phenomena comes not from the juristic construction but by inferring the underlying modes of thought from fact. Accordingly, people regard their rights as issuing from relations of one person to another and not from legal propositions about those relations. Thus the state precedes the constitution that family precedes the order of the family, possession precedes ownership etc. Thus the Inner order of human association comes temporally before legal propositions, but is also the basic form of law from which legal propositions are derived.

Ehrlich explains that in social association, human beings come together and recognize certain rules of conduct as binding. Gradually, they regulate behavior with the rules. Examples of rules, according to Ehrlich, include rules of law, work, religion, ethics, decorum, tract, etiquette, fashion. Ehrlich maintains that the legal norm is of the same nature as all other rules of conduct. The essential compulsion behind the legal norm is social compulsion.

The state is merely one legal association among numerous others such as family, religious institutions and corporations. Consequently, there are many legal norms that have not been expressed in legal provisions of the state. The function of the state norms of compulsion is to protect norms formed in society and to protect the various institutions of the state. There are social facts of the law that exist in the conviction of an association of people. These facts are usage, domination, possession and declaration of will. Norms of law are derived from these facts. State compulsion is not necessary for this process.

These facts of law affect legal relations in three ways: a) they give enforcement to these relations, b) they control, hinder or invalidate these relations and c) they impute legal consequences to their relations that are not derived directly from them. Only one variety of legal norms, namely the norms of decision is state-made. The transformation of state norms into a fundamental legal norm takes place when those norms become part of the living law. The living law (the law as it actually exists in society) is always in a state of change and is always ahead of the state law. It is the task of jurisprudence to solve this tension between the two. It is thus a product of social developments as well as a stimulus of them. The task of the jurist is technical whereas the social facts of the law help in resolving this tension. However, where the social facts of the law are not so clear, the jurist is to seek guidance in principles of justice.

Over time, this theory has received some criticisms especially from jurists like Kelsen. Some of the common problems often associated with the theory include the following:

- This theory suffers form the problem that it fails to distinguish law from customs and morals.
- The theory points out basic elements governing human communities that underlie the law but the basic problem of resolving conflicts remains uninvestigated. Especially since it does not even deal with the problem of conflicting interest.
- The conception of the living law does not take an adequate account of the differences of social institutions that exist in different societies.
- The theory treats the distinction between law and custom too simply, and thus fails to analyse how law and custom influence each other.
- Social institutions for Ehrlich arise spontaneously, thus there is an automatic ordering of various social relations such as marriage, family associations, possessions etc. However, such complex and far-reaching forms of social relations do not sprout out spontaneously.
- The interplay between law and custom may not be as pervasive as Ehrlich suggests (some laws may not have anything to do with customs and still be hugely important for e.g. tax).
- Law is not always an expression of the custom of those whom it governs as it also applies to infants, incompetents, etc.
- Law is often a deliberate and conscious act to alter certain practices found in customs and usages. This makes law far from being an expression of customs because it may contravene them.
- There are two aspects of custom that need to be distinguished namely custom as a source of law and custom as a type of law. This distinction is quite familiar in international law. Ehrlich fails to make this distinction.
- Ehrlich distinguishes between legal norms created by the sate for

specific state purposes such as those needed to protect constitutions, finances, etc. and legal norms whereby the state contributes only its sanction to social facts. However contrary to his conclusion regarding the importance of customs, it seems that deliberately created law for specific state purposes has been greatly expanding in response to modern social conditions and this has increasingly pushed custom to its place of innocent irrelevance.

The above mentioned theories could have received greater attention with only one theory being explored at a time. Yet, these notes are merely meant to briefly introduce the concepts, and a general introduction to concepts and the roots of the theories paves the path to further reading and inquiry on the themes highlighted and other theories. Having started to introduce the vast body of theories that make up some of the earlier theories within the vast body of Sociological Jurisprudence, the discussion is far from complete. At this point, what this note should hopefully have achieved is to create an awareness of the vital links between law and society and law within society. The theories of Roscoe Pound, Max Weber and Karl Marx should also be seen to fully cover the themes at hand. Moreover, it would also be vital to cover some of the very recent and modern theories from Michel Foucault and Jurgen Habermas which also make up part of the concepts of law and society. ■

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NOTES ON ADMINISTRATIVE LAW: THE AMERICAN EXPERIENCE

Fasil Abebe [♣]

Background

The United States Constitution is an offspring of the western tradition of liberalism and republicanism. While liberalism is concerned with freedom, republicanism is concerned with the right of the citizen to participate in government.

Many constitutions provide for a list of fundamental rights of citizens. Some also state that laws which are inconsistent with these rights can be nullified by the courts. One such constitution is the US Constitution. Types of constitutions vary world-wide but one relevant distinction is between parliamentary and presidential constitutions. In the latter, the president and the legislature are chosen differently. In the former, however, the executive emanates from the legislature. The US is a presidential system, and the separation of powers doctrine which is enshrined in the Constitution insures that power does not fall into the hands of a single leader or power group.

The principle of *separation of powers* is adversely affected if law making, executive and adjudicative functions are granted to a single government agency. However the law puts limits to the exercise of these powers. It is up to the court to determine the proper determination of the separation of powers principle at the level of the agency. Although it is not possible to abolish the administrative agency for the sake of maintaining the traditional separation of powers principle, it is possible to designate (within the agency) separation of functions between those who lodge a complaint and those who judge.

The US does not have courts specializing in administrative law disputes. Ordinary courts have jurisdiction to deal with these cases. This choice is based on the American idea of the separation of powers which does not accept the administrative court to be part of the executive.

The US Constitution is supreme in relation to any other law. Because of these reasons, arguments based on the Constitution are typical of administrative law litigation in the US. The Federal system considers the states as independent units having defined relationships with the federal government. Many disputes

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start at level of the state. But according to the supremacy clause of the US Constitution state law is subordinate to federal law.

The US has a written constitution and several amendments called the Bill of Rights. The Constitution is supreme in relation to any other law and the US Supreme Court insures the respect of the constitution. Any government agency cannot thus act contrary to it even if it is accorded such power by legislation.

Reliance on the Constitution for the setting aside of agency action is exercised sparingly because conservative theorists argue that such action should be based on a specific constitutional text. Other theorists have argued that in the interest of protecting individual liberties, evolving social values should permit the courts to exercise the power of giving full meaning to the Constitution.

Historical development of American Administrative Law

Administrative law in the United States has its origins in the common law courts of England during which officers of the crown were to deal with claims related to damage liability. The damage remedy became insufficient, in the 17th Century, and new writs such as *mandamus*, *prohibition*, *certiorari* were used. The judiciary assumed this role as a result of political development during the glorious revolution of 1688. Later, the expansion of administrative activities led to the adoption of legislation to rationalize the system. In the US, this resulted in the Federal Administrative Procedure Act of 1946. It has been amended to include provisions that meetings of certain agencies be open to the public and providing for stricter procedural rules in decision making. The Act also lays down the availability, timing, and scope of judicial review.

Comparison between the English and American systems of administrative law

Institutional, historical and cultural differences exist between the two. The English system is based more on formal reasoning while the US law is based more on reasons related to substantive results.

England has a centralized political system while in the US federalism and the theory of separation of powers have resulted in a diffuse governmental power. The American judiciary has the power to rule over the constitutionality of statute while this is not possible in England. Any court decision in England can be replaced by a parliamentary statute. American legislatures are less effective than their English counterparts which give the American courts greater capacity to innovate in what are considered socially desirable ends. In England, the courts consider their duty to be to decide disputes in accordance with a statute or previous case law.

Obtaining judicial review

The Courts to whom petitions for judicial review are brought have their authority in a law which designates a particular court to review certain decisions of an agency. The courts can also assume jurisdiction under their general judicial power. The Administrative Procedure Act provides that generally a statutory basis should be found to seek review.

The following are examples of statutory grounds of review.

1. Agency regulation of owners of public utilities are required to conform to statutory requirements on selection of parties who could enter them, the rates they can charge, the prevention of concentration of a service in a few hands. Statute may require that utilities be safe and provide competent service and make them available to a wider public. Members of the public may be given power under the statute to give their opinion on the adequacy of such services.
2. The regulation of the professions have controlled entry into the profession, control of practice and discipline of misconduct in the interest of the protection of the public. Any deviation from the statute can be a ground for seeking review of the administrative action.
3. Other statutes involve labor relations, consumer protection, licenses for radio and TV production, food and drug legislation and land use control.

All these activities will involve questions of administrative law such as what procedures must be followed before granting a license to operate a service and what form of hearing will be required for a disciplinary decision.

Timing of request for review

In the interest of maintaining the balance in the respective spheres of the administration and the court, rules have evolved determining the time for requesting review. Judicial review can commence only after a final administrative action and the exhaustion of internal remedies. This has the purpose of preventing interruptions of administrative actions. Review must not be requested before the maturity of the case. It is analogous to the rule against interlocutory appeals in civil cases.

Ripeness of a request for judicial review means the prevention of a judicial decision until an administrative decision has reached the enforcement stage and waiting for finality will not cause hardship to the parties. The practical impact and not the abstract formulation of an administrative decision is required for seeking judicial review.

Scope of judicial review

Modern government is given a great variety of administrative duties and broad powers of law-making and adjudication. Administrative agencies have different functions but can be summarized as regulation of private conduct and the provision of goods and service. They exist at every level of government, national or local. They may use standardized procedures or special procedures required by a specific statute. They may employ formal or informal procedure. Broad general principles are employed by the courts in reviewing agency decisions in the areas of fact and law and procedure. General principles on standing, exhaustion of administrative remedies and maturity of the subject matter are basic requirements of judicial review.

Knowledge of the substantive area with which the agency is dealing and knowledge of the agency itself in terms of its place in the government structure are necessary in the practice of judicial review. Principles of judicial review cannot be understood outside the particular nature of the agency. Those who deal with administrative law often become specialized in one area of administration. A case law approach is necessary in order to understand particular solutions. Administrative regulation of monopoly power in the interest of price and profit regulation, the need to control excessive profit, the need to control environmental pollution, all will raise administrative law problems but the solutions will not be the same. They must correspond to the nature of the activity of the administrative agency.

The dividing line between the power of the agency and the power of the courts is not easy to see, but generally the courts must defer to the agency for the application of a statute. The acts of the agency are limited by requirements of reasonableness, transparency, and procedure. It will be for the court to determine whether these legal requirements have been complied with.

The court's role will include questions as to whether the agency acted with in the scope of its authority and whether the legal requirements that permit the action have been fulfilled. The actual administrative decision must not be arbitrary. Considerations of the relevant factors by the agency are also important. The court may return a case to the agency for further detailed treatment. The agency must state valid and consistent reasons for its decisions. Departure from prior decision must be explained by the agency. These are the criteria by which the courts control the activities of the administrative agencies although the courts are also obliged from acting arbitrarily and the exercise of the judicial function is to resolve disputes according to law.

The Federal Administrative Procedure Act (APA) describes the general scope of administrative review. Section 706 of the Act provides that the court the power to:

- Compel agency action which is not taken;
- Hold unlawful and set aside agency action which is:
  a) arbitrary, capricious,
  b) contrary to the Constitution,
  c) in excess of statutory power,
  d) made without procedure required by law,
  e) unsupported by substantial evidence,
  f) unwarranted by the facts.

These provisions can apply to an agency's conclusions of facts or conclusions of law. They are also used to review the proper exercise of discretion by an agency.

Grounds of review

1. Administrative agencies are obliged to rely on facts whenever they make a decision. Otherwise the law which is regulating a certain behavior would be applied despite the absence of facts which warrant its applications. Therefore judicial review of the facts on which the agency relied is a legitimate concern of judicial review. According to the Federal Administrative Procedure Act (APA), there must be substantial evidence of the facts to reach a particular decision. In relation with the requirement that a decision should have a basis in fact, the APA also empowers courts to set aside agency action which is arbitrary, capricious, or an abuse of the discretion given to the agency. This means that the decision of the agency must have a basis in reason. The technical capacity of the courts must of course be equal to that of the agency for the court to evaluate such judgment. In this role they may need the advice of technical assistants to help them to appreciate the nature of the action which is in dispute.

2. On the other hand, it is generally true that courts decide questions of law without taking into consideration the position of the agency. The decision will be based on the meaning of a piece of legislation and the courts are the final authority on the meaning of the law. The court's adjudicatory methods are also more fair than that of the administrative expert or policy maker. The APA thus states that one of the functions of the court is to decide questions of law. Where the agency has been given law making powers by law, the court's role will be to provide a reasonable interpretation.

3. A statute may also give an administrative agency powers of rule making which are necessary for its mission. How these powers will be exercised is also a concern of administrative law. Rule of law constraints will be imposed. Elements of this power of rule-making will include requirements of consistency over time and across similar cases, reasoned judgment and neutrality of the decision maker and possibility of hearing.

Examples of judicial review cases

Speech

The first amendment which forbids the legislature form making laws limiting the freedom of speech was intended to protect political freedom, but has been also used to protect all forms of speech. Legal provisions on defamation as well as use of speech in the commercial context such as in publishing contracts were given narrow meaning enlarging the protection given to free speech.

Unreasonable search

The provisions of the fourth amendment against unreasonable searches and seizures although largely applicable to the criminal law have been also applied to the administrative process. This has been the case with inspection of premises by government agents and the requirement of submission of documents by private persons. Courts have assimilated these inspections to searches under the Constitution and made them subject to the issuance of a warrant. The requirements of information from private persons are also subject to standards relating to privacy.

Self-incrimination

In the process of administrative decision making, a person is not obliged to submit information that is self –incriminating. It applies to written as well as oral information.

Procedural due process

The provisions of the fifth and the fourteenth amendments provide that no person may be deprived of life, liberty or property without due process of law and these are the source of fair procedure in administrative processes. Originally applicable to courts, it has become applicable to the administration in the course of the 20th century. All administrative regulatory activities such as public employment, licensing are not allowed to deprive the rights of citizens without due process of law. The procedures required have been mainly supplied by the the legislator and courts. It is to be noted that the courts usually supplement the procedure where it is inadequately provided by the legislator.

The type of procedure required has been enacted in the Administrative Procedure Act of 1946 which provided rules applicable to different circumstances. The procedure will vary with the case but discussion with an agency official, the delivery of a clear and final decision, the provision of an appeal procedure within the agency, the right to present evidence and the right to assistance of counsel have usually been considered important. It is as if the requirements of the criminal procedure have become part of administrative procedure. The actual procedural requirements are generally provided by statute. The 1946 APA is the statute that has put in statutory form the procedures which

have found general acceptance. It prescribes internal agency rules and the manner of seeking judicial review. Other judicial rules of procedure contain rules on the role of the courts.

Substantive due process

It is generally true that statute and administrative regulations impose economic loss on same sections of society or grant economic benefit to others. This happens in granting professional licenses, imposing control of pollution or restrictions on the use of property. All these measures will require the adequate compensation of the person affected by the measures. Some statutes provide for analytic requirements in the promulgation of rules. The statutes of individual agencies also provide for special procedural requirement. The interpretation to particular statutes given by the US Supreme Court also serves as an important source for understanding administrative law. Certain types of legislation were not permitted because they had a negative impact on the liberties of the citizen, for example the liberty to contract freely. At some time in the history of administrative law, social and economic progress promoted by legislation was opposed by some judges contrary to general economic and political developments. However, the modern trend of courts is to impose constraints only on legislation which is lags behind social and economic development.

Contractual and tort claims

The liability of a government agency for tort is based on tort claims at the place where the harm has occurred. In general, government tort law is not as pervasive as private tort law with many administrative law limitations on types of injury. Contract law is also subject to distinct laws on government procurement. Standard contract terms are prevalent containing clauses promoting some public policy such as minimum wages and simpler methods of variation of contracts as well as greater protection of private persons. ■

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