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ABORTION LAW IN ETHIOPIA: A Comparative Perspective

*Tsehai Wada**

Introduction

Induced abortion or the deliberate termination of pregnancy is one of the most controversial issues in legal discourse. As a legal issue, abortion is usually discussed in light of the principles of criminal law. Depending on circumstances, however, abortion can also be discussed from the standpoint of constitutional law. In the former case, the issue usually takes the form of criminalizing or decriminalizing the act, while in the latter, the issue becomes whether a pregnant woman has a constitutional right to terminate her pregnancy. The issue thus usually involves the competing arguments in favour of the "right" of the fetus to be brought onto life (i.e. *personhood*) vis-à-vis the right of the mother to abortion based on her interests and choice.

Although many factors have contributed to the debate, it appears that religious outlooks permeate the controversy pertaining to criminalizing and decriminalizing abortion. Major religions still hold that abortion is the deliberate taking away of life and, therefore, not condoned under any circumstance. On the other side of the spectrum, advocates of women's rights, argue that when the interests of the fetus comes into conflict with the rights of the pregnant woman, the latter should take precedence and it is the woman's decision that should count in the end.

The issue whether a fetus has a life of its own that is worthy of protection under the law, is found to be another issue of contention. Some argue that a fetus has no life of its own for some weeks while others contend that life starts from the very moment of the union of the sperm and the egg, which according to this view is a scientific truth. One of the major aspects of the debate on abortion is the mindset of these perspectives of thought influenced by different values.

Abortion is an issue, which affects every country in the globe. In countries that have decriminalized abortion, women are spared of the dire consequences of illegal abortion. In many other countries wherein abortion is a criminal act, however, illegal abortion is the major cause of maternal mortality and other serious health problems, as is to be discussed at a later stage.

* LL.B, LL.M; Assistant Professor of Law (Faculty of Law, Addis Ababa University)

Given the nature of abortion as an act as well as a point of debate, the issue deserves discussion from a comparative perspective.

This article attempts to shed light on the historical development of the laws of various countries and the effects of illegal abortion in many countries. Religious positions are the main catalysts that fuel the debate on abortion, and the article will thus attempt to highlight the positions of some of the major religions.

Ethiopia's legal regime pertaining to abortion has been changing through time. In 2004, Ethiopia has enacted a new Criminal Code that has radically (albeit inadequately) reversed the highly restrictive position of previous laws on abortion. The process had involved a lively and heated public debate on the pros and cons of criminalizing / decriminalizing abortion. In addition to changes in the law, therefore, the debate has enhanced public awareness and concern over the issue. Thus, the new law and the setting of public discourse which accompanied its enactment will definitely influence the conduct of many individuals including pregnant women, physicians, illegal abortionists, etc. for the years and decades to come. This article, therefore, attempts to show the nature of the debate and critically examines whether the new law has appropriately and adequately addressed the issue.

This article encourages readers towards informed judgment rather than polarized recriminations.[1] The first and second sections of this article discuss the history of abortion and the positions of major religions on abortion. The third section addresses the legal regime and its impact in various countries. And the last three sections deal with Ethiopia's abortion law and the public debate that surrounded the 2004 Criminal Code, followed by conclusions and recommendations.

1. The History of Abortion

Abortion is not a recent phenomenon but a practice that is at least as old as recorded history. "The oldest known medical texts citing abortion techniques appeared in China around 2737 B.C.E., more than 4,700 years ago".[2] Such practices are older than recorded history…even among indigenous cultures.[3]

[1] Note:
Anti-abortionists in Ethiopia attempt to show that the major causes of unwanted pregnancy and thus abortion are, lack of religious discipline, immorality and the influence of alien culture, or generally breakdown of cultural and religious values, etc. They also attempt to show that the phenomenon is peculiar to those who are living in cities, the educated, the 'uncultured', etc.

[2] Ivan R. Dee, *Born Unwanted,* 10, in D. P. Judges, *Hard Choices, Lost Voices*, (Chicago, 1993). (Hereafter, *Judges*) at 84

[3] G. Devereaux, *A Study of Abortions in Primitive Societies* (New York, 1955), in Judges, at 85

Moreover, figures on distribution and frequency [of abortion among tribal cultures] suggest that the practice of voluntary abortion is and has been a common practice in a majority of cultural traditions of mankind.[4]

Abortion was practiced in classical Greek and Roman times during which traditional beliefs, Judaism and Christianity eventually shared the outlooks of Hebrew, Greek, and Roman thoughts which believed that feticide was not homicide prior to the fetus forming.[5] Socrates, Plato and Aristotle were known to have been supporters of abortion. Aristotle wrote that "when couples have children in excess, let abortion be procured before sense and life have begun; what may or may not be lawfully done in these cases depends on the question of life and sensation."[6] Even Hippocrates, who was against abortion because he feared injury to the woman, recommended it under certain circumstances by prescribing violent exercise.[7]

Greek and Roman civilizations considered abortion an integral part of maintaining a stable population[8]. According to Soranus, [*circa* 98-138 A.D.]; abortion was practiced to conceal the consequences of adultery, to maintain feminine beauty and to avoid danger to the mother when her uterus is too small to accommodate the embryo.[9]

In primitive tribal societies, abortion was induced by using poisonous herbs, disrupting the fetus or by sheer pressure on the abdomen until vaginal bleeding occurred.[10] It should, however, be noted that all scholars are not in agreement with the assertion that abortion was practiced with impunity by all ancient societies. Some have maintained that "the ancient Persians and Assyrians punished abortion …and the Code of Hammurabi (c. 1728 B.C.E.) and the Septuagint version of the Book of Exodus. Both texts, however, addressed only the unintentional causing of an abortion by a third party."[11]

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[4] H. L. Shapiro, " *An Anthropologists View" in Abortion in a Changing World*, 1:184, in Judges, *Supra*, Note 2 at 85.

[5] J. M. Riddle, *Contraception and Abortion from the Ancient World to the Renaissance* (Cambridge, Mass., 1992), 20-23, in Judges, at 86.

[6] Aristotle, *Politics* (Circa 350 B.C.E) Book Seven, Part XVI. Paragraph 5, Translated by Benjamin Jowett)

[7] H.P. David, "*Abortion Policies*", in Abortions and Sterilization: Medical and Social Aspects, J.E. Hodgson, ed. Grun and Stratton, New York, 1981, pp.1- 40, and Wendell W. Watters, *Compulsory Parenthood: The Truth About Abortion*, McClelland and Stewart, Toronto, 1976, p.52, in Child Birth by Choice Trust, *Abortion in Law, History and Religion*, Toronto, Canada , 1995), p.3, (hereafter, the Trust).

[8] Ibid.

[9] J. T. Noonan, "*An Almost Absolute Value in History*," in *The Morality of Abortion: Legal and Historical Perspectives*, ed. (Cambridge, Mass.1970), p.3-4, in Judges, *Supra* Note 2, at 85.

[10] The Trust, Supra, Note 7 at.3

[11] S. M. Krason and W. B. Hollberg, "The *Law and History of Abortion: The Supreme Court Refuted*," (cont.)

2. The Position of Different Religions on Abortion

2.1- Catholics

The current debate on abortion is no doubt fueled by religious positions on the subject. Of all the religions, the position of the Catholic Church appears to have influenced the current position of many local laws, particularly in the western world. Some writers forward the view that, "The Bible …is remarkably silent on the issue of [abortion] that some modern Christians regard it as akin to murder."[12] According to Noonan, however, there is an express prohibition in *Didache*, or *The Teachings of the Twelve Apostles (c.100 A.D.)*, which provides, "You shall not slay the child by abortion. You shall not kill what has been generated" but not in the other works such as that of Matthew, Luke or Galatia.[13] Noonan cites second-century writings, including those of Clement of Alexandria and Tertullian, condemning abortion. Others however, have argued that Tertullian justified therapeutic abortions.[14]

At least starting from the time of Aristotle, "*ensoulment*"- a point of pregnancy from which the fetus can have a recognizable status, often regarded as occurring at forty days – became the border line to condemn or allow abortion.[15]

> [I]n the eleventh and twelfth centuries Roman Catholic opposition to contraception and to abortion became clearer…. The writings of Ivo (bishop of Chartres from 1091 to 1116), Peter Lombard, and Gratian established that "both contraception and abortion were out of order and jeopardized a person's soul".[16]

There were different positions in the church. "In 1588 Pope Sixtus V issued the bill *Effraenatum*, which equated abortion with homicide throughout pregnancy and without regard to maternal health".[17] Some, however, supported abortion for therapeutic reasons and rape. It appears that the Church had no uniform position on abortion till quite recently. Recent developments show that the Church's position is now much firm than it was in its earlier periods.

The decline of the ensoulment theory was accompanied by a hardening of the papal position on abortion. In 1869 Pius IX deleted references to "ensouled

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[11] (cont.)...in *Abortion, Medicine and the Law*, ed .J. Douglas Butler and David L. Walbert, 3rd ed. (New York, 1986), 196-198, in Judges, *Supra*, Note 2 at 85

[12] *Ibid* at 87

[13] Noonan, p.9, in Judges, *Supra* Note 2 p.85.

[14] C. C. Means, " A Historians View," in *Abortion in a Changing World*, 1: 17- 18, in Judges at .87-88

[15] *Supra*, Note 2, Judges notes that a Council of Eastern Bishops, the Council of Ancyra, in 314 A.D. prohibited abortion without regard to ensoulment but provided for a reduced penalty of ten years penance.

[16] Riddle, p.112, in Judges, *Supra* Note 2, at .87-88

[17] Noonan, 33-34 and Means, 18-19, 9 and 15, respectively. In Judges *Supra* Note 2, at 89

fetus" in the excommunication for abortion, a change interpreted as meaning that ensoulment occurred at conception. Several late–nineteenth–century papal pronouncements declared illicit many forms of therapeutic abortion. The new Code of Canon Law in 1917 specifically included 'mothers' among those to be excommunicated for procuring abortion. In 1930 Pius XI issued an encyclical condemning abortion for therapeutic, social, and eugenic grounds. And the Second Vatican Council declared in the early 1960s, "Life from its conception is to be guarded with the greatest care. Abortion and infanticide are horrible crimes."[18]

The dramatic change in policy was dictated by the rising birth control movement that had resulted in the decline of the Catholic population, especially in France. Moreover, "in Italy, during the years 1848 to 1870, the papal states shrank from almost one-third of the country to what is now Vatican City. It has been argued that the Pope's restriction on abortion was motivated by a need to strengthen the Church's spiritual control over its followers in the face of this declining political power".[19]

This rigid position is not, however, shared by all followers. At least in Canada, Catholics for a Free Choice, which is a pro-choice group, believe that it is an individual woman's right to make decisions regarding abortion and contraception in accordance with her conscience. Moreover, according to a poll conducted in Canada, 77% of Catholic Canadians believe that abortion should be permitted in certain circumstances, and 36% think it should be permitted whenever a woman decides she wants one.[20] Although the Catholic Church appears to be the staunchest opponent of abortion, other religions also share this position to a certain extent. The positions of some churches are discussed here below:[21]

2.2- Position of various churches: Sample overview

There seems to be no unanimity on the subject, within the *Anglican Church*. This is because, the 29th Synod in 1980 rejected abortion for reason of convenience or economic or social hardship and a 1983 report from a sub group of the Church's Task Force on Human Life held that in circumstances such as a real economic hardship, abortion may be a moral choice which should

[18] Noonan, p.39-45, in Judges, *Supra*, Note 2 at 89

[19] W. W. Watters, pp.92-93, in the Trust, Supra Note 7 at 4.

[20] Ibid at 40.

[21] Note: The positions of the different religious groups discussed here are taken from the publication of Childbirth by Choice Trust, cited above, which mainly focuses on sources obtained from religious representatives in Canada. Though it is not fully warranted, there is every reason to assume that these positions are equally shared by religious representatives in other parts of the world too, albeit, with some minor differences.

not be denied. The Task Force stated that the fetal right to life is a diminished right if …it stands in the way of a woman's health or sanity. In 1989, however, the Church took a position that abortion should be allowed only in cases where pregnancy endangers the woman's physical or mental health. It stated that abortion should never be used except for serious therapeutic reasons.[22]

The 1982 resolution of the Canadian *Baptist* Federation opposed abortion for any other reason other than to save the woman's life.[23]

The *Evangelical* Fellowship of Canada, representing approximately 25 conservative Christian denominations, adopted a strong anti-abortion stand in 1989, calling for a government policy that would make any abortion illegal unless performed to save the woman's life.[24] This Church is divided on the issue of abortion, so much so that it is difficult to determine an official policy. What is officially known in this regard is that, the Church (in 1988) rejected abortion as a moral option except to prevent the death of a woman, and adopted an interim statement, which repudiates abortion on demand and upholds the sanctity of life in its 1989 convention.[25]

Jehovah Witnesses believe that in the eyes of the Creator, Jehovah God, it is a sin to make a life that one does not intend to care for, or to have an abortion.[26] The *Presbyterian Church* holds that abortion should be lawful only if a pregnancy endangers the woman's life or is likely to impair her physical or mental health in a permanent or prolonged way. It has consistently opposed abortion on demand, and holds that there is no point after the moment of conception when the fetus does not qualify as human life.[27]

The 24th General Council of the *United* Church stated (in January 1971) that "abortion is morally justifiable in certain medical, social and economic circumstances," and that "abortion should be a private matter between a woman and her doctor". It, therefore, called for the removal of abortion from the

[22] Motion of the 29th General Synod of the Anglican Church of Canada, June, 1980 and, "Abortion O.K. in Some Cases, Anglican Church Says", *The Toronto Star*, May 14, 1988, in the Trust, Supra Note 7 at 39

[23] M. McAteer, Abortion; "Church Members as Divided as General Society Is". *The Toronto Star*, Sept.2, 1989, in The Trust, p.39. It should be noted here that until 1984, the regional Baptist Convention of Ontario and Quebec accepted abortion when the pregnancy constituted a grave threat to the woman's life or health, when there was risk of a deformed child, and when the pregnancy was the result of rape or incest. In 1984, however, this group withdrew its position and brought it in line with the Federation's position. Id.

[24] Ibid. at 39.

[25] M. McAteer, in the Trust, *Supra*, Note 7 at 39-40.

[26] *"Life: A gift to be Cherished", Awake*!, Watch Tower Bible and Tract Society of Canada, Georgetown, Ontario, May 22,1993, in the Trust, *Supra*, Note 7 at 40.

[27] M. McAteer, in the Trust, *Supra*, Note 7 at 40

Criminal Code, except when performed by medically unqualified people and in places not approved for that purpose.[28]

2.3- Buddhism, Hinduism and Humanists

According to *Buddhism*, a fertilized egg is considered as a sentient being, and abortion is synonymous with killing. Nevertheless, there are position papers of the Buddhist Temples which emphatically state that the abortion decision is one, which the woman herself must make.[29] The position of *Hinduism* is no different from that of Buddhism. Accordingly, it considers abortion as killing and thus inconsistent with the Hindu belief in non-violence. However, medically therapeutic abortions are tolerated.[30]

On the contrary, *Humanists*[31] do not consider an embryo/fetus to be a person, but rather, to have the potential of becoming one. They see the abortion decision as a personal, moral choice for the woman and not … the subject of criminal legislation.[32]

2.4- Islam

The majority of Muslim scholars permit abortion, although they differ on the stage of fetal development beyond which it becomes prohibited. Scholars agree that abortion at or after the ensoulment stage is prohibited except to save the woman's life. One group permits abortion up to 120 days after conception. Another prohibits it as early as eighty or even forty days after conception. In either case, many take the view that abortion does not abruptly become prohibited at a certain stage, but becomes increasingly disfavoured as the fetus develops, until it becomes finally prohibited. On the other hand, a minority of scholars hold a very strict view, which prohibits abortion from the very moment the semen attaches to the uterus, on the theory that it is already on its way to being ensouled.[33]

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[28] United Church of Canada, "*General Council Executive Updates United Church Policy Statement on Abortion"*, Press Statement Released Monday, November 27, 1989, in the Trust, at 40-41.

[29] Sugunasiri, S. "How Non-Christians Tackle Abortion", *The Toronto Star* Magazine, Jan. 6, 1990, in the Trust at 41

[30] *Id.*

[31] It is to be noted that this outlook cannot be regarded as religion

[32] *Supra*, Note 28

[33] A.Y.al-Hibri, 'Family Planning and Islamic Jurisprudence', *IN/FIRE Ethics, Newsletter of the International Network of Feminists Interested in Reproductive Health*', Vol.3, Issue 2, 1994, the Trust, p.42.

Note: Another scholar expressed the position of Islamic law as follows;

"[Despite some differences in opinion], *according to the teachings of The Prophet Mohammed (sAas), the* soul is placed in the fetus after 120 days…Thus, under Islamic law, the fetus is considered as a human being after the end of the fourth month.From this, it is clear that abortion after the month can only be allowed in Islamic law if… (cont.)

2.5 - Judaism, Sikhism and Unitarians

According to Jewish Talmud compiled around 600 CE "an embryo is a limb of its mother".[34] and for the first forty days after conception, the embryo is "simply water."[35]

Abortion for therapeutic reasons, when the woman's life is clearly in danger, is mandatory in *Judaism*. Her life takes absolute precedence over the potential life of the fetus, which is not regarded as full life until late in the process of birth. Although there is no unified Jewish position on abortion; Rabbis in Reformed Judaism generally take a pro-choice stance toward a woman's decision for abortion.[36]

Sikhs emphatically state that the woman's right far outweighs the right of an embryo/fetus, which is not given the status of a human person. Accordingly, abortion is allowed up to a medically safe point.[37] And, the *Unitarians* promote family planning and education for responsible sexuality, and support the right of all women to freely exercise their own conscience in the matter of abortion.[38]

3. Comparative overview of the legal regime in some countries

Before we proceed to an overview of the legal regime in various countries, we may recall a widely read and highly popular question that was raised by Judith Jarvis Thompson nearly four decades ago:

> You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you—we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only nine months. By then he will have recovered from his ailment, and can safely be unplugged from you.[39]

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[33] (cont.) ...it is the lesser of two evils, that is, if the mother's own life is at risk." Found at: www.al-Muhajaba'sislamicblogsabortion in Islamiclaw.html [visited on June 30, 2004].

[34] Hulin 58a

[35] Yevamot 69b

[36] The Trust., *Supra,* Note 7 at 42.

[37] Ibid at 42-43

[38] Ibid at.43

[39] Judith Jarvis Thompson, "A Defense of Abortion", *Journal of Philosophy and Public Affairs*, 1 (1971) at 47

Judith Thompson then raised the question whether it would be morally incumbent to accede to this situation:

> All persons have a right to life, and violinists are persons. Granted you have a right to decide what happens in and to your body, but a person's right to life outweighs your right to decide what happens in and to your body. So you cannot ever be unplugged from him. I imagine you would regard this as outrageous, which suggests that something is really wrong with that plausible-sounding argument I mentioned a moment ago."[40]

3.1 – USA, Canada and England

Although restrictive abortion laws endured for a long time, many social and technological factors forced them to give way to more liberal laws. The advance in medical technology, women's enhanced awareness about their rights, and concerns about population militated against maintaining restrictive laws. It was under such a setting that American physicians opted for the relaxation of restrictive abortion laws, and movements towards asserting a woman's right to full control of her body enhanced the momentum. As a result, state laws allowed abortions for a variety of reasons, such as: best interest of the patient, sound clinical judgment, informed patient consent, avoiding harm to the woman's physical or mental health, avoiding birth of a fetus which will be born with serious mental or physical handicap, pregnancy resulting from rape, incest, and illicit intercourse with a minor girl.[41]

Moreover, a case decided by the Supreme Court of the United States in 1973 brought about a radical change in the abortion laws of the country. *Roe v Wade*, is an important case because it established a federal constitutional right to abortion. In *Roe v Wade* (1973)"[42] the ruling of the US Supreme Court included the following:

> During the first trimester of pregnancy, the state cannot bar any woman from obtaining an abortion from a licensed physician. During the second trimester, the state can regulate the abortion procedure only to protect the woman's health. In the third trimester, the state may regulate to protect fetal life, but not at the expense of the woman's life or health.

"The decision has endured a quarter century and remains essentially intact, despite many subsequent decisions."[43] Roe's holding have dealt with issues such as interest of the state, husbands, parents, and others.[44] It should, however, be noted that the decision on *Roe v. Wade* has not brought about a consensus between the pro-life and pro-choice lobbyists. Thus, the issue of abor-

[40] Ibid

[41] The Trust, *Supra* Note 7 at 108

[42] Roe v. Wade, 410 U.S. 113 (1973)

[43] Jared C. Leuck, "Roe v. Wade and Its Supreme Court Progeny", *14 J. Contemp. Legal Issues 209* (2004-2005) at 209

[44] Ibid

tion is still a legally controversial issue in the United States. Different cases have been brought to the Supreme Court since 1973, among which *Webster v Reproductive Health Services* (1989) and *Planned Parenthood of Southern Pennsylvania v Casey* (1992), can be cited as examples.[45]

Canadian abortion laws have also passed through many changes through time. The 1869 law of Canada prohibited abortion and punished it with life imprisonment. In 1969, the criminal law was amended to legalize abortion when pregnancy poses a threat to the life or health of a woman. In 1988, in a case that involved a well known abortionist by the name of Dr. Henry Morgantaler, the Supreme Court struck down the abortion law as contrary to section 7 of the Charter of Rights and Freedoms (guaranteeing " life, liberty and security" of the person) and the court reasoned out that, Section 251 [that part of the criminal law that allowed abortion for therapeutic reasons] clearly interferes with a woman's physical and bodily integrity. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person[46].

[45] Notes. The core decisions of the latter two land mark cases are the following:

- Webster v Reproductive Health Services (1989)

States may bar public employees and public hospitals from being used for abortions. States may also require doctors to conduct tests to try to determine whether a fetus can survive outside the womb.

- Planned Parenthood v Casey – 1992

Requirements of a mandatory 24 - hour delay before an abortion, lectures by doctors against abortion, consents from parents of minors, and reporting requirements did not constitute an " undue burden" on women seeking to end an unwanted pregnancy and such provisions are constitutional.

According to one observer, the position of the Supreme Court on abortion, has gone through four distinct evolutionary stages in the twenty years since Roe. In the first, dominated by Roe itself, the court explicitly recognized a constitutional right to abortion. In the second stage, the court elaborated – some said expanded – the contours of abortion rights, as challenges were brought to a variety of state laws regulating abortion. In the third stage the court reversed its expansive trend and began to authorize a great range of restrictive state regulation of abortion. And in the fourth and most recent stage, a narrow and fragile majority of the court announced its continuing commitment to Roe's "core holding" and the use of viability as a legal boundary but also substantially revised the constitutional test for previability abortion regulations. [Judges, p.109 -110].

It is also interesting to note that the controversy over abortion is still an ongoing process in the U.S. The pressure to maintain the current position or over turn it or make it more restrictive is reflected in the positions of those political parties that held power at different times. The Republicans are pro-life, while the Democrats are pro- choice. These parties have appointed judges who can advance their causes and repealed or amended legislation to suit their positions.

[46] The Trust, Supra Note 7, at 35-38.

England substantially liberalized its abortion laws in 1967 by allowing the range of justifications for therapeutic abortion to include almost any aspect of the pregnant woman's circumstances, including the impact on existing children.[47] It is also believed that the reduced influence of religions at this time enhanced a secular and pragmatic mindset regarding the issue of abortion.

3.2 – France, Belgium, Portugal and Germany

The French Napoleonic Code of 1810 and its successive formulations prohibit abortion in absolute terms. The criminal law made an exception to this sweeping prohibition in 1939 by allowing abortion performed under a state of necessity, i.e. to prevent an immediate and more serious harm, such as the death of the pregnant woman. In 1975, France enacted a public health legislation that allowed the performance of abortion during the first ten weeks of pregnancy (now 12 weeks) on a pregnant woman who found herself in a "situation of distress" because of the pregnancy.[48] This law also allowed abortions to be carried out later in pregnancy if two physicians certified that the pregnancy posed serious danger to the woman's health or if there was a strong possibility that the child would suffer from a particularly severe illness recognized as incurable at the time of diagnosis. The law had also provided for a waiting period of one week before abortion and mandatory counseling provided by a person other than her physician. These obligations were left out in 2001.

Belgium's Penal Code, like that of France, was largely based on the Napoleonic Code of 1810 as reformulated in 1867. The law, therefore, used to prohibit abortion. Belgium, however, amended its law in 1990 and allowed

[47] The Abortion Act of 1967 reads in part as follows:

Sec.1- Medical Termination of Pregnancy

1. Subject to the provisions of this Section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith…
   a) that the pregnancy has not exceeded its twenty- fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
   b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
   c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman , greater than if the pregnancy were terminated ; or
   d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

[48] Reed Boland and Kibrom Teklehaimanot, *Abortion Law and Practice in Africa*, Eudora/attach/Africa/paper6.5.02doc.pp5-10 (2002) (hereinafter B&T.Haimanot).

abortion for a variety of reasons. The changes made in the 1990 legislation are very similar to the 1975 law of France.[49]

Portugal's Penal Code provisions had prohibited abortion in an absolute manner until they were amended in 1984 after which they allowed abortion for a variety of reasons including termination of pregnancy when there are significant indications that the pregnancy resulted from rape. However, such permissive abortion must be performed during the first 12 weeks of pregnancy.[50]

In pre-World War II Germany and in particular under the Weimar Republic, public awareness towards birth control was steadily growing until the early 1930s. In 1933, birth control centers were closed and advertising of contraceptives were prohibited. While the Nazi Party was in power in Germany, abortion was strictly forbidden, as "Aryan" women were to reproduce to increase the "master race". Abortion was declared an act against the state and the death penalty was introduced in 1943. Despite this restrictive law and its severe punishment, Jewish women were forced to have abortions; both abortion and sterilization were used by the state against groups that were considered racially undesirable.[51]

East Germany enacted a law in 1972 that allowed abortion for a variety of reasons; West Germany also enacted a similar law in 1976. After reunification, a 1992 law permitted first trimester abortions on request after mandatory counseling and three-day waiting period. A follow-up law allowing abortions during the first twelve weeks of pregnancy, provided that the woman undergoes counseling by a doctor, was narrowly approved by Germany's parliament in 1995.[52]

There is an interesting issue that needs to be noted in the European context regarding a direct conflict between abortion laws of an European state and EU Laws. *Society for the Protection of the Unborn Children (Ireland) Ltd. V. Grogan* [53] "was the first case in which a member state, Ireland, referred a case to ECJ regarding the direct conflict between national and community abortion laws."[54] The details of the outcome of the case fall beyond the scope of this article.

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[49] Id.

[50] Id.

[51] The Trust, *Supra*, Note 7 at 9-10.

[52] Ibid at 10-11

[53] Society for the Protection of the Unborn Children (Ireland) Ltd. v. Grogan and others, [1997] 317/92

[54] A. Czerwinski, "Sex, Politics and Religion: The Clash Between Poland and European Union over Abortion," *32 Denv. J. Int'l law & Policy* 662 (2003-2004) at 662

3.3 - Asia and Oceania

The abortion laws of Asia and Oceania exhibit major differences that are prompted by dominant religious beliefs, colonial legacy or concern over population growth. In *Bangladesh*, the law prohibits abortion under many circumstances.[55] Since 1957, the Chinese law allows abortion on request. In 1979, China has adopted a "one child" policy in urban areas, while rural families may have up to two children. This policy has been criticized for forcing women to abort against their will.[56]

Abortion is legal in *India* since 1971, and the burgeoning population growth was a factor for legalizing the act.[57] In *Indonesia*, abortion was technically illegal. However, a judicial interpretation rendered in 1970, permitted medical professionals to offer the procedure so long as they were discreet and careful. The 1992 Health Law of the country provided among others, that "certain medical procedure" could be performed to save the life of the pregnant woman. According to the views of some critics, the new law made the situation more confusing and the word "abortion" was avoided by legislatures in order to avoid political risk.[58]

In *Malaysia*, a former restrictive law is recently repealed by a new one modeled on the English statute. The new law allows abortion if continuing a pregnancy involves more risk to a woman's physical or mental health than terminating it.[59] *Pakistan* had a restrictive law that was imposed by the British during colonial rule. In 1991, however, the country replaced this law with more liberal criminal legislation designed to conform to the principles of Islamic law. According to the latter law, abortion in the earlier stage of pregnancy is no longer a crime, if it is carried out to provide "necessary treatment".[60]

In *Australia*, the laws governing abortion fall within the legislative responsibility of the eight individual states and territories. All criminal abortion codes were originally based on English law of the mid-19th century and South Australia is the only state where an Act of Parliament has formally legalized abortion, in 1969. In all the other states, though abortion remains a criminal offence, common law precedents have allowed practitioners to carry out legal abortions where they consider it is necessary for the health of the pregnant woman.[61] A law enacted in 1977, in *New Zealand*, allowed abortion under very particular conditions, such as, rape, extreme stress for the woman, or

[55] Id. at 21.
[56] Id.
[57] S. K. Henshaw, "Recent Trends in the Legal Status of Induced Abortion", *Journal of Public Health Policy*, Summer, 1994, at 165 -172
[58] The Trust, *Supra*, Note 7 at 22, 23.
[59] S. K. Henshaw, in the Trust at 24.
[60] Ibid at 24
[61] Ibid at .20, 21

danger to the woman's life. These restrictions were, however, somewhat relaxed in 1978.[62]

Japan enacted a law in 1948 that allowed abortion in cases of rape, genetic foetal defects, and damage to the woman's health. Economic considerations were added in 1949. In 1976, the law limited the period of permissible abortion from 28 weeks to 24 weeks of pregnancy; and in 1991, the period during which abortion was allowed was cut to 22 weeks of gestation.[63] In *Philippines*, which is Asia's only Catholic nation, abortion is illegal under its 1986 Constitution; and the right to life is recognized "from the moment of conception".[64] Abortion is legal on request, in *Vietnam*. The government's strict 1988 "two child policy" imposes fines on above quota births.[65]

3.4 - The Middle East

In *Iran*, abortion is illegal, except to save the life or physical or mental health of a woman, or in cases of fetal impairment. The government, however, outlawed abortion in 1979, i.e. after the Islamic revolution. After 1988, i.e. the end of Iran's war with Iraq, population explosion has been increasingly seen as a major obstacle to economic reconstruction and as a result, the government has reversed its pro-natalist policies thereby officially promoting family planning.[66]

Since 1983, *Turkey* allows abortion on request up to the end of the 10th week of pregnancy. Married women, however, need the consent of their husbands[67]. In *Jordan*, as in the rest of the Arab countries, abortion is illegal (with a few medical exceptions) under the legacy of the French and English laws, which have undergone little serious revision.[68]

Israel's law was liberalized in 1977 to allow abortion to avert "grave harm to the woman or her children owing to difficult family or social circumstances". However, in response to Ultra-Orthodox pressure, the law was amended in 1979, and the social indication was rescinded. Under the current law, abortion is permitted when performed under any one of the following conditions: The woman is under 17 (the legal age of marriage) or over 40; the pregnancy results from a criminal act (rape or incest) or from an-out-of wedlock rela-

[62] Ibid at 24

[63] "Japan's proposal on Abortion Law Draw Fire", *The Toronto Star*, April 30, 1990, in the Trust, p.23

[64] J. L. Jacobson, "The Global Politics of Abortion", *World watch paper 97*, July1990 at 20

[65] The Trust, *Supra* Note 7 at.25

[66] Ibid at 26.

[67] Ibid.

[68] Nahid Toubia, 'views from the Arab World: A rich diversity of Peoples", *IPPF people*, Vol.17, No.4, 1990, in the Trust, *Supra* Note 7 at 25

tionship; there is suspected physical or mental malformation of the fetus; and continuation of the pregnancy may endanger the woman's health or life.[69]

3.5- Anglophone African countries: Sample Overview[70]

England was the first colonial power to liberalize its abortion law in 1967, and former colonies of England seem to have followed suit. The laws of Zambia in 1972, Zimbabwe in 1977, Seychelles in1981, Ghana in 1985, and Botswana are based on the 1967 Act of England. In *Zambia*, abortion can be carried out on broad indications, such as threat to life, physical or mental health and socio-economic indications. The law of *Seychelles* permits abortions to be performed on the ground of pregnancy resulting from rape, incest, or defilement, and in cases of serious mental disorder.

The laws of *Ghana* and *Botswana* allow abortions to be carried out: when the pregnancy is the result of rape, defilement, or incest; when the continuation of the pregnancy would involve risk to the life of the pregnant woman or injury to her physical or mental health; or, when there is substantial risk that if the child were born, it may suffer from, or later develop, a serious physical abnormality or disease. "Before 1975, the South African common law prohibited abortion under any circumstances except when the life of the mother was endangered."[71] Nevertheless, "illegal abortion was a roaring trade for the medical profession by the late sixties."[72] Decades later, we now see that South Africa has gone a long way and has one of the most liberal laws in the world regarding freedom to abortion.

In Egypt, whose Penal Code is based partly on Ottoman law, it is reported that abortions are allowed in case of threat to health and fetal defect. The Penal Code of *Sudan* that was enacted in the 1980s based on the principles of the Quoran, allows abortion on the following grounds: to protect the life of the mother; if the pregnancy was the result of rape and is of less than 90 days duration; and if it is proven that the fetus is dead in the mother's womb.

3.6 - French Speaking African Countries: Sample Overview

Abortion reform in countries formerly under French control has been less comprehensive and most of them have failed to follow the reform in France

[69] E. F.Sabatelo, "Estimates of demand for abortion Among Soviet Immigrants in Israel", *Studies in family planning*, Vol.23, No4, July/August 1992 at .270-1

[70] E. B & T Haimanot, Supra, Note 48, at 11 Most of the following legal positions of African Countries are based on this material.

[71] D. Hansson & D. E.H. Russel, "Made to Fail: The Mythical Option of Legal Abortion for Survivors of Rape and Incest," *South African Journal on Human Rights* (9 S. Afr. J. Hum. Rts. 500: 1993) at 500

[72] Ibid.

as a model - unlike the situation in former English colonies. *Tunisia* was the first country to liberalize its law in 1965, before France in fact. Under this law, abortions are allowed on request during the first twelve weeks of pregnancy and thereafter, any time in pregnancy if there is a threat to the pregnant woman or if the child to be born will suffer from a serious disease or disability.

The Penal Code of *Morocco* (amended in 1967) allows abortion to be performed at any point during pregnancy to preserve the health of the pregnant woman. Prior to 1976, *Algeria* had a law that prohibited abortion, except to save the life of the pregnant woman. In 1976, however, a new health law authorized abortions to be carried out to preserve the seriously threatened health of the pregnant woman. Another new law enacted in 1985 clarified that the threat to health includes a threat to psychological as well as physical health. *Cameroo*n's Penal Code permits an abortion to be carried out to save the pregnant woman from a serious threat to her health and in cases of rape, after the prosecutor makes a statement of the materiality of the facts. *Togo* and *Benin* removed all provisions relating to abortion from their Penal Codes, in 1980. *Djibouti*'s 1995 Penal Code allows a pregnancy to be terminated by a physician for therapeutic reasons.

Comoros amended its Penal Code in 1982 to allow abortions to be carried out for serious medical reasons. *Burkina Faso* enacted a Penal Code in 1997 and under this law; abortion can be carried out at any point during pregnancy if the pregnancy places the health of the woman in danger or that there is a strong probability that the child to be born would suffer from a particularly severe illness recognized as incurable at the time of diagnosis. Moreover, the Code allows a termination of pregnancy, when the pregnancy is a result of rape or incest, the materiality of which has been established by the Public Prosecutor.

The Penal Codes of *Chad*, The *Central African Republic*, Congo, *Madagascar, Mali, Mauritania*, and *Senegal* prohibit the performance of all abortions. Côte d'Ivoire, Guinea, Chad, and Madagascar allow abortion only when it is necessary to save the life of the pregnant woman.

3.7 - The spectrum in Africa's march towards liberal laws on abortion

The following are six commonly cited instances[73] in which abortion is permitted:

[73] http://www.un.org/esa/population/publications/abortion/doc/Notes.doc Accessed: January 13, 2008

a) "Intervention to save the life of the woman (life grounds);
b) Preservation of the physical health of the woman (narrow health grounds);
c) Preservation of the mental health of the woman (broad health grounds);
d) Termination of pregnancy resulting from rape or incest (juridical grounds);
e) Suspicion of foetal impairment (foetal defect);
f) Termination of pregnancy for economic or social reasons (social grounds)."

In addition to these six levels in the spectrum of freedom to abortion, liberal abortion policies allow a seventh category, i.e. abortion upon request (subject to some procedural regulations). It is interesting to note that out of fifty-three African countries, twenty-two fall within Level I in the freedom to abortion (i.e. allow abortion only to save the life of the pregnant woman); and only three African countries (namely Cape Verde, South Africa and Tunisia) have attained Level VII in the degree of freedom to abortion by allowing abortion upon request, of course with some regulatory framework which guards against spontaneous whims.[74]

Seven African countries (that allow abortion on grounds "a or b" stated above) belong to the Level II[75], and 13 countries fall within Level III[76] (because they allow abortion on grounds "a or b or c"). The majority of African legal regimes on abortion thus fall within Levels I to III in the spectrum of freedom to abortion. It is indeed surprising that most abortion laws in Africa haven't yet elevated their abortion laws to Level IV which allows termination of pregnancy resulting from juridical grounds of rape or incest.

3.8- The impact of restrictive abortion laws on maternal and infant mortality

Poverty, extreme youth, unpreparedness for motherhood, abuse, abandonment by a partner[77] are some of the factors the lead to abortion due to unwanted pregnancy. Current social realities clearly show that there are numerous reasons which create the will and determination in many women to ter-

[74] http://www.un.org/esa/population/publications/abortion/profiles.htm Accessed: January 13, 2008

[75] Ibid

[76] Ibid - It is to be noted that Ethiopia has not yet updated the data in the Profiles because it is the 1957 Penal Code (rather than the Revised 2004 Criminal Code) that has been used as the basis for Ethiopia's classification into Level III.

[77] B. Radford & G. Shaw, "*Beyond Roe and Abstract Rights*", Louis U. Pub. L. Rev. 209 (1993-1994) at 209

minate pregnancy. World Health Organization's (WHO) database and periodical studies[78] show that abortion is widely practiced throughout the world – legally as well as illegally. According to reports, nearly 20 million unsafe abortions took place in 2003, 98% of them in developing countries with restrictive abortion laws. In another study conducted in 1991, an estimated 26 to 31 million legal abortions and 10 to 22 million clandestine abortions were performed worldwide in 1987. Legal abortion rates ranged from a high of at least 112 abortions per 1,000 women of reproductive age in the Soviet Union to a low of 5 per 1,000 in the Netherlands. Other statistics indicate that China performed 10,394,500 abortions in 1987 alone. [In the same year], 6,818,000 abortions were performed in the Soviet Union. …In 1975, 2,250,000 abortions were performed in Japan and in 1982, 11million abortions were performed in the Soviet Union.[79]

Illegal abortion is shown to be the major cause of maternal mortality in many countries and a cause for infanticide, abandonment of newborns, selling of unwanted children and placement of so many children in orphanages. The data also reveal that Latin America and Africa are the worst affected regions in this regard. Latin America and the Caribbean had the highest incidence of induced abortion in the developing world, with between 2.7 and 7.4 million performed each year. Moreover, complications arising from these procedures are the principal causes of death among women of reproductive age. Approximately 800,000 Latin American women are admitted to hospitals every year for post-abortion complications.

Abortion is a major public health problem for most of Africa, where most of the abortions carried out are illegal and hence unsafe. For example, "the restrictive statutory formula has driven many pregnant women and girls to non-physician providers in a bid to avoid reluctant parenthood by accessing secretly illegal and septic abortions"[80] which are unhygienic and unsafe.

Almost 5 million unsafe abortions are performed each year, approximately 30 unsafe abortions per 1,000 women of reproductive age. Of these 5 million abortions, a disproportionately high number of the world total result in death: 34.000 a year, 40% of the world total, at a rate of 100 per 1,000 live births.

[78] http://www.who.int/reproductive-health/publications, Global and Regional Annual Estimates of Incidence and Mortality, Unsafe Abortions, United Nations Regions, 1995-2000 and Report for 2003, 5th Edition, Geneva,2007, last visited on November 8,2007.

[79] S. K. Henshaw, *Induced Abortion: A World Review, Family Planning Perspective*, 22 (1990), 76,78, in Judges, *Supra*, Note 2 at 31

[80] V.N. Opara, "Re-characterizing abortion in Nigeria", *ILSA Journal of International & Comparative Law* (Vol.11:143, 2004) at 144

Maternal mortality rates are 880 deaths per 100,000 live births, and 12-13% of all maternal deaths are the result of unsafe abortions. The risk of death from unsafe abortions is one in 150 procedures, and this is by far the highest in the world.[81]

Despite legal reforms and improved access to health services in many countries, latest figures show that the situation is not encouraging. The incidence of unsafe abortion is still very high in Africa and South America, compared to other regions. The estimates for the year 2003 show that only about 40% of women of reproductive age live in countries where abortion is available on request and there is no evidence of unsafe abortion. On the other hand, unsafe abortion rates are close to 30 per 1000 women of reproductive age in both Africa and Latin America.[82] Thus, in these regions, unsafe abortion is still a major cause of maternal mortality and responsible for, *inter alia*, the consumption of a significant share of resources, including hospital beds, blood supply, medication, and often operating theatres, anesthesia and medical specialists.

Based on analysis of data gathered on the correlation between restrictive abortion laws and maternal and infant mortality rates, Chad M. Gerson noted that lesser access to abortion is correlated with higher rate of maternal and infant mortality:

> "Access to abortion in inversely correlated with both maternal and infant mortality. These correlations are suggestive of a palpable cause and effect relationship between access to abortion and maternal and infant mortalities."[83]

Recent figures show that Burundi, Chad, Ethiopia, Guinea, Mozambique, Rwanda, Sierra Leone and Somalia have the highest mother mortality rates of 1,300 or above per one hundred thousand live births.[84] It is to be noted that three countries with restrictive abortion policies (Egypt, Libya and Mauritius)[85] have managed to have very low maternal mortality rates owing to another significant variable, i.e. very high per capita income compared to most countries in Africa.

With regard to infant mortality, Angola, Guinea-Bissau, Liberia, Niger, Sierra Leone and Somalia have the highest rates which range from 130 to 165 per one thousand deliveries.[86] Ethiopia's infant mortality rate, i.e. 114 per one thousand deliveries is also considerably high.

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[81] See Judges or Trust for general world data and R & T. Haimanot, for African data.

[82] WHO, above, 2007.

[83] C. M. Gerson, "Toward an International Standard of Abortion Rights: Empirical Data From Africa." *18 Pace Int'L Law Review.* (Fall 2006), 373, page 380

[84] Id at 377.

[85] Id. at. 380-81.

[86] UNICEF: *The State of the World's Children 2004: Basic Indicators* (cited in Gerson, Note 72 at 377)

4. Ethiopia's Abortion Laws up to 2004

Christianity, Judaism, Islam as well as other religions were practiced in Ethiopia before the 15th Century. Moreover, as a country of multiple nations, nationalities and peoples, there are a number of customary laws that can serve as bases of laws and may have bearing on abortion. However, due to dearth of materials pertaining to the subject at hand, it cannot be ascertained with certainty that abortion was a proscribed act before this period.

4.1- The Feteha Negest

The *Feteha Negest* was not penal law in the strict sense, and it embodied provisions of penal law, family law, and successions. Most of its contents dealt with religious affairs. Moreover, it was not binding on non-Christians. The part of the Feteha Negest which dealt with abortion provided the following:

> "If a woman conceives and wants to abort the unborn child in her womb, she shall be beaten and exiled."
>
> *Chapter XLVIII, Corporal and Spiritual Punishment for Fornication; VII- 72*

> "If a man makes a woman abort with poison and lies with her, he must remain outside the church for the rest of his life or in danger (if he is not on the verge of death) must he be deemed worthy of receiving the Holy mysteries, because he has committed the three greatest sins: fornication, homicide, and sorcery. As for women who commit carnal sins and kill their children afterwards and hide their death, first it was provided, with reference to them that they be expelled (from the community) until the day of their death, but because of the great mercy of God towards us the penalty shall be for ten years, as it has been commanded."
>
> *Chapter XLVII, Homicide and its Corporal and Spiritual Punishment as Contained in its Canons) [End of Part XII] – on Spiritual Punishment.*

4.2- The 1930 Penal Code.

The position of the 1930 Penal Code on abortion was absolute because it allowed no exceptions. It should also be noted that though the law had acknowledged criminal defenses, such as, legitimate defense, superior order, infancy, etc., the defense of necessity was not recognized under this law.[87] Six provisions of the Code dealt with the crime of abortion. According to Article 381, abortion or consent to abortion was punishable by imprisonment from one up to three years and/or a fine ranging from 10 up to 50 Birr. And, performing an abortion upon the consent of the woman was punishable by imprisonment (Article 382) from one month up to one year and a fine ranging from 50 up to 200 Birr. The punishment for a middle man who brought together the abortionist and the pregnant woman was the same punishment

[87] See Articles, 145 – 151 of the Code.

provided for physicians and mid wives plus one -third, when the abortion is consummated (Article 383).

Abortion accompanied by violence or other means was made punishable by imprisonment from 15 up to 20 years (Article 384) if the offender was aware of the pregnancy of the woman. And, according to Article 385, a person who carried out abortion was liable to imprisonment from three up to seven years and/or a fine ranging from 3,000 up to 7,000 Birr if the abortion was consummated.

4.3. - The 1957 Penal Code.

The Penal Code of 1957 contained nine provisions that specifically dealt with abortion. Section 2 of Book V, Chapter I is entitled "*Offences Against Life Unborn: Abortion*". Article 528 dealt with general principles that governed the crime and its punishments, as well as the exceptional grounds under which abortions may be performed, legally. It also stipulated that the requisite criminal mentality for liability is intention, but not negligence or imprudence. According to Article 529, self-abortion was punishable with simple imprisonment from three months to five years, and procuring means or aiding are punishable with simple imprisonment from one to five years. And, abortion procured by another (upon consent) entailed rigorous imprisonment not exceeding five years (Article 530). Where the woman was incapable of giving her consent, or where such consent was extorted by threats, coercion, or deceit, or where she was incapable of realizing the significance of her actions, or where the intervention was effected against her will, the punishment was rigorous imprisonment from three to ten years.

Where abortion was performed for gain, or where the offender habitually made it a profession, he was liable to an additional penalty of fine (Art.531). However, abortion made on account of an exceptionally grave state of physical or mental distress (Article 533), especially following rape or incest, or because of extreme poverty, entitled the offender to free mitigation of sentences. The only exception where abortion was *not punishable* was when it was made to save the pregnant woman from grave and permanent danger to life or health which were impossible to avert in any other way, and in the case of grave and imminent danger which can be averted only by an immediate intervention (Arts. 534 & 536). It can be noted, that the 1957 Penal Code made a significant departure from the Feteha Negest and the 1930 Penal Code in recognizing such exceptions. This was consistent with liberal laws of Europe, in the late 1950s.

Analysis of Articles 533 and 534 of the 1957 Penal Code in light of the *Seven Levels of Freedom to Abortion* (discussed earlier) under Section 3.7 indicates the following:

Table I - Grounds on which abortion is permitted [88]

• To save the life of the woman……..…..…….…….	Yes
• To preserve physical health……..……..	Yes
• To preserve mental health…..…….	Yes*
• Rape or incest…….……	No
• Foetal impairment……..……..	No
• Economic or social reasons……...…….	No
• Available on request.……	No

*The Penal Code does not specify whether a threat to health includes both physical and mental health.

Article 533, in principle, considers abortion as an offence, but entitles the accused person to free mitigation where "the pregnancy has been terminated on account of exceptionally grave state of physical or mental distress, especially following rape, or incest, or because of extreme poverty." Grave state of physical health or mental distress, if caused by rape or incest or as a result of extreme poverty, can entitle the accused to free mitigation, while the latter factors (i.e. rape, incest or extreme poverty) do not on their own suffice as grounds of free mitigation unless they in addition bring about grave state of physical health or mental distress.

Article 534 goes beyond free mitigation and declares abortion unpunishable where "it is done to save the pregnant woman from grave and permanent danger *to life or health* which is impossible to avert in any other way." The term "health" in Article 534 does not seem to include "mental health" and as shown in the Table above, the 1957 Penal Code falls within Level II in the range of freedom to abortion, with some ambiguity whether the term "health" includes mental health in which case, the Penal Code could have been elevated to Level III.

[88] http://www.un.org/esa/population/publications/abortion/profiles.htm Accessed on January 13, 2008

4.4 - The practice of abortion until the advent of the 2004 Criminal Code

There are ample data that prove the magnitude of abortion and their consequences despite the punishments stated under various provisions of the 1957 Penal Code. Two prominent groups, namely, The Ethiopian Society of Obstetricians and Gynaecologists (ESOG) and IPAS (International Products And Services) have done extensive researches in the area and published their findings at different times.

ESOG's Survey[89]

The surveys were conducted between 1981 and 1999 in Addis Ababa, Gonder, Jimma, Yirga Alem, North Western Ethiopia and Gambella. Representative samples revealed that between August to February 1990 in five hospitals in Addis Ababa;

a) A total of 2275 patients were interviewed and 1296 (56.7%) admitted to have had induced abortions, while 43.3% stated they had spontaneous abortions.
b) There were a total of 7158 deliveries and the abortion frequency was 317.8 / 1000 deliveries and the incidence of induced abortion was 200/ 1000 deliveries.
c) Of the induced abortion cases, 46.6% interfered with the pregnancy at the gestational age of 13- 20 weeks. In 97.5% of the induced abortion cases, the pregnancy was not planned. 83.6% did not want a child now, and in 43.1% of the cases, the partner was not in favour of having a child now.
d) A total of 1712 units of blood were used and of these 404 units were used for all abortions cases. Cases of induced abortion consumed 289 (73.3%) of the 404 units of blood. The induced abortion cases received more blood and plasma expanders than the spontaneous abortion cases. The mean length of hospital stay was higher among cases of induced abortion, compared to cases of spontaneous abortion (2.69 days vs. 1.69 days, respectively).
e) There were a total of 69 maternal deaths and abortion related deaths contributed 52.2% of all maternal deaths. Of these, 35 (97.2%) were induced abortion cases.

In another survey conducted in Jimma between October 25 and November 25, 1999 the study conducted on 205 women of reproductive age group, found that:

a) 51% the unwanted pregnancies were terminated;

[89] See ESOG, A Database on Abortion, Literature Review, October, 2000, ESOG: *Report on Survey of Unsafe Abortion in Health Facilities in Ethiopia*, May, 2002

b) 93.3% of women with induced abortions were aged less than 30 years;
c) 57% were single and 64% had high formal education;
d) The most common reasons for failure to prevent unwanted pregnancy were improper use of contraception (19%), unintended intercourse (18%) and modern contraception failure (17.2%).

A study conducted between July 1 and December 31, 2000 in 15 hospitals and eleven administrative regions[90] the study found out that:

a) A total of 1075 cases were studied and women in the age group of 20 -29 accounted for 58.3% of all cases; 53% were house wives; 63% were married while the rest were single; students accounted for 14.6%; and 47.9, 20.4,17.8, and 6.2% of all patients were Orthodox Christians, Muslims, Protestants and Catholic Christians, respectively.
b) Non use of contraceptive method was responsible for 78% of pregnancies and 19% of the women reported that unwanted pregnancy occurred due to contraceptive failure and rape accounted for only 3% of all pregnancies that ended in unsafe abortions.
c) A total of 13 deaths were reported and this is high even by African standards.
d) The total cost of treatment of incomplete abortion was Birr 332, 259.90 and the average cost for such treatment in government health facilities was estimated at Birr 309.38, thus abortion costs almost ten fold than normal delivery.
e) 250 cases of induced abortions and 619 of spontaneous abortions were from urban areas, while 25 cases of the former and 179 cases of the latter were from the rural areas.

IPAS's survey[91]

The study was conducted between July and September 2000 and it covered Oromia, Addis Ababa and Amhara. The following are its major findings:

a) Of those facilities that provide uterine evacuation services, only 26% were staffed by obstetricians/ gynecologists. Non specialists and mid level providers were much more common, staffing nearly 70% of these facilities.

[90] All regions of Ethiopia except Benishangul and Harrari are included in the study. Moreover, the study covered 98% of the total population.

[91] IPAS, *Responding to Unsafe Abortion in Ethiopia: A Facility Based Assessment of Post – Abortion Care Services in Public Health Sector Facilities in Ethiopia*, June,2002.

Notes:

- IPAS is an NGO that works to improve women's lives through a focus on reproductive health. Authors of this report are: Gebre Selassie, H. and T.Fetters.
- The details of the surveys are very extensive and comprehensive. Thus, the following are general summaries only.

b) Of the 1,295 women suffering from abortion related complications and managed in the sample centers, in three months period, 94% were treated using sharp curettage – the unacceptable method – and only 5% were treated using MVA (Manual Vacuum Aspiration) and 1% were referred to higher level facilities.79% of patients that had MVA and 71% of those who had curettage were given no analgesics and the reasons given were absence or shortage of these substances.

Based on the above findings, the Ministry of Health concluded that "abortion is found to be the leading cause of hospital admission for women in 1994/95 and also the second most frequent cause of death next to tuberculosis in the same year".[92]

5. The Revised Criminal Code of 2004

The Revised Criminal Code has maintained most of the provisions of the former Ethiopian Penal Code, including the order of articles. This law has, however, introduced the following major changes:

a) The former law exempts those who committed abortion negligently under Art. 528(1), Paragraph 3. This defense has been omitted from the new law and the probable reason is that under (Article 59/2) of both Codes, negligent acts are made punishable only when the law expressly so provides and it will be redundant to show the same in the Special Part.
b) The 2004 Criminal has repealed Articles 802 and 528/2 of the 1957 Penal Code. Under the 1957 Penal Code advertising for abortive means was punishable.
c) The punishments provided under Art. 529 of the former law for a woman who procures her own abortion and against those who procured for her the means of or aid her in the act are reduced from 3 months up to five years simple imprisonment and 1 to 5 years simple imprisonment respectively, to simple imprisonment, Art. 546(1) & (2).
d) The punishment provided for those who perform abortions or assist in the act contrary to the law under Art.530 of the former law is reduced from rigorous imprisonment not exceeding five years to simple imprisonment, under Art. 547(1).
e) Consenting to abortion contrary to the law was not an illegal act under the former law. Under the Revised law, however, it is an offence punishable with simple imprisonment, Art. 547(3).
f) The former law did not provide for a special punishment for those persons who perform abortions without having proper medical profession.

[92] Ministry of Health of Ethiopia, *Health and Health Related Indicators*, Jan. 1998, p.32. quoted in ESOG,(2002) Note: The statistics kept by the Federal Police Commission and the Ministry of Justice do not show significant numbers of legal cases pertaining to abortion.

The Revised law has, however, made this act punishable by simple imprisonment for not less than one year, and fine, Art. 548(1) (b).

g) The major departure from the former law is reflected under Art. 551 of the Revised law which deals with "***Cases where terminating pregnancy is not punishable***". According to this provision, termination of pregnancy resulting from rape or incest, which was a ground of mitigation under the former law (if it entails *exceptionally grave state of physical or mental distress*), are no more punishable (Art. 551/1/a), and mere statement of the woman is adequate to prove that the pregnancy resulted from these causes (Art. 552/1). Termination of pregnancy where the child has an incurable or serious deformity or where the pregnant woman, owing to a physical or mental deficiency, suffers from or her minority, is physically as well as mentally unfit to bring up the child are new defenses introduced by the 2004 Criminal Code, Art. 551(1) (c &d). Moreover Article 550 allows mitigation of punishment for abortion done "on account of extreme poverty."

h) The Revised law has also done away with the formalities required for abortions performed for medical reasons and provides that the Ministry of health shall issue directives under which pregnancy may be terminated (Art. 552/1). Violation of such directives is made punishable by fine not exceeding one thousand Birr, or simple imprisonment not exceeding three months (Art. 552/2).

The new law has broadened the grounds of legal abortion and this is definitely a step forward. Articles 551 and 550 of the 2004 Criminal Code have thus elevated Ethiopia's position in the spectrum of *Levels of Freedom of Abortion*:

Table II - Grounds on which abortion is permitted under the 2004 Criminal Code

• To save the life of the woman…….	Yes (Art. 551/1/b)
• To preserve physical health……	Yes (Art. 551/1/b)
• To preserve mental health……...	Yes (Art. 551/1/d)
• Rape or incest…….……	Yes (Art. 551/1/a)
• Foetal impairment……...	Yes (551/1 /c /b)
• Economic or social reasons……	No*
• Available on request……..	No

* The 2004 Criminal Code Considers 'extreme poverty' as a mitigating factor which is far below rendering it unpunishable.

Minutes of the Justice System Reform Program Coordinating Committee indicate that a Policy Committee which consists of high ranking government officials and legal experts had decided by majority, in favour of decriminalizing abortion in 2003.[93] But, since the law could not be enacted - as expected - at the end of the parliamentary year, it appears that the pro-life group seized this opportunity to push its views and the new law couldn't go beyond the Level shown in Table II above.

To sum up, it can be said that Ethiopian abortion law started its voyage from rigid restrictions to some reform in 1957, and it has indeed broadened the scope of permissible abortion under the 2004 Criminal Code although it has yet to elevate itself towards the level it deserves. Until the pro-choice stance of our laws become commensurate with our needs and the objective reality, the abortion is bound to continue underground thereby rendering the lives of pregnant women and girls susceptible to the dangers of unsafe abortion.

6. The pro-life/pro-choice debate on the eve of the new Criminal Code

The abortion issue has given rise to the emergence of two distinct groups with different positions.[94] Both groups had campaigned to promote their respective positions by organizing workshops, street demonstrations, publication and other means. Given the history of Ethiopia, where laws are in most cases enacted without any ruffle, the campaigns of these groups were groundbreaking phenomena. The positions of these groups are presented as follows:

6.1- The Anti-abortion group

This group consisted of gynecologists, lawyers, and theologians.[95] The group, in addition to staging street demonstrations against the draft law, published a material (62 pages) entitled: "The Bell of Death – Abortion and its Consequences", on September 2003, in Amharic. The core contents of the material stated that:

a) Abortion is strictly forbidden in the Bible;
b) Women who abort suffer from different types of physical as well as psychological diseases, including cancer and are vulnerable to suicide;

[93] *Minutes of the Justice System Reform Program Coordinating Committee* (Sene 14, 1995 Eth. Cal., June 21, 2003) pp.3 &4.

[94] Note – A draft law was initially prepared by the Ministry of Justice. Another draft was also prepared by the Justice and Legal System Research Institute. Both drafts have not, however, made radical changes on abortion. The only case of departure was recognizing rape and incest as grounds of defense. The different lobbies were thus staged based on the positions of the draft laws.

[95] Note: Given the contents of their material, which cites the Bible but not the Quoran, it seems that Muslims were not part of this campaign.

c) Researches made by the pro-choice groups do not cover the whole country, as a result of which the vast rural areas are left out from coverage; these researches have failed to show the whole picture and are made with a view to justifying the decriminalization of abortion.
d) In an opinion poll collected in June 2003, in Addis Ababa, among 1000 female respondents: 91% responded that abortion is not a solution to social problems, while 7% responded that it is; 80% responded that decriminalizing abortion is not an issue of the rights of Ethiopian women, while 17% responded that it is; 92% opposed the legalization of abortion, while 8% supported legalization;
e) By legalizing abortion on demand, Ethiopia will join the minority (27%) of the international community, but not the majority;
f) The researches, which disclosed that the maternal mortality rate of the country is 50%, were made before two decades (in 1983). In two researches published in 1988 and 1993, however, the rate is found to be 22% only;
g) Instances, which call for abortion to save the life of the pregnant woman, do not arise in practice.

Based on the premises here-in-above, the group recommended that:
a) individuals should abstain from sexual intercourse before marriage and extra marital sexual intercourse, after marriage;
b) women should be encouraged to make use of every variety of contraceptives, except loops, that adversely affect the foetus after conception;
c) women who are faced with pregnancies should be (persuaded?) to accept the situation, but be supported financially, materially, etc.
d) abortion should not be allowed even in cases of pregnancies resulting from rape or incest.

Although it is not clear whether it is a follow-up to the campaign by this lobby group, or that the Ethiopian Orthodox Church is part of this group, the Church made its position on abortion clear in a separate occasion, soon after the publication of the above discussed material. Accordingly, the Patriarch gave a press statement that was reported in Ethiopian Herald and Addis Zemen on December 25, 2003 (Tahsas, 15, 1996). The core contents of the statement underlined that:

> "as humanity begins from birth, any attempt to or act of abortion is imperious and sacrilegious; abortion is inhuman and anti religious because it is an act of trespassing the laws of providence in creation in which parents serve the means of god's will; abortion is a contravention of the Devine command: "Thou shall [not] kill"; and the movement to make abortion legal only emanates from selfish and capricious motives."

6.2- The Pro-choice Group

Different groups advocated for the legalization of abortion. Given the efforts made in exposing the magnitude of abortion in Ethiopia, persistence in creating awareness among the public, methods and standards of articulating the issue, ESOG (Ethiopian Society of Obstetricians and Gynaecologists) stands first among all others. Believing that other groups also share ESOG's position, the latter's position alone is presented here-below:[96]

a) all data collected in the country indicate that abortion is the major cause of maternal mortality;
b) reproductive health rights are indivisible women's rights;
c) abortion is a multifaceted health, social, economic, psychological, and reproductive problem;
d) the position of the 1957 Penal Code has contradicted these rights and has greatly contributed to the above problems.

The Association, therefore, called for *inter alia*, the following:

a) women should be given the opportunity to terminate unwanted pregnancies;
b) abortion should be decriminalized;
c) abortion should be allowed when it is proved that the pregnancy jeopardizes the health and social life of the woman and the fetus, when pregnancy results from rape, or due to contraception failure;
d) abortion should be provided together with strong counseling; and
e) abortion should not, however, be taken as a major means of [family planning] and family planning services should be expanded.

6.3- Public opinion during the Legislature's workshops and public meetings

The Women's Affairs Committee and the Legal and Administration Affairs Standing Committee of the Legislature, had organized two workshops in November 1999 and March 2003, respectively, to discuss the draft criminal law. Abortion was one of the major issues that were deliberated in these workshops. Although no votes were taken during these deliberations, it was apparent that the general view leaned towards liberalization of the existing law.[97] Almost all resource persons were pro-choice (or close to this view), though there were some participants who voiced anti-abortion views based on reli-

[95] Note. The following are major points in the position of the Association, and are taken from a leaflet flyer distributed at one of the workshops organized by IPAS, at the end of 2003. The leaflet is entitled as "ESOG's Position on Abortion" (written in Amharic).

[97] Note. This writer was one of the resource persons in these workshops, and this assertion is made based on this personal experience.

gious grounds. Resource persons were drawn mainly from two professions, namely law and medicine. The presentations and the discussions addressed the magnitude of the problem of abortion in Ethiopia and the legal issue of abortion in light of the Constitution and laws of other countries.

The following provisions of the Constitution of the Federal Democratic Republic of Ethiopia (Proclamation No.1/1995) were invoked during the workshops:

> Art.35. *Rights of Women*
> (4) The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs, and practices that oppress or cause bodily or mental harm to women are prohibited.
> …
> (9) To prevent harm arising from pregnancy and childbirth and in order to safeguard their health, women have the right of access to family planning education, information, and capacity.

It was also argued that the constitutional right to privacy, which is enshrined under Article 26 of the Constitution, should be interpreted in line with the decision in the case of *Roe v Wade*. The conclusion was, therefore, that the Ethiopian law of abortion (under the 1957 Penal Code) is unconstitutional.

Moreover, the Legislature had called public meetings at major cities[98] of the country to discuss on the draft laws. Here again, abortion was one of the prominent issues that attracted public attention. Unpublished minutes of these meetings (written in Amharic) disclosed the following:

a) Although abortion was widely discussed in all the fourteen cities, votes on the issue were taken in five cities, only. Accordingly, despite the fact that these two cities have no particular culture of conservatism or the dominance of any one known religion, participants in Awasa and Dire Dawa voted against decriminalization of abortion. Interestingly enough, the same participants voted for the criminalization of prostitution, which is not a criminal act under the existing law.
b) Participants from Ambo, Dessie, and Adama voted in favour of the position of the draft law.
c) It appears that no votes were taken in the meetings held at Harrar, the minutes imply that the dominant position was allowing abortion on demand when pregnancy resulted from extra-marital relationships, provided that it does not endanger the mother and allow the act in a restrictive manner, and in case when the pregnancy is the result of marital union.

[98] These cities are: Jijiga, Awasa. Harrar, Assosa, Desse, Arba Minch, Assayita, Nekemte, Mekelle, Adama, Dire Dawa, Bahr Dar, Gambella, and Addis Ababa.

d) In all other places, namely Jijiga, Assosa, Arba Minch, Assayita, Nekemte, Mekelle, Bahr Dar, and Gambella, the issue was adequately discussed although no votes were taken.[99]

Concluding remarks

As Donald Judges correctly remarked:

> Abortion is an exceptionally serious decision for most women, arrived at after weighing numerous important considerations —many of which involve balancing a variety of responsibilities…people should, [therefore], be careful in judging a decision they have not personally faced. [100]

The root cause of induced abortion is, no doubt, unwanted pregnancy. It also goes without saying that unwanted pregnancy occurs more frequently in modern societies than the old, for at present there are more reasons to postpone one's marriage than in the past. Pursuing one's education, waiting to have certain material possessions, looking for a proper partner, etc. which were not significant causes in the past, may force one to postpone his/ her marriage and engage in pre-marital intimate relations. Moreover, even in marriage, contraception failure, rape or incest can bring about unwanted pregnancy. Biological grounds, such as inability to carry the pregnancy are also causes of induced abortion. Given the multiplicity of causes, a law that attempts to spare pregnant women from the unwanted consequences of illegal abortion, should at the same time address the root causes, without which legal condemnation alone will not bear fruit.

Apart from adverse factors such as inaccessibility of health facilities, restrictive laws have contributed to the sad predicament of those women that seek abortion. Apparently, the dire consequences of illegal abortion are nearly nonexistent in countries with liberal abortion laws while the reverse is the case in those countries that have restrictive laws.

Ethiopian abortion laws have to a certain extent reacted to the social dynamism that calls for change. Although, the researches made in the field show that illegal abortion has resulted in dire consequences than anywhere in the world, it may, however, be presumed that the researches merely indicate the tip of an iceberg. This is so, because many women still do not have access to medical care and abortion can be procured in sophisticated health facilities that can perform the procedure without a hitch. The data in every research

[99] Note. The points contained in these minutes are somewhat confusing and vague. Accordingly, in those places where participants voted for decriminalizing abortion, it is not clear whether they voted to retain the position of the existing law or that the act should be criminalized *in toto*.

[100] Judges, *Supra*, Note 2. at 33

cannot thus capture the real figures of actual abortions. Nor can the extent of abortion and its adverse consequences be captured through data gathered by researchers.

Be this as it may, it will be imperative to ask whether the new law has addressed the issue adequately. In the opinion of this writer, the new law still seems to be half baked. Needless-to-say, the law does not recognize contraception failure, the number of children in a family, HIV/AIDS, and the predicaments of the unmarried and prostitutes as justification for legal abortion. Failure to take such social and economic factors into account is clearly among the major shortcomings of the 2004 Revised Criminal Code.

Although the new law has introduced a major shift, it still needs to adjust itself to the reality and allow abortion for every justifiable ground. Given the fact that a woman bent on aborting a fetus cannot be deterred by any sanction of the law, *allowing abortion on demand* is the only realistic option. Since the law does not address the above mentioned causes of unwanted pregnancy and others, it is currently susceptible to widespread violations through underground abortions.

Soon after the enactment of the law, the Ministry of Health issued "*Technical and Procedural Guidelines for Safe Abortion in Ethiopia*" in June 2006. The Guidelines, *inter alia*, provide that:

> "abortion is the termination of pregnancy before fetal viability, which is conventionally taken to be less than 28 weeks from the last menstrual period or if this is not known, a birth weight of less than 1000 gm.; the woman seeking the service is entitled to have it within three working days, after counseling, and minors and mentally disabled women should not be required to sign a consent form to obtain the procedure."

It might take some time for Ethiopian abortion law to take another courageous step towards legalizing *abortion on social and economic grounds*. It might even take longer to allow *abortion on request*. Meanwhile, however, the issuance of the *Technical and Procedural Guidelines for Safe Abortion* by the Ministry of Health, at the heel of the new law is indeed encouraging. The Ministry is thus expected to make every needy woman the beneficiary of the new change; and it may be hoped that Ethiopian women will be spared from the unwanted and remediable consequences of unsafe abortion in the near future. ■

COMPETITION POLICIES AND LAWS:

Major Concepts and an Overview of Ethiopian Trade Practice Law

*Harka Haroye**

Introduction

Competition policy and law appertain to market and/or market reform which has become an important ingredient of the democratic process[1] in countries which are in transition from authoritarian systems to a liberal democracy. Furthermore, competition and/or competition law are not only concepts of law but have become important yardsticks of economic development.

It goes without saying that a meaningful implementation of the competition regime requires putting in place not only a proper and adequate competition law, but it also needs the establishment of an autonomous and capable competition authority. The first part of this article deals with concepts and principles related to competition policies and laws, and in the second part a modest attempt has been made to appraise the Ethiopian situation in light of what has been addressed in the first part.

Part I- Competition Policy and Law

1. Competition Policy

It is maintained that an appropriate competition policy has to include both micro economic policies and Competition law.[2] The phrase: "*competition policy*" consists of two terms, i.e., *competition* and *policy* which must be first treated separately and then jointly for the sake of proper understanding of what is behind the phrase.

In the corporate world, competition is taken as a process whereby firms strive against each other to secure customers for their products.[3] In market economies, competition refers to a situation where sellers strive for buyers' patronage with a view to achieving certain business objectives like profits, sales or market share. This can be associated with rivalry in terms of price, quality, service or combination of these and other factors that are valued by custom-

* LL.B, LL.M; Chairman of the Ethiopian Trade Practices Investigation Commission; Former Minister of Justice

[1] Andrew, Heywood; *Politics*, 2nd Edition (Palgrave, India, 2002) p. 81

[2] Cuts, *All About Competition Policy and Law for the Advanced Learner* (KBS Printers, India, 2000), 17

[3] Ibid; 1

ers.[4] On the other hand, policy refers to the general principles by which a government is guided in its management of public affairs.[5]

A businessperson or business firm competes to excel or to take the place of its rival, and under certain circumstances, the competitions may even involve attempts towards elimination. It is at this juncture that laws and policies intervene to regulate the avenues and modalities of the competition so that the public at large and the business community can ultimately benefit from predictable and enforceable rules of conduct within the framework of free competition.

Generally, business firms adopt two methods to out compete with others. One of these methods is *fair* and it is realized through means such as producing quality goods, becoming cost efficient, adopting the best technology, investing in research and development oriented activities. Under fair competition, firms do their best in terms of innovation, choice, quality and services to attract their customers.[6] On the contrary, the practices referred to as '*unfair methods*' involve the adoption of restrictive business practices such as predatory pricing, exclusive dealing, forming cartels and the like[7] rather than focusing on innovation, choice, quality and services.

Fair business practices can be associated with antimonopoly business behaviors and the unfair business practices with manifestations of monopolies, which are connected with scarcity of goods, poor quality, high prices, unresponsiveness to consumers, unreasonable, irrational, or incomprehensible terms of dealing, an arbitrary and highhanded attitude.[8] Usually, markets are far away from what is called perfect competition where a large number of firms produce homogeneous goods, fix one price, where the entry and exit are free and easy, where there is a perfect mobility of all players in the market and where all the buyers and sellers have perfect information of the conditions of the market.[9]

The notion of free market at its face value signifies that market forces should have a predominant role in the operation of the market. However, this should not imply that free market does not need a policy direction. Nor should the notion totally rule out the intervention of government. Perfect competition is simply a theoretical assumption, and it is to be noted that market imperfec-

[4] The World Bank and Organization for Economic Cooperation and Development (OECD), A Framework for the Design and Implementation of Competition Law and Policy (U.S.A, 1998), 1

[5] Black's Law Dictionary, 8th Edition

[6] Supra note 2, P.1

[7] Ibid

[8] Craig W, Conrath; *Practical Handbook of Antimonopoly Law Enforcement for Economies in Transition of Development* (2003), XVI

[9] Supra, note 2, at.3

tions and restrictive business practices are prevalent in market situations many of which are man-made. Government intervention in markets, mainly through competition policies is unavoidable because governments intervene in markets mainly through competition policies.

Competition policy refers to those governmental measures that directly affect the behavior of enterprises and the structure of industry.[10] As indicated above, an appropriate competition policy includes both *micro-economic policies* and *competition law*. Some of the microeconomic policies induced by the government have an important impact on competition and hence on the economy of developing or transitional economies. These economies are characterized by high level of public ownership, government intervention, importance of agricultural and service sectors with comparatively small industrial sectors, concentration of production in one or small number of commodities, small formal private sector, a large informal sector and dependence on imports for manufactured goods.[11]

The *first* governmental measure that has a bearing on competition, especially in transitional economies, is privatization and it refers to the transfer of ownership and management responsibility from the state to the private sector.[12] The *second* pertains to liberalization of trade wherein an attempt is made to expose protected domestic industries and services to competition from abroad.[13] The *third* measure is about relaxing foreign investment and ownership requirements whereas the *fourth* measure refers to economic deregulation.[14] In due course of a shift towards market economy, regulations like price controls and institutions like marketing boards phase out in many countries where companies are allowed to have more freedom in their decisions over pricing and production.[15]

It must be emphasized that an effective competition policy is especially essential for transition economies because their capital markets are often not as effective as those in developed countries. Moreover, they have significant import restraints, and government organs play a dominant role in setting prices and in making other vital decisions in addition to which they are highly affected by the culture of collusion rather than by competition. [16]

[10] Ibid; 17
[11] Cuts, Towards a Healthy Competition Culture … (Jaipurs Printers P. Ltd, India, 2005), p. 5
[12] Ibid; 9
[13] Ibid
[14] Ibid
[15] Ibid
[16] Robert H. Lande, *Creating Competition policy for Transition Economies*, Brook. J. Int'l law [Vol xxlll] P. 347

2. Objectives of Competition Policy

Competition policies of different countries have different objectives. This is so because there are different political systems with different economic goals and competition policies are mainly reflections of these political systems.[17] Proper understanding of the objectives of competition policy is thus important to comprehend the nature of monopoly and the problems caused by it.

In a *monopoly market form* there is generally only one firm in the concerned industry and there are no close substitutes for the product of the monopolist.[18] Close substitutes are goods or services that are considered to be economically inter-changeable by buyers.[19] Since there are no close substitutes of the product available, competition is absent in this market form.[20] What follows from the absence of competition in the monopoly market form is that the monopolist is a price maker and therefore can fix the price and allow demand to determine output, or set output and allow demand to set the price.[21] There are adverse effects that ensue from this market form. Some of these are the tendency to reduce output, to increase price and to reduce the quality or the service .[22]

By its very nature, competition policy aims at fighting monopolies and thus preserving free competition. One of the major objectives of competition policy is the protection of the consumers' interest.[23] There are three approaches in the protection of consumers' interest:

a) The thrust of the first approach, which is associated with the Chicago school, is that it ignores consumers' interest and focuses solely on *social welfare and economic efficiency*.[24] This approach has little support among policy makers and the society at large because it ignores the protection of the consumers' interest.[25]
b) The second approach recognizes the immediate and short term interests of consumers as the primary aim of competition policy. [26]
c) According to the third approach the protection of interest of consumers is essentially a long term goal, and its immediate concerns are to be subordinated to the welfare of the society as a whole.[27]

[17] Czeres, The Controversies of the Consumer Welfare Standard, Competition Law Review, March 2007,(http://www.global competition policy. Org)
[18] Supra, note 2, P.4
[19] Ibid, endnote 4, P.55
[20] Ibid, 4
[21] Ibid
[22] Supra, note 8, P 1-19
[23] Supra, note 11, P.13
[24] Supra, note 17, P 125
[25] Ibid
[26] Ibid
[27] Brodly, *The Economic Goals of Anti-trust Efficiency*, Consumer Welfare and Technological Progress (1987) NY Univ LR, supra note 17, P.125

It is a point of consensus that no democratic government would viably afford to impose competition policy that solely focuses on efficiency or on social welfare. It has to consider the interest of consumers.[28] But how does competition policy protect the interest of consumers?

Competitive market forces business enterprises to do their best to attract and retain their consumers. Towards this end, enterprises have to strive towards excellence in innovation, choice, quality service and price.[29] Competition, in effect, offers a greater choice of products at lower prices because of the fear that only the fittest will survive in the market.[30] Consumers are better off under such setting because purchasing power of consumers increases as a result of lower prices,.

For example, an Ethiopian farmer who used to buy battery cells for 5 Birr each saves Birr 3 if, due to competitive market, the price comes down to Birr 2 each. The farmer can thus use the margin to buy something else. But we don't have to forget that business firms are consumers too. In their business activities they purchase the products of other firms as their inputs and the price and quality of these inputs partly determine their own competitiveness and profits.[31]

An equally important objective of the competition policy is that it stimulates efficiency and competitiveness across the economy.[32] Economic efficiency would be taken as an encouragement of allocation and dynamic efficiency that could be materialized through lowered production costs and technological change and innovation.[33]

Yet, the most common objective of competition policy is the maintenance of the competitive process or of free competition. As this objective is the stepping stone for the other objectives, it aims at striking down or preventing unreasonable restraints on competition.[34] The Supreme Court of U.S.A in its decision in the case between *Northern Pacific Railway Co. v. United States* (1958) aptly summarized the objectives of competition policy. It stated:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time pro-

[28] Supra, note 17, p.127
[29] Supra, note 2, p.6
[30] Cuts, *Competition Policy and Law Made Easy* (Jaipur Printers P.ltd, India, 2001) 1
[31] Supra, note 11, p 13
[32] Ibid
[33] Supra, note 4, p. 3
[34] Ibid, p. 2

viding an environment conducive to the preservation of our democratic political and social institutions.[35]

3. Competition Law

Competition law is also referred to as antitrust or *antimonopoly law* or *restrictive business legislation*. The function of competition law is to prevent anti-competitive business practices by firms and to prevent unnecessary government intervention in the market place.[36]

3.1- Competition policy versus competition law

Although competition law is one component of competition policy, competition policy and competition law are not identical. Nor does one stand for the other. Competition policy could be taken as a *positive instrument* because it facilitates competition, while competition law could be regarded as a *negative instrument* because it prevents anti-competitive practices.

In fact, competition law is believed to complement other policies that promote competition by preventing restrictive business practices and by facilitating market access. In this regard, it could be said that the enforcement of competition law is a necessary but not a sufficient condition for maintaining fair competition. This is so because in addition to competition law there are competition enhancing policies which ought to be in place.

Such policies, *inter alia*, include liberalized trade policy, relaxed foreign investment and ownership requirements, economic deregulation and privatization. Thus, microeconomic policies that enhance competition and competition law are two sides of the same coin. Furthermore, it could be said that competition policy is an economic concept whereas competition law is a legal concept. [37]

Competition law mainly targets so-called "*restrictive business practices*" (RBPs). These practices which constitute the main content of competition law are abuse of dominance, anti-competitive arrangements, otherwise called collusion, and mergers and acquisitions.[38] Apart from these practices, some countries provide provisions for unfair competition [39] in their competition laws. For example, the 2003 Ethiopian Trade Practices Proclamation and the 2003 Tanzanian Fair Competition Act address the issue of unfair competition.[40] Even before the 2003 Trade Practices Proclamation came in to

[35] A statement cited at note 8, p. 1-20
[36] Supra, note 2, p. 17
[37] Ibid
[38] Supra, note 11, p. 28-30
[39] Supra, note 30, p. 24
[40] Article 10 of the 2003 Ethiopian Trade Practice Proclamation and article 15 FF of the 2003 Tanzanian Fair Competition Act

force in Ethiopia, the concept of unfair competition was embodied under Articles 130-134 of the 1960 Commercial Code and under Article 2057 of the 1960 Civil Code.

3.2- Abuse of dominance

Distinction has to be made between a legitimate dominant market position and abuse of dominant market position. What the law prohibits is *abusive behavior* but not *dominant position* as such. As it has been rightly maintained, firms could achieve a legitimate dominant market position, for example, through innovation, superior production or distribution methods or through greater entrepreneurial efforts. [41]

The fact that abusive behavior requires the existence of dominant market position is a matter of common knowledge because a market power that does not exist cannot be abused. Equally true is that a specific dominant market position that does not result in abusive behavior is outside the scope of competition law.

The analysis of dominant market position will be meaningful only when it is done with regard to a relevant market. The relevant market for the assessment of a dominant position is the market that comprises all products or services that actually or potentially compete with each other.[42] To define a relevant market is to describe the context for the exercise of market power:- the ability of an enterprise to profitably raise price above competitive levels for a significant period of time.[43]

3.3- Components of market

A market has two components: the *product market* and the *geographic market.*[44] The product market describes the goods or services that are bought and sold whereas the geographic market refers to the location of the production or the sale of the product. The whole aim is to determine the extent to which purchasers would switch between alternate products or source of supply[45] in response to a small but significant and non-transitory price increase. In other words, the product market is all about those products or services which consumers would switch to if price of the relevant product or service rose, when that switching prevents prices from rising above the competitive level.[46]

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[41] Supra, note 4, P 69

[42] EU Commission Notice on the definition of Relevant Market for the purposes of community competition law (97/C 372/03)

[43] Supra, note 4, P 10

[44] Ibid

[45] Ibid

[46] The U.K Guide line on Abuse of Dominance, Article 3(3)

The geographic market is defined by the buyers' view of the substitutability of products made or sold at various locations.[47] It is believed that if buyers of a product sold at one location were to switch to buying the product from a source at another location in response to a small but significant and non-transitory price increase, then those two locations are in the same geographic market.[48]

Once a relevant market has been defined, it is necessary to establish the existence of a dominant position of a firm, the essence of which is the power to behave independently of competitive pressures. Dominance of market power helps the firm in question to charge higher prices and to engage in some anti-competitive practices which could exclude or deter competition from the market.[49] It is to be noted that the market share of a firm and the existence and the extent of market entry barriers [50] stand out as crucial among the factors which could show the dominant position of a firm.

3.4- Market share and market entry barriers

Production capacity, production volume and sales by value are commonly taken as the most important factors [51] among indicators of market share of a business firm. Under competition laws of some countries, a particular market share (often 40-50%), creates a rebuttable presumption of dominant position.[52] However, it is impossible to set out definite thresholds at which a firm can be judged as having or not having a significant market power.[53] At any rate, the greater the market share of a firm, the more likely is that firm to exercise dominant market power[54].

As indicated above, the existence and the magnitude of market entry barriers are important factors which show whether a firm has a dominant market position. If entry to market is easy and sufficiently profitable, the firm's dominant position will inevitably erode over time.

There are different categories of entry barriers with different effects. There are absolute barriers to entry and there are those which are not absolute. For example, if a business firm has to be licensed before it enters into a certain business activity, the government license serves as an absolute barrier because the firm in question cannot enter into the business without having that license.

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[47] Supra, note 4, P 13
[48] Ibid
[49] Supra, note 46, Article 3(9)
[50] Supra, note 4, P 71
[51] Supra, note 8, P 5-148
[52] Ibid
[53] Ibid, 70-71
[54] Ibid

Generally, it can be said that the question of entry is the question of time, money and profit opportunity. There are factors which strengthen the dominant market position of the already existing business firm/s by repelling the new entrants. This is so, where, among other things, entry into a certain business takes a long time and if it requires spending a lot of money, and above all where there is a less or minimal profit opportunity.

3.5- Abusive practices

The following behaviors are commonly considered as abusive and prohibited by competition laws of many countries.

a) Excessive price on a product or a service

Excessive prices that restrain competition must be stopped.[55] But this does not mean that a price of a commodity or a service in a free market economy has to be regulated by the state. Moreover, it does not imply that every price increase is unacceptable because price may increase for different reasons, including surges in demand, high unit costs and exercise of market power.

b) Price discrimination

Where a seller charges different prices according to the profile of the customer but in the absence of appreciable cost differences that might justify different prices,[56] there is said to be price discrimination.

c) Refusal to deal

Competition law does not generally oblige firms to cooperate with competitors against their will. But the law prohibits refusal to deal in situations where dealing with the competitors does not force the firm in question to incur unnecessary expenses or damages and when the dealing is crucial for the business operation of the other competitors.

d) Tie-in

The fourth abusive practice is what is commonly called the *tie-in* which consists in making the sale of one product conditional upon the purchases of another product. This behavior is seen as abusive only if the firm has a dominant market position, and even when it does, the decision on whether or not the tie-in is abusive requires the analysis of the purpose of the tie-in and the market context.[57]

[55] Supra, note 4, P 73 – 74
[56] Ibid
[57] Ibid, 76

e) Predatory pricing

Under what is called *predatory pricing*, the firm sells its products at prices so low as to drive competitors out of market to prevent new entry and to successfully monopolize the market. At its face value, predation or selling goods or services at unreasonably low prices has nothing wrong in it or may even appear advantageous to the consumers. But predation is condemned not because it results in low prices but because it is likely to lead to reduced output and high prices in the future.[58]

f) Vertical restraints

The sixth commonly prohibited abusive business practices are vertical restraints. Vertical restraints are restrictions that are imposed by the upstream firm (a manufacturer or a wholesaler) on a downstream firm (a retailer). In these restraints, the downstream retailer agrees to limit where it sells the product, or not to sell rival products and, at times, the retailer agrees not to sell below prices established by the manufacturer.[59]

3.6- Regulation of restrictive business agreements

Competition laws of many countries regulate restrictive business agreements as their second component. These agreements are of two types. There are horizontal agreements, that is, agreements between competitors and there are vertical agreements, i.e., agreements between upstream and downstream firms.

Not all horizontal agreements hurt competition. Some horizontal agreements are important for the market because they foster efficiency, reduce risk, create new or improved products or methods of distribution or they may create a better information flow thereby helping the market to be competitive.[60] For example, an agreement between competitors to construct a new plant that none could build independently, to conduct research and development that none could afford independently, to jointly purchase supplies and thereby to reduce their costs, to form a network of suppliers to offer a new product or reduced costs are competitively beneficial to the firms as well as to the market itself.[61]

In contrast, there are horizontal agreements which do impede competition, by restricting output and raising prices. Specifically, there are horizontal agreements that eliminate competition, e.g., price fixing, bid rigging, and alloca-

[58] Ibid, 77 -78
[59] Ibid, 78 – 79
[60] Ibid, 9
[61] Ibid

tion of markets.[62] The following are some of the vertical agreements considered as restrictive and hence prohibited.[63]

- *Resale price maintenance*: It is an agreement where price floors or ceiling are imposed by the manufacturer.
- *Exclusive distribution agreement:* It is an agreement whereby distributors are assigned exclusively within a geographic area or over particular types of clients or over specific products.
- *Exclusive dealing agreement:* It is an agreement whereby downstream firms are prohibited from dealing with competing producers or distributors.
- *Tie-in sale agreement:-* It is an agreement whereby downstream firms are required to purchase a certain range of products before being allowed to purchase a particular product. An extreme example is what is called "Full line forcing", whereby a downstream firm is required to purchase an entire product range.
- *Quantity forcing:* It is an agreement whereby downstream firms are required to purchase a minimum quantity of a product.

3.7- Mergers and acquisitions

The concern of competition law includes mergers and acquisition. The primary concerns on mergers and acquisition emanate from the fact that both can result in the concentration of market power. Sometimes, market structures become more concentrated over time resulting in the success of few firms and in the failure of the rest not because of the competitive efforts by the former but because of mergers or acquisitions. Thus, if it is the concentration of market power that is suspicious, then the rationale for controlling mergers and acquisitions is simple: it is far better to prevent firms from gaining market power than to control the already created power.[64]

There are three categories of mergers: horizontal, vertical and conglomerate.[65] *Horizontal mergers* take place between two firms that are actual or potential competitors, which sell the same products or close substitutes. The term "horizontal" signifies the fact that the two enterprises are at an identical level in the chain of production. *Vertical mergers* take place between firms at different levels in the chain of production. *Such firms* have an actual or potential buyer-seller relationship. *Conglomerate mergers* are neither horizontal nor vertical; they neither produce competing products nor are in an actual or potential buyer-seller relationship.[66]

[62] Ibid, 19 – 20
[63] Ibid , 36 – 37
[64] Ibid, 41
[65] Ibid, 42
[66] Ibid

Not all mergers pose a threat to competition in a given market, as some of them are the result of investments by firms with available cash or result from the better use of underutilized enterprise resources; and the impact of other mergers on competition and on consumers is indeed negligible. From those categories of mergers indicated above, horizontal mergers are the most suspect because they tend to reduce the number of independent competitors in a particular market.[67]

If it is more desirable to prevent firms from gaining concentrated market power than attempting to control the same power after its creation, the most effective method is a notification obligation, that is, requiring notification by firms of their intent to merge in advance of consummation. The requirement of such notification is to permit the competition authority to investigate the transaction and, if necessary, to prevent or amend the merger transaction before it becomes effective.[68]

One important point that has to be underlined is that not all mergers need be notified in advance. The requirement to notify all merger cases would create an unnecessary compliance burden on the business community and an excessive workload for the competition authority which has to review every notification. The desirable method to follow is to set a minimum threshold below which mergers should not be reported. The size threshold may be expressed in terms of annual sales (turnover), total assets or both. Additionally, the size of the transaction (the value of the securities or assets to be acquired or merged) and the size of the parties (the minimum size of either party) should be included into the threshold.[69]

3.8- Unfair competition

In a few countries, the competition law includes rules on unfair competition. By unfair competition, the following is understood:

> " Dishonest or fraudulent rivalry in trade and commerce, especially, the practice of endeavoring to pass off one's own goods or products in the market for those of another by means of imitating or counterfeiting the name, brand, size, shape, or other distinctive characteristics of the article or its packaging." [70]

Thus, by its very nature, this practice infringes the intellectual property rights of individuals or individual firms. Yet, its overall impact on competition, a country's economy, or the market in general is said to be minimal. Thus, if the competition authority preoccupies itself with enforcing this field of the competition law, it will spend its time and resources in arbitrating basically

[67] Ibid
[68] Ibid, 56
[69] Ibid
[70] Supra, note 5

private disputes.[71] According to the proponents of this view, the unfair competition cases must be arbitrated by regular courts.

The prohibited behaviors under the notion of unfair competition are:- (1) The distribution of false or misleading information that is capable of harming the business interests of other firms, (2) The distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods, (3) False or misleading comparison of goods in the process of advertising, (4) Fraudulent use of another's trademark, firm name, or product labeling or packaging, (5) Unauthorized receipt, use of dissemination, of confidential, scientific, technical, production, business, or trade information. [72]

4. Competition Authority and Competition Culture

The success of competition policy depends not only on a well drafted piece of legislation, but requires effective enforcement of these provisions. This in its turn necessitates putting in place a proper competition authority and building-up a competition culture. As regards the competition authority, three things are crucial, namely, *independence, powers and resources*.

4.1- Competition Authority

Competition authorities may take one of a number of different structures. The most independent competition authorities are not only administratively separated from the government but they are staffed by competition professionals and they do not rely on the government for their budgetary allocations. On the other hand, the least independent authorities are those which form part of government ministry and therefore are subject to civil service restrictions on recruitment and on central budget allocations in their administrative activities.[73]

The powers of competition authorities may be divided into investigative and adjudicatory. As regards these powers, practices differ from country to country. In countries like Canada, South Africa, Tanzania and Zambia, the investigative power is exercised by one body while the adjudicatory power is exercised by another.[74] On the other hand, the competition authorities of some countries (for example Pakistan) exercise both the investigative and the adju-

[71] Supra, note 4 P. 147

[72] Ibid

[73] Supra, note 11, P 40

[74] UNCTAD Guide book on competition systems (United Nations, New York and Geneva, 2007) pp. 35,135,150,and 159 respectively

dicatory powers.[75] In countries like India, Tanzania and Zambia, the competition authorities have adjudicatory role in the sense that their decisions have a binding force whereas in Kenya this decision-making power is vested with the concerned ministry[76]. The powers granted to competition authorities should include the power of advocacy which is important to create competition culture necessary as a helping hand in the implementation of competition law.

Any government which wants to implement competition law in a meaningful way, has to provide the necessary support for the competition authority. In this regard the level of financial support available and the way it is used is important; but equally important is the man-power. In developing countries, in particular, the shortage of man-power is understandable because there is only a small pool of persons with knowledge of competition related laws or economics or with regulatory experience. But the same cannot be said as regards the shortage of other resources because this problem could be solved over-time as the awareness level of the concerned authorities and/or officials improves.

4.1- Competition Culture

Governments committed to implement competition policy and/or competition law or its competition authority should do their utmost to build up a competition culture, because fair competition cannot develop in its absence. Needless -to-say, competition culture promotes a well regulated market, efficient allocation of resource and production processes in the economy, and stimulates firms to compete with one another in price, in quality and through the innovation of new products. The benefits of this efficiency do not just accrue to firms, but lead to greater value and choice for customers, environmental protection and sustainable development.

Competition culture is made up of a number of elements of which laws form only one part.[77] There are many stakeholders that can contribute to the flourishing of competition culture. Active consumers, responsible business, sensitized media and those other institutions which work in cooperation with the competition authority could be mentioned as examples.[78]

It is to be noted that competition culture is a result of comprehensive, continuous and strenuous advocacy work. Advocacy work targets beyond unfair business practices in the private business sector; and it further aims at solving problems caused by unnecessary public intervention in an economy and

[75] Supra, note 11, P 41
[76] Ibid
[77] Ibid, 23
[78] Ibid, 23 – 24

problems caused by the implementation of state measures which advance private interest [79].

Moreover, competition advocacy demands the performance of different activities. These activities include performing reviews of existing and proposed laws and regulations, providing advice on state measures that might foster anti competitive practices and associated resource misallocation, conducting outreach activities to educate the public directly through the holding of seminars and the publication of news letters, or indirectly through the media, informing judges and legislators about competition policy related matters, and undertaking studies of actual or potential state measures that may influence market out comes .[80]

Part II- The Case of Ethiopia

Starting from the transitional period, the Ethiopian Government has pledged to enforce free market economic policy and it has reiterated its position in the Trade Practices Proclamation of 2003. The Trade Practices Proclamation (hereinafter the Proclamation) regulates certain areas of competition and has established the Trade Practices Investigation Commission (hereinafter Commission) which became operational starting from September 2004.

But the Ethiopian competition regime is facing a number of problems which need timely attention. These problems could be divided into those emanating from the Proclamation itself and those which do not have any relationship with the Proclamation.

The Proclamation does not offer a complete set of competition rules. Article 6(1) of the Proclamation should be mentioned in this regard in that it omits any reference to forms of collusion other than "written" or "oral" agreements. In order to prevent undertakings from evading the application of Article 6(1) by colluding in a way that falls short of an agreement, other categories of collusive behaviour should be included, that is, the concept of 'concerted practice' and 'decision' by an association of firms or undertakings.[81] Moreover, Article 6(2) of the Proclamation lacks precision and a clear reference to vertical restraint although it prohibits certain collusive behaviors.

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[79] Simon J. Evenett, "Competition advocacy: Time for a rethink?" *Northwestern Journal of International Law and Business*, 26: 495 (2006) 497 – 98

[80] Competition advocacy in regulated sectors: Examples of success, Report of the capacity Building and competition policy Implementation working Group, International competition Net work, Seoul, Korea at 47 – 48, cited in a work under note 79.

[81] International Development Law Organization (IDLO) Report on Reviewing the Institutional and Legal Framework for the Development of a Better Competition Law Regime in Ethiopia (2007), 9

The provisions of the Proclamation on abuse of dominance have attracted the attention of many observers and experts. The main problem pointed out by these observers and experts is the absence of a definition of relevant market and dominance in the Proclamation. It may be argued that the title of Article 11 of the Proclamation is an indication for the prohibition of abusing dominant market power. The absence of definition of dominance in the Proclamation has led some observers to interpret Article 11(1) as not prohibiting the abuse of dominant market power at all.[82]

It is true that the content of Article 11 is misleading mainly because the provision does not define relevant market and market power. But in light of its title, the purpose of this article is the prohibition of abusing dominant market power. The argument which does not see any relationship between those prohibited practices under the provision and relevant market and market power is simply foreign to the concepts and notions on abuse of market power. Furthermore, Articles 11(2) (a) and 11(2) (i) are indeed confusing because they share elements of predatory pricing. Furthermore, there seems to be a slip of the pen regarding Article 11(2) (f) of the Proclamation because the proper place for the practices it prohibits is unfair competition but not abuse of dominance.

Whether or not the competition law of different countries provides for mergers and acquisitions has become one major international yardstick to measure the adequacy of those laws. The Trade Practices Proclamation of 2003 does not include provisions on mergers and acquisitions. And, the absence of procedural rules in the Proclamation complicates the problem further.

The Proclamation bundles competition and non-competition provisions. Examples of non-competition provisions are Article 10(2) (h) on anti-dumping and Articles 20 and 21 which are on labeling and price regulation respectively. One obvious problem of this bundling is that it diverts the attention of the competition authority from real competition issues. The other problem is that the non-competition cases could remain unresolved. Moreover, there are problems in the Ethiopian competition regime pertaining to the organizational setup of the Commission, man power, budget and other resources.

The Commission has investigative and adjudicatory powers. The fact that the Commission is entrusted with powers to decide on cases it has investigated, obviously raises the problem of partiality. However, one may contend that there is no issue of bias as long as the parties of the decision can file an appeal with a court. Most competition authorities, at national or at international level (such as the European Commission, US Federal Trade Commission,

[82] Ibid, 10

German competition authorities) decide upon the case they have investigated themselves.

In spite of the Commission's power of investigation, only hearings have been conducted so far. I don't remember any case decided by the Commission which was supported by an investigation which involves fieldwork. One obvious explanation for this problem is lack of necessary manpower. If the investigative problems of the Commission remain unaddressed, the competition or the market problems of the country will remain unaddressed and the competition authority will remain preoccupied with unfair competition cases.

Article 55(4) of the FDRE Constitution entrusts the House of Peoples' Representatives with the power to enact a Commercial Code and what the Proclamation regulates clearly falls within the scope of commerce. In light of this, the Proclamation applies nationwide. But the Commission does not have branch offices in the regional states or at least in some of them.

As a matter of fact the Commission is composed of high ranking government officials. So far, I don't remember any strong case in which the impartiality of the Commission was questioned. But in light of its composition, the fear of partiality cannot be totally ruled out.

The members of the Commission serve on a part-time basis because they have to perform regular duties elsewhere. The Proclamation provides for the establishment of a permanent commission but what we have in practice is a board-like collection of individuals. Until very recently, there were five Commission members and there is only one lawyer.

One of the reasons that explain best the establishment of competition authorities is the desire of having speedy decision on competition cases. While the decisions of the Commission have never been that speedy, they are of a good quality. The report submitted to the World Bank by the International Development Law Organization (IDLO)[83] in March, 2007 alleges that the Commission has received no competition complaints up to now, and that it has not conducted a single competition investigation since its creation.

However, the source of this information is hearsay and the assertion that the Commission has not conducted a single competition enquiry until now is simply false. It is to be noted that *competition enquiry* in the course of adjudication is different from *investigation* (which includes field work). It is true that many of the cases decided by the Commission during the period in question were related to unfair competition cases. But there were competition cases as well.

[83] Ibid, 8

The Commission is accountable to the Minister of Trade and Industry as far as its decisions are concerned. This is so because Sub-articles (2) and (3) of Article 15 of the Proclamation provide that any administrative measures or penalty must be approved by the Minister. The accountability of the Commission to the Minister regarding planning and reporting is somewhat acceptable; but to make the Commission accountable to the Minister in matters pertaining to its decisions utterly erodes the Commission's independence.

Situations could arise where the Ministry of Trade and Industry appears before the Commission as a party. To give the final say of approval to the Minister on a case in which the Ministry is involved as a party, totally undermines the impartiality of the system and defeats the whole notion of justice. For example, in a case involving the export of *teff*, Ministry of Trade and Industry was a plaintiff.

The Commission does not have its own secretariat because Article 2(9) of the Proclamation designates a department under the organizational structure of the Ministry to fulfil this task. The problem as regards this arrangement is that the members of this department are not accountable to the Commission and they are not in a position to give proper service to the Commission. This is partly due to shortage of resources and lack of experience.

The Commission has two lawyers and one economist on a full-time basis and one more lawyer as a part-timer. But none of them had previous training in competition economics or competition law. The Commission does not have its own budget either. Though there has been some progress regarding the provision of resources, much remains to be done in this area as well.

Conclusion

Development is incomplete without implementing competition policy and/or competition law; and endeavors to build a democratic system are incomplete without market reform. Therefore when we talk about competition policy and/or competition law, we are in other words talking about development, and serious development endeavors presuppose the implementation of competition policy and/or competition law.

Competition (either negatively or positively) affects business, consumers, as well as the whole nation. And more importantly, all of us are consumers in one way or the other. Thus, we ought to join hands and work towards the proper implementation of competition policy and/or competition law.

The Ethiopian competition regime is in a very bad state and it must be rescued very soon. The only way to do it is to put in place an adequate competi-

tion law and a truly independent and strong competition commission and a competition tribunal.

It was as far back as 1889 and 1890 that Canada and USA, respectively, laid strong foundations for a proper competition regime. If Ethiopia cannot do so after over a century, we need to indeed take the blame. Until Ethiopia's competition regime is comprehensively addressed, the business community, consumers of goods and services, and the transitional economy at large are bound to steadily encounter the pitfalls of inadequate competition laws and insufficient regulatory mechanisms. ■

SUBSIDIARY CLASSIFICATION OF GOODS UNDER ETHIOPIAN PROPERTY LAW: A COMMENTARY

*Muradu Abdo**

Introduction

The Civil Code of Ethiopia (the Code) classifies goods into corporeals and incorporeals[1]. Corporeal goods, in turn, are divided into movables and immovables[2]. The classification of corporeal goods into movables and immovables in the Code can appropriately be termed as the primary classification of goods. Numerous other classifications complement such primary classification of corporeal goods. These other classification of things can collectively be termed as subsidiary (complementary or secondary) classification of goods. The subsidiary classification of things includes corporeals and incorporeals, consumable and non-consumable, fungible and non-fungible, divisible and indivisible, principals and fruits, things in public domain and private domain, collective and personal assets, and ordinary and special movables.[3]

There are numerous factors that set the primary classification of goods under the Code apart from the subsidiary classification of things. First, the division of corporeal goods into movables and immovables permeates the entire pri-

* LL.B, LL.M; Lecturer-in-Law (Faculty of Law, Addis Ababa University)

[1] The title of Book III of the Code which is entitled "Goods" as well as the reading of Article 1126 of the same implies that the subject matter of property rights under the Code is goods. In this Commentary, I have employed the terms "things", "corporeal goods," "property" and "goods" interchangeably to mean the resources, tangible or intangible, over which property rights may be established. The Code uses these words rather inconsistently.

[2] The English version of Article 1126 of the Code classifies "all goods" into movable and immovable. The reading of the Amharic and French versions of Article 1126 of the Code shows that what is divided into movable and immovable under this provision is not just goods but corporeal goods. See Billilegn Mandefro, Revised Unofficial Translation of Arts. 1126-1500, 1647-1674 of Book III, Civil Code (1960) From the French Original Draft, (AAU, Law Library, Unpublished) (1973-1975).

[3] There are other classifications with secondary importance under Ethiopian law. See Article 665/3 of the Criminal Code of Ethiopia (2005) which divides movable things in terms of value into those things with `very small economic value`` and those things with higher economic value. See also Article 669/1 and Article 681/2 of the same which deal with ``sacred or religious objects, or objects of scientific, artistic or historical value…` See also Article 1094 of the Code which divides things with sentimental value (family objects) and those things without sentimental value. Discussions about intrinsic and accessories and elements as regulated in Articles 1131-1134, and Articles 1135-1139 of the Code are not made here since they are an aspect of the primary division of corporeal goods under the Code.

vate and public law of Ethiopia generally and the Code particularly.[4] Second, the majority of the provisions of Book III of the Code are devoted to the regulation of the various aspects of movables and immovables goods.[5] Unlike the primary division of corporeal goods, the subsidiary division does not have a pedigree in the history of the civil law tradition to which Book III of the Code is traceable. Further, the primary classification of goods, which is based mainly on a lay notion of mobility, is considered to be fundamental in the structure of the Code. The primary classification implies the significance accorded to immovable property in Ethiopia, be it in the past, present and in the foreseeable future. Finally, the division of things into movable and immovable is closer to common sense; such division is also thought to be understandable to non-lawyers. Hence, when it comes to classification, the Code is designed in such a way that the primary division would have far-reaching consequences while the subsidiary divisions would have comparatively limited effects.

The above distinctions do not however imply that the subsidiary classification of things is trivial which does not require any treatment in property law. Nor do such distinctions between the primary and subsidiary classification of goods suggest that property law literature should offer a scant attention to the subsidiary classification. The differences between the two groups of goods do simply imply the relatively greater importance given to immovable things in the Ethiopian property law.

The subsidiary classification of things in the property law of Ethiopia is numerous and quite useful to fully grasp the basics of property law. The subsidiary classification of goods is valuable in order to settle some disputes. As will be shown later on, there are several issues of acquisition, transfer and extinction of ownership in respect of things which are not addressed in the Code by the primary classification. The subsidiary classification steps in to fill such gaps in the Code. Without the complementary role assigned to the subsidiary classification, many issues of property law would be left unregulated in the Code. In addition, the uniqueness of certain goods (e.g., those in the public domain of the state) warrants specially designed rules. The subsidiary classification can subsume the primary classification; and as such it is possible to craft property law of a given country without even making men-

[4] The law of movables and immovables affects the majority of the notions included in Book III of the Code, contract law, agency law, law of persons, mortgage, antichresis, civil procedure, criminal law and commercial law, etc.

[5] For example, the following articles in the Code do exclusively apply to immovable property: Arts. 1207-1256 (special rules applicable to immovable property and use and ownership of water), Arts 1359-1385 (servitude), Arts 1460-1488 (expropriation) and Arts 1553-1646 (registration of immovable property).

tion of the primary classification of things. The use of division of corporeal goods into movables and immovables is not thus something that cannot be dispensed with.

Property law literature has given little coverage to the treatment of subsidiary classification of things. Moreover, the legal rules dealing with subsidiary classification of goods are scattered over the various sections of the Code and other laws, which make a comprehensive treatment of such rules a task difficult to accomplish. Apart from their sparse distribution, many of the rules on subsidiary classification of things are incorporated in the Code in a manner not easy to discern. Such arrangement of and approach to the rules pertaining to subsidiary division of goods in the pertinent legal texts perhaps makes them go unnoticed.[6]

This Commentary considers the nature, criterion, significance and legal effects of the subsidiary classifications of things under Ethiopian property law. This explanatory endeavor will hopefully make rules relating to the subsidiary classification of things more explicit, accessible and hence less obscure to a student of property law. This Commentary relies on analysis of the pertinent legal provisions of the Code and the Commercial Code of Ethiopia as well as on comparative law.

1. Corporeals and incorporeals

The division of goods into corporeals and incorporeals is one of the multitudes of subsidiary classifications recognized in the property law of Ethiopia. A corporeal thing is any product a human person can perceive whereas an incorporeal thing is any product that humans cannot perceive, but which has economic value.[7] Incorporeal things are rights of property that can only be claimed or enforced by legal action and not by taking physical possession such as bank accounts, shares, trademarks, trade secrets and copyrights. The critical test for classifying things into corporeal and incorporeal products is human perception**.**

[6] Recently, the writer has gone through property law course outlines of five different law schools in Ethiopia in order to see if issues related to subsidiary classification of things are covered in property law classes in the country. Assuming that what is taught is what is included in a course outline, the result is that such course outlines have not included the various types of secondary classifications with the exception of the classification of things into private domain and public domain of the state, which appears to be included because it is included in the Code at a paragraph level.

[7] See the Constitution of the Federal Democratic Republic of Ethiopia, Article 40/2, Proc. No. 1. 1995, Fed. Neg. Gaz., Year 1. No.1. This sub-article defines private property in terms of tangible and intangible product with value.

Roman law classified objects, i.e., all things whether or not appropriable, into *res corporeals* and *res incorporeals*. To the Romans *res corporeals* meant physical objects and included the right of ownership, which could be felt by the senses. To them *res incorporeals* meant, on the other hand, objects without physical existence but having pecuniary value such as inheritance, obligations and all real rights with the exception of ownership,[8] which curiously was regarded as objects having existence in space. The Romans introduced this dichotomy since they thought that possession and obtaining ownership was thought to be possible in respect of physical objects only.[9]

Article 461 of the Louisiana Civil Code divides things into corporeal and incorporeal. Corporeal things, under this Code, are those objects which are made manifest to the senses, which we may touch or taste, which have body, whether animate or inanimate.[10] In the same Code, incorporeal things are objects which are not manifest to the senses, and which are *conceived* only by the understanding such as inheritance, servitudes and obligations.[11] The French Civil Code of 1804 does not provide for the division of things into corporeals and incorporeals. But authorities there have arrived at a slightly different version of this classification by way of inference from the joint reading of several articles of the French Civil Code, i.e., the division of estates (*biens*) into things (*choses*, *biens* coporeals) and rights (*droits*, *biens* incorporeal).[12] Such classification has importance in relation to the rule under Article 2279 of the French Code that states that possession is equivalent to ownership in relation to movables as such rule does apply only to corporeal movables.[13]

Under the German Civil Code of 1900, property interests such as ownership, usufruct and right of recovery may be established only over corporeal things. The law of property in that country does not govern incorporeal objects, which do have economic value and are the subject matter of appropriation.[14]

In the Ethiopian property law, the distinction between corporeal and incorporeal goods is important because there are numerous articles applicable to cor-

[8] Roman jurists, conceived ownership not as an intangible thing but as a tangible thing because they were unable to distinguish the right established on an object from the object over which the right was constituted. See Marcel Planiol, Treatise on the Civil Law, Vol 1., Part II 12th Ed. 1939 (Trans by Louisiana Law Institute) at 282.

[9] Later in the course of the evolution of property law, it was appreciated that real rights such as usufruct and servitude could be the subject of possession, and thus the formulation of the concept of quasi-possession in relation to such rights. Id., at 341.

[10] http://www.findlaw.com/11stategov/la/civilcode.html (accessed January 10, 2008).

[11] *Id.*

[12] See Marcel Planiol, *Supra* Note 8 at 282.

[13] *Id.*

[14] See Athanassios N. Yiannopoulos, *Infra* Note 29 at 775.

poreal goods alone;[15] there are also provisions in the Code whose application is limited to incorporeal things.[16] The relevance of the dichotomy also lies in the message of Article 1126 of the Code. The governing version of this article classifies corporeal goods into immovable and movable. In addition, division of things on the basis of corporeality is implicitly recognized in, for example, Article 1128 and Articles 1347-1358 of the Code. One can also gather the division of goods into *corporeals* and *incorporeals* from the title of Book III of the Code by way of inference. The division under consideration is also enshrined in the FDRE Constitution.[17]

For the purposes of mode of acquisition and transfer of property rights, the Code equates incorporeal goods with those whose existence can be ascertained by the senses. This division is of some importance in the law of possession; in the case of incorporeal goods, the law of possession comes up with what we call quasi-possession since intangible things cannot be physically controlled in the sense of material assets. The possession of incorporeal things is expressed via the continued enjoyment thereof or by defending the right when the occasion calls for it. In the context of the law of usufruct, the beneficiary cannot make physical use of intangible things; her right is limited only to the enjoyment of the fruits of such subject matter.

For instance, a usufructuary or a copyright of trademarks or of a trade secret or of a share in a business association or of a credit or generally of an incorporeal thing may only reap the fruits thereof. It is not possible for such usufructuary to think of the other right (e.g., the right to physical control and use), which she would enjoy, if her usufruct is constituted over a non-consumable thing, say, for instance, a car. The law of loan envisages a contract between a lender and a borrower in respect of corporeal goods for the latter is entitled under such contract to have physical control of the thing covered in the loan. The notion of license is introduced in connection with intangible things. What accrues to the licensee under contract of license is the right to collect fruits arising out of the subject matter of such contract. At the end of the usufruct, loan and license, the usufructuary, loanee and licensee are required to return the documents that symbolize the existence of the incorporeal thing they have been enjoying in the course of the contract. These persons are not supposed to restitute any thing else to the owner.

The law of movables and immovables (the primary classification of things) does not address the rights of the usufrucutuary, loanee and licensee on in-

[15] See Arts 1325-1346 of the Code which are exclusively applicable to things having corpus.

[16] See Arts 1347-1352 of the Code.

[17] See the FDRE Constitution, *Supra* Note No. 7.

corporeal goods. This is because the primary classification is intended, in the main, to focus upon tangible things; the terms movable and immovable normally denote physical things. These terms might imply intangible things only by invoking legal fiction. To the extent that the subsidiary classification under consideration deals with the entitlements of the parties to contract of usufruct, of loan and of license, it discharges its complementary role in the Code.

As mentioned above, under Ethiopian law, not all corporeal goods are the subject matter of property rights. Property rights can be established on some corporeal goods while it is not possible to create such rights on some other corporeal goods. Corporeal goods are the potential seats of property rights only if they can be appropriable. Besides, not all incorporeal goods are the subject of property law. Only those incorporeal things which are expressly designated by law as the objects of property rights can be regarded as such. For example, Articles 1128, 1309, 1310 and 1347 of the Code can be taken as some of such designations. Certain incorporeal things fall within the domain of contract or tort law. A person's claim against a wrongdoer, or a claim of specific performance should clearly be put beyond the domain of property law because such actions are not directed against a person in respect of a thing.[18]

2. Consumable and non-consumable things

The central test for the classification of things into consumable and non-consumable product is consumability. Intention (*animus*) alone does not make a thing a consumable or non-consumable.[19] *Consumability* is rather ascertained by reference to an *objective* criterion (consumption or alienation) and the prevailing notion in the pertinent trade.[20] A consumable thing is a movable thing, which is used up when first used or subjected to transaction. One cannot use the same consumable thing again and again. In the case of currency, for instance, if one has a Ten Birr note and if she wants to use it, she would inevitably put the note into circulation not to find the same Ten Birr note again. Or, if one orders a meal in a restaurant, she will finish off her meal the moment she eats it all. She cannot keep on eating the same meal all the time. A non-consumable thing is a product one can use for a prolonged period of time. One does not finish off a non-consumable thing the moment

[18] See Marcel Planiol, *Supra* Note 8 at 267-270.

[19] Stretching party autonomy to give them a free hand to distort concepts based on facts and perhaps for apparently no good reasons flies in the eye of logic and common sense.

[20] Under Art. 1713 of the Code in the absence of a clear term in a given contract, the usage of the pertinent business community may be useful to determine whether or not some goods shall be taken as consumables.

she uses it. One can use her house or ploughshare or table many times. Repeated use over a relatively longer period of time characterizes non-consumable things.

Article 1327 of the Code attaches importance to the division in question, and the provision does not require a beneficiary of a usufruct to restitute the object given in usufruct in the case of consumables. The usufructuary of consumables is entitled to get ownership over the object the moment the usufruct is validly created and transfer procedures are finalized.[21] The usufructuary of consumable things is, however, under the obligation to pay the value of such things calculated at the time the usufruct was created.[22] In addition to such remedies, the possibility of returning things of comparable quantity and quality (to the bare owner) upon the extinction of the usufruct, is available even if such option is not preferred under Ethiopian law. A bare owner who has subjected her consumable things to usufruct is thus entitled to certain special protections. On the other hand, a beneficiary of usufruct over a non-consumable is obliged to properly manage, in the course of the usufruct, and restitute the object when the duration of the right expires because the ownership of the thing lies in the bare owner.

The application of the loan for use provisions[23] of the Code is possible in relation to consumable things and so are those articles of the Code dealing with letting and hiring.[24] It appears that a finder of consumable things, especially when they are perishable things, is mandated by law to sell them out at a public auction and keep the proceeds thereof to the owner.[25] A possessor in bad faith cannot be required to restitute the very consumable thing she purchased from a person without authority assuming that she has consumed them up the time of recovery by the true owner. Further, a possessor in good faith of some types of consumable things such as stolen currency and bearer instruments cannot be required to restitute them to the true owner.[26]

[21] Art. 1324/2 entitles a usufructuary to require at any time, advisably prior to the commencement of the usufruct, sureties where the usufruct extends to consumable goods. Here the term `sureties` seems to exclude real security if the usufruct is established gratuitously. If the usufruct is created for consideration absent a contrary term in the contract the usufructuary will be required to provide personal guarantee. The Amharic version of sub-article 3 of this article entitles the bare owner to terminate the usufruct over consumable things if the beneficiary is unable to furnish surety within a reasonable period of time or where she makes unlawful use of the thing; but in relation to non-consumable things, such things may be vested in a curatory.

[22] See Art. 1327/2.

[23] See Arts. 2767-2778.

[24] See Arts. 2727-2766.

[25] See Art. 1156

[26] See Art. 1167

The law of consumables fills the lacunae present in the principal classification. In the case of the primary classification, transfer of ownership does not take place in the absence of cause implying transfer of ownership. But in the case of the law of consumable things, transfer of ownership inevitably takes place if the consumable thing is delivered even if the parties have intended to create usufruct or loan. The inevitability of such transfer arises out of the nature of the things involved, i.e., they cannot be of some use without being used up or alienated. If usufruct is established on a movable thing, the usufructuary is normally required to restitute the very thing she gets in the form of usufruct to the bare owner upon the termination of such usufruct; but the usufructuary of a consumable thing is not expected to make restitution of the thing given to her in the form of usufruct. Under the primary classification, a true owner is entitled to recover her thing from the possessor in bad faith, which is not possible in the case of the law of consumables if the possessor in bad faith uses such thing up. In relation to the issue of whether or not stolen currency and security bearer can be acquired via possession in good faith, the law of movables and immovables (the principal classification) leaves a gap covered by the law of consumables.

3. Fungible and non-fungible things

"Two or more things are fungible vis-à-vis each other if they belong to the same genre of things and if, by virtue of their physical characteristics or the intention of those who deal with them, they are interchangeable or substitutable one for the other in view of the end for which they will be used."[27] The key test for the division of things into fungible and non-fungible is interchangeability. A fungible thing is normally a movable that is capable of interchange. Liquid and flour are fungibles. Normally, fungibles occur in trade in terms of number, weight or measure. One can exchange the same quantity of white (*magna*) *teff* with the same quantity of another white (*magna*) *teff*. Likewise, an Ethiopian Ten Birr note can be exchanged with another Ethiopian Ten Birr note. One can do the same in connection with the same quality and quantity of butter.

The possibility of replacement of one thing by another is not the only test of fungiblity. Parties, it may be argued, may declare a non-fungible thing to be a fungible thing or vice versa; the law may designate a thing to be a fungible thing.[28] So there are four ways for a thing to become a fungible thing: its na-

[27] See A. Precis, "The Classification of Things", htpp://faculty.law.isu.edu/jrtrahan/class.doc (accessed on January 10, 2008)

[28] On the issue of basis of classification, Demolombe, as quoted in Yiannopoulos, says the will of parties matters. Other jurists do argue other wise: while intention may be pertinent, a thing should be open to interchangeability in its natural state; the intention of the parties alone cannot... (cont.)

ture of replaceability, party decision, the law, and notions prevailing in trade.[29]

A non-fungible thing is an object that is incapable of interchange. Unless one makes some sort of arrangements, it is not easy to have interchange between, say, a plot of land and a house, both being non-fungible.

There are instances of making use of this division in the Code in the fields of property, contracts, successions and civil procedure. The law of fungibles does help one to determine as to who shall be an owner of a thing in the case of merger. Article 1183/1 of the Code is one instance where two or more fungible things owned by several persons are intermingled and could not be separated, or could be separated with excessive cost, the result of the mixture is joint property, prorate, of such persons. The possession and thus ownership of fungible things is transferred from a transferor to a transferee when, in addition to the conclusion of a juridical act, the seller "individualizes the thing (picks it out) or weighs, counts or measures out the required quantity of thing from her stock of things of the same kind"[30] and makes a declaration to that effect. The use of the terms "a particular thing" and "a specific chattel" in the pertinent provisions of the Code suggest that only non-fungible things may be the subject matter of preemption, promise of sale and right of recovery.[31]

The other instance is found in contract law, which states the quality of the thing that a debtor must deliver to her creditor. Art. 1747 [32] of the Code provides that where a contract relating to fungible things is silent about the quality of the fungible things due to the creditor, the debtor may opt to deliver an average quality of a thing, which conforms to the generic description of that fungible. In the case of non-fungible things, i.e., in case of specific (determinate) things, the creditor may, under some conditions, require the debtor to deliver the thing agreed or pay her monetary compensation for the subject matter of the contract cannot be replaced by another thing.[33] A creditor may not invoke specific performance with regard to consumable things.

[28] (cont.) convert a non-fungible thing (e.g. a tract of land) into a fungible thing. See A.N. Yiannopoulos, *Infra* note 29 at 779.

[29] A.N. Yiannopoulos, `Introduction to the Law of Things: Louisiana and Comparative Law,`*22 L.L. R.* (1961-1962) at 778. One may inquire into the difference between consumable and fungible things. Things which are fungible are also consumable. However, there are things which are fungible without being consumable (e.g. videocassettes of the same record) and things which are consumable without being fungible (e.g. wine of a particular vintage).

[30] See Precis, *Supra* Note No 27. See also Article 1145/1 of the Code.

[31] See Articles 1386 and 1411/1 of the Code, marking the words "…a particular thing…" and "…specific chattel…", respectively.

[32] The application of Art. 1778 of the Code also hinges on the distinction between fungibles and non-fungibles. So is the application of Article 1145/1 of the same.

[33] See Articles 1745 and 1747.

The law of fungibles has importance in the law of successions[34] and civil procedure.[35] The use of the law of movables and immovables (the primary classification) alone would not enable one to handle the above issues. Thus, the concept of fungibles is embodied in the Code as a complementary tool.

4. Divisible and indivisible things

Divisible things can be split into several same units which can be assigned for individual ownership while that cannot be done in relation to indivisible things. Divisibility relates to the issue of whether or not physical apportionment of a certain physical thing, be it a movable or immovable, can or should be accomplished; if physical division can be attained, if that is economically sensible.

Under Roman law, things were divisible if they could be divided into several parts of the same kind as the whole without thereby suffering diminution in value.[36] Article 1340 of the Civil Code of Louisiana states that a thing is indivisible if the consequence of dividing it would be a diminution of its value, or loss or inconvenience to one of the owners. Article 752 of the German Civil Code envisages the possibility of partition of things in kind in relation to those things which, without diminution in value, can be divided in equal parts corresponding to the shares of the co-owners. "A thing is indivisible if it cannot be physically divided into discrete parts or though it can be so divided, the parts cannot be used for the same purposes as the undivided thing, the parts are not of the same nature, the parts are not of the same value, or the aggregate value of the parts is significantly less than the value of the undivided thing."[37]

The Code and the Revised Family Code[38] recognize the classification of immovable things into those, which are subject to division and those, which are not. In both Codes, the recognition of divisible and indivisible things is made in the context of co-ownership. Under Art. 1272/2 of the Code, a court to which a request for termination of joint ownership in respect of an immovable is made is expected to make order for sale instead of division where it finds such property to be indivisible either because physical individualization[39] would be contrary to the nature of or purpose of the immovable or

[34] See Art. 1047.

[35] See Arts. 225 and 226/3& 4 of the Civil Procedure Code of Ethiopia (1965).

[36] Yiannopoulos, *Supra* note 29 at 780.

[37] See *Supra* note 27.

[38] Reference here is made to the Revised Family Code, Proc. No. 213, 2000, Year 6th Extraordinary Issue 1.

[39] In both cases of matrimonial property upon the dissolution of marriage and ordinary joint ownership, the law gives the ex-spouses and the joint owners the right to insist on the physical partition, equally in the case of the former and pro rata in the case of the latter. See Art. 91 of the Revised Family Code and Art. 1272/1 of the Code.

would reduce its economic value or seriously impair the making use of it. Under Article 1276 of the same Code, "joint ownership may be perpetual where…division thereof is impossible or would be unreasonable." In the context of jointly owned movable thing, the Code, under Art. 1271/1, appears to be silent about the possibility of termination through division; such Article simply envisages sale by auction.

The possibility or desirability or feasibility of division in kind of a jointly owned movable cannot be ruled out. The Code itself, under Art.1264 envisages this when it stipulates that "each joint owner may at any time apply for the partition of" fruits of a thing jointly owned. Thus, certain jointly owned movables can be partitioned in kind (e.g. some meters of cloth or a certain quantity of maize). The Revised Family Code also signifies the possibility of dividing movable things because it simply says 'property.'[40] Art. 92/1 of the Revised Family Code provides that "if there is a certain property which is difficult or impossible to be divided…, such property shall be sold…"

Read together, provisions of the Code and the Revised Family Code described above imply criteria to determine whether or not a given property is open to partition in kind namely: desirability or economic feasibility or practical difficulty or impossibility. It may be undesirable to partition a jointly owned thing for which the co-owners have developed sentimental attachment. Undesirability of phyiscalization of marital property also exits; in fact, it may even be illegal for spouses to go for division of common property before their marriage is dissolved.

The issue of economic non-feasibility arises when the economic value of the units assigned to an ex-joint owner is exceedingly less than the economic value of the share in the thing before the division. Such non-feasibility should equally be said to exist when the size of the unit given to each joint owner or some of them is manifestly useless. The issue of difficulty or impossibility means that the thing, after the division, cannot serve its previous purpose or cannot maintain its existence. For example, a car is a composite thing and division of a car would basically means disassembling it and breaking it into spare parts. It is not possible to divide a plot of land on which a condominium is built during the life time of such condo.[41] Nor are parts of a condominium intended for common enjoyment open to division in the course of the joint ownership of such building. A party wall cannot be partitioned.[42]

[40] See Art. 92/1 of the Revised Family Code

[41] See the Condominium Proc., Article 2/1, No 370, 2003

[42] Art. 1201/1 defines party wall as opposed to private wall as `a wall or fence separating two parcels of land,` which may be argued by virtue of contextual reading to include buildings or parts thereof.

The consequence of the dichotomy of things into divisible and indivisible becomes clear when one asks the question: should the jointly owned thing be sold at public auction or divided if one of the joint owners opts to bring such ownership to an end? If the thing is divisible, then the solution adopted is physical partition of the thing jointly owned and apportionment of the resulting units to each joint owner according to her share. In effect, each co-owner goes away with a unit of the thing co-owned. In so doing, the share of each co-owner is localized in some material portion of the thing previously co-owned, which might lead to the extinction of co-ownership. If it is not possible to divide a co-owned thing then follows public auction or private sale followed by division of the proceeds thereof among joint owners pro rata, which is called licitation.[43] If the time for division or sale of the thing is not appropriate, it can be postponed for a certain period of time.[44]

The law of indivisible things is useful to remove one of the deficiencies in the law of movables and immovables. The straightforward application of the latter division of things does not offer a solution to the problem of bringing co-ownership to an end in the case of indivisible things.

5. Principals and fruits

The concept of fruits is useful in the application of some of the rules regarding acquisition of ownership (e.g. via possession in good faith[45] and accession[46]), joint ownership,[47] usufruct[48] and common property including per-

[43] *Supra* Note 27

[44] See Arts. 1271/2 and 1273 of the Code. In the case of movables, the court, upon the application of one of the joint owners, has the power to postpone the sale or division up to six months while, in the case of immovables, the court can postpone it for a maximum of two years. The request for postponement may be based on anticipated rise in the price in the thing or the thing is under construction or some issues of claim by a third party are anticipated. In the mean time, where necessary (e.g. the co-owners are in serious discord), the court may appoint a person who administers the property.

[45] See Arts. 1161-1167 of the Code. Under this provisions, though nothing is stated about the fate of fruits obtained out of a thing delivered to a person in good (in the case of stolen things) or in bad faith, it appears sound to argue that the person in either case should return not only the principal but also the fruits which she has collected in the course of the possession of the thing. This is precisely because she is not the owner of the thing in her possession and absent a contrary stipulation she who owns the principal owns the fruits thereof.

[46] See Arts.1171-1283.

[47] See Art. 1264 of the Code.

[48] See, for examples of, Arts. 1309, 1311, 1328 and 1331 of the Code. In relation to corporeal goods, a usufructuary has two rights: the right to use such thing given in usufruct and be the owner of the fruits thereof whereas in the case of incorporeal things (e.g. usufruct over trade secrets), the nature of the object of the usufruct dictates only the enjoyment of fruits.

sonal property of one of the spouses[49] both in the course of marriage and after its dissolution. These cases trigger the question as to who, and as of when, shall be the owner of the increments (fruits) of the main thing (which is subject to joint ownership, usufruct, pledge and marital property). The primary division of corporeal goods into movables and immovables lacks an answer to this question. Thus, the division under consideration here is set out to remedy this deficiency in the law of movables and immovables as enshrined in the Code.

According to several provisions of the Code, which need to be read together, 'fruits'[50] are increases of a thing in conformity with its purpose without diminution of the principal thing. Fruits are all that a thing produces at periodical interval without diminution of its own substance.[51] If *fruits* are not obtained at a regular interval or produced using the substance of the main thing, they are called *products*, which mark the distinction between fruits and products. The term `*regular interva*l` means production of increases yearly or at a shorter interval.[52]

Fruits are further classified into *natural fruits* and *artificial fruits*. Natural fruits are those fruits, which are the periodic increments of animals and plants.[53] Artificial fruits are classified into civil and industrial fruits. Civil fruits are fruits, which are entitlements either by virtue of law or agreement; civil fruits do not come out of the body of the principal thing.[54] Such is the case with interests on sums of money or profits from a business association and rents obtained out of a non-consumable thing. Fruits that may be obtained by cultivation or workings on the soil are called industrial fruits (e.g., trees and crops)[55].

[49] See Art. 62/1 of the Revised Family Code which declares that all fruits regardless of their nature obtained out of both personal and common property shall be taken as matrimonial property.

[50] See Arts. 1170, 1171 and 1333.

[51] The French Civil Code and Louisiana Civil Code do not explicitly define the notion of fruits; both rather come up with the classification fruits as fruits of nature, fruits of civil transaction and fruits of industry. In the two jurisdictions, writers and courts have inferred from their respective civil codes a definition of fruits which is things produced periodically by a principal thing without diminution of its importance. See A. N. Yiannopoulos, *Supra* Note 29 at 785. The German Civil Code, on the other hand, under Article 99, states that:`` fruits of a thing are the products of the thing and such other profits as are obtained from the thing according to its destination. Fruits of a right are the revenues which the right yields according to its destination, particularly where one has a right to obtain parts of a thing or a right to yields by reasons of a legal relation.``

[52] This is an inference from Article 1333 (a).

[53] Marcel Planiol, *Supra* Note 8 644-650

[54] *Id.*

[55] *Id.*

Products are fruits that may be collected from a thing by adding something to the principal thing mainly in the form of labor and raw material, which consequently diminishes the substance of the principal thing. The Code assimilates products to fruits under some situations. The assimilation occurs where products (e.g. wood cuttings, quarries and minerals) are collected according to the usage, in conformity with the purposes of the principal thing as well as agreed upon working plan preferably prior to the commencement of the usufruct.[56] But it is not clear where the demarcation that separates the periodic and non- periodic products lies.

In terms of legal effects, natural and industrial fruits become property of the owner of the principal thing upon their separation from the latter. The general rule is that a person who owns the main thing also owns the fruits thereof based on Articles 1170 and 1171 of the Code. The ownership of fruits of the breeds is given to the owner of the mother should the owner of the father claim ownership. For example, the owner of a cow owns the calf without regard to who owns the bull.[57] Joint owners of a thing are owners of the fruits or products of such thing proportionate to their share in the principal.[58] Under Ethiopian family law, fruits of both personal and common property are taken as common property.[59] In principle, an owner whose possession has been deprived by another person is entitled to claim the recovery not only of the main thing but also the fruits thereof precisely because the main thing belongs to the original owner.

The rule that she who owns the principal is the owner of the fruits thereof suffers from exceptions. A usufructuary, not a bare owner, is the owner of the fruits produced by the thing given in usufruct between the date of creation and date of extinction of such usufruct.[60] In the course of lease, the lessor

[56] The Code creates fiction under Article 1170/2, which states that ``periodical products of a thing and anything which may according to usage be derived from a thing in conformity with its purpose shall be deemed to be fruits.`` In the context of usufruct, the Code prefers working plan to mere usage in assimilating products to fruits. See Articles 1333-1335 of the Code which envisage the right of the owner or the usufructuary to require the drawing up of plan of exploitation either by themselves or an expert failing agreement; the working plan can be modified under some situations at the request of either party.

[57] http://www.britannica.com/eb/article-28554 (Accessed 16 February, 2006)

[58] See Article 1264 of the Code.

[59] See Art. 62/1 of the Revised Family Code, which provides that: "all income derived by personal efforts of the spouses and from their common or personal property shall be common property." The corresponding provision of the Code, Art. 652/1, is not as explicit as, Art. 62/1, in this regard. In the face of Art. 649/2 of the Code, it might be argued that income (fruits) obtained out of the personal property of the spouses was not regarded as common property. But both the Revised Family Code and the Code use the term 'income' rather than the term 'fruits'.

[60] See Art. 1328 cum Art. 1331 of the Code.

cannot claim the ownership of the fruits out of the thing covered by the lease. In the case of unlawful enrichment, the person required to make restitution is given the right to retain the fruits of the property he has received.[61] In the event of return of the absentee, the fruits of her property collected by her presumptive heirs or legatees are given the option to retain such fruits.[62]

6. Things in the public and private domain of the state

Every state, irrespective of the ideology it subscribes to, needs property in the sense of goods capable of appropriation.[63] Of course, a state with a socialist ideology is expected to have a lot more property than a state with a capitalist ideology. Property under state control enables it to carry out its classical functions.[64] The state uses its property to discharge its roles.[65] Take roads, bridges and national museums. Generally every body has access to these resources. Ethiopian property law calls this type of resources property in the public domain of the state. As will be considered below, property in the public domain of the state is a piece of property owned by the state but accessible equally to every body. Things in public domain may be immovable or movable things. Members of a given local or national community profit from things in the public domain directly whereas property in the private domain of the state benefit the public indirectly. Things in the public domain may be under the control of private persons though usually such resources are put under the custody of public authorities.[66]

As the reader may have noticed, the preceding sections of this Commentary have explained goods regardless of the identity of the owner of such goods. In this section, what is examined is the nature, classification and the effects

[61] See Art. 2178/1.

[62] See Art. 171/2.

[63] The term `property` is used under Arts 1444-1459 to refer to the objects of property rights, not to refer to property rights.

[64] These functions include the classic tasks such as defense, security and the administration of justice as well as the modern ones such as redistributive, allocative and stabilization functions.

[65] At present land and water including natural resources, in Ethiopia, are collectively owned. These resources are automatically taken as part of public domain things; they may or may not be the case. Public domain things are different from common things (e.g. the ocean) and public domain things are not the same as collective things (such as land and water in Ethiopia today).

[66] There may be antiques (e.g. an old spear and shield) held by a private person. The public will have access to these cultural heritages in same way and the person in possession of such objects will have a limited ownership right. The heading of Section I of (Book III, Title IX, Chapter 1) the Code reads just “Public Domain”, which implies that if the property should be dedicated to public use or public service, it is immaterial whether possession thereof lies in a private or public persons. Thus, all property owned by private persons does not necessarily belong to the private domain and all property owned by the public institutions does not fall within the ambit of its public domain.

thereof of things under the custody of the state. What the lawmaker seeks to regulate under Articles 1444-1459 of the Code is a unique category of property both in terms of the manner in which the resources involved is sought to be used and the feature of the administrator of such property. This unique legal situation cannot properly be captured by the rules devoted to the principal classification of corporeal goods under the Code.

6.1 The Basis of the classification

The Digest, the principal Roman legal document, distinguished three kinds of state property, namely: (a) public property not open to private ownership or property serving public purpose; or (b) things which were destined to public use; and (c) property of the state or its political sub-divisions which was susceptible of private ownership and subject to the rules of civil law like any other property held by private persons.[67] Hence, the Romans regarded those resources dedicated to public purpose or public use as property forming part of the public domain of the Roman state while some other resources held in the hands of the state but not so open to the public were taken as property forming part of the private domain of the state. Public use or dedication to public purpose was the distinguishing mark of property which formed part of the public domain of the state.

Article 1444 of the Code dissects property (goods) into two broad classes, namely property in the private domain and property in the state domain. The same article further divides the latter (property in the state domain)[68] into private domain of the state and public domain of the state. The property so sub-classified might be held by political units at any level of the Ethiopian

[67] See A. N. Yiannopoulos, *Infra* Note 69 at 706.

[68] See A. N. Yiannopoulos, *Infra*, note 69 at 705. In Louisiana, state owned things are divided into three: (a) "things dedicated to public use; title to these things is vested in the state, but this title should be regulated by rules of public law rather than the Civil Code. The Code merely regulates only some incidents of the public use of such property. This is insusceptible of private ownership and thus exempt from seizure, prescription and alienation in general. (b) "Another category of things belonging to the public domain consists of the things such as streets, public walks, quays and public squares. These things, dedicated to public use and out of commerce, ordinarily belong to political sub-divisions of the state. And (c) property of the private (national) domains of the state is property susceptible of private ownership. Such property, though serving public purposes directly or indirectly, is not subject to public use. It is clearly alienable by the state, but, for reasons of policy, not subject to seizure and prescription against the state. To the private domain belongs also property of political subdivisions of the state which is not destined to public use. As in the case of similar property held by the state itself, such property is susceptible of private ownership and alienable but not exempt from prescription." See also Arts. 453 and 454 of the Louisiana Civil Code

Government, federal and state, and regardless of the type of property, be it movable or immovable.

The basis of the division of state property into property in the private domain of the state and property in the public domain of the state is controversial. One view is that the criterion of the division must lie in whether a certain property belonging to the state is not susceptible of private ownership. According to this view, insusceptibility of private ownership is the criterion on the basis of which one categorizes certain goods into public domain of the state.[69] This view triggers the question: are there things, which are absolutely insusceptible of private appropriation?

A second view states that the true reason for the dichotomy is dedication of a certain thing to the public service, not innate insusceptible of private ownership.[70] To this latter view nothing on earth is inherently incapable of private appropriation.[71] And the law makes the dedication. There are certain resources, tangible or other wise, which shall be regarded as things in the public domain of the state just by virtue of their dedication to the public use or purpose. It is to be noted that things in the public domain can be commercialized while they are in the hands or under the control of the public authorities, though to a very limited degree.

The Code adopts the second view. It is not any innate attribute of a thing which makes it qualify for the category of property in the public domain, but it is rather the needs of a given community as reflected in its laws or practices or policy that makes a given thing part of public domain of the state;. So virtually anything open to appropriation can fall within the scope of property in the public if so declared by a concerned community. The fact that a given property is inalienable or is not subject to prescription does not mean that it is inherently incapable of private appropriation but the inalienability or imprescriptibility may rather come out of dedication of such thing by law to the common good.

[69] See A.N. Yiannopoulos, "Common, Public, and Private Things in Louisiana: Civilian Tradition and Modern Practice," *21 Louisiana Law Review* (1960-1961) at 704.

[70] *Ibid.* Some tend to split this second view into distinct positions capitalizing on the terms `public use` and `public service.` See, for example, "…the essential characteristic of property within the public domain finds in dedication to public service.`` As to the third view, the essential characteristic of property within the public domain is dedication to public use."

[71] See A.N. Yiannopoulos *Supra* Note 69 at 17. This is based on the realistic consideration that, while all things are by their nature susceptible of ownership, consideration of public utility and convenience may require certain things to be withdrawn, entirely or in part, from the sphere of free private relations.

The Code deals with property forming part of the public domain of the state without providing a clear-cut definition of the term. Instead, the Code gives us a guideline and some examples of property in the public domain. The basic guideline is whether a certain property is held by the state and whether or not that property is accessible to every body for use or destined to a public purpose.

Article 1445 (a) of the Code provides that a thing is regarded as falling in the public domain of the state if "it is directly placed or left at the disposal of the public." Article 1445 (b) of the same adopts another alternative criterion.[72] According to this standard, there is a certain good, and there is a public service,[73] and the former is destined to the use of the latter in order to promote its particular objective. The authorities in charge of the administration of things in the public domain may charge fees. These fees are merely considered as service charges and payment of service charge to access things in public domain of the state may not warrant one to say such property is in the private domain of the state. The obvious implication of Article 1445 of the Code is that all goods, movable or immovable, in the hands of the state that meet the requirement of this Article will fall within the ambit of public domain of the state. In other words, all things the state controls and which do not meet the test of Article 1445 fall within the private domain of the state.

It seems that test of public use or public service under Article 1445 of the Code applies to situations other than the ones explicitly mentioned as examples in Articles 1446-1447 and Article 1255 of the same. Article 1445 is a fall back provision. That is, there is a certain property belonging to the state and that property could not fall within the scope of Articles 1446-1447 and Article 1255; then, recourse should be made to the test set forth in Article 1445, i.e., public use (accessibility) or public purpose.

[72] A.N. Yiannopoulos *Supra* Note 69 at 771. Things under the possession of the state and dedicated to a public purpose differ from things dedicated to public use in that the public served by them is not public use. Like things dedicated to public use, these are susceptible of private ownership but only to the extent compatible with public purpose. In this category belong state-owned buildings housing governmental offices and educational and health institutions. Municipal buildings housing offices and institutions belong to the same category.

[73] See Arts. 3207-3243 of the Code. In particular, look at Art. 3207/1 which provides for the definition of public service as follows: an activity which a public community has decided to perform for the reason that it has deemed it to be necessary in the general interest and considered that private initiative was inadequate for carrying it out shall constitute a public service. On the authority of this stipulation, one may argue that the investment activities of some public enterprises in Ethiopia may be regarded as public service.

Articles 1446-1447 and Article 1255 of the Code furnish examples of things that must fall within the public domain. As regards these illustrations, there would be no controversy for the Code requires one to categorize them automatically into the public domain. Under Articles 1446-1447 and Article 1255, mention is made to antiques one finds in museums, roads, streets, canals, railways, seashores, port installations and lighthouses, churches, mosques, fortresses, waterways, lakes and underground accumulations of water fall within the public domain of the state.[74] It is submitted that there are many kinds of property that may be designated as property in the public domain of the state.[75] For instance, the period of protection of patent and copyrights is limited under Ethiopian law. Enjoyment of these rights is not for an indefinite period of time. After the lapse of a period determined by law, the public is free to use patented[76] and copyrighted materials whose duration has lapsed.[77]

6.2 Legal effects

The legal effect of the classification of property belonging to state or other administrative bodies into private domain and public domain is the application of different rules to each of them. There are three options in determining which rules shall apply to the regulation of property in the public domain of the state. Option one is to regulate objects in the public domain of the state exclusively on the basis of private property rules. For example, in the German Civil Code, "state property is in all cases private property; however, exercise of ownership rights is limited in the interest of public use and public purpose. The power of the state to regulate public use and public purpose is not regarded as an incident of ownership but as authority deriving from the sphere of public law properly belonging to the state."[78]

The second approach is to treat things dedicated to public use or public service entirely under public law; here private law will have nothing to say

[74] See also Art. 130 (a &d) of the 1955 Revised Constitution of Ethiopia for additional list of things in the public domain of the state which was probably reflected in the Code.

[75] For the additional list of property included in the public domain of the state, see Research and Conservation of Cultural Heritage, Art. 2 (7&8), Proc. 209, 2000, Fed. Neg. Gaz. Year 27 No 39. See also the Ethiopian National Archives and Library, Art. 2/20, Proc. 179, 1999, Fed. Neg.Gaz. Year 29 No 63.

[76] See Inventions, Minor Inventions and Industrial Designs, Art. 16, Proc., No 123, 1995, Year 54th No 25: A patented invention falls within the public domain, perhaps becomes a common thing, twenty years after the issuance of certificate of patent in favor of the owner.

[77] See Copyright and Neighboring Protection, Art. 20, Proc No 410, 2004, Year 10th No 55. In broad terms, copyright expires fifty years after the death of the author.

[78] A.N. Yiannopoulos, *Supra* Note 69 at 771.

about things out of commerce. Article 714 of the French Civil Code appears to adhere to this pattern. Finally, the third approach is to govern public domain things partly under a civil code and partly under administrative law. According to Planiol, Civil codes should to some extent treat things in public domain for a couple of reasons: private property everywhere comes in contact with the public domain and that the general classification of things belong essentially to a civil code which should "contain the basic principles of law."[79]

This hybrid system is the preferred approach under the Code. The mixed approach rests on the belief that both public law and private law should in different respects govern property forming part of the public domain of the state. Titles VI, VII and VIII of Book III of the Code govern property in the private domain of the state and property held by persons other than the state. In other words, Articles 1126-1443 of the Code govern state property in the private domain. Article 1444(2) provides that "property belonging to the state or other administrative bodies shall be subject to the provisions relating to property privately owned." The state owns property in its private domain same as property is owned by an individual or a company.

The consequence of this is that property forming part of the private domain of the state could be alienated (either freely or for consideration), acquired through possession in good faith, occupation, prescription and accession. However, if a certain property is categorized into the public domain of the state, Articles 1444-1459 of the Code shall govern it. These articles do not claim to treat every issue connected to things in the public domain; they simply provide one with skeleton. Articles 1454 and 1455 state that property which forms part of the public domain may not be alienated nor could it be acquired by possession in good faith[80] or usucaption.[81] The consequence of this is that state property in the public domain may not be alienated either freely or for consideration even by the state or its administrative units, which are merely regarded as custodians. Further, no one can acquire ownership over such property through possession in good faith or usucaption. Nor can one acquire property in the public domain through occupation (for they are already occupied) and accession.

6.3 Possibility of limited marketability

Property forming part of the public domain of the state is not absolutely put beyond commerce. The public authority, which is in charge of the manage-

[79] Marcel Planiol, *Supra* Note 8 at 814.

[80] See Art. 1161-1167.

[81] These provisions should be read to put things in the public domain beyond the reach of attachment as well as prescription.

ment of things in public domain, has certain powers, which imply that things in public domain under the Code can be subjected to limited private relations. Things in public domain may be given in concession of permanent or temporary nature to private persons. Such concession, however, must not have the effect of altering the purpose of such property.[82] For example, if there is a national museum and if it has artifact shops and restaurants the latter may be contracted out to private individuals.

Besides, the public authorities may authorize private persons to occupy such property and construct works on the same.[83] A certain street may be given out in concession to a private company to put up advertisements and permit others to do so with payment. But, in the course of such contractual arrangement, the street will be open to vehicles and pedestrians. In order for an individual to occupy property in the public domain, there must be authorization which specifies whether the person is allowed to undertake construction. Moreover, the character of such construction as well as the time for which the authorization is granted and the fees chargeable ought to be expressly stated.[84]

The public authority that gives the authorization or grants the concession is given the power to cancel the authorization or the concession if the private individual (beneficiary) fails to adhere to the conditions specified in the agreement.[85] Pursuant to Article 1459 of the Code, the public authority is empowered to order the destruction of any work or the cessation of any activity by the beneficiary, which in fact impairs the very existence or the purpose of the property forming part of the public domain. The authority which is bestowed with the custody of public domain property should have the right, of course on behalf of the public, to bring possessory and petitory actions.[86]

6.4 Enlargement of the public domain

Article 1450 of the Code envisages two means through which public domain may increase or expand:[87] expropriation and alignment. Expropriation relates to the taking away of rights in immovable property in return for advance payment of compensation for public purposes.[88] The property taken through ex-

[82] See Art. 1456 of the Code.
[83] See Art. 1457 of the Code.
[84] See Art. 1457 (2&3) of the Code.
[85] See Art. 1458 of the Code.
[86] This is simply inferred from Arts. 1148, 1149 and 1206 of the Code that recognize the right of a holder to file possessory action against a usurper.
[87] In addition to these two avenues, the state may acquire property falling within the ambits of its public domain via investments, donations, excavations, accession and inheritance in default of heirs. For the latter, see Art. 852 of the Code. See also Art. 1194 of the Code in the case of vacant immovables without a master.
[88] See Art. 1460 cum Art. 1464. See also Art. 40/8 of the FDRE Constitution.

propriation may enter the public domain.[89] Alignment proceeding, on the other hand, helps the competent authorities to widen narrow or straighten zig-zag or lengthen short roads or streets[90]. Where the alignment proceeding reveals that certain un-built plot of land falls within the public highways, then, such plot of land will be automatically incorporated to such public ways.[91] Alignment plans are particularly related to town planning.

6.5 Shrinkage of the public domain

There are *three* grounds on the basis of which things once in the public domain cease to be so and enter into the private domain with its apparent legal consequences. One such ground is declassification through *declaration*. According to Article 1454 of the Code, the pertinent public authority may alienate property forming part of the public domain after having declared it no longer part of the public domain. The *second* ground for withdrawal of things from public domain is non-use. If a thing in a public domain, for example, a street, is no longer in use, it may be open for private appropriation. If a fortress serves no longer its purpose, then it would fall within the private domain. The *third* factor is a natural cause. For instance, a building in the public domain may collapse as a result of earthquake or other natural disasters.

7. Personal and collective things

Written in the spirit of private ownership of the critical resources of the country, the Code could not envisage the division of things into personal and collective things. This subsidiary classification of things has been added to the property law of Ethiopia since 1975. The division in question is still of some relevance because the FDRE Constitution has maintained collective ownership of natural resources including land as the legacy of the Ethiopian revolution. This dichotomy of things helps us to identify things open to private ownership and those which are put beyond the reach of private ownership. This subsidiary classification is an attempt to link the wealth of an individual to her labor and to her material and spiritual needs.

7.1 Nature and basis of the classification

The term "personal things" is not used here to mean property owned by one of the spouses in the course of marriage;[92] nor is the term under consideration used to connote human faculties which may be the sources of immense

[89] This will be true to the extent expropriation is invoked to expand the public domain of the state.

[90] See Art. 1450.

[91] See Art. 1451 of the Code.

[92] See Arts. 57-58 of the Revised Family Code.

power and wealth.[93] Rather, the term is employed as opposed to collective assets in the ideological sense. Personal things are resources owned by a physical person for her own survival, comfort, convenience and cultural needs as well as those persons living with her.[94] Personal assets shall be linked to the person of the owner of such assets.

The term "personal asset" implies that the owner of such assets should not be allowed to accumulate property which would permit her to hire and exploit the labor of others. It also implies that the principal source of personal assets shall be the labor of the owner herself. The basis of the dichotomy of things into personal and collective seems to be an ideological preference. Personal things can be transferred via sale, donation, inheritance and attachment.

In order to ensure that the possessions of individuals do not grow into productive assets, mechanisms are devised such as limiting the size, the number and the magnitude of such property. And constant nationalization is employed as well. Property in personal ownership includes "a one-family house, a one-family apartment, household articles, clothing and motor vehicles, etc. The list of articles which may belong to a person varies according to her place within the social and economic stratification in her society."[95]

All resources other than those permitted to be owned by private individuals are taken as productive assets; productive assets are to be held and managed by the government on behalf of the public. Productive assets chiefly consist of natural resources including land and water resources and other key means of production.[96] Intangible things such as patents and copyright may also enter into the domain of productive assets. The nature and size of things falling into the domain of productive assets obviously depend on the stage of the economic development of the society which adopts this classification of things.[97]

[93] See Kennethr R. Minogue, "The Concept of Property and Its Contemporary Significance" in the International Library of Essays in Law and Legal Theory, Property Law Vol. 1 at 15. Here the author distinguishes among personal attributes (e.g., quick wits), personal property (e.g., the clothes on our back) and productive property (e.g., farms and factories). Minogue thinks that all the three categories of property might be the source of immense influence on others.

[94] See Articles 10-18 of the 1977 Soviet Constitution. In 1987, Ethiopia followed the footsteps of the ex-USSR when it adopted a constitution which reproduced a verbatim copy of these provisions on the forms of property. See Articles 12-18 of the PDRE Constitution.

[95] See Kazimierz Grzybowski Infra Note 100, at 260-261.

[96] *Id.*

[97] *Id.*

7.2 Reasons for the classification

It is argued by the proponents of socialism that some of these assets are the products of nature and created by no one but by nature for every one.[98] Some of these assets are produced by the capitalist class not as a result of its own innovative power but due to monopoly over state power and years of merciless exploitation of the working class. Thus, these resources shall be possessed by the state in the name of all its citizens. Citizens will have indirect benefit from some of these resources. In relation to others such as land, citizens will have individual access to the same and will enjoy proprietary rights over such resources but short of ownership. No single person, be it an individual or an association or even the government, shall have command in the sense of possessing ultimate say over these resources.[99] Collective things are seen as a heritage of nature and past generations; to be used for the common good by the present generation and to be passed onto the future generation.

7.3 Implications of the classification

The classification of resources into personal and productive is featured uniquely by gradation in the protection of which the law offers to each of these classes. The property of the state as the foundation of the social and economic order calls for the highest degree of protection. For example, of the property in private (individual) ownership, only the property of working peasants and artisans enjoys the protection of the state. The motivation behind the varying degree of protection is to ensure that private property must not prejudice public interest.

Special protection of socialist property is primarily reflected in the fact that the law makes it impossible to transfer objects of socialist ownership into any other ownership. Transfer of property from one socialist ownership into any other has little legal significance as it always remains in state ownership and the socialist juristic persons "merely exercise the right of ownership vested in the state in their own name with regard to assets in their management."[100]

The state is the sole owner of all state property, regardless of what it is or who manages or uses it; state organizations exercise within the limits established by law only the right of possession, use, and disposal of state property attached to them in accordance with the aims of their property and the purpose of the property. State property is not subject to attachment by creditors; execution of creditors` claim may apply only to raw material, fuels and other

[98] *Id.*

[99] *Id.*

[100] Kazimierz Grzybowski, Reform of Civil Law in Hungary, Poland and Soviet Union, *10 Am.J.Comp.L3* (1961) at 261-262.

property included in the working capital of state organization.[101] Nor is it open to prescription. A person may by taking possession thereof, acquire ownership of the usual objects of personal property in case they have no owner, and other things shall become the property of the state.[102]

Countries including Ethiopia that claimed to have adhered to Marxist doctrine in the past recognized the distinction between personal and productive assets. In those countries the use of the term 'private things' was deliberately avoided as that was said to carry with it the connotation of unbridled accumulation of private holdings. The provisions of the PDRE Constitution (1987) dealing with property were a verbatim copy of Articles 10-18 of the Soviet Constitution of 1977. These provisions of the PDRE Constitution merely restated the legislative pronouncements regarding forms of ownership the then government of Ethiopia had been issuing between 1974 and 1986.[103] Articles 12-18 of the PDRE Constitution provided that:

> The forms of ownership of the means of production are socialist, that is, state and cooperative ownership, private ownership and other forms of ownership as determined by law. State ownership is public ownership. The Ethiopian State shall, through the ownership of key production, distribution and service enterprises, play the leading role in the economy. Natural resources, in particular land, minerals, water and forest, are state property. Private ownership shall, guided by state policy, carry out activities beneficial to the national economy. The right to transfer private ownership in accordance with the law is guaranteed. Personal property is protected by law. The right to transfer personal property in accordance with the law is guaranteed. The state may, where public interest so requires, purchase, requisition [*sic*: expropriation for immovable] by making appropriate payment, or nationalize upon payment of compensation, any property in accordance with the law. Labor is an honorable source of wealth and well being of the society. The social standing of any person shall be determined by his work.

When read together with other proclamations regulating the ownership of the means of production,[104] these constitutional prescriptions virtually abolished private ownership of property except in the trivialized sense of the term.[105] As the above quotation indicates, a mechanism of constant nationalization

[101] *Id.*

[102] *Id.*

[103] The term `collective ownership` has not been consistently used in statutes in Ethiopia. Collective ownership, public ownership, government ownership and state ownership are terms used interchangeably.

[104] See Public Ownership of Rural Lands Proc. No 31, 1975, Neg. Gaz. Year 34 No 26. See Also Government Ownership of Urban Lands and Extra Houses, Proc No 47, 1975, Neg. Gaz. Year 34, No 41.

[105] Farmers could have use right over a plot of land whose size was limited by legislation and practice, too. Urban dwellers could not own more than one dwelling house; when they elected to sell such house the state was privileged to have preemption right. (cont.)

was built into these statutes to nib at its bud of any sign of increase in the size of personal assets.

7.4 Distinctions

A description of things analogous to, yet different from collective things is in order. Collectively owned things are different from common things though there are many similarities. Common things also called universal things (e.g. the sun, the moon, the atmospheric air and the high seas) cannot be owned by any entity even by the state in their entirety though that may be possible as a matter of theory. "Common things are those which do not belong to any body and which may be used by all, e.g., the air, the sea, the river water, the solar heat. They are so abundant, that every one may take of them what he needs without depriving any body else."[106] These are resources dedicated to mankind in general whether such resources are traced to, as done by writers of religious inclination to the workmanship of God or taken as gift of nature as claimed by writers of secular orientation.

There are several common bonds between collective things and things in the public domain of the state. Both are controlled by the state indefinitely. Both are held and managed by the state in the name of the entire nation in order to avoid conflict of the wills of the multitude and unbearable transaction costs. The state shall deploy both to the betterment of its citizens. Citizens are entitled without distinction to benefit either directly or indirectly from such resources. Moreover, in both cases one is not expected to buy her way in for membership is open and free. Hence, the essential commonalities between collective assets and things in the public domain are understood if two questions are posed: who is entitled to have beneficial interests in such resources (all citizens) and in whom the power to make decisions regarding the same is vested (state authorities)?

Collective things are confused in some property law literature with things in the public domain. For example, a distinguished property treatise writer said:

> …there is a common usage of collectively owned thing or there is a complete dedication of it to the general service, which in many cases can be had without

[105] (cont.) Small businesses were allowed only in the course of so called transitional period and even in that case a capital ceiling was put in place. This approach was pretty much similar to the approach taken by the Soviet property law which abolished private property in principle and recognized small ownership in contrast with the Bulgarian property law approach which did permit private ownership in principle but prohibited large scale ownership. See N. Dolapchiev, Law and Human Rights in Bulgaria,*29 International Affairs 1*(1953) at 65.

[106] Aubry and Rau, *Droit Civil Francais,Vol. II, 7th ed.* (An English Translation by the Louisiana Law Institute), (St. Paul Minn West Publishing Co.) (1966).

> any contact with the thing used; it is thus the entire nation that derives an advantage from its battleships and its forts, although the citizens themselves, individually, make no use of them and are not in possession of them and many have not even seen them…[107]

Yet**,** the two classes of things are different in important respects. The above quotation may apply to things in the public domain of the state, but not necessarily to collectively owned resources for citizens may have the opportunity to have individual and direct enjoyment of collectively owned property. For example, in Ethiopia, both urban and rural lands are collectively owned but, for instance, plots are allotted to each farmer who has individual exclusive possession over such plot.

Secondly, one can imagine a thing in the public domain (e.g. a shield which can be taken as antique), which is in possession of a private person whose ownership right is limited by virtue of the character of the thing she owns. Technically speaking, heritages held by mosques and churches are within private domain as these institutions are not part of the state and are established and sustained by private initiatives. But, for all practical purposes, cultural heritages held by mosques and churches in Ethiopia are part of the public domain. In the case of collective assets, they are held by the state (or at least by association of persons mandated by the state) to manage a given resource to the common good.

Third, collective ownership is often, if not always, ideologically motivated. Collective assets, as history witnesses, usually result from nationalization. On the other hand, things in the public domain of the state do not necessarily have a bearing on assault against private possessions by way of nationalization.[108] It is not possible or feasible or desirable to individualize and confer exclusive possession on individuals in respect of at least some of the things in the public domain. Yet, physical apportionment in order to bestow exclusive property rights on individuals in respect of a collective asset (e.g. land) may be seen as possible or feasible and even desirable, at least from the perspective of some people.

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[107] See Marcel Planoil, *Supra* Note 8 at 800-801. Another writer, M. Ducrocq made a similar confusion in writing:: "If the citizens were the owners of the national or communal property, they would be entitled to ask for its partition, for they would be the owners of undivided property and nobody can be forced to remain in in-division…the result would be the spoliation of future generation and the destruction of the domain of the state in favor of the generation of then living. If the citizens cannot sue for partition, it is not because the national property is owned by a fictitious person, who would be a fantastic person, but it is because there are two ways of being owner. And collective ownership lasts as long as its dedication to the collectivity does not entail partition.."

[108] See Marcel Planoil, *Supra* Note 8.

Collectively owned things are not the same as jointly owned things which are in the state of in-division. Collective ownership suppresses the autonomy of individual shares; those shares do not exist in the sense that the individual, even if she is considered as an owner, cannot exercise the rights attached to ownership.

On the other hand, joint ownership permits the autonomy of the individual because individual property subsists in shares. In the case of joint ownership, each of the shares, even if it is physically merged into the others, has its special owner; undivided co-ownership is always individual ownership with physical merging of the shares.[109] Collective ownership, on the other hand, rests upon the necessary grouping together of the person to which it belongs and such things are not intended to become the subject matter of private ownership.[110]

8. Ordinary movables and special movables

Mere adherence to the major scheme of classification of goods in the Code, i.e., the law of movables and immovables, leaves many issues of acquisition and transfer of movables unanswered. The same procedure of transfer does not apply to all kinds of movables. And not all movables are subject to the law of possession in good faith. Thus, a distinction among movables is necessary to identify the proper rules of transfer and acquisition of ownership regarding movables.

Recognition of the division of movable things into ordinary and special can be inferred from Articles 1186/2, 2267/2 and 3047/2 of the Code. Special movables may be corporeal (e.g. motor vehicles) or incorporeal (e.g. business).[111] The basis of this dichotomy of movable things into special and ordinary seems to hinge entirely on the wishes of the legislature. When the legislature deems it appropriate to single out a movable thing and put it in the category of special movable, that is all to it. Some movables are seen by the lawmaker as deserving special treatment because of a combination of many factors such as their economic value (e.g. aircrafts and ships[112]), security reasons (e.g. arms) and the need to ensure continued enjoyment by debtors after such things are given in the form of security (e.g. construction machinery).

[109] *Id*

[110] *Id*

[111] See Art. 124 of the Commercial Code which treats business as a special movable. There are other laws which give special treatment to some movables. For e.g. TV sets, motor vehicles, construction machinery and arms are considered by separate law as special movables.

[112] For the purposes of transfer, ships, vessels and airplanes are assimilated to immovable property in France and Louisiana. See A. N. Yiannoplous, "Movables and Immovables in Louisiana and Comparative Law," *22 L.L.R.* (1961-1962) at 561.

This section explains rules applicable to ordinary movables and special movables, distinguishes special movables from ordinary movables, and comments on rules applicable to motor vehicles and shares in business associations.

8.1 Ordinary movables

Every movable which has not been classified by the law as a special movable is an ordinary movable. Registration is unnecessary to effect transfer of ownership over ordinary movables. Moreover, there is no need to secure a title certificate in connection with ordinary movables. In order to transfer ownership over ordinary movables there is a need to have cause in the sense already mentioned, i.e., juridical act (contract or testament) or law (court order). In addition, there is a need to effect delivery of the ordinary movable from the transferor to the transferee. In French law, an intention to transfer ownership as expressed in a valid agreement without the need to effect delivery is good enough to transfer ownership over movables.[113] In Germany, however, an intention to transfer ownership as indicated in an agreement followed by delivery leads to transfer of ownership in respect of movables.[114]

The Ethiopian law of ordinary movables has followed the German approach. Under Article 2274 of the Code, delivery involves the handing over of a thing and its accessories to the transferee. Article 2274 of the Code offers just one type and the most common sense of delivery.[115] In respect of ordinary movables, delivery leads to possession, which in turn leads to the presump-

[113] K.W. Ryan, "An Introduction to The Civil Law", (Australia, The Law Book Co. Of Australasia PTY LTD., 1962) at 170-171.

[114] *Id.*

[115] Roman law gave recognition to various types of delivery. *Constitutum possessorium* refers to the case where a transferor in possession could agree to transfer ownership but to retain possession of the thing in some other capacity than that of owner. *Traditio brevi manu* occurs when a transferee was in possession of the thing, but not as owner, an agreement that she should become the owner would transfer the ownership to her. *Traditio longa manu* is the situation where the transferor could point out a thing to the transferee and authorize her to take such thing at her will; *traditio per cartam*, literally means agreements alone, the delivery of a written agreement instead of delivery of the thing; here clauses would be inserted in the agreement under which the owner divested herself of ownership and retains possession as a mere detentor. The fifth form is agreement followed by actual handing over the subject matter to the transferee, i.e., actual delivery. In these five cases, Roman law put one common central condition, which is the transferor should intend to part with ownership and the transferee shall intend to obtain ownership. Under Roman property law, if a seller intends to sell a movable thing and the buyer intends it to be a gift, title may pass. On the other hand, if the seller intends loan while the buyer intends a gift or sale, there is no unity of mind and thus title would not pass. W.W. Buckland, "A Manual of Roman Private Law," 2ed. (1953) at 133-136. Some of these modes of delivery are incorporated in Arts 1144, 1145 and 1147 of the Code.

tion of ownership.[116] Simply stated, she who possesses an ordinary movable is assumed to hold it for herself and to be owner thereof. As ownership over ordinary corporeal movables may be transferred when possession is transferred, whosoever is in possession of an ordinary movable is presumed to possess it on her own behalf and to be the owner of such thing.[117] If anybody disputes such ownership, the obligation to disprove such presumption is borne by the disputing party.[118] For instance, a bare owner will surely rebut the presumption that a movable thing she has given in usufruct is owned by the usufructuary. A pledgor and an owner of a lost thing may set aside an inference of ownership in favor of a pledgee and a finder, respectively, arising out of their possession.[119]

The rule that a cause followed by delivery is sufficient to transfer ownership over ordinary movables is tied to one of the policies of property law. A transferee of an ordinary movable is not required to ascertain whether or not the person with whom she is dealing is an owner. To introduce registration or some other formalities in relation to ordinary movables is to impede the smooth flow of goods in commerce. With regard to ordinary movables, to require formality is to put a practically impossible bureaucracy in the way of exchange of goods given the multitude of such products and the speed with which they change hands. If the purchaser's title could be attacked at any time, she would be reluctant to enter into transaction relating to movables; this would, in turn, impede the speed and reliability of commercial transactions. To avoid such inconveniences, the law has greatly simplified the requirements of transfer of ordinary movables. *Establish cause and receive delivery of an ordinary movable, you become the owner thereof* has become the favored rule.

8.2 Special Movables

As highlighted earlier, a transfer of ownership in respect of special movables requires a *cause*[120], i.e., a contract of sale or donation or a testament or a court order. The *cause* should be accompanied by *registration* and *issuance of a certificate of title* by a proper authority. Possession of a special movable alone does not make one an owner thereof.[121] The distinction between *special*

[116] See Art. 1193/1.

[117] *Id.*

[118] *Id.*

[119] See Article 1193/2.

[120] Notice that the term used by the Amharic version of Art. 1184 of the Code may be translated as "juridical act" while the English version makes mention of one type of juridical act namely an agreement.

[121] See Ditu Tufa v. Jemal Shita (Sup. Ct., Civil File No 666/82, (Sene 1982 E.C).; Colonel Belayneh Mengistu v. Mugyb Seid, Sup. Ct., Civil File No 305/86, (Hidar 1987 E.C.); Hagbes PLC v. Colonel Mulugeta (Sup. Ct., 1986 E.C.)

and *ordinary movables* has a clear legal basis. Article 1186/2 envisages the issuance of special laws that single out some movables and implies that special steps are envisaged in their transfer.[122] Special movables are limited in number under Ethiopian property law. The list of such movables include; businesses,[123] motor vehicles,[124] construction machinery,[125] ships[126], and non-negotiable instruments,[127] patent[128] and trademarks[129.] Considerations of security and safety (e.g., firearms), debt security (e.g. business chips and air-crafts), easier identification of the true owner for the purpose of liability (e.g., motor vehicles) are the major policy reasons for the designation of certain movables as special movables. However, the factor due to which a certain ordinary movable joins the category of special movables appears to be dictated by a variety of other interests.

When the law considers a certain movable as having special significance, it may designate it as a special movable. For the purpose of transfer, special movables are elevated to the status of immovable property. If, for example, Ato Kumsa owns an automobile which he sells to W/rt Semira, the latter is mere possessor of car (even after having paid the full price of the car) until Ato Kumsa surrenders the possession of the car to the buyer together with transfer of a certificate of title thereby enabling W/rt Semira to have a certificate of title in her own name.

8.3 Special movables versus ordinary movables

Unlike the case of ordinary movables, one cannot claim to be an owner of a special movable by mere possession. As a corollary, one cannot establish the ownership of a special movable by proving mere possession. Second, one cannot acquire the ownership of special movables through possession in good

[122] See Article 2267.

[123] See Art. 3047. See also Arts. 150-205 of the Commercial Code of Ethiopia.

[124] See Motor Vehicle and Trailer Regulation, Legal Notice, 1969, No 360, Year 28 No 9.

[125] See Registration and Control of Construction Machinery, Art. 4/1, 1999, No 177 Year 29 No 61.

[126] A ship must be registered. For the valid transfer of property rights in a ship with Ethiopian nationality the instrument which establishes such rights must be "drawn up in a recognized legal form" and registered with ship registers. Publication must take place as well in order to set up such agreements against third parties. See Maritime Code of the Empire of Ethiopia, Arts. 7-8, 45, and 50, Proc. No 164, 1960, Neg. Gaz. Year 19, Extraordinary Issue No 1.

[127] Art. 341 of the Commercial Code provides that the effective transfer of registered shares requires registration. See also Arts. 722 & 723 of the same Code.

[128] See Inventions, Minor Inventions and Industrial Designs, Arts. 14 & 15, Proc. No 123, 1995, *Nega. Gaz.*, No 25 Year 54.

[129] Court practice as well as the practices of the previous Ministry of Trade and Industry, and now that of the Ethiopian Intellectual Property Office depict that ownership of trademarks is established not by mere use in commerce of a distinctive sign but by registration. A draft trademark law in pipeline is in line with this practice.

faith. The belief on the part of an acquirer in the fact that the person with whom she concludes a sale contract holds title or is legitimate person to make transfer is destroyed by publicity which raises a presumption of knowledge on the part of the buyer. It appears that Articles 1161-1167 of the Code should not be invoked with regard to special movables for publicity destroys any claim of good faith on the part of a third party. For the purpose of transfer of ownership, special movables, e.g., business, motor vehicles and construction machinery, are treated as immovable things; registration and issuance of title deeds in the name of the current owner are required. It naturally follows from this that special movables are to be subjected to mortgage while non-fungible ordinary movables are to be charged with pledge.

On the other hand, the law simplifies the transfer of ordinary movables. Unlike, special movables the conclusion of a contract or testament followed by delivery effects transfer of ownership in respect of ordinary movables. The law desires their speedier movement in the market. A prescription that undergoes longer steps in the process of transfer of ordinary movables would be impractical and unnecessary; and that would impede their flow in commerce given their volume, number and frequent exchange of hands in a market.

8.4 Transfer of motor vehicles

In *Habteab Tekle v. Esayas Like and Bezabih Kelile*,[130] the issue was whether ownership relating to a certain vehicle was transferred to the appellant. The appellant argued that he is the owner of a car which he bought from the second respondent after having paid the full price, on the basis of a contract of sale made in writing and authenticated with the proper authority. The appellant, thus, claimed that the ownership of the car has been transferred to him even if the title certificate relating to the car was not issued in his own name. The appellant stated that transfer of ownership relating to the motor vehicle was not transferred to him owing to circumstances beyond his control, i.e. because the second respondent (the seller) did not pay customs duties.

The first respondent, on the other hand, argued that the car was attached to satisfy the debt owed to him by the second respondent, in whose name the car was registered. The High Court held that the car in dispute was owned by the second respondent. The basis for the holding of the court was that transfer of ownership of special movables was equivalent to that of immovable property, and that the person in whose name a special movable such as a car is

[130] Supreme Court, Civil File No. 570/80 (Sene 22, 1980 E.E.) See Getaneh Agonafer V. Fantu Gutema (High Ct., Civil File No 369/78 (Miazia, 1980 E.C.); Eteneh Tadele V. Berta Construction (High Ct., Civil File No 285/80 (Gnbot 1980E.C.).

registered (and title certificate is issued) is the owner thereof. The High Court thus found that the title deed of the car in dispute bears the name of Bezabih Kelile (second respondent), thereby making him the owner of the car, and the Court decided that the car could be attached to satisfy the claim of the first respondent (Esayas Like).

However, the Supreme Court reversed this decision of the High Court. The Supreme Court invoked Articles 1186/2 and 1195 of the Code, and stated that he who possesses a title certificate pertaining to a special movable in his own name is presumed to be the owner. The Supreme Court stated that the presumption laid down under Article 1195 of the Code can be set aside by contrary evidence. According to the Supreme Court, the contrary evidence is one of the grounds embodied in Article 1196. The provision cited by the Court enables setting aside the presumption of ownership by virtue of title deed where it was not issued in accordance with the law or was issued by an authority having no jurisdiction; or where the title deed was issued on the basis of an invalid act; or if the person in whose name the title deed is issued acquired the ownership after the day on which the title deed was issued.

The Court noted that the appellant could have completed the process of transfer of ownership if the second respondent had paid the required customs duties. The second respondent did not pay the customs duties on the car, which he imported duty free and which upon transfer was required to be taxed. The Supreme Court further stated that the contract of sale of the car took place a year before the first respondent instituted debt recovery suit against the second respondent showing that the appellant had bought the car from the second respondent well before the attachment order. Based on these considerations, the Court reversed the decision of the High Court and ruled that the ownership of the car had to go to the appellant.

It is submitted that the decision of the Supreme Court is wrong because the appellant did not rebut the presumption that the car belonged to Bezabih Kelile within the meaning of Articles 1195 and 1196 of the Code because the title certificate bears his name. In the decision of the Supreme Court, none of the three factors envisaged to rebut the presumption of ownership under Article 1195 was shown to have existed. The Court considered the failure to pay tax by Bezabih Kelile as a good cause that had to go into the determination of rebuttal factors. Apparently, Bezabih's failure to pay tax has obstructed the completion of the transfer of the title deed of the car to Habteab's name. Nevertheless, that cannot be considered as one of the ingredients or constitutive elements of the provisions invoked by the Supreme Court which would warrant setting aside the presumption of ownership contested in the appeal

under consideration. A judgment delivered in the absence of such rebuttal factors would contravene a straightforward legal rule; and obviously casts doubt on the predictability of court decisions.

On the top of that, the fact that the appellant bought the car in dispute from the second respondent well before the attachment order does not have any legal consequence as state of mind of an acquirer is not relevant in the case of special movables. The car in dispute was still owned by the second respondent in whose name it was registered with the pertinent authority. The Court should, however, be praised for recognizing that for the purpose of transfer, special movables are similar to immovable property and that the rules designed to regulate the latter may apply, with the necessary changes, to the transfer of the former.

Before winding up the discussion on the transfer of motor vehicles, it is worth making mention of the prevailing practice. As a matter of practice, a contract of sale of a motor vehicle is required to be made in writing and be authenticated by the proper authority. The seller (or her heirs) and the buyer have to appear in person or via their agents, before the authority in charge of registering motor vehicles, and request the cancellation of the name of the former and enter in the register of motor vehicles the name of the buyer.

The pertinent law, however, does not require written agreement, authentication and personal appearance[131] of the seller and the buyer. As matter of law, in the case of conventional transfer of title in respect of a motor vehicle, the two parties fill out and sign a form annexed to the pertinent law called Title Transfer Page. The seller alone delivers the completed Title Transfer Page along with the Car Booklet Title bearing the name of the seller to the concerned authority. The concerned public authority verifies the signature of the

[131] The requirement of personal appearance has on many occasions complicated title transfer process because sellers in some cases refuse to accompany the buyer. In that case, sellers ask the concerned authority to effect them the transfer but in vain. The buyer sues the seller requesting the court to compel him to appear in person before the proper authority to facilitate the transfer process. Some five years ago, this type of litigation generated a huge controversy between courts and practitioners. Some judges took the stance that the buyer had to request the authority in charge of registration of motor vehicles and should it refuse to do so, she had to file a suit against the authority; the practitioners, on the other hand, insisted that the courts had to order the seller to personally appear before the authority to effect the transfer. Some courts however accepted plaintiffs plea and ordered defendants to make a personal appearance to speed up title transfer. See Shiferaw Tsegaye v. Wendemu Bekele (Sup. Ct., Civil File No 800/81 (Yekatit, 1981.); Lema Kebede v. Muluneh Becheri and Tadele Beyene (Sup. Ct., Civil File 185/89, Tahesasse 1991E.C.; Esmail Nur v. Fikremarkos Teklu (First Instance Ct., Civil File No 1000/89, Tahsas, 1991 E.C.

seller; cancels the old title certificate and then issues a new title in favor of the buyer.[132]

8.5. Transfer of shares

Special movables as already indicated can be either tangible or intangible. Shares are among the most important kinds of intangible special movables. Under the Commercial Code of Ethiopia, shares in a business association are divided into two on the basis of the steps followed in transferring them: bearer (ordinary) shares and special shares. The reading of the relevant provisions of the Commercial Code reveals the following. The transfer of ownership or interest in a bearer share which perhaps may be issued only by a share company[133] is accomplished through two steps: *cause* which may be a juridical act or court order or the application of the rules of intestate succession plus *delivery* of the certificate representing the proprietary interest in the share.[134] On the other hand, the transfer of special shares follows a different track. Even in the case of the transfer of ownership or interest in a special share issued by business associations in Ethiopia, cause is indispensable but something more is needed for the valid transfer of such interest to flow from a transferor to a transferee.

Some illustrations can be provided here. In the cases of ordinary partnership, a partner may transfer the ownership of her share or interest short of ownership such as usufruct. The third party cannot step into such partnership nor can she obtain interest in a share of a partner unless the transfer is approved by the other partners.[135] If partners approve the transaction, the memorandum of association needs to be amended. And third parties are affected by the transfer of a share in an ordinary partnership only after the amendment is deposited with the proper authorities and is published.[136] The issues of approval by the other partners, amendment to the memorandum of association and the publicity requirements via registration and publication do apply to cases of transfer of a share by a general partner. But in the case of general partnership, a partner may constitute an interest short of ownership over her share in favor of third party without the consent of the other partners. Such assignment of

[132] See Art. 9/2, Supra, Note 124. Similar lines of cases arose in connection with transfer of immovable property and with similar court disagreements.

[133] See Arts 274/1 and 510/3 of the Commercial Code which prohibit a joint venture and a private limited company from issuing securities. Though there are no explicit prohibitions in relation to an ordinary partnership, a general partnership and a limited partnership, one can argue that the articles under consideration shall be extended to the same.

[134] See Art. 340 (1&2) of the Code she who is possession of a certificate evidencing a bearer share is taken as the owner of the same and thus entitled to receive dividends, redemption and take part in general meetings.

[135] See Art. 250 of the Commercial Code

[136] See Art. 224 of the Commercial Code

"beneficial interest in a share" to a third party, to use the language of the Commercial Code, will not bind the partnership; nor does the third party get the status of a partner.[137]

In the contexts of joint venture, limited partnership and private limited company, with some variations, transfer of the share of a member of such associations can be validly transferred to a transferee with the approval of the other partners, which is the fundamental element for the valid transfer of a share to a third party. In the case of a joint venture, under Article 274/2 of the Commercial Code in the absence of a contrary contractual agreement or perhaps legal provision,[138] a unanimous agreement of the partners is required for a valid assignment of a share probably to a third party.[139] It is not clear whether this article refers to the assignment of the ownership of a share or an interest in a share less than ownership or both types of assignments. Under this article, amendment of the memorandum of association is necessary but the very nature of the partnership will be destroyed if the amendment is publicized via registration and publication of the same.

Under Article 302 of the Code, the requirement of approval is maintained in the case of assignment of a share in a limited partnership but it is made a bit lax. Here the requirement is the approval of the managers and the majority members of the limited partners. The consent of the general partners may be disregarded. The registration and publication formalities are maintained.[140] Like the case of joint venture, it is not clear if Article 302 does apply to the transfer of ownership or interests less than ownership or both by a partner of a limited partnership. Nor is Article 302 clear if it is referring to assignment to a third party or between the partners though it seems to refer to the former. In respect of transfer of shares to a third party[141] in a private limited company, the following steps are required: the transfer deal must be made in writing;[142] shall be approved by the majority of the members representing at least a three-quarters[143] of the capital, and the approval shall be entered in the share register to be maintained by the company and be registered in the com-

[137] See Art. 283 of the Commercial Code

[138] The phrase "unless otherwise provided" under Art. 274/2 of the Commercial Code may refer both to a contrary provision and agreement

[139] Id.

[140] See Art. 224 of the Commercial Code

[141] Assignment of share between members can take place without restriction absent a contrary provision in the article of association of the company. See Art. 523/1 of the Commercial Code of Ethiopia

[142] This means the contract must be signed by the parties and attested by two witnesses by virtue of Art. 1727 of the Code.

[143] This requirement can be made more stringent by the articles of association, for example, which may set the vote of members representing more than 75% or even 100% share of the company. See Art. 523/2 of the Commercial Code.

mercial register.[144] If one or more of these conditions are missing, the transfer contract will not bind third parties, the company and perhaps even the transferor and the transferee.[145] In case the share of a member of a private limited company is attached, the third person purchasing such share may step into the company upon the approval of the other members.[146]

In relation to transfer of registered shares in a share company, there appear to be two conditions that are stated in Articles 333 and 341 of the Commercial Code that are written in the spirit of free transfer of shares. These two requirements may be described as registration of the transferred share in the name of the transferee in the register of shareholders that shall be kept at the head office of the transferor's share company[147] and compliance with any restrictions which may be specified in the articles of association or by resolution of an extra-ordinary meeting by virtue of Article 333 of the Commercial Code. Failure to observe any of the two conditions of transfer will make the transfer a mere attempt; the person trying to effect transfer remains a shareholder and the other person cannot enjoy the status of a shareholder. It is clear that Articles 333 and 341 of the Commercial Code do apply to the case of transfer of ownership either freely or for consideration and either before or after the death of the transferor; but it is not clear if these stipulations do apply to the case of the constitution of property interests (e.g. usufruct or pledge) which are less than transfer of full or partial joint ownership over the share of a shareholder.[148]

In respect of a cooperative society, transfer of a member's share either as a whole or a portion thereof or an interest in the share less than ownership such as pledge and usufruct can take place.[149] No transfer by a member of her share or benefit in a cooperative society shall be valid unless: the member has held such share or benefit for at least one year before the transfer and the

[144] See Arts. 522 and 523 of the Code. See also Art. 524 of the same Code for the case of transfer of the share of a deceased member of a private limited company.

[145] Art. 522 of the Commercial Code appears to have this message. This provision may mean that, absent the formalities indicated therein, the agreement purporting to transfer share will have effect between the transferor and the transferee, but does not bind third parties and the company.

[146] See Art. 523/5 of the Commercial Code.

[147] See Art. 331 of the Commercial Code. An analogous register of shares shall also be maintained by any private limited company under Art. 521 of the same Code.

[148] It seems that for the exercise of such subordinate rights established over a share to be effective, communication to the share company is necessary, which may be inferred from Art. 329 of the Commercial Code for one cannot vote at meetings as a beneficiary of usufruct over a share in a given share company without some kind of communication to such share company about the creation of such right.

[149] See Cooperative Societies Proclamation, Proc. 147, 1998, Art. 19, Fed.Neg.Gaz., Year 5th No.27.

transfer is approved by the management committee.[150] On the death of a member of a primary society, her share or benefit shall be transferred to one of her heirs designated as such in the register of society or failing such designation to her legal heir at law, and where such heir is a member or is willing to be a member. Where such heir is not a member or she is a member but does not wish to become or is not admitted as a member, she shall be paid the value of the share or benefit of the deceased member.[151] Where the heir accepts and is accepted as a member and if the shares or benefits to be transferred to such heir exceed ten percent of the total paid up capital of the society, the member shall be paid the difference in cash.[152] The transfer or payment made to an heir shall not be reversed due to the claims made by third parties on the society.

In conclusion, the requirements for transfer of shares in the case of ordinary partnership, joint venture, general partnership and limited partnership are more stringent than the requirements needed to transfer share in a private limited company. Such conditions are relatively loose in relation to transfer of shares in a share company as marketability of shares is one of the hallmarks of share companies. This informs us whether the emphasis is on the name, image and character of the incoming member or merely on her capital contribution. With the exception of private limited companies and cooperative societies, the conditions under which an heir or a member may assume membership in other business associations are not outlined. If the memorandum or articles of associations of these business associations are silent, too, the private limited company provisions on this point should apply with the necessary changes.

With the exception of the case of private limited companies, another issue not regulated by the Commercial Code (including the cooperative law) is the question of transfer of shares or interest short of ownership in a share between members. This lacuna in the pertinent law should also be covered either by the bylaws or by analogy because such internal transfers might lead to undesirable concentration of decision-making power in the hands of one or few members of a business association. Aside from the cases of ordinary partnership, general partnership and cooperative societies, the conditions necessary for the establishment of rights short of transfer of title over a share are not provided for. It is argued here that in the case of absence of a stipulation in the memorandum or articles of association, the general partnership provisions on this point shall (with the necessary change) apply to the creation of rights less than transfer of ownership over shares issued by the other business organizations. Finally, it appears that the constitution of right of promise of

[150] *Id.,* Art. 19/1 (a& b). | [151] *Id*., Art. 19/3 | [152] *Id.*

sale[153] and preemption[154] over a share in a business association shall be equated with transfer of shares and thus be regulated accordingly because such transactions may eventually lead to transfer of shares.

Concluding remarks

There are good reasons not to argue that the primary classification of things under the Code should be relegated to a secondary position.[155] The argument implicitly advanced in this Commentary has been that the primary classification of goods under the Code is complemented by the various kinds of classification of goods embodied in various parts of Book III of the Code and other laws.

Limiting oneself solely to the analysis of the classification of things into movable and immovable things cannot help one to sufficiently understand the property law of Ethiopia. The taxonomy of corporeal versus incorporeal things can be employed to explain the object of property law of Ethiopia. Consumable things bear upon the law of usufruct and of loan; fungible things affect the law of possession, of accession and of contract. Indivisibility impacts the law of joint ownership and of matrimonial property. The law of movable things can be appreciated well if the class of ordinary and special movable is brought into the picture. The notion of personal property is of some relevance to identify resources, which are put beyond the domain of private ownership. And, the entire domain of state property is explained by the conception of private and public domain property.

In short, the subsidiary divisions are not meant to replace but to augment the dominant categorization of things by the Code, i.e., the law of movables and immovables. The student of Ethiopian property law should thus appreciate the role played by the multifarious kinds of subsidiary division of things spread over the various fields of private law of the country. ■

[153] See the words "a specific chattel" under Art. 1411/1.

[154] *Id.*

[155] It is submitted that the division of things into movable and immovable is and should be still alive in Ethiopia. If the classification of thing has to be organized around a key asset, Ethiopia at present does not have an asset more important than immovable property. Ethiopia is an agrarian society; immovable property still retains the center stage. The division of things into movable and immovable things is intelligible to laypersons. Law is desired to be accessible, not only in terms of language but also in terms of idea. It is sensible to retain this division. In addition, the collectivization of land does not abolish the ownership of buildings. Further, people can still hold rights in land. A holder of land can enjoy usufruct, lease her land for a specific period of time, donate a portion of her land and mortgage lease right in the case of an investor. These rights are immovables by the object to which they apply as they are linked to an immovable asset.

VOID AGREEMENTS AND VOIDABLE CONTRACTS:

The Need to Elucidate Ambiguities of Their Effects

Lantera Nadew[*]

An Overview

We enter into contractual engagements daily, if not many times a day. Every business organization, be it large or small, binds itself in bonds of contract with customers, suppliers or employees in the conduct of its business operations. All these involve interactions of contractual nature. "We all make contracts everyday... [and]... many of us spend most of our lives in performing contractual obligations."[1] One may safely say that contracts are the most frequent juridical acts and the most useful among laws that govern social relationships.

However, not all contracts are valid, thereby raising the issue of *defects* or *vices* which might render the contract susceptible to *invalidation*, and at times *of no effect*. It is not, of course, possible to avoid the occurrence of vitiating factors; but we can reduce undesired effects of defective contracts. Contractants who have the necessary awareness of defective and unenforceable contracts and their subsequent effects, are unlikely to conclude defective contracts "thereby reducing risk".[2]

Some defects (vices) render a contract ***void***, while others make it ***voidable***.[3] Most legal systems expressly define defective contracts and enumerate effects that these category of contracts produce. The terms "*void*" and "*voidable*" have common law origin and are used to show the degree of defect in contract.[4] Void, voidable, and unenforceable contracts denote different degrees of ineffectiveness of contractual engagement.[5] These terms have their counterparts in the continental system. But under many circumstances,

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[*] LL.B, LL.M, Lecturer and Deputy Director, Institute of Federalism and Legal Studies, Ethiopian Civil Service College.

[1] Smith, J.C. *The Law of Contracts*, 2nd ed, (London: Sweet and Maxwell, 1993) at 1

[2] As careful examination of type and effects of disease is a must to prescribe a curing medicine, vices that may taint validity and legal effect of contract and the source of such vitiating factors appears to be investigated to shift to the right way to have fruit bearing contracts.

[3] Guest , A. G. (ed.) *Anson's Law of Contract* 26th ed. (Oxford University Press, 1986) p. 17

[4] O'Donovan, Katherine , "Void and Void Marriages in Ethiopian Law" *Journal of Ethiopian Law* Vol. 8 No. 2 (1972) P 439

[5] Guest, *supra*, note 3

the terms lack clarity and as a result usually bring about confusion and misunderstanding.[6]

A *void* contract is an act that the law holds to be no contract at all-- a *nullity from the very beginning*; conclusion of void contract does not change the position of "contractants."[7] They can assume as if the contract was never formed. This form of contract, therefore, cannot hold the term contract in real sense; categorizing such an empty act under contract is generally regarded as contradiction in terms. As a result, some authors prefer to use the terms "*void agreement*" in lieu of *void contract*.[8] It is logically fallacious to view a void act as a contract; because if an agreement is truly void, it is not a contract.[9] Strictly speaking a void contract produces no legal effect. Neither party, therefore, can sue the other for enforcement of the same.[10] The defect causing a contract void is incurable and has no binding effect and hence, unless a new and independent contact is re-entered, there will be no contractual relationship. To use a statement from one of the external assessors of this article, it is absolutely impossible to kill what is already dead; a mere draft, or an "of no effect" contract cannot be invalidated.

Voidable contract, on the other hand, is binding until it is avoided (invalidated) by the option of the party whom the law protects. It is a contract,"... where one of the parties has power by manifestation of election to avoid the legal relations created by the contract …."[11] A voidable contract, thus, is a 'sick contract' that may be "cured or killed" depending upon the option that may be exercised by the victim of the *defective agreement*.[12] That is why it is said, "Annullable acts live in a way under menace of death."[13] If the victim of the vice waives his right to avoid the contract and elects to ratify it, his power of avoidance extinguishes and the contract is deemed to have had no defect from the moment of election.[14]

The Ethiopian Civil Code does not make use of the terms "void" and "voidable". Instead, the Code opts to employ different terminologies but

[6] O' Donovan, *supra* , note 4

[7] Guest , *supra*, note 3

[8] Abichandani R.K. *Pollock and Mulla Indian Contract and Specific Relief Acts* 11th ed. Vol. I (Bombay: N.M. Tripathi Private Ltd ,1994), at 391

[9] A contract creates obligation on contracting parties. If there is no legal obligation, the relationship cannot bring about contract.

[10] *Supra* , note 3

[11] Morris J. (ed). *Chitty on Contracts* Vol. 1 (London: Sweet and Maxwell, 1972) at 15

[12] An agreement may be said to be defective if it is not freely given or where the faculty of understanding of the author of consent is not developed or collapsed.

[13] Planiol M. *Treatise on Civil Law* 12 ed. Vol. I part I (Translated by Louisiana State Law Institute, 1939) at 218

[14] In accordance with Art. 1811 of the Civil Code a party who is entitled to avoid a voidable contract may opt to upheld the contract whenever asked by the other party in accordance with Art. 1814 of the Civil Code.

producing similar effects.[15] The Civil Code has chosen to apply the expression "*of no effect*" whenever an agreement is intended to be null and void.[16] The term voidable, on the other hand, is synonymous to the phrase, "...*may be invalidated*…."[17]

Ironically, the Ethiopian Code appears to mingle the effect of void and voidable contracts. Arts. 1808-1818 that deal with effects of defective contracts, appear to permit invalidation of a contract that is tainted with defects in object and form. Sub-art. 2 of Art. 1808 envisages that a contact whose object is unlawful or not made in a prescribed form may be invalidated at the request of any contracting party or interested third party.

It is ridiculous to talk about invalidation of a contract that is already invalid by operation of law (non-existent from the very beginning). As stated above, it is awkward to kill what is already dead. Then what is the effect of Art. 1808(2) of the Civil Code? Because of this dilemma one may be tempted to deduce that there is no difference between effects of void agreements and voidable contracts in Ethiopia. The confusion has thus created unpredictability of judgments.

Some courts, order for invalidation of contracts that were tainted with defects which can render contracts *void ab initio* (non-existent from the very begin-

[15] Though not uniform, the Ethiopian Civil Code and the Commercial Code in some limited situations use the notion of "void" instead of the usual expression "of no effect". For instance, Art. 2828 of the Civil Code states the contract of pledge shall specify the maximum amount of money guaranteed by pledge, otherwise the contract shall be void. Art . 215 of the Commercial Code sets forth, the contract of partnership to be void if it allocates the whole profit to one partner.

[16] Krzeczunowicz G. *Formation of and Effects of Contracts in Ethiopian Law*, (AAU, 1980) p. 57. Vices that make contracts void are specified in Arts, 1714-1716, 1719 cum 1720(1) and subsequent provisions of the Civil Code. Contracts may be ' of no effect' where the defect relates to the object of the contract (where obligations of parties is not defined (Art. 1714) impossible (Art. 1715) or illegal (Art. 1716) the contract is of no effect. Similarly, where a form required in respect of certain contracts is not observed, the agreement cannot attain the status of contract and remains at the draft stage for the parties are not assumed having finalized the stage of negotiation (Art. 1720(1)). Immorality of object or total lack of consent causes the same effect.

[17] The expression, " may be invalidated" is set out in different provisions of the Civil Code that are meant to protect the interest of a party whose consent is vitiated or who is incapable of contracting. Contracts entered by minors beyond the power granted by law and acts of persons under judicial interdiction may be invalidated. These are persons generally regarded as incapable to enter into juridical acts and may request invalidation whenever the dealing is assumed to be injurious. Defects in consent or incapacity are the two factors that render a contract voidable.

Thus, even the words void and voidable are not directly incorporated in the general contract section like that of the Anglo-American systems. Similar concept is expressed in a different terminology but revealing almost identical consequence.

ning).[18] But others declare voidness of contract and order parties to be reinstituted extra contractually. In some cases the effect of period of limitation exacerbates the situation.[19]

This short article attempts to shade light on effects of void agreements and voidable contracts under the Ethiopian Civil Code. The possible and actual confusion that frequently arises because of the uncertainty of terms will be briefly assessed and possible ways out will be pointed out. The effect of period of limitation on void agreements has been a confusing issue, and an attempt has been made to propose possible solutions until a binding authoritative interpretation is rendered through a decision of the Cassation Division of the Federal Supreme Court or until a remedial legislative action is taken.

1. The Nature of Defective Contracts

Defective contracts are contracts which do not satisfy the essential elements that are necessary to have a valid contract.[20] Deficiency pertaining to some of the elements makes a contract voidable and others cause it to be void (to be non-existent or of no effect). Defects relating to capacity and consent make a contract voidable.[21] An incapable person is a person who is protected by law from possible contractual abuses and may opt either to 'kill or cure' the contract. The option usually depends upon fruits of the contract. If the contract is assumed to be fruitful, the person may not opt to invalidate it.[22] In this case, the dealing remains valid and the defect is regarded as cleansed. The effect

[18] Facts of the Cases are mentioned in Part III.

[19] Interested third parties or contracts usually demand invalidation of void contracts because of the confusion resulting from the wording of Art. 1808(2) of the Civil Code.

[20] Art. 1678 of the Civil Code enumerates the essentials of contract. Lack of some of these elements causes a contract to be non-existent from the very beginning and others make it merely defective but enforceable.

[21] Art. 1808(1) of the Civil Code.

[22] Art. 1808(1) of the Civil Code With regard to juridical acts entered by minors, Art. 299 of the Revised Family Code (*Federal Negarit Gazetta* Extraordinary Issue No. 1/2000) uses the expression of no effects. Sometimes the Code uses the word may be annulled or annullable. The wording of Art. 299 of the Civil Code may create an impression that contracts entered by minors are void. But the intention of the lawmaker is manifested in Art. 1808(1)of the Civil Code . Art. 300 of the Revised Family Code, for example, declares that the nullity of juridical acts entered by minors may be demanded by the minor, his/her heirs or representatives. Where the fruit of the dealing is assumed beneficial these people may not request for invalidation and hence the contract will remain valid. The drafter was not selective in using terms when drafting the Code. This failure can be remedied by resorting to other provisions of the Civil Code. The legal effect of juridical acts performed by a person under judicial interdiction and minors is identical (Art. 358 of the Civil Code). Art 387 of the Civil Code defines instances in which a person interdicted by law may demand invalidation of juridical acts. As per this provision the interdicted person, the person who dealt with him/her or the public prosecutor can request for invalidation.

of defective consent is also the same.[23] The victim of consent may decide to avoid or confirm the transaction. Unless the person exercises the option, the law does not avoid effects of the contractual dealing.

Strict application of the literal reading of the beginning phrase in Art. 1678 of the Code is true with regard to defect pertaining to object and form of a contract.[24] Lack of object[25], ambiguous object, impossible or illegal object makes the agreement *of no effect*.[26] Similarly, non-compliance with the f*orm* required by law or prescribed by the contracting parties makes the contract non-existent from the very beginning (*void ab intitio*).[27] The old maxim "*forma dat esse rei*"[28] (form gives existence to the transaction) envisages the

[23] Arts 1696 – 17710 of the Civil Code define the effects of contracts tainted with vices of consent. Consent is one of the pillars in contract. Consent to produce contract has to be sustainable at law. This means, it has to be freely given. If consent is tainted by mistake, fraud, duress or other cases of undue influence it is said not free and not sustainable at law. In this case, the victim of the defective consent can require invalidation of the contract.

[24] Art. 1678 of the Civil Code begins with the expression, "No valid contract shall exist unless---" This expression seems making the effect of lack of capacity and defective consent almost identical with the defect in object and form of contract. This assumption is far away from the intention of the lawmaker. The intention of the lawmaker is evident from various provisions that deal with effects of defect in capacity and consent. See for example Arts. 1696 – 1710 of the Civil Code with regard to effects of defective consent and Art. 1808(1) and other provisions defining effects of contractual dealings of an incapable person. After all, the law has devised the possibility of invalidation to protect an incapable person. Children below the age of 18 are regarded as incapable because their faculty of understanding is not developed. The faculty of understanding of insane persons and persons under judicial interdiction is supposed collapsed. The defect in faculty of understanding calls for legal protection. The law is assumed standing at the side of these people and favors them. This category of people can request for invalidation unless the right is barred by period of limitation. On the other hand, Arts. 1714-1716 of the Civil Code specify effects of contracts the object of which is defective. Similarly, Art. 1720 of the Civil Code declare the effect of non-observance of formality requirement.

[25] By object we mean the obligations of contracting parties. Contracting parties promise to discharge certain obligations to their contractant. The promise of each of the contracting parties becomes their respective obligation.

[26] Arts. 1714 – 1717 of the Civil Code.

[27] The term "form" is not defined in the Code. It is the solemnity that the law attaches to a contract. Some times the law requires a contract to be made in writing. In certain situations, the law demands a written contract to be registered. The Commercial Code, for example, demands partnership agreements to be made in writing and be registered. Registration therefore, may be taken as a formality requirement. Copies of all written documents have to be deposited. Deposit of contractual documents may also be taken as a formality. Arts. 1721 -1725 declare general situations that require attestation. All written contracts shall be attested by two witnesses. Thus, attestation is a formality requirement. Similarly, Arts. 1728 to 30 make signature of contracting parties as a formality requirement. As stated in Article 1726 contract parties may also prescribe a given kind of formality other than those mentioned in the Civil or Commercial Code.

[28] Planiol, *supra*, note 13 at 233

effect of non observance of '*the Form*' requirement. Thus, "the ... solemn form which the law exacts for certain acts is generally considered to be a cause for their existence."[29] If contracting parties enter into a contract ignoring the *form* prescribed either by law or agreed by the contracting parties, the act is deemed not to have been made.[30] Art. 1720 of the Code reads "where a special form is prescribed by law and not observed, there shall be no contract but a mere draft of contract." The mere draft is not a contract but a simple intention to enter into a contract. It can, thus, be ignored by any contracting party or third party.

However, if the departure of formality requirement relates to some ancillary matters such as stamp- duty, registration fee or even non-compliance of requirement of publicity, unless otherwise clearly stated, the effect of such trifle violation does not render a contract *void ab initio*, and the contract remains valid[31] subject to the requirement that the formalities which are lacking ought to be fulfilled if the instrument is to be produced as evidence for the existence of a binding contract.

2. Invalidation and Declaration of Voidness

Invalidation is the process of setting aside a defective contract. Vices that render contracts to be invalidated are mentioned in Art. 1696 and 1808 of the Civil Code. Art. 1696 of the Code states, "A contract may be invalidated where a party gives his consent by mistake or under deceit or duress". To have a valid contract—a contract that binds all of the contracting parties-- the law requires, not a *bare* consent but a consent that is freely given. If one consents to an act with a vitiated consent,[32] the law permits him/her either to 'kill or cure' the contract weighing fruits it may generate. Similarly, where a party to the contract is incompetent (i.e. lacks capacity due to age, mental condition, etc) to conclude a valid juridical act or acts beyond his/her authority, the contract may be avoided depending upon the option to get rid of the act.[33]

[29] Ibid

[30] Art. 1720(1) of the Civil Code.

[31] With regard to authentication, *Gorfe G/ hiwot vs. Aberash Dubarge et al* (Cassation File No. 21448) is very notorious and has been an issue of current legal discussion. The main theme of this case is that an unauthenticated contract of sale of an immovable property cannot produce legal effect. Before disposition of this case, failure to have a contract authenticated was not considered as a factor causing a contact to be of no effect but now it has been a settled rule and authentication has been one of the formality requirements for legality of a contract relating to immovable property.

[32] Needless to say, a person may consent to an act because of mistake, fraud, duress and other cases of undue influence. Vices of consent are specified from Art. 1696 -1710 of the Civil Code. Instances in which a contract may be invalidated, the meaning of vices and requirements that have to be met to invoke each of the vices are specified in the Civil Code.

[33] Art. 314 of the Civil Code.

Contractual engagement of a minor may be impugned by the minor when he/she develops the faculty of understanding to weigh the fruits of contract, or by his/her representatives or heirs just after conclusion of the contract. The condition of notoriously insane or persons under judicial interdiction is not different. The law guards such persons with lessened capacity from 'dangerous juridical acts'. This category of people should not be exploited under the guise of contract. Contractual dealings of persons who have failed to understand the effect of their act may be impugned at the request of the insane or interdicted person or by their representatives or heirs.[34]

As stated in the Civil Code (Art. 387) juridical acts entered into by persons under legal interdiction may be invalidated. Article 387 of the Civil Code declares that "Juridical acts performed by a person interdicted by law in excess of his power shall be of no effect."[35] The expression, "*of no effect*" in the sense of Article 387 seems to mean voidable. This meaning is very evident from the words used in the Amharic version of the Code. Sub art. 2 of Article 387 of the English version permits nullity of acts performed by an interdicted person at the request of certain specified persons. If anyone of these persons fails to demand nullity of the act, the act would remain valid. Can we conclude that juridical acts performed by persons under legal interdiction are *void ab intio*? We don't have to be guided by the expression "of no effect" in this case, as the same expression is used with regard to juridical acts performed by minors (Art. 299 of the Revised Family Code).[36]

A contract at the menace of invalidation (voidable contract), thus, is a contract that is defective (but binding) from its very inception, and it may or

[34] Art. 343 of the Civil Code: An insane person to require invalidation of a contract while his/her faculty of understanding was collapsed should prove the fact that he/she was not in a lucid period. He/she may be required to produce evidence that he/she did not understand the effect of the contract at the critical time that he/she has entered into the contract. Proving the mental state of a person is possible but not simple to understand owing to the current Ethiopian condition. To protect the interest of the person who frequently fails to understand effect of juridical acts, it is advised to have judicial interdiction.

[35] Civil rights of an interdicted person may be restricted because of his dangerous nature. Acts that may be freely performed by a person under legal interdiction are enumerated in Art. 386 of the Code but no reference is made to contracts. Using the principle of *ejusdem generic* or *interperetetio restricta*) it is possible to reach at the conclusion that a legally interdicted person cannot enter into a contract free from defect if he/she concludes beyond his legal power, the contract is susceptible to death.

[36] The English version of the Civil Code does not explicitly mention whether contracts entered by persons under legal interdiction may be invalidated. The Amharic version, however, avoids the uncertainty and expresses that contracts entered by persons who are interdicted by law may be invalidated. A person may repetitively commit a crime relating to contracts. (cont.)

may not be invalidated at the option of party entitled to do so. This means, the contract is not a nullity from the beginning, and , it is valid and binding until it is rescinded. [37] The party whose consent is vitiated or who is regarded as incompetent of concluding juridical acts has two options: he/she can seek invalidation or ratify it where the act is considered fruitful. If he/she chooses to adopt the contract, the power of avoidance would be extinguished and the contract will be deemed to have had no defect.[38] Even if he/she opts to invalidate the contract, the other party can avoid invalidation if he/she agrees to make the deficiency good.[39]

Arts. 1808-1818 of the Code are meant to regulate the effects of invalidation of voidable contracts and effects of void contracts. Art 1808 (1) of the Civil Code specifies the two categories of defects that can render a contract voidable.[40] This provision is in line with the definition of voidable contracts. However, Art.1808 (2) of the Code is the source of all the confusion as it seems to allow invalidation of void contracts.[41]

[36] (cont.) To reform the person and save the public from the dangerous behaviour of the criminal the court while passing criminal judgement may interdict the person by making prohibition. In this case one may, however, query whether the interdiction is made to protect the person and the choice of invalidation has to be decided by the interdicted person or whether it is imposed to punish the criminal. If the former reason is true, it is possible to argue that a contract entered by a person under legal interdiction is voidable and may be declared void by the request of the interdicted person if the fruit of the contract is assumed to be injurious. But if the later case is taken as a reason for interdiction, obviously, the contract would be taken as illegal and void *ab initio*. If the person is interdicted, he/she may be reformed and the prohibitive adjudication may be said to be beneficial. But the faculty of understanding of a person under legal interdiction is neither collapsed nor less developed. An interdicted person knows what he/she does. Sub art. 2 of Art. 387 fuels the perplexity. It states that "The nullity thereof may be required by the interdicted person, the person with whom he has contracted or the public prosecutor though the subject matter of the act performed were illicit. This leads to question whether legal interdiction causes contracts to be void or voidable. If the contract is merely taken as void, the agreement cannot produce legal effect and no need for invalidation. If it is taken as merely voidable, the right person that can demand invalidation of the contract is the interdicted person or persons acting on his/her behalf. The Code, however, permits invalidation of contracts by the other contracting party too or by the public prosecutor. This is the future of void contract and it is possible to argue that contracts entered by persons interdicted by law are void in spite of the usual words of nullity or the clear expression of the Amharic version.

[37] Guest, *supra*, note 3 at 18

[38] Art. 1811 of the Civil Code.

[39] Art. 1702(2) of the Civil Code, Art. 1812 of the Civil Code.

[40] These are already pointed out above with regard to vitiation of consent and incapacity of parties

[41] Art. 1808(2) of the Civil Code states that "A contract whose object is unlawful or immoral or a contract that is not made in a prescribed form may be invalidated at the request of any contracting party or interested third party"

As has been pointed out, the defect in void contracts is not curable. It is a permanent defect. How can courts give life to an illegal act or an act that is not made in a prescribed form? In Ethiopia, courts do not have a power to change legislative enactment or challenge its effect.[42] It has been mentioned above that because of this confusion which emanates from the wordings of Sub-art. 2 of Article 1808 of the Civil Code, some lower courts have rendered decisions which validate contracts that were tainted with incurable defects.[43]

In the case, *Askale Tesema vs. Setegn Getahun and Asfaw Banti*,[44] the first defendant sold a residential house that belonged to the plaintiff and to the second defendant without acquiring her consent while the plaintiff was in separation. The contract was concluded in writing but was not registered. After lapse of the required time, the plaintiff demanded invalidation of the contract. The Federal First Instance Court accepted the defence of period of limitation. The present plaintiff appealed against this decision. The Appellate Court decided that the contract did not fulfil the requirements of the law, and found that the case is thus imprescriptible. The Court relied on Art. 1723 of the Civil Code.[45] The effect of failure to comply with a form prescribed by law or by contracting parties is provided in Article 1720 of the Civil Code.[46] The Court concluded that as the parties have not observed the prescribed form - the requirement of registration, there shall be no contract. Consequently, the Appellant's right cannot be barred by the period of limitation. The Court decided that where there was no contract, the right cannot be barred either by the general period of limitation that is envisaged in Art. 1845 of the Civil Code or under the specific stipulation of Article 1810. The Court further concluded that where there is no contract, provisions dealing with the effects of invalidation of contracts cannot govern a non-contractual relationship and it ordered parties to be reinstated extra contractually.

[42] It has been pointed out above that currently Cassation Division of five judges is empowered to ascertain recurring legal confusion and taken as a law binding all the lower court including State courts.

[43] These courts argued that if request for invalidation is not brought within the requisite time for invalidation in accordance with Art. 1810 or 1845 of the Civil Code, the contract cannot be invalidated. This means that the contract will remain valid and enforceable in court of law. Moreover, claimants demand invalidation of the contract citing Art. 1808 (2) of the Civil Code. This kind of decision is usually quashed by higher courts. This is waste of time and resource and has to be managed in accordance with the spirit of the law.

[44] Civil Appeal No. 1470 Federal High Court Addis Ababa, (Archives), *Erasho Bagage vs. Getahun Bololo*, Civil Case No. 1/88 Bolose Woreda Court (Archives)

[45] Art. 1723 of the Civil Code requires a contract relating to immovable properties to be made in writing and be registered in court or notary. .

[46] As stated in this provision, if a contract is not entered in a prescribed form, the agreement cannot be taken as a contract but remains at the stage of negotiation – a draft. .

The purpose of this short article is not to comment on the disposition of the case but it appears important to note whether the Court's decision was in the right direction. The lower Court purely based its judgement on Art. 1808(2) cum 1810 of the Civil Code and decided that the right to bring action for invalidation is barred by period of limitation. It is true that Art. 1810 of the Civil Code requires an action for invalidation to be brought before an appropriate court within two years. The commencement of the period varies depending upon the moment that the vice disappears.[47] If Art. 1808 (2) were applicable to govern invalidation of a contract with *defective object* or failure to comply with a requisite *form*, the decision of the lower Court would have been correct. But permitting invalidation of a contract tainted with defect in object or form makes Articles 1714 -1716 and 1719 – 1730 of the Civil Code superfluous. The intention of the lawmaker that is revealed in these provisions cannot easily be defeated by a single sub-provision. The apparent contradiction by the aforementioned provisions and Article 1808(2) needs to be settled by judicial construction or legislative action. One of the basic rules of statutory interpretation is that whenever the strict literal reading of a given legal provision is absurd, unreasonable or inconsistent with other provisions, interpretation is necessary despite a seemingly clear reading of the provision. Under such circumstances, resort shall be made to the function, spirit and purpose of the provision rather than its rigid literal reading.

In *Askale Tessema vs. Setegne Getahun and Asfaw Banti*[48], the Appellate Court affirmed that a non-registered contract is void. Arts. 1723 and 1720(1) of the Civil Code lead to this conclusion but this assertion at the time was not in line with the purposes of registration.[49] The purpose of registration, as stated in the Civil Code, is creating public notice (constructive notice). The part of the Civil Code that was meant to regulate the process of registration of immovable properties in Ethiopia is still under suspension and the guiding rules are customary rules that were being used before the coming into effect

[47] A brief discussion on period of limitation in general and the relationship between Art. 1810 and 1845 is summarized under Part IV below. .

[48] *Supra*, note 44

[49] Currently there is a hot discussion among the lawyers concerning the effect of registration in Ethiopia. Some view that the disposition of *Gorfe G/hiwot vs. Aberash Dubarge* et al has changed the effect of registration from ad probationem to ad validitatem. Careful looking of the Case reveals that the focus of the Case is on authentication but not on registration. If this holds true, it is possible to argue that the purpose of registration is not changed and its purpose is only to create constructive notice among the public. Authentication has to be conducted in the Office of Registration of contracts and registration of contracts involving immovable properties has to be carried out in municipalities as it was being done customarily. See also Art. 3364 of the Civil Code. For detailed discussion on this issue see Kassa Nakumo (Fitawurar) vs. Akililu Gobeze, Civil Appeal No. 353/57, and Supreme Imperial Court Div. No 1, *Journal of Ethiopian Laws*, Vol. IV No. 1 at 69.

of the Civil Code of 1960.[50] Art. 3364 of the Civil Code declares that, "The customary rules relating to the formalities to be complied with so that the transfer or extinction of the ownership of immovable properties *may be set up against third parties* shall apply." Before the enactment of the Civil Code of 1960, customarily, transactions involving immovable properties were being registered in the *rist* section of municipalities.[51] As revealed in Article 2878 of the Civil Code, registration of contracts serves as creating public awareness as to the facts of registered contracts. This means unregistered contracts relating to immovable properties cannot affect the interest of third party but valid among the contracting parties.[52]

In *Askale Tessema vs. Setegn Getahun and Asfaw Banti*, it is not doubtful that the plaintiff is not a contracting party and hence the contract cannot affect her interest, as it was not registered. What is then the legal effect of this contract? As W/ro Askale can regard the contract as if it was never concluded, there is no need to require invalidation of contract. The causes of invalidation of a contract are not manifested in this contract.[53]

The decision of the lower court therefore seems to be erroneous. On the other hand, the Appellate Court seems to have gone to the other extreme. Failure to have a contract registered, at the time, cannot be taken as a factor which renders the contract of no effect. The Appellant demanded invalidation of the contract because of the express wordings of Art. 1808(2) of the Civil Code. But she had no obligation to do so, as unregistered contract relating to sale of the building cannot affect her interest. Then one may query the action that could have been taken by W/ro Askale. While her house was being held by a person under the guise of a defective contract, her motive is to get rid of the injurious contract and she had no option other than invoking Article 1808(2) of the Civil Code. W/ro Askale used the wording of the Code *as it is* and demanded invalidation of the contract. The second Respondent, Ato Asfaw had

[50] Art. 3363 cum 3364 of the Civil Code.

[51] Kassa Nakumo (Fitawurari) vs. Akililu Gobeze, Civil Appeal No. 353/57, Supreme Imperial Court Div. No 1, *Journal of Ethiopian Law*, Vol. IV No. 1. at 69

[52] Before the incorporation of European Communities law, in England, the purpose of registration was similar to the Ethiopian stand. Later on, the English law gave protection only to innocent third parties. In this case a party knowledgeable as to the contract cannot be protected. This means, a third party having awareness as to the unregistered contract cannot be guarded. (Unregistered contract may affect the interest of third parties that have awareness as to the contract). The Ethiopian law is silent in this regard. It is, therefore, possible to argue that where a contract relating to immovable properties is not registered, third parties are generally protected. (The contract cannot be enforced against the interest of third parties.

[53] In this particular case, the causes that render a contract to be invalidated are not prevalent and hence the plea of invalidation is not relevant. The plaintiff is entitled by law to regard as if the contract was never concluded.

to invoke Article 1810 to avoid invalidation of the contract. Had the Plaintiff in the lower court demanded declaration of voidness rather than invalidation, as this expression is not specified in Art. 1810 of the Civil Code, probably the defendant would not have invoked the defence of period of limitation or the Court would not have accepted the defence.

If a contract is void, anyone of the parties may refuse performance and may not necessarily petition for declaration of voidness. However, in certain limited instances the demand for declaration of voidness appears to be imperative. W/ro Askale's case falls under the latter scenario. Unless she demands declaration of voidness how can she avoid the effect of the contract as the "purchaser" holds the building and got evidence disclosing the fact that he had purchased the house. In some cases, parties may not agree on the voidness of the contract and may demand for enforcement of the agreement. In this case too, the contracting party or any interested third party may apply for declaration of voidness and call for restitution. For purpose of restoration to the former position (to the position that contracting parties were before the formation of the contract), Arts. 1808 – 1818 is relevant. The court cannot lend its hand for enforcement of a void transaction; however, it can assist towards the avoidance of effects of defective dealing.

In some legal systems, if a contract is void the court need not order for restitution. In English law, for example, a contract for gaming and gambling is void and the court cannot assist for restoration to the former position.[54] In Ethiopia, however, as the part of the Code governing restitution does make distinction, where a contract is declared void, things that were given or delivered under the guise of contract should be returned back.

Now the question whether the petition for declaration of voidness may be barred by lapse of time is outstanding and will be addressed in the next part.

3. Period to set aside Defective Contracts

Voidable contracts cannot keep going in a defective condition perpetually. If the defective nature is discovered by contracting parties or interested third party having right to annul the contract, the defect should be avoided by the process of invalidation. The victim of defect may also opt to ratify the defective dealing. Ratification cleanses the contract from the defect. If the victim of defect opts to invalidate the contract, he/she should exercise his/her option within the period prescribed by law. Where the defect is of a nature that entitles the victim to request for the invalidation of the contract and if a party does not exercise his/her right within the time stipulated, the law cleanses the contract.

[54] Guest, *supra*, note 3 at. 7

A period for setting aside of defective contracts in Ethiopia is another area of ambiguity and has been subject of litigation in courts. The effect of period of limitation of void contracts is not simple as it may seem because of the arduous task of distinguishing the two categories of defective contracts. Decisions are not uniform in this regard. In the case *Tirunesh Dadi vs. Abebech Lendado*,[55] the lower court held that the period of limitation had run to invalidate the contract, because 3 years had passed from the date of conclusion of the contract. This judgment was quashed by the Appellate Court. The Appellate Court ruled that an illegal contract cannot be maintained by invoking lapse of time. The Appellate Court summed that mere lapse of time cannot validate an illegal contract and hence a void contract can be challenged at any time. A similar decision was rendered in the case Askale *Tesema vs. Setegne Getahun* and *Asfaw Banti*.[56]

In *Erasho Bagaje vs. Getahun Bololo*[57] an agricultural land was sold to the defendant. After lapse of three years of the transaction, the plaintiff demanded invalidation of the contract pursuant to Art. 1808(2) of the Civil Code. But the court declared voidness of the contract ignoring the wordings of Art. 1808(2) of the Civil Code. The Court asserted that sale of land is unlawful pursuant to Art. 1716 of the Civil Code and ordered the buyer to restore the land. The seller was ordered to refund the purchase price of Birr 3000 and got the land back.

The Code sets forth two provisions which govern the time for invalidation of contracts. First, the general period of limitation that is enshrined in Art. 1845 and the other is embodied in Art. 1810(1). There seems to be apparent redundancy and hence clarifying a “grey area" appears to be imperative to resolve the prevailing uncertainty. To comprehend the effect of period of limitation (limitation of action) on defective contracts and thereby avoid or reduce the confusion, let us first deal with the general nature and effect of period of limitation (limitation of actions).

3.1- The Nature of Period of Limitation

A period of limitation is a procedure that limits the time within which an action shall be brought. It is a time limit at the end of which an action may not be entertained in courts of law.[58] After lapse of a period within which action has to be lodged, no remedy may be granted in courts of Law. In early Ro-

[55] Civil Appeal No. 35/87, Wolaita Zone High Court (Archives)

[56] Civil Appeal No 1470/84 Federal High Court (Archives)

[57] Civil Case No. 1/88 Boloso Woreda Court , Areka (Archives)

[58] Corpus Juris Secundum, *Limitation of Actions* Vol. 53 (New York: American Law Books Co, 1948) at 900

man law there was no period of limitation and actions were perpetual. A debtor could not thus defend himself by invoking lapse of time in action, no matter how long it was.[59] It was at a later stage that the Imperial Constitution established a means of defence against perpetual actions.[60]

Today, in all legal systems, rights should be exercised within a defined period of time after which the law stands at the side of the defendant and prohibits a stale claim. The time limit for bringing action need not be alike in all legal systems. For example, in France, the longest period of limitation for personal as well as real actions is thirty years[61]. In Philippines, according to Art. 1149 of the Civil Code, general period of limitation is 5 years.[62]

A claim neglected for many years without any attempt to enforce it creates a presumption that it has ceased to exist.[63] The recognition of period of limitation is based on two assumptions.[64] First, a reasonable delay in presenting a claim may place the other party at a serious disadvantage since evidence may be lost. Secondly, lapse of time may be regarded as evidence for tacit abandonment of claim. Where a creditor remains too long without requiring payment, for example, the law takes away his/her right of action, as a claim that is neglected for many years without any attempt to enforce creates a presumption that it has ceased to exist.[65]

In *Doughlas v Lioyd's Bank Ltd*[66] (1886), the deceased ("F") had deposited a large sum of money with the defendant bank on terms that he could withdraw at any time giving 14 days notice. "F" died before withdrawing the money. After 61 years, (in 1947) his heirs presented deposit receipt and demanded

[59] Ibid

[60] Planiol supra, note 13 at 579. In Ethiopia, too, before Fetha Negast, actions were perpetual. Fetha Negast declared the time at which actions to be brought before court of law. This law provided that if some one has left any thing belonging to him with another person for a period of thirty years and he has not asked for it, cannot claim it after the expiration of this period nor can his son. The same principle applied for debts, inheritance, fraud etc. After lapse of this time, no remedy was provided. (see Paulos Tsadua (Abba), *Fetha Negast*, (Law Faculty, AAU, 1968 p. Xvi)

[61] Planiol *supra* , note 13

[62] David Rene, *Commentary on Contracts in Ethiopia*, (translated by Michael Kindred 1973) page 89; some jurisdictions fix ten years as that of the Ethiopian system. Art. 127 of the Switzerland Code of Obligation, Art. 167 of Japanese Code, Art. 349 of Lebanon, Art. 2946 of Italian Civil Code. The drafter of the Civil Code submits that the Ethiopian formula is taken from the Italian Civil Code. Art. 374 of the Egyptian Civil Code declares 15 years, Article 249 of the Greek Civil Code provides for 20 years. BGB Section 195 sets the maximum period of limitation 30 years as that of the French Code.

[63] Corpus Juris Secundum, *supra*, note 60 at 901

[64] Ibid

[65] Paton W.C. *A Text Book of Jurisprudence* 13th ed. (Oxford University Press, 1964) at 45

[66] Doughlas vs. Lloyd's Bank Ltd. 34 Comp. Case 263

the money. At the time the bank had no records for the deposit. The claimants instituted action against the bank for its failure to allow withdrawal of the money. It was held that under circumstances of such extraordinarily long lapse of time and in the absence of all relevant evidences regarding deposit in current account, the bank was not obliged to pay.

The rule of period of limitation is important and safeguards public interest in many respects. First, it reducers burden of courts by restricting certain neglected claims. And, when time goes on, truth may be forgotten as human memory may fade, witnesses may die or evidences may be lost -- the nearer the action into the ken of events, the easier to discover the truth.[67] If evidences supporting or disproving the claim are lost, or facts of the case have disappeared from minds of people, innocent persons may be exposed to fraudulent claims.

The importance and necessity of period of limitation is never doubted. A learned judge remarks: "… statute of limitation is a statute of repose, peace, and justice. It is one of the repose because it extinguishes stale demands and quite title. … controversies are restricted to a fixed period of time least they should become immortal while men are mortal. It secures peace as it ensures security of right; and it secures justice as by lapse of time evidence in support of rights may have been destroyed."[68]

It is generally accepted that the doctrine of period of limitation is a defence that may bar procedural rights. However, the rule of period of limitation does not go to the extent of affecting substantive rights. One may thus question the importance of a dormant right—a right that cannot be enforced in court of law. There are limited instances in which a dormant right may be active. The holder of a dormant right may enforce it in tribunals other than formal courts if the debtor consents to litigate.

In exceptional cases, the court may also permit enforcement of a right barred by period of limitation. As revealed in Art. 2199(2) of the Civil Code, where a defective thing was sold and the purchaser failed to bring action within one year of notification of a defect, the purchaser can demand set off if the seller sues for unpaid balance of price. On the same token, if the defence of period of limitation is not raised as a preliminary objection, the holder of a stale right can still proceed in court of law.

[67] Sethi D. *Basu's Limitation Act* 4th ed. (Law Book Co. Allahabad, 1972) at 1.

[68] Bhatnagar J. Parkash, *Commentary on the Limitation Act* (Eastern Book Co. Lucknow, 1964) at 12

3.2- Period of Limitation vis-à-vis Voidable Contracts

The right to avoid a defective contract can only be enforced if it is claimed within the time fixed by law. It is repeatedly mentioned that the law makes an act voidable with the intention to empower a weak party – a party protected by law – to avoid the effects of the contract provided that the request for invalidation is lodged in due time. If the party that is entitled to avoid the contract doesn't do so within the time limit prescribed by the Code, the law takes away the shield and cleanses the defect automatically under the assumption that the party who is protected by law has waived his right or has ratified the act.

With regard to invalidation of voidable contracts, the Civil Code has provided two provisions. Although Art. 1810 of the Civil Code is the first provision that has to be considered for issues involving period of limitation regarding invalidation of defective contracts, there are instances that Art. 1845 of the Civil Code may regulate the situation. Art. 1845 of the Civil Code is a general provision governing issues of limitation of actions involving all cases of contracts.[69] It provides that "Action for invalidation, performance or non-performance shall be brought within ten years." Art 1810 (1), on the other hand, reads: "No contract shall be invalidated unless an action to this effect is brought within two years *from the ground for invalidation having disappeared."*

Upon first impression, one may be confused by the two regulatory provisions (Arts. 1845 & 1810) for both of them deal with the issue of invalidation of defective contracts but with different time limits. How can we reconcile the two provisions? What would happen if a person seeks invalidation of a voidable contract after 9 years of the disappearance of the fact that rendered the contract voidable? Would it be possible to invalidate a voidable contract that was tainted by a defect that was discovered after 13 years of formation of the contract? If a vitiating factor that entitles the victim to seek invalidation is discovered, such party should not keep silent for unwarranted period of time. Art. 1810 requires that the option to avoid a defective contract be exercised within two years from the date of awareness of the defective state of the contract. If the victim of defect fails to bring action within two years, the law cleanses the contract from defect and the victim may not be allowed to sue his/her contractant. What would happen if the victim becomes unable to sense the "pain" of the vice and fails to bring action before lapse of ten years from the date of formation of the defective contract?

[69] Art. 1845 of the Civil Code governs all issue including invalidation, performance, non-performance of contracts.

If the cause for invalidation disappears in less than ten years, the governing provision is Art. 1810 of the Civil Code. After disappearance of the cause, the victim is expected to demand invalidation of the defective contract within two years provided that the maximum time cannot exceed 10 years. Art. 1845 of the Civil Code does not permit invalidation of a defective contract to be sought after lapse of ten years. This is the maximum period of limitation that can apply. In the case of unconscionable contracts or lesion (Art. 1710), however, the period commences from the date of the conclusion of the contract (Art. 1810/2). In this case, the victim of vice enters into the contract with full awareness of the defective nature of the contract and is expected to bring action for invalidation within two years of the conclusion of the defective contract.

3.3- Period of Limitation vis-à-vis Void Contracts

It has been pointed out that a void contract generates neither right nor duty to be enforced in court of law. The issue of period of limitation cannot thus be invoked where there is no right. As discussed earlier, period of limitation is simply a procedural device that bars a right if it is not exercised within a defined period. "Because of the fact that defect of void or nonexistent contract is more or less a permanent character, mere lapse of time cannot give efficacy to such contracts."[70] Planiol shares the same view saying : " nullity is imprescriptible"[71] It makes no sense for lapse of time to make an act efficacious when it was forbidden by law. However old it might be, a void act can produce no effect. Therefore, the rules embodied in Articles 1810 and 1845 are not relevant to void contracts.

In many cases, however, victims of void contracts demand invalidation of contract and most lower courts tend to give decisions on the basis of Art. 1808(2) and Art. 1810 of the Civil Code. As observed in the case, *Trunesh bandi v. Abebech Lendado*, the defendant requested for invalidation of the contract and the lower court accepted the defence of period of limitation with the intention of cleansing the defect of illegality. The lower court in the case *Askale Tesema vs. Setegn Getahun and Asfaw Banti* followed the same direction.

Attempt has been made to show that a void contract is not subject *to* period of limitation. The usual question involving period of limitation vis-à-vis void acts is: what would happen if contractants fail to agree on the status of the

[70] Jurado Desiderio P. *Commentary and Jurisprudence on Obligations and Contracts*, Rev. ed. (Coloocan City: Phillippine Graphic Arts Inc, 1969) at 483 - 484

[71] Planiol, *supra*, note 13

contract? It is also questionable whether a contracting party or interested third party can request invalidation of a void contract by invoking Article 1808(2) of the Civil Code. If enforcement or invalidation of a void contract is sought by any of the two contracting parties or interested third parties, the court may order for declaration of voidness of the contract even if it is not requested by the parties. Declaration of voidness is a judicial decision which declares that there is no contract between the claimants. The parties, therefore, have to be restored to the former position by the process of restitution (Arts. 1815—1818). However, in *Askale Tesema v. Setegne Getahun and Asfaw Banti*, the High Court, after declaring voidness of the contract, ordered for restitution extra-contractually. The Court based its argument on the nature of the void contract. As there was no contract, restitution provisions of the Civil Code were assumed not applicable. Where parties have attempted to conclude a contract and the agreement failed to produce contract, restitution should be effected on the basis of Arts. 1815 – 1818 of the Civil Code.[72]

Conclusion

Where dispute arises regarding the status of void contracts, courts may declare voidness of the contract. It is to be noted that declaratory judgement of voidness may be given at any time without the need to comply with the requirement of period of limitations. Declaratory judgement of voidness cannot be stale and passage of time cannot cleanse the defect that vitiated the contract. As a void contract is an act inexistent in eyes of law, it is apparently imprescriptible. This is so, as opposed to voidable contracts where an option to invalidate the contract should be exercised within two years from the date of disappearance of causes rendering the contract defective. It must, meanwhile, be noted that the right to demand invalidation of a voidable contract cannot go beyond the maximum period of limitation that is envisaged in Article 1845 of the Civil Code. After lapse of 10 years from the formation of the contract, the defect is presumed to have been cleansed by operation of the law.

In light of the brief discussion in the sections above, words such as "*of no effect*", "*null*" or "*non-existent*" should be taken to mean "*void*". And the phrase "*may be invalidated*" should have been consistently used in the Civil Code to mean "*voidable*". However, the Code mingles *void* agreements (due to grounds of defective object and form) with *voidable* contracts (defective due to lessened capacity or defective consent) as a result of which ambiguities and contradictions arise. This apparent contradiction between Article

[72] At least Art. 1676 of the Civil Code authorizes the application of provisions of contract for performance of obligations arising from non-contractual relations too.

1808 (2) and Articles 1714, 1715, 1716, 1720 *ff* can be resolved only if the phrase "... *may be invalidated* ...." in Article 1808 (2) is interpreted as"...*may be declared void*..." However, this remains to be a temporary solution until the nature and effect of void agreements vis-à-vis voidable contracts are distinctly and unambiguously articulated by legislative action, or at least until the problem is addressed through a case decided by the Cassation Division of the Federal Supreme Court so that its analysis and ruling can be binding in the interpretation of similar legal issues which involve Article 1802/2 of the Civil Code. ■

THE CHALLENGES FACING AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

*Elise G. Nalbandian**

Introduction

The idea for the creation of the African Court of Human and Peoples' Rights (the Court) was first raised in 1961, in the Law of Lagos Resolution[1]. But it was not until 1998 that the Assembly of Heads of State and Government of the OAU (the Assembly) adopted the Protocol to establish the Court[2] which came into force on the 25th of January 2004. After some delay caused to the actual establishment of the Court due to the integration of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union[3], the 4th AU Summit in January 2006 saw the election of the eleven judges.

The rationale of the Court is to strengthen the regional human rights protection system, as it has always been the view that the regional system is weak and ineffective for it has always lacked an institution capable of producing enforceable decisions, mainly because the African Commission of Human and Peoples' Rights (the Commission) can only make recommendations. To provide the African human rights regime "with its missing link",[5] the Protocol not only has vested the Court with the power to render binding and

* LL.B, LL.M, Lecturer in Law, St. Mary's University College

[1] "The Law of Lagos" Resolution in M. Hamalengwa and others (eds) *The International Law of Human Rights in Africa* (The Hague: Martinus Nijhoff Pub., 1988) on 37 see Declaration 4

[2] Protocol to the African Charter of Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights (the Protocol), Ouagadougou, 1998. It came into force in 2004 upon the ratification by the 15th Member State. At present 23 African states have ratified the Protocol including: Algeria, Burkina Faso, Burundi, Comoros, Côte d'Ivoire , Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo and Uganda

[3] Decision on the Seats of the Organs of the African Union, Assembly/AU/Dec. 45 (III) Rev 1 produced at the 3rd Ordinary Session of the AU states "…that the African Court on Human and Peoples' Rights and the Court of Justice should be integrated into on court"

[4] C. E. Welch, *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations*, (Philadelphia, University of Pennsylvanian Press, 1995) Ch. 5 pg. 151

[5] B. Kioko, "The African Union and the Implementation of the Decision of the African Court on Human and Peoples' Rights" 15 *Interights Bulletin*, Vol. 1 (2005), 7-9

enforceable decisions[6], it has also made provisions for the Court to exercise a relatively wide jurisdiction, as long as the Court functions in such a way as to complement and reinforce the Commission as per Article 2 of the Protocol.

The Court is vested with three heads of jurisdiction: a) contentious, b) advisory and c) conciliatory and even these heads of jurisdiction are given relatively wide scope. The inclusion of the advisory[7] and (to a lesser extent) the conciliatory jurisdictions[8] within the Courts powers will ensure that the Court will be able to, over time, develop a persuasive or even authoritative status vis-à-vis member states. The reason is that the advisory jurisdiction under Article 4 provides the Court the option of a 'soft' method of promoting respect for human rights [9] which has the potential to win the acceptance of African states than a 'hard' method of condemning violations, which runs the risk of rousing a negative stance of state parties against the Court. Nevertheless, for the Court to be truly effective as a mechanism to protect human rights as opposed to simply promoting it, the Court also needs and has the power to condemn violations and order appropriate remedies[10] under its contentious jurisdiction. This jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any ratified human rights instrument[11] thus creating a forum where international human rights obligations (especially the Charter) will be enforced.

So, while the scope of the contentious jurisdiction (*ratione materiae*) of the Court is quite wide, the Court' *locus standi* provisions are comparatively restrictive thus limiting the jurisdiction of the Court in general. This is evident from the reading of Article 5 of the Protocol, which provides that the Commission, the state party that has lodged a complaint to the Commission, the state party against which the complaint has been lodged, a state party whose citizen is a victim of human rights violations and the African intergovernmental organisations (for matters under their jurisdiction) have compulsory standing. Access is also available in cases where individuals and non-governmental organisations (NGOs) with observer status before the Commission wish to make a complaint under Article 5(3). However, this is an optional access only, in the sense that the state party against whom the complaint is being made must have declared its acceptance of the competence of the Court to receive cases under Article 5(3).[12]

[6] Arts 28 - 31of the Protocol
[7] Article 4 of the Protocol
[8] Article 9 of the Protocol
[9] Ap van der Mei, "The Advisory Jurisdiction of the African Court of Human and peoples' Rights", 5 *African Human Rights Law Journal* (2005), 27-45
[10] Article 27(1) of the Protocol
[11] Article 3(1) of the Protocol
[12] As laid out in Art. 34(6) of the Protocol

From the short description of the Court's features, the most striking aspect highlighted by the Protocol is clearly the fact that the Court can only function as long as it does so within the African human rights protection framework that already exists. Although, it is foreseen that the human rights regime already in place and the Court will be mutually reinforcing, there is a risk that the system already in place can weaken the way the Court will operate once it is up and running. Thus the next sections will explore the Court's dependence on the existing structures and how they may potentially present challenges for the Court.

1. The Court and Its *Ratione materiae* Jurisdiction

Articles 3(1) and 7 of the Protocol give the Court a broad jurisdiction by allowing it to interpret and apply the African Charter of Human and Peoples' Rights (the Charter) as well as any other human rights instruments that have been ratified by the states concerned.[13] This innovative provision has been widely welcomed as it establishes a court which has the responsibility to hold states to all their human rights obligations and to establish continent-wide standards. To date, African states in general had shown a "willingness to subscribe formally to international and regional norms, while at the same time (violating) those undertakings with near impunity".[14] Although, the advantage of having a forum in which all these laws will be applied and enforced is an attractive proposition, there are two concerns that can be raised about the contentious jurisdiction of the court. Firstly, what will be the effect of the application of the Charter on the performance of the Court? And secondly what will be the effect of the application of all the human rights obligations of the states that have ratified the Protocol.

1.1- Application of the Charter

The African Court will interpret and apply the African Charter as a matter of course. This is as it has been ratified by all fifty-three African states.[15] Moreover, it is an appropriately African instrument, which very progressively gives due prominence to all three generations of rights, around

[13] This provision is broader in scope than the provisions of the other two regional human rights systems. This is as new Art 32(1) of the European Convention and the Art 62(3) of the American Convention limit the contentious jurisdiction of the Courts to the application of the Conventions and their Protocols.

[14] J. Allain & A. O'Shea, "African Disunity: Comparing Human Rights Law and Practice of North and South African States" 24 *Human Rights Law Quarterly* (2002), 86-125

[15] *ibid*

which the Court can establish norms that will be applicable to Africa as a whole, which will in turn contribute to a unified regional approach to human rights. Additionally, the Charter will be applicable as well as enforceable directly in a court for the first time, whereas in the past the Commission had applied the Charter but had failed to enforce any of its decisions or even gained substantive acceptance of its annual reports.[16] Apart from this, the Charter has been mentioned in very few cases in the domestic courts and in most of these instances, only as an interpretive aid as opposed to being a fully enforceable source of rights.[17]

However, despite the fact that the Charter will gain more important role in enforcing rights across the continent due to the Court, the Charter itself is a weak document. One of the major drawbacks of this otherwise innovative and comprehensive document is the fact that, although the Charter has provided for its own application by the Commission to fulfil its protective mandate, it has subsequently failed to provide the Commission with any power of enforcement.[18] Even more crucially, the Charter also has substantive weaknesses such as the extensive number of "clawback" clauses incorporated into the articles setting out the rights[19] as well as the potential of the abuse of the language of individuals' duties in articles 27-29 of the Charter.[20] It is these substantive weaknesses that will affect the Court's functions and therefore present a challenge to the Court.

In addition to allowing violations of fundamental human rights due to clawback clauses, the Charter can also potentially contribute towards the actual violations of human rights. This is due to the incorporation of individuals' duties towards the state and the family in the Charter in Articles 27 to 29. These "duties" have raised concerns generally over the hypothetical possibility of the prioritisation of the states' rights over individual rights to

[16] Over the years, the OAU/AU Assembly and Summit of African leaders adopted the Commission's reports without much discussion but at the 3rd Ordinary Session of the AU Assembly, the Commission's Annual Activity report was not adopted at all. This shows that the work of the Commission was either accepted for a formalistic show of adherence to the Commission or was rejected.

[17] F. Viljoen, "Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa" 43 *Journal of African Law* (1999), 1-17

[18] C. E. Welch, supra note 4

[19] M. Mutua, "The African Human Rights Court: A Two-Legged Stool?" 21 *Human Rights Quarterly* (1999), 342-363 and M. Mutua, "The African Human Rights System: A Critical Evaluation", *Human Development Reports* (2000), Background Paper sponsored by UNDP at: http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF

[20] C. E. Welch, supra note 4, pp 150-152

the disadvantage of the individuals' freedoms.[21] However, the more trenchant and specific critique is made in light of the treatment of rights of women in the Charter.

The duties the Charter envisages in its formulation of peoples' right are the duties one individual owes to another individual as well as to his/her community and state as well as the duties the states bear towards their respective subjects.[22] Concerns about the potential abuse of the language of duties in light of women's rights have been raised as the Charter provides that a state is to contribute to family life as the "custodians of moral and traditional values".[23] Commentators such as Claude Welch have pointed out that this may potentially have an unintended negative effect in that when interpreted narrowly within a conservative court/forum, this provision could result in the entrenchment of patriarchal norms, cultural practices and institutions that are harmful to women within the regional framework.[24] Thus in this instance, the challenge for the African Court is to ensure that the judges exercise a progressive attitude towards women's rights and interpret the language of duties in connection with article 18(3) which is intended to ensure the elimination of discrimination against women as well as the protection of women as stipulated in other international declarations and conventions.[25]

1.2- Application of all other Human Rights Obligations

From the analysis above, it becomes clear that the substantive weaknesses of the Charter will require the Court to apply the Charter in conjunction with other sources of international human rights obligations as the Charter cannot offer any enforceable protection in view of certain rights. This must have become obvious to the drafters of the Protocol as well, as they had the foresight to extend the contentious jurisdiction of the regional court far beyond the boundaries expected of regional courts[26] and gave the Court the jurisdiction to interpret and apply "any other relevant Human Rights instrument ratified by the state concerned".[27]

This can give the Court a wide base of tools ranging from United Nations documents to regional as well as sub-regional documents that can be applied

[21] The inclusion of the duties of individuals towards the state has not resulted in any actual human rights violations as per Mutua (supra note 19) or Welch (supra note 4)

[22] Art. 27(1) of the Charter

[23] Art 17(3) of the Charter

[24] C. E. Welch, "Human Rights and African Women: A Comparison of Protection Under Two Major Treaties" 15 *Human Rights Quarterly* (1993), 548-574

[25] This might be a reference to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979

[26] For e.g.. the European Court of Human Rights applies the European Convention

[27] Article 3(1) of the Protocol

by the Courts to protect human rights as African states have tended up to now to ratify a great many international human rights treaties.[28] The only limit placed upon the potential application of all these available tools is the requirement that the state in question should have ratified any or all of these documents.

The potential width of the jurisdiction of the Court, although quite impressive and advantageous for the Court in one way, may however present the Court with two possible challenges. The first challenge will arise out of the potential overlapping of jurisdictions of the Court and the host of sub-regional bodies that have proliferated under the AU umbrella. This will be analysed in the next section. The second problem arises from the fact that Africa is a big continent with fifty-three states that have different legal systems and diverse patterns of ratification of international treaties. Commentators regularly focus on the disunity/diversity that exists within the continent when it comes to the treaties they ratify or the reservation they make to the treaties [29] and this disunity is similarly true for the twenty-three states that have ratified the Protocol.

Most of the twenty-three states have consistently ratified many of the Conventions sponsored by the United Nations[30] as well as some of the African human rights treaties[31], although there are incidences of states not ratifying specific conventions. The overall effect of the disunity in the ratifications will have the effect of creating a system in which the Court will not be able to use the same instruments for similar cases from different states and the interpretation of rights may, as a consequence, differ. This will mean that the Court will find it harder to establish any general or continent-wide norms.[32] Moreover, there is the issue that as more African states ratify the Protocol and accept the jurisdiction of the Court, the erratic pattern the other states have ratified human rights instruments will exacerbate this problem. In

[28] In R.W. Eno, "The Jurisdiction of the African Court on Human and Peoples' Rights" 2 *African Human Rights Law Journal* (2002), 223-233, the author discusses the fact that many African states ratify a great many treaties due to internal and external pressures and for international public relations reasons

[29] J. Allain and C. O'Shea, supra note 14

[30] All 22 states have ratified the ICCPR, CEDAW and the CRC (although the last two are subject to reservations by Algeria and Libya)

[31] For e.g. the OAU Convention Governing the specific Aspects of the Refugee Problems in Africa, The African Charters on the Rights and Welfare of the Child and The African Charter on Human and Peoples' Rights on the Rights of Women in Africa

[32] Although this is difficult in any system, for example, see the ECHR issues and the arguments about margins of appreciation given to states in P. Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism" 19 *Human Rights Law Journal* (1998), pgs 1-5

addition to the problems caused by the different patterns of ratification of human rights treaties, some of the ratifications by these twenty two states have been limited in scope by effective reservations.[33]

These problems will damage the Court's standing as a source of general norms which other courts can follow as the Court will seem to be applying Human Rights instruments inconsistently and possibly producing inconsistent judgements. Moreover, there is a possibility that more states will start to utilise their right to place reservations on their international duties which will further exacerbate the problems to be encountered by the Court.[34]

2. The Court and other Courts and Institutions

2.1- The Challenge posed by Sub-Regional Courts

The broad jurisdiction of the Court as provided for in Art. 3(1) will raise another set of problems as it is not clear whether or not the Court's jurisdiction should extend to interpreting and applying sub-regional economic treaties such as the African Economic Community (AEC) Treaty, the Common Market for Eastern and Southern Africa (COMESA) Treaty, the East African Community (EAC) Treaty, Economic Community of West African States (ECOWAS) Treaty and the Southern African Development Community (SADC) Treaty. These treaties are not human rights instruments as such, but include human rights concerns or references to the African Charter,[35] which are integrated into the treaty as "part of the overall objectives of the organisation or as principles underlying their action". [36]

If the Court, in deciding the parameters of its own jurisdiction as allowed by the Protocol,[37] chooses to apply these instruments as result of their human rights dimensions, not only will this contribute to the problems caused by the

[33] In J. Allain & A. O'Shea, supra note 14 the authors discuss the fact that some reservations may not be effective. For example Lesotho's reservation to CEDAW is "meaningless" as the Constitution of the State includes provisions against sexual discrimination and thus it is unlikely that compliance with CEDAW would conflict with the Constitution.

[34] Note that the Vienna Convention on the Law of Treaties of 1969 limits the states' right to do so. Additionally, the African Commission's jurisprudence has not suffered unduly from any reservation made by states as it is not common practice by most African states to actually utilize reservations as explained by Allain and O'Shea, i*bid*

[35] Article 6(d) of the EAC Treaty, Article 6 of the COMESA Treaty and Article 4(g) of the ECOWAS Treaty

[36] N. J. Udombana "Protecting Human Rights In Africa through Supra-national Courts" 15 *Interights Bulletin*, Vol. 1 (2005), 13-15 (on 13)

[37] Article 3(1) allows the Court to interpret and apply the Protocol itself and article 3(2) indicates that the Court has the power to rule on or decide a dispute over its jurisdiction.

incoherent ways states ratify treaties (as discussed in the previous section) but the problem of overlapping jurisdictions and contradictory decisions will also emerge as these treaties have made provisions for their own judicial institutions to interpret and apply their treaties. In fact, this problem of overlapping jurisdictions may emerge regardless of the Court's decision to apply the treaties or not. This will result from the fact that all the treaties have made provisions extending their courts' jurisdiction to applying and interpreting the African Charter. So, whatever the Court decides, there is a possibility of overlapping jurisdictions where several courts find themselves operating in the same space concurrently.

Having a multiplicity of courts certainly has its advantages as a single court is likely to be weighed down with an unmanageable caseload and does suggest that there is more political will among the African States to be bound by international instruments than there was at the end of the 1990's. However, the existence of these numerous courts adjudicating on the basis of the same instruments can have its disadvantages too. In the case of a specific violation in a country which has ratified the Protocol and also belongs to one of the regional intergovernmental organisations which has its own court, both the Court and one of the regional economic community (REC) courts will have the competence to interpret the Charter and the treaties of the intergovernmental agencies (assuming the Court has decided to interpret and apply the REC treaties). This may result in differing/contradicting standards of human right protection being produced by the courts which will create confusion as to which judgement to apply as the Protocol has in no way provided for the Court's primacy in any situation. This damages the standing of the Court, as ideally, there should not be any avenue of doubt as to the applicability of the Court's judgements, especially in matters surrounding the interpretation of the African Charter.

This challenge for the Court is further enhanced when considering the fact that the Protocol's failure to establish for the superiority of the Court's competence also extends to situations where the treaties establishing the REC courts have been provided with exclusivity clauses, establishing these courts primacy in any disputes concerning the application and interpretation of the sub-regional/REC treaties.[38]

Another consideration is that as there are so many courts at the regional and sub-regional levels, there is the opportunity for the same case to be brought

[38] G. Naldi and K. Magliveras , "Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human Rights" 16 *Netherlands Quarterly of Human Rights* (1998), p 431

to several different forums with slight alteration to the presentation of the case[39]. Alternatively, there is the possibility that the parties concerned belong to various groups and may choose to present the case in one forum but not another as it would be more convenient for that one party.[40]

2.2 The African Court of Justice

The African Union's Court of Justice (ACJ) is another regional court that has the potential of creating challenges for the Court. Originally, some of the challenges it may have presented would have been similar to the ones created by having so many other courts. However, in July 2004, during the 3rd Ordinary Session of the AU, the Assembly of the AU decided to integrate the ACJ and the African Court of Human and Peoples' Rights due to a lack of financial resources for two new separate institutions[41]. This was a wise decision as it is questionable whether African states have the "material wherewithal to operate two supra national judicial institutions".[42] This merger poses an additional advantage in that all problems of overlapping and concurrent jurisdiction and possible contradictory decisions will be avoided. Nevertheless, this merger in itself may actually present the Court with one of the greatest challenges to date.

To implement this merger, it has been suggested the Court will be made into a subsidiary branch of the ACJ which after the merger will be renamed the Court of Justice and Human Rights of the African Union.[43] This merger was clarified by the Draft Protocol on the Integration of the African Court on Human and Peoples Rights and the Court of Justice of the African Union (draft merger document) where it was explained that the ACJ would become the "principal judicial organ of the African Union" (Art. 2(2)) and "the Court

[39] C. A. Odinkalu raised this point in a Presentation titled: "Complementarity, Competition or Contradiction: The Relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa", Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9-10 December 2003

[40] This is called forum-shopping in the United States of America, when plaintiffs bring the same case to the court which will be most favourable to their case, which has negative aspects on the concepts of justice and fairness.

[41] Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Doc. EX/CL/162 (VI)

[42] N.J. Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication" 28 *Brooklyn Journal of International Law* (2003), 811-866

[43] Draft Protocol on the Integration of the African Court on Human and Peoples Rights and the Court of Justice of the African Union , EX.CL/195 (VII), Art. 2(1)

shall be constituted by a Specialised Human and Peoples' Rights Judicial Division" (Art. 2(3)) which will be one of the "special chambers" that the Protocol Establishing the ACJ[44] has made provisions for.

Many NGO's and academics have been against the merger as they argue this would mean that the Court would lose its independence from the AU and possible from the political concerns of the member states as well as lose its specialised nature.[45] The second set of concerns was raised with regards to the differences that exist between the two institutions, such as the different levels of expertise of the judges as well as the different competences of the courts (even if there are areas of overlapping jurisdiction).[46] However, the draft merger document has addressed this issue somewhat as it includes provisions for at least seven of the judges to have a higher level of expertise in human rights laws as per Art.3(1) of the draft merger document

All the concerns or advantages aside, the two courts have not yet been integrated and both institutions are developing at their own respective paces and thus they are in different phases of establishment. This is due to the decision taken during the 5th Ordinary Session in July 2005, in Sirte, Libya, where the assembly decided to establish the African Court of Human and Peoples' Rights immediately and not wait for the merger document to be ratified or for the protocol document establishing the ACJ into force.[47] Once the ACJ protocol and/or the draft merger document comes into force (whichever comes first), it is likely that the merging process will take place and this may not be an easy task for the African Union or the African human rights system in general.

3. The Commission and the Court

The one institution that will have the greatest effect on the Court is the African Commission on Human and Peoples' Rights due to Article 5 of the Protocol, which provides that the only groups who have automatic access to the Court are African states, African Intergovernmental organizations as well

[44] Draft Protocol Relating to the Statute, Composition and Functions of the Court of Justice of the African Union, CAB/LEG/23.20/45/VOL/II (2003) (the Draft Protocol of the ACJ)

[45] C. A. Odinkalu, "Judicial Nomination Procedure for the African Court on Human and Peoples' Rights" 15 *Interights Bulletin*, Vol. 1 (2005), 28-30 (on 29)

[46] Amnesty International Press Release, "African Union: Assembly's Decision Should not Undermine the African Court", AI Index: IOR 30/020/2004 (Public), 9 August 2004

[47] Coalition of an Effective African Court on Human and Peoples' Rights, "About the African Court", http://www.africancourtcoalition.org/editorial.asp?page_id=16 (accessed 27/5/07)

as the Commission. It is generally the view that states normally will not use their standing to bring other states to the Court[48] just as the African intergovernmental organisations won't use their standing in a significant way as these bodies tend to have their own courts. It therefore remains for the Commission to bring the majority (if not all) of the cases to the Court. The Commission's influence on the Court is further strengthened by Article 8, which states that there should be complementarity between the Commission and the Court as the reason the Court was founded in the first place was to reinforce the protective mandate of the Commission as well as to improve the image of human rights and the Commission in Africa.

These two provisions, read in conjunction, may be interpreted as meaning that the Commission and the Court will exist as a two-tiered system, where cases must be considered first by the Commission and then by the Court. This will be similar to the way the European system used to function before the establishment of the single permanent court[49] as well as being similar to the way the Inter-American system functions.[50]

If the African system, like the Inter-American system or the old European system chooses to accept the image of the Commission and the Court as being part of a two-tiered system acting within a single regional human rights regime, the African Court will have to decide whether the Court will ultimately accept the Commission's decisions about the admissibility of cases as well as to what extent the Court will adopt the Commission's findings and decisions/recommendations. In other words, the Court will have to decide as to the extent and intensity of the independence of the Court from the influence of the Commission.

In deciding its Rules of Procedures, the Court can apply Article 6[51] to its full extent so that when a case is presented to the Court, (even by the Commission), despite the fact that the Commission has already decided on the admissibility of the case on the basis of the same Charter provision (Article 56), the Court can repeat the procedure. Likewise, the Court can choose to maintain

[48] According to Judge Piza Escalante of the Inter-American Court of Human Rights in the case of *Vivianna Gallardoet al, v Costa*, No. G 101/81, Judgement of November 13, 1981, 20 I.L.M. 1424 (1981); Human Rights Law Journal 328 (1981)

[49] R. Murray, "A Comparison Between the African and European Courts of Human Rights" 2 *African Human Rights Law Journal* (2002), 195-222 (on 201))

[50] D. Padilla, "An African Human Rights Court: Reflections from the Perspective of the Inter-American System", 2 *African Human Rights Law Journal* (2002), 185-194, and A. E. Dulitzky, "The Relationship between the African Commission and the African Court: Lessons from the Inter-American System" *15 Interights Bulletin* Vol. 1 (2005)

[51] Article 6 of the Protocol

its relative independence and get involved in fact-finding procedures,[52] without having to accept the findings of the Commission.

This higher level of independence of the Court may present the Court with the advantage of not being burdened with the "severe image problems… associated"[53] with the Commission, as it is possible that the Court will be judged deficient due to the image of the Commission. The additional advantage of keeping the Court independent of any of the Commission's decisions and findings will lie in the fact that the Court's procedures, as laid out in Articles 27-30, provide for more depth and formality in the Court inquiries and judgments than can be provided for by the less legally structured Commission[54] whose procedures suffer from several defects. Critics of the Commission often point out the Commission's procedural defects which have tended to include problems such as delays in between the final hearing and dissemination of the findings[55] (which are also not disseminated widely enough).[56]

Moreover, the fact that the Commission tended not to give very long or any properly reasoned decisions,[57] and has in the past been known to issue decisions without the full facts of cases[58] further strengthen the argument for keeping the two institutions separate. However, in recent years, the Commission has improved its reports by presenting much longer and much more de-

[52] As provided for by Article 26 of the Protocol

[53] M. Mutua, supra note 19, page 360

[54] J. Harrington "The African Court on Human and Peoples' Rights" in M.D. Evans and R. Murray (eds.), *The African Charter of Human and Peoples' Rights- System in Practice*, (Cambridge University Press, 2002)

[55] This is as Article 55 of the Charter places no time-constraints on the Commission to release its decision, which has in several cases means that the Commission could potentially spend up to several years to come to a decision (*ibid)*

[56] M. Mutua, supra note 19, points out that "The Commission arranges its decisions into sections dealing with facts…admissibility of evidence and the final conclusion. However, each of these sections is scant in both substance and reasoning"

[56] For e.g, J. Harrington, supra note 54, points out the case of Communication 59/91, *Embga Mekongo Louis v Cameroon, Eighth Activity Report* 1994-1995, Annex VI (Documents of the African Commission) which was a case where the Commission issued a decision without any information on the facts of the cases.

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tailed reasoned reports.[59] This improvement notwithstanding, some academics continue to argue that the Commission's reports are still not adequately improved enough for them to be a credit to the Court.[60] In addition, the Commission's reports are based on a quasi-judicial procedure, thus the resulting report may not be sufficiently compatible with the Court, which will require a higher level of legalism in its procedures. Furthermore, keeping the Court and the Commission's institutional identities somewhat separate will allow the Court to explore possible avenues of development (as was intended in the drafting of the protocol, which foresaw a conciliatory role for the Court[61]) as opposed to a simple system of being a forum for appeals for decisions taken by the Commission.

On the other hand, the Court's retention of so much independence might disadvantage the Court. The most obvious disadvantage of having the Court carrying out its own procedures of deciding the admissibility of cases and actually engaging in full fact-finding hearings is the fact that this may potentially mean that the Commission and the Court are engaged in carrying out identical functions. This duplication of labour will be a waste of financial resources, especially considering the fact that both institutions receive their limited budgets from the same source. This is a crucial point for African supra-national institutions, which tend to be underfinanced.[63] Similarly, the duplication of procedural requirements will also waste time, especially in view of the fact that both the Commission and the Charter will have to carry out the admissibility procedures in line with Article 56 of the African Charter. Moreover, the Commission has been deciding the admissibility of cases and engaging in full fact-finding mission for some time and its experiences in theses areas have reached a level of professionalism which can ultimately benefit the Court a great deal.

Finally, the overstatement of the Court's independence will disadvantage the Court as there is a risk that the Commission will not feel enough of a 'partnership' with the Court to co-operate in any way with the court. This

[59] C. A Odinkalu and C. Christensen, "The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures", 20 *Human Rights Quarterly* (1998), 235f (on page 277)

[60] A. Motola, "Celebrating Two Decades if the African Charter on Human and Peoples' Rights", *Pambazuka News*, 22nd June 2006, as available on http://www.pambazuka.org/en/category/features/35337

[61] Article 9 of the Protocol

[62] C. E. Welch, supra note 4

[63] This problem actually afflicted the Inter-American System, as the Commission "avoided sending cases on (to the Court) by broadly interpreting its discretion as to which cases to submit…as a result the Court was precluded from exercising its contentious jurisdiction for almost a decade" as per A. E. Dulitzky, supra note 50

may result in a situation where the Commission may choose to function as it has always functioned and will, as a result, broadly interpret its discretion as to which case to submit to the court. [64]As a consequence, very few cases may be sent on to the Court by the Commission which will in effect mean that the Court will hear a small number of cases at best, or more likely, none at all. Furthermore, if the Commission chooses to continue exercising its full protective mandate, a situation of overlapping jurisdictions between the Court and the Commission will develop,[64] with all the potential problems such a situation implies, as discussed above.

Conclusion

In conclusion, it becomes apparent that the Court is being added onto a system which is going through a period of "considerable confusion and flux"[65] with many new institutions coming into being with little or no regard to any of the other institutions or to the already-established mechanisms while the older system remaining largely unchanged. This has created a system where there is/will be a lack of consistency and co-ordination in the way common (human rights) goals are approached in the different AU bodies.[66] This deficiency can affect the Court's operations adversely in several different ways.

Firstly, the lack of co-ordination, as illustrated by the potential situations of possible contradictory judgements, overlapping jurisdictions and duplication of labour between the Court and other AU institutions can lead to a great deal of uncertainty as to the position of the Court within the regional system, especially due to the fact that the Protocol fails to provide for the Court's primacy in all human rights matters. Secondly, the failure to clarify the relationship between the Court and the Commission, which is symptomatic of the lack of consolidation between the institutions, will result in a situation where an institution outside the Court's influence will have the power to decide whether the Court will hear any cases at all. This clearly shows that the Court will depend on the Commission, which has been to a large part condemned for its ineffectiveness.[67] Even if the defects of the Commission will not in reality affect the function of the Court, the image of the Court as a

[64] G. Naldi and K. Magliveras, supra note 38, pg. 434

[65] A. Lloyd and R. Murray, "Institutions With Responsibility For Human Rights Protection Under the African Union", 48 *Journal of African Law* Vol. 2 (2004), 165-186, at 184

[66] Lloyd and Murray *ibid* refer to the "need for co-ordination…from within the AU to ensure that human rights remain central to its agenda"

[67] Although, the Commission's findings have improved, see C. A Odinkalu and C. Christensen, supra note 57

body that is dependant on this much criticised institution can mean that the Court will not be able to inspire as much respect from the states which the Court will ideally require to establish itself as the most important human rights court on the continent.

Most of these problems can be solved by amending the Charter (removing clawback clauses etc.) as well as the Protocol (widening the standing provisions in response to current efforts to afford NGO's automatic standing). However, these amendments can only be made by African states just as it is a matter for the states to comply with the judgements. This will mean that unless the states are prepared to sacrifice some of their interests as well as some of their sovereignty for the good of the regional system, the Court will not be able to effectively and independently play a significant role in the enforcement of human rights. It will therefore be necessary for all the African States to display more political will and dedication to the human rights movement which will in short mean that long-standing African attitudes will have to change more than they already have. Commitment of African states to rule of law is expected to increase in the years to come so that they can be engrained in Africa's political culture. This will undoubtedly take some time. This is clearly manifested in the slow ratification pace of the Court's establishment protocol. Thus the expectation that the Court can immediately "cure" all the problems of the regional human rights system seems to be unachievable in the short term. ■

SHARING THOUGHTS

The Early Days of the Faculty of Law, AAU

Norman J. Singer

Charles O. Stokes Professor of Law &
Professor of Anthropology
University of Alabama, USA

Introduction

I have been asked to share some of my thoughts on the early days of the Faculty of law, Addis Ababa University. In December 2006, I was privileged to give a series of lectures at a number of the Faculties of Law in Ethiopia [Bahir Dar University, Gondar University, Hawassa University, Jimma University, Haramaya University, and Addis Ababa University]. I was able to reflect on some of the events of the early days when Addis Ababa University, Faculty of Law [which was then known as Haile Selassie I University] was just forming. It is my intention in these remarks to reiterate some of what I said during those lectures.

The Period

The Faculty of law, Haile Selassie I University was founded in 1963, shortly after the University College had been changed into a full University. It was reported that Emperor Haile Selassie desired to staff the new Faculty of Law from France. This was thought to be essential since the sources of the new Civil Code of 1960, the Penal Code of 1957, and the Commercial and Maritime Codes of 1961 were essentially French and Swiss law. However, at that time it was very difficult to find French persons who were able to teach in English. Harris Wofford, who had been a Professor of Law at Notre Dame University in the United States and who was working in Ethiopia at the time, intervened and approached James C.N. Paul who was a Professor of Law in the U.S. Professor Paul undertook the Deanship. He spent six years in Ethiopia, four as Dean of the Faculty of Law and two as Academic Vice President of the University. The rest is, as it is said, history.

The circumstances that brought me to Addis Ababa

Following my first degree, I was employed by an American company that had a series of international offices. They sent me to Stockholm, Sweden where I was the Special Assistant to the Managing Director of the company Standard Radio & Telefon, AB. By coincidence, the Managing Director, Frank Hammar, a telecommunications engineer, had been the head of the Swedish team that represented the Royal Board of Telecommunication which was the group that was installing and implementing telecommunications system in Addis Ababa for the Ethiopian Imperial Board of Telecommunications in the early 1930s. Thus my introduction to Ethiopia came from Engineer Hammar and his secretary who had both spent some years in Ethiopia. I began reading whatever I could find about Ethiopia, both because it was something I knew nothing about, and because it was a means of maintaining a decent level of conversation with my secretary and my boss.

Following my work experience in Sweden, I enrolled in a Faculty of Law, and when I was about to graduate, I found an employment notice informing me that the dean of the new Faculty of Law from Addis Ababa, Ethiopia would be coming to interview perspective law teachers. It seemed natural for me to put my name on the list, which I did, and shortly thereafter I was interviewed by Dean Paul and made an arrangement to join the faculty.

The academic staff

The academic staff at the new Addis Ababa Faculty of Law, in the beginning was more or less American. Of course, there was the famous Polish Professor George Krzecunowicz who had come to Ethiopia after World War II from France. He was working for the Ministry of Justice teaching Diploma courses in law. When the Faculty of Law was founded he joined and served there for a number of years.

The American group who first came in 1963, was led by Professor James C.N. Paul as the first and founding Dean of the Faculty. He had been a Professor of Law in the United States at the University of Pennsylvania, School of Law. None of the other members of the Faculty who arrived that first year, other than Professor Krzecunowicz and Dean Paul, had teaching experience. Professor Bob Sedler had graduated from Law School in the United States a few years before, but he was serving in an administrative position as an Assistant to the Dean at Rutgers Law School. The others, Steve Lowenstein, Larry Church, and Owen Cylke were all fresh graduates of law school in the United States. The Faculty expanded the next year with the addition of one experienced law teacher who had been teaching at the University of Virginia,

School of Law from 1944. The others were either recent graduates or in the case of Stanley Fisher, had been a Fellow in the Ministry of Cooperatives in Tanzania for one year before joining the Faculty of Law in Addis Ababa. In 1964 Michael Kindred and Harrison (Hap) Dunning joined the Faculty; they spent a year in France prior to coming to Addis Ababa. Art Goldblatt had spent a couple of years working as a lawyer and, as noted above, I was a new graduate the year that I joined.

In the following year a number of experienced people sponsored by their Governments joined the Faculty. There were two Belgians, Jacques Vanderlinden [with teaching experience] and Thierry Verhelst; a Finn, Zaki Sundstrom, from University of Helsinki; a Canadian Jean-Louis Baudouin from the University of Montreal; Mecktel Immenkotter from the University of Munich; Michael Topping from the University of Edinburgh and Professor Roland Stanger from Indiana University School of Law. There were others who did not have teaching experience. For example, there was Peter Sand from Germany, and Everett Goldberg and Anthony Ceratto from the United States

In the ensuing years, there were a number of other people who came to the Faculty of law on two-year contracts. The names of those individuals can be found in the early issues of the Journal of Ethiopian Law. For the most part, the individuals who were joining the faculty were products of the American system where legal education is a graduate course following a four-year undergraduate program.

Memories about students

I have fond memories of students. There are a couple of things that are relevant when thinking about the students. First, many of us who were faculty members were about the same age as our students. This was especially true of the group who were military officers or had been selected for the military academies in the late 1950s; second, the number of students (initially) in each of the classes was small, approximately seventeen. However, at the beginning there was only one class and then one additional class each year. Since we were members of the faculty with the first intake of students, it was much easier to get to know the students; third, in my case, I was the Chairman of the Student-Faculty Relations Committee for three of the four years I was on the Faculty. This latter fact made it much easier for me to get to know the students as we worked together very closely in arranging various programs at the Faculty.

Of course, there were events and activities that were done in total partnership between the students and the members of the faculty. One of these was the

Journal of Ethiopian Law. For each faculty editorial position there was a parallel student editor. The working relationship between the faculty and student editors was essential to the ongoing work of the Journal. I served as the faculty Case Editor of the Journal for three years. I am proud to say that all three of the parallel editors and I became very close. Even today, more than forty years after I last served as an Editor, I am still close to the two editors who have survived.

One of the major events that took place was a joint faculty-students "circle" trip to visit the provincial High Courts in Dessie, Mekelle, Gondar and Debre Marcos during a school holiday in 1967. The University provided us with a bus; fifteen students and six faculty members and their families made the trip together. There were some memorable events along the way, one of which was camping out in the royal *gibbi* in Gondar where the officials of the province provided a traditional feast. Many of us who were on that trip still talk about it.

Again, because of the number of students and the age of most of us, we developed a feeling of family all involved in the same enterprise. We all took the development of the Faculty of Law very seriously, and each constituency in its own way was working for its development. This was greatly furthered during the third year of the Faculty's existence by the generous funding that was made available through the Ford Foundation. This external funding made it possible to do many things that would not have been possible before - more programs, more opportunities and therefore a much closer set of relationships among the persons involved.

The facilities

The Faculty of Law was first given one of the buildings on the campus at Siddist Kilo which had originally been one of the Emperor's palaces. The Emperor had given the palace compound to the University following the 1960 coup attempt which had taken place in the main palace building. He moved to a new residence in another location of the city. The facilities which housed the Faculty of Law were pretty much the same as they are today. The main building which contained three classrooms and an area for the administration was on the upper floor of the Duke of Harar's palace. It was difficult to determine what many of the rooms had been used for prior to the time it became the Faculty of Law's home in 1963. The ground floor focused around the library, although there were additional rooms there as well. In fact, my first office on the ground floor was a pink-tiled room that had formerly been a bathroom.

As the number of full-time lecturers grew there were some renovations in the building to increase the number of offices, and additional buildings became part of the Faculty. For example, just behind the main building, on the side of Ras Makonnen hall, there was a small building which has been the "*buna bet*" [the coffee house], which every official building will have. The "buna bet" was moved to another location and it was remodeled to hold a number of faculty offices. Other buildings were also converted into office buildings and one also had additional classrooms.

The major find in the main building, which was full of rooms with rather nice paneling, was the location of hidden switches in the wall which opened up the walls and gave access to secret [at least we thought they were secret] alcoves and a number of additional bathrooms. I am sure that the original residents knew and had access to all these "secret" rooms while they were living there.

There have been promises of new facilities as the present faculty of law buildings are not in good shape. To date there has not been a new facility even though the number of students enrolled in the Faculty of law has increased more than ten fold from the original enrollment.

Quality and standards of legal education during the late 1960s

The standard of legal education at the time was quite outstanding. There were reasons for the high standard such as quality of students, the vigor and commitment of staff, the student-staff team spirit, strong achievement motivation and sense of mission in the attitudes of students as would-be members of a newly emerging legal profession

In the 1960s there were not many secondary schools in Ethiopia. Many of the then school-aged children were not enrolling in school because they did not live in a place that was close enough for them to attend school without being away from their families for most of the school year. In the few schools available, there was full enrollment, but the number of children in any given age group was far reduced. For example, I once saw a statistic that only 6% of children in the first grade age group were actually enrolled in school. However, many children were older than that age cohort that would enter school in the first grade. It meant that the age cohort had a reduced number, but of the older more mature children much of the enrollment on the grade level was made up of older children.

I was curious about the English proficiency level of law students in Ethiopia in the 1960s although Ethiopia did not have English as its working language.

I found out that the medium of instruction (until around 1964/65) was English starting from the 3rd grade. For example students used to learn all subjects (science, math, history, and other subjects) in English, other than Amharic and Morality (which was called *Gibre Geb*).

I was told that after learning English as a language only in the first and second grades, there were difficulties of comprehension for a year or two when all subjects were taught in English third grade onwards. However, students managed to come over the difficulties at young age probably because the best age to learn language is childhood. Students at fifth and sixth grade levels wrote and spoke English pretty well. For example, Eight Grade National Exam was subjective, i.e. essay type, and performance of students was remarkable. Starting from the first grade, students went to school the whole day, and the national exams at eighth and (since around 1964) at sixth grade reduced the number students along the way. This was repeated in the twelfth grade where there was a rather strict competitive exam to qualify for entrance into the single university. In retrospect, I believe that the screening system was too strict and elitist. Yet, it had the undeniable merit of preparing world class university students.

In the tenth grade, there were also a series of vocational opportunities available for students who had passed the two leaving exams, but who were either not confident of passing the 12^{th} grade leaving exam, or who opted for an earlier career. Many students would switch tracks and enter teacher training or other vocation opportunities. There was also the opportunity after the eleventh grade to switch to the *Bede Mariam* Laboratory School which would guarantee entrance in to the University's Faculty of Education. This ensured a University degree, but it also meant a career of teaching in secondary school. I also remember that there was American Field Service (AFS) Program which allowed a number of Ethiopian students from all secondary schools to complete their twelfth grade in the US. They lived as a member of an American family for a year, and all Ethiopian AFS students were reputed for their competence, integrity, interpersonal skills and culture. Upon completion of 12th grade as AFS students, they joined Haile Selassie I University, based on their twelfth grade completion transcript from a US High School.

Once the students qualified for the University by passing the 12^{th} grade leaving exam, they had to apply for a faculty. As the Faculty of Law was new and the profession of a lawyer or a judge was prestigious, the number of persons choosing the Faculty of law as a first choice was high. It ensured that the better students among those eligible would be chosen for the faculty of law.

In addition, when the Harar Military Academy was opened in the late 1950s, the Emperor visited the then existing secondary schools and handpicked the best students for the military academy. Many of the students completed the academy and were officers in the Ethiopian Army when the Haile Selassie I University formally commenced operation. Many of the military officers who had been among the best students in their secondary schools then opted for a leave of absence in order to complete a university degree. Many of these officers [both Army and Navy] selected the Faculty of Law for their university education. There were also a number of officers who were pre-Harar Academy, who had graduated from Sandhurst (UK) and opted for legal education.

Thus, the quality of the students was very high whether the students came directly out of secondary school or through the military. Moreover, the initial classes had less than twenty students each, and were quite easy to deal with intellectually. As I noted above, the member of the teaching staff was also made up of rather exceptionally committed and capable persons. The mix of students and faculty thus allowed for an exceptional level of performance.

The blend between the new Codes and Ethiopian traditional law

The fact that there were differing legal systems, Code and traditional, was not obvious to me at the outset. As a new graduate of law school and a person who had never had prior experience with a legal system similar to the Ethiopian one, it appeared to me that what we were teaching, i.e. the Code law, was perfectly reasonable and caused no concern about conflicting legal systems. It did take me a while to understand that the vast majority of people in Ethiopia were not processing their legal transactions through the Codes. The Codes were the territory of the upper socio-economic classes and those individuals who had the benefit of western styled education. As many as 90% of the Ethiopians did not belong to the upper socio-economic class. It became obvious to me sometime during my second year of teaching that there was the entirely separate legal system through which most of the disputes in Ethiopia were being processed. I guess it might be fair to say that there was an urban law and a rural one. They did not seem to meet.

When I learned what the reality was, it became very important to me that I spend time working with the students, who were mostly products of the urban environment, to realize and comprehend that there was a secondary system of law existing in Ethiopia. The Codes did not take into consideration the living traditional practices that were very much a part of the law. However, many individuals of European heritage would simply dismiss the traditional systems as they existed in the countryside [and in the urban areas as well] as “custom” and not law. The definition of law can be manipulated so that only

the rules and processes formally recognized by the government become part of the legal system. I felt that, although it was possible to write off all traditions as "customs" it was not a realistic way to deal with the rules and behaviors of a vast majority of the people.

I had hoped to bring some knowledge of the traditional system into the curriculum, which was set up to mirror a western styled course of study. When I taught Private International Law [also known as Conflicts of Law], I introduced a component which introduced the students to "internal conflicts of law" or the traditional system of dispute settlement. There were a number of different systems with which we could have become acquainted. I chose the Sunday evening dispute resolution sessions of a man called Basha Retta, a man possessed by the spirit *Adal Moti*, who held dispute resolving sessions at his compound which was just outside the small town of Ilulta, on the Dessie Road going north from Addis Ababa. I took a group of three students to the sessions and because it was located in an area without a road, we spent the night there on the Sunday evenings when we attended his sessions. By spending the night we were able to talk to many of the people who brought disputes to him in order to understand how they felt about his effectiveness, etc. Seeing how effective he was fortified my view that it was a mistake not to include the traditional system within the officially recognized legal system.

My memories about Professor René David

I was fortunate in that following my time on the Faculty of law, I had several opportunities to meet Professor René David (of the University of Paris) who was the drafter of the Ethiopian Civil Code. We talked about many things, but seemed to concentrate our discussions on the existence of a parallel system of law [the traditional system] in Ethiopia. His position was very clear. He felt that the official law recognized in the Civil Code was the only law in Ethiopia. In fact, he repeated a number of times that the systems that existed outside of the officially recognized Code system were just custom. Many systems, he repeated, had components of custom. In fact, he noted that France or the United States had customary principles, but they were custom and did not attain the status of law.

I had just completed my studies in the anthropology of law when I had the opportunity to have these discussions with Professor David, and I tried to convince him that there were certain elements inherent in a definition of law which raised the status of custom to that of law. I also noted that where there were independent systems, as there were in various Ethiopian ethnic groups, it was much easier to recognize the rules in place as rules of law and not just rules of custom. I felt that the elements that were present in many of the sys-

tems within Ethiopia created a parallel system of law, even if the official recognition was not accorded to them by the Government. Professor David simply reaffirmed his belief that there had to be official recognition by the government, and in the case of Ethiopia, since there was no recognition of the parallel system, (and that in fact, they were not system of law), there was nothing to recognize even if the government would do it. We respectfully disagreed with one another. I still believe that most of the systems of traditional dispute settlement in Ethiopia possess the elements which give them the force of law.

Attachments and looking into the future

I wish I could say additional remarks with more depth and provide a deeper historical perspective on the history of legal education in Ethiopia. But the pages I am typing are getting long and I think I have to wrap up my thoughts. All of us who were in Ethiopia back in the 1960s and early 1970s are still very much attached to Ethiopia. For most of us, teaching in Ethiopia during our youth was not merely a job, but a noble mission motivated by a passionate involvement in legal education. According to recent research, maximum learning takes place in the course of teaching, and the years I was at AAU Faculty of Law was a great learning experience which nurtured the initial stages of my law teaching career and my exposure to the world beyond USA and Europe. I recall what one of my former colleagues said during a social event (Washington D.C., January 2006) while we were having tea with a team that came from Ethiopia for an exposure tour to US Law Schools. He recalled the extent to which he really missed the general knowledge, broader world outlook and sense of mission of his Ethiopian students (of the 1960s) after he left to the US for another law teaching job.

My optimism thus takes its root from my satisfaction in and appreciation of the earlier days of AAU Faculty of Law, and is reinforced by ongoing efforts toward benchmarking and enhancing standards of legal education in Ethiopia. A number of regional and private law schools have been established during the current decade. I have visited nearly all of them, and my impression is beyond the scope of this article. What I would like to underline at this stage is my concern about resources, admission policies, staff recruitment, staff development schemes, class size, and commitment of students and staff toward sense of mission. Law schools prepare members of the legal profession with the competence and integrity required for the responsibilities of the profession at national, regional and global levels, and our focus to quality legal education today pays-off hundreds-fold tomorrow. ■

NOTES CORNER

- Notes on Jurisprudence: Early Legal Positivism
- Notes on Legal History

NOTES ON JURIPSRUDENCE

Early Legal Positivism: Bentham & Austin

*Elise G. Nalbandian**

Introduction

Legal Positivism developed in reaction to Natural Law theories and it distinguished itself as a movement after breaking away form the Natural law system of theorising. The difference between the two schools of jurisprudence lies in the fact that Legal Positivists, like any other type of Positivists (be they Sociological, Logical or Philosophical Positivists) tend to prefer to focus on the "real, observable world and its actual existence"[1] and to be able to produce a study of law that examines and describes the nature of systems of rules in contrast to the Natural Law theorists who tended to consider questions how laws can be made just or ethical.[2] In short, Positivism seeks to pursue the study of Jurisprudence solely from an analytical angle, thus concentrating on the question "what is law?" rather than take a normative approach as most Natural Lawyers are said to do. To this end, all Legal Positivists try to generalise common features of stable systems of rules to explain what law is in reality.

Although there are numerous Positivists and quite a few Positivist theories of Law, there are three dominant theories which embody this school of Jurisprudence. The first group includes the Early Positivists, Bentham and Austin, who propounded analytical positivism in the early Command Theories of Law. The second theory is the Positivist theory (or Concept of Law) of H.L.A. Hart which was described as the ruling theory of law by Ronald E. Dworkin and the third one is the Pure Theory of Law of Hans Kelsen.

All three theories share many features in common in that they react to natural law theories and they tend to encourage the study of law to focus on the study of human laws (which are a result of human endeavours) so as to avoid the lack of clarity they all feel natural law theories suffer from. All three subschools also hold that any link between laws and morals is arbitrary and at-

* LL.B LL.M, Lecturer in Law, Faculty of Law, St. Mary's University College

[1] J. Penner, D. Schiff and R. Nobles, Introduction to Jurisprudence and Legal Theory: Commentary and Materials (2000) Lexis Nexis UK, London, p. 92

[2] For a discussion on Natural Law Theories, see E. Nalbandian, "Notes on Jurisprudence: Natural Law Theories", 1 Mizan Law Review, No. 1, June 2007, p. 167-178

tributable to linguistic expression. Thus, this theory intends that the two notions should be kept separate. Finally, they all assert that what human law is and what it ought to be are different questions (which for the positivists is the main reason why natural law is unclear).

Similarities aside though, each Positivist theory of law is distinct in its approach and emphasises different areas as being key to the true understanding of what law is. It is for this reason that the following notes will describe the Early Positivist theory of Law as introduced by Jeremy Bentham and developed by John Austin (Bentham's disciple) in the 19th Century and its possible criticisms which have since then been expressed by various critiques including later Positivists.

1. **Background of Early Legal Positivism**

In the 19th Century, perhaps one of the most influential figures in English law was Blackstone, who was conservative in his thinking. As such, his answer to the difficult question "what is law?" was steeped in praise for the common law system which in his view was based on reason and natural law. Bentham found Blackstone's theories unconvincing and in his many writings, pointed out the deficiencies in Blackstone's writings and lectures as well as those in the theories of Social Contractarians and other proponents of Natural Law theories. His main argument at this time was that Natural Law theories did not provide any objective guide to what was moral or immoral or good or bad in deciding what law was valid or invalid. Bentham argued that what constituted morality in these theories could in fact also be understood as being subjective, culturally determined standards of common likes and dislikes[3]. But his true opposition to Blackstone emanated from the fact that Blackstone explained that English law was based on natural law and praised it for the same reason. In Bentham's view, however, this was incorrect for a variety of reasons but mostly, Bentham (who was a reformist and thus was inclined to be more critical of the system) seemed opposed to all the praise of the English Law system. This, according to Bentham, is due to the confusion between what the law is and what it ought to be, which he blamed on the influence of Natural Law thinking.[4]

Bentham felt that this conservatism in legal thinking hindered reform and he held that law should be criticised, improved and reformed. Thus, he broke away from the general trend of the theories of his time and he introduced a

[3] Supra note 1 and lectures by the authors of the book (Richard Nobles and David Schiff, London School of Economics and Political Science, 2004-2005)

[4] J.W. Harris, Legal Philosophies, (1997) 2nd Ed. Lexis Nexis UK, London, p. 28

new approach in jurisprudential thinking by suggesting that law must be defined in terms of facts. For him the important facts included among others, the political facts of power,[5] human commands/prescriptions and the system of coercion. To do so, he suggested that any definition of law needed to focus on at least eight very important issues in law, including;

1. The source – the person(s) whose will the law expresses or who created the law
2. Subjects – the person or things to which the law applies
3. Objects – the acts to which the law applies
4. Extent – the range of the law's application in terms of the persons whose conducts are regulated by the law.
5. Aspects – the various ways in which the will of the sovereign (expressed in the law) may apply to the objects (as in [3] above) of the law
6. Force – the sanctions which the law relies upon for compliance
7. Expression – the various ways in which the wishes of the sovereign are made known (the way law is published etc.)
8. Remedial appendages – any such other laws which are created and published in order to clarify the requirements of the principal law.

Once these elements were identified, Bentham then believed that the questions "what is good law?" could be answered based on ideas of utility whereby the good laws are those which maximise happiness/pleasure and the minimisation of pain/misery. But he pointed out that these could be done only after the question "what is law?" had been fully dealt with at the factual level.

Although Bentham is clearly the founder of the Command/Imperative theory of law (as named due to the idea that the factual ideas of the will of the sovereign as expressed in the law), his work about the nature of law was not widely known due to the fact that they were not published. Thus it fell to his disciple, John Austin, to develop/make known this legal theory in the 19th Century.

2. John Austin and the Command Theory of Law

John Austin was a disciple of Bentham's as he was both a positivist and a utilitarian. Hence, Austin's work was largely based on Bentham's work and Austin's classification of law and criticisms of his view of law are indeed necessary for a full understanding of the 19th Century Early Positivist Theory of Law.

[5] E. Christodoulidis, L. Farmer and S. Veitch, Jurisprudence: Themes and Concepts, (2007) Routledge Cavndish UK, p. 12

Austin, like Bentham was a definitionist. He wanted to clarify what law was and what it was not and it was Austin who made the distinction between the terms (which he coined) 'analytical jurisprudence' – which involves looking at the basic facts of the law, its origins etc – and 'normative jurisprudence' – the question of the goodness of law. For Austin, like Bentham, the important part of the study was the analystical question. Another similarity between Austin and Bentham is that both jurists believed that the same factual issues (namely of power and sovereignty[6] as well as sanctions[7]) were key to the understanding of the law, as it is.

Austin first sets out to clarify the idea that people with power set down rules for others who obey them to govern their actions. In other words, Austin suggests that law is 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him'[8] and this is done so in the form of a command. In short, laws can be understood in Austinian terms as commands from/by the sovereign. So everything that is law must be a command. But Austin points out that all commands are not law necessarily as some commands may lack the generality that will enable them to become a law. Hence, Austin's theory holds that a command that is directed specifically is a command, but a command directed generally and over time is law.

Austin then goes on to discuss the fact that in the English language (as in some others) many concepts can be labelled as "law" - but these do not necessarily qualify as law as a lawyer, judge and other members of the legal profession would understand it. The word "law" is therefore according to Austin, vastly misused and not sufficiently considered. For example, Austin raised the idea of "laws of Science" or "laws of God" as well as "human laws" to indicate this. Austin, systematically approached this issue and classified laws into different types to focus his study on something quite specific. He firstly distinguishes the concept of the laws of God. These are God's laws to regulate humans and so Austin called this 'laws properly so called' and indicated that this is not something to be considered in a theory which attempts to understand human laws.

In Austin's theory, human laws are treated in distinct categories: firstly, laws strictly so called (positive law where rules are backed by sanctions and the laws are set by men for men) and laws not strictly so called (laws which have no sanctions by the State attached). This latter category was also labelled as "positive morality". The laws stircitly so called are then also divided into two: 1) laws set by men for men as political superiors to political inferiors

[6] Ibid | [7] Supra note 4 | [8] Supra note 1

and 2) laws set by men for men in pursuance of political rights (contracts, tort, property) which are not commands and are not as important or essential as the first type of law set by men for me and he tags these types of laws as being "Expository matter". All other usages of the word "law" such as "laws of science" are said to be laws by analogy.

To summarise; Austin's understanding of human laws can include three general types of law:

- Penal law: Command+Sanction
- Expository matter: lots of appendage type laws that develop over time but are not as essential as penal law: such as Family Law, Contract Law etc.
- Permissive Law or Positive Morality which includes International law etc. which are closer to being laws by analogy then they are actual laws

Ultimately, the focus of Austin's theory is such that his conception of the law that needs to be studied can be and regularly is reduced into one very famous quote:

"*Law is a Command of a Sovereign backed by a Sanction.*"

This quote indicates the three elements that are key to the understanding of law in Austin's terms: firstly the concept of the Sovereign, then the concept of the Command and finally, the role of Sanctions in law.

2.1 - The Sovereign

The sovereign is the source of law in a society and thus is the most important figure that needs to be understood. Without a sovereign there can be no law as human laws are a result of human endeavour and the endeavour of the human truly refers to the soveregin's endeavours. As such, Austin describes the sovereign as a person or an institutions that is factually determinate (in other words can be clearly and easily identified) and is a common political superior. As the common political superior, this sovereign must also be someone or something that is habitually obeyed by the majority of the members of a society who must also not be in habitual obedience to anyone or anything else. Finally, Austin makes it a requirement that the sovereign should be legally illimitable and indivisible and the sole source of legal authority in any given society.

2.2 - Commands

A Sovereign as a source of law can only make the laws he/she/they/it wants in the form of a command. Hence, Austin states that the sovereign's will is

expressed in the form of a command which is an imperative statement establishing the sovereign's wishes. The command is different from an order in that (as already mentioned above) Austin specifies that commands must be generally applicable and must not be specific. It is also a specific expression of will or type of order as anything that is a command in Austinian terms must have a sanction attached to it should the command not be obeyed.

2.3 - Sanctions

A sanction is in Austin's terms "even the smallest evil…" which can be any harm or pain which is part of the threat in the command of the sovereign. This is an important part of law as it provides the motivation for the subjects to obey the sovereign's commands and a disincentive for the majority of the society to disobey the law. As such, Austin describes the sanction as having to have possibility of application as this is a key part of the law in the event of a breach. The sanctions can include damages, remedies, compensation, maintenance costs or other types of punishments which are imposed on by actual bodies founded as institutions to enforce the law.

3. Discussion

According to Austin, laws only exist in independent communities that have identified political sovereign who is a person or a group whose commands are habitually obeyed in the community and who does not obey anybody else. For Austin, the sovereign who issues commands etc. is the Parliament which is the representative of the people. Furthermore for Austin, the legal sovereign is the political sovereign as this is the one body that has the power to promulgate its own laws and have them enforced except for the one exception where Austin includes judge-made-law as part of law in the sense that the sovereign delegates authority to judges to make law. It can and should be appreciated that Austin's theory is comprehensible and systematic.

Be that as it may, Austin's theory also suffers from various weaknesses (mainly the problem that the theory does not adequately explain the important features of modern legal system) that many critiques have explored. A most detailed study among the dominant criticisms of Austin's work (indirectly) can be found in H.L.A. Hart's "The Concept of Law" (1961). Hart's project was to create a 20th Century Positivist theory and his attempt was not to specifically criticise Austin's theory. Rather, Hart's attempt was to deal with the general problems all Imperative law theorists raised in describing the law in the most simple terms. The reason why a lot of it seems like a criticism of Austin is due to the fact that Hart regarded Austin's theory as the

"most thorough attempt to analyse the concept of law in terms of apparently simple elements"[9].

The following criticisms will thus be structured along the lines of summaries of the second and third chapters of Hart's "The Concept of Law" with additional points of criticisms where they exist from other sources furnishing the body of criticisms, where Hart has not done so.

3.1 - The Problem of the Continuity of the Legislative Authority

Austin has described a hierarchical system of law with a sovereign who is factually identifiable and whose commands are habitually obeyed. However, the problem with this idea is that it is not clear who the sovereign is (necessarily) in cases where the sovereign changes for example as Austin's description of the sovereign does not actually make it clear how legislative authority continues form one person to the next or one institution to the next. For example, where a ruling sovereign passes away and a new one inherits the position or if there are elections and a new parliament is elected, there is no allowance for an instance where the bulk of the population will obey the new sovereign. This is as Austin only discusses "habitual" obedience, i.e. an obedience that has always been part of the behaviour of the bulk of the society. This makes it such that questions will arise as to whether the populations is going to have to continue being in habitual obedience to the older/ preceding ruler (who, if dead, can no longer pronounce his commands) or will there have to be a new habit of obedience established for the new sovereign, who until he/it is habitually obeyed will not be a sovereign and thus will not have any legal legislative authority as he/she/it is not a sovereign. Hence, in Austin's theory, allegiance to legislative authority seems to have gaps, which is a very serious weakness.

3.2 - The Problem of the Persistence of Law

As laws tend to be viewed by Austinians as commands of a determinate sovereign and thus all laws exist and are valid due to the authority and existence of this specific sovereign. Imagine that the sovereign that created this command/law has passed away or passed on, the questions arises as to whether the laws continue to exist considering the ones who commanded them no longer does. Austin suggests that the new sovereign affords the older laws his/her/its tacit consent and the laws will persist. However, in a systematically positivistic system, the new sovereign (which is not clear can exist due to the problem stated in 3.1 above) has to actually make a command as to the

[9] H.L.A. Hart, The Concept of Law, 2nd Ed., Clarendon Law Series, Oxford University Press, 1994, p.18

existence of such a tacit consent. This, however, will be a problem because in most legal systems, the persistence of law is presumed by custom without requiring new sovereigns to go through a process of validating older laws as it is assumed that they are valid.

3.3 - The Problem of the Illimitability of the Sovereign

Hart points out that a sovereign as per Austin is not bound by any law or to any other sovereign. In short, a sovereign is illimitable in his/her/its power and Hart argues that in any Parliamentary system (and even in most monarchic systems) this theory of the scope of law cannot work as even the law-makers are bound by some laws. Although hart did not develop the next argument that is going to be made in this paragraph, it is worth noting under this heading. Sovereigns tend to be bound at least by the rules which make up constitutions. Austin disregards constitutional law as law not properly so called but in so doing, makes a mistake as constitutional rules all clarify that legislators are subject to the law and this is in fact an important feature of legislative authority.

3.4 - The Problem of the Variety of Laws

According to Hart and Kelsen, Austin's failure to recognise various types of laws is a fatal blow to his theory. For example, Kelsen argues that contract law can be made to fit with an imperative law model and yet, Austin considers this type of law as expository matter. Hart on the other hand went further and said that there are many varied areas of laws and on a conceptual point of view each type has a different way of being defined and applied. He goes on to then point out that Austin's penal code as being imperative system is not complete or even desirable. Hart's view is that Austin is wrong to point that a law is not in effect until a sanction is in place and he further shows that there is a difference between following a habit and having legal obligations emanating from legal rules.

3.5 - The Treatment of International Law as Positive Morality as a Problem

This was not an issue Hart raised but quite similar to the issue of constitutional law as discussed above. Like constitutional law, for Austin, international law is a matter of positive morality and thus International Law is not law. Austin's reason for this statement was based on the idea that there is no determinate sovereign that can make the commands that make international law. He also does not recognise custom as a source of law which also makes it impossible in his conception of law to recognise international law as law.

However, in practice, laws can be said to exist and be valid in the international arena based on customs and treaties.

3.6 - The Problem of the Indivisibility of the Sovereign/ Legislative Authority

Another criticism Hart did not raise but is growing in importance, focuses on the issue that the sovereign has to be indivisible. This idea does not work in states with federalist governments such as the U.S.A etc. or in other parliamentary democracies that have devolved power in a bid to decentralise authority in law-making (see devolution in the United Kingdom). Quite often in such systems there are multiple law-making bodies and this type of system cannot be reflected in the view of the central and indivisible sovereign as described by Austin.

3.7 - The Problem of the Generality of Commands that are Law

Austin allows for judicial law making based on the idea of delegated authority however, Austin has not considered the fact that this idea contradicts the nature of judgements in judicial law making which tend to be more specific rather than general when ordering individuals by law to act or forebear from acting in a certain way. Despite the fact that this is a specific command, this is still a law in this case.

Concluding Note

In spite of Hart's (and other) criticisms levelled against Austin's theory, this theory has had quite wide-ranging influence on the works of numerous influential jurists, including the works of Hart. Austin's theory is indeed an important part of the study of legal theories and it is one of the most systematic and thorough analyses of law. Furthermore, this theory is not without its supporters. The fact that there are numerous criticisms to be made about this theory does not mean that it is all wrong. Needless to say, certain elements of the theory have influenced or are part of other theories including (arguably) Hart's theory of law. ■

JEAN MAILLET'S LECTURES ON LEGAL HISTORY

Mainly abridged (with omissions) from Professor Jean Maillet's transcribed lectures entitled "*History of Legal Institutions*", 1964

Elias N. Stebek[*]

1. Conceptions with regard to the objective of legal history

Three conceptions are held by scholars with regard to the conception and significance of legal history and legal traditions.

1.1- The Historical Conception

According the historical conception, the study of legal history can bring about a better understanding about past societies. However, there is some unwillingness to study ancient laws as if they are currently enforced.

Historians of legal institutions can of course specialize in this field of study, but this doesn't usually appeal the law student "who wishes to study the law for itself and not as a means of understanding ancient societies".

1.2- The Sociological Conception

This conception contends that studying the law of past societies extends towards the study of the relationship of the law with political, economic, social and other factors, because they are interrelated and have constant and sustained interaction.

This approach is indeed rich and profound, and it studies legal history and legal traditions from a wider perspective. It may also raise various philosophical issues. At deeper analysis and comparison, similarities and concordances between legal traditions of past societies and interactions between the various elements of society are generally observed. Yet, the interaction of the various elements of society and their impact cannot be explained with scientific assertion.

This sociological or philosophical approach to legal history suits departments of sociology and philosophy rather than schools of law. And, if it is to be studied by law students, it has to be reserved to advanced students in view of the abstract nature of the analysis and the complex issues involved.

[*] Dean, Faculty of Law, St. Mary's University College

1.3- The Technical Conception

The technical conception forwards the principle that the purpose of studying legal history ought to be modest, and that its objective must be to gather the legal problems and understand the legal reasons why certain solutions were chosen and justified. This conception is of course narrow and tends to consider law as an isolated element of social organization. This conception could have *three* interpretations.

a) The utilitarian interpretation

According to this interpretation, the technical conception facilitates the search in the past "for the origin of present laws and enables us to understand the latter." Supporters of the utilitarian interpretation believe that "we cannot study modern laws without searching out their legal roots in the past".

b) The "mineral" interpretation

Adherents of this interpretation strive to "draw up a list or inventory of the various solutions to particular problems" found and used in past systems and choose the best for our current problems. But, legal material or solution of the past may be "ill-fitted to present needs, however well-suited it was to past needs".

c) The "ideal" aspiration

Some jurists aspire to draw from the past "a rational and perfect system of law or at least a logical and coherent legal construction, a kind of legal masterpiece having a universal value." However, "since law must be adjusted to economic, social, political and other factors" it is difficult to create a universal system of law, on the basis of History of Law.

Professor Maillet's conclusion

"In conclusion, we may say that the three conceptions of the History of Legal Institutions … however interesting, do not fit the requirements for teaching this subject in a law school, with the possible exception of the third conception in its first interpretation, namely, as a means for explaining the source and origin of modern laws, of comparing them with the most valuable laws of the past, and learning something about the changing and relative nature of law. This is what we may call the *'utilitarian conception'* of History of Law since it does not aim at extra-legal ends."

2. Early History of Law up to Code Napoleon

2.1- The transition from empirical to rational system of law

"As soon as a society reaches a certain level of civilization, its internal life becomes so complex that it cannot get on with a purely empirical system of law, and then the society resorts to rational methods and to a scientific approach and so develops a theoretical conception of law as a science. At such a time, specialists in law begin to appear along with a legal literature. Training in law begins to take place with the development of law schools and the exposition of the law becomes rational and scientific." …

2.2- Mesopotamian or Babylonian law

Stage 1

Archeologists have discovered fragments of short codes in south of modern Iraq that date back to 3 Millennium B.C. They are of little interest to modern jurists since they are brief and fragmentary. There were frequent civil wars in Mesopotamia (the Babylonian Empire) during this period.

Stage 2

The first real code in the history of law (Code Hammurabi) appeared in the Babylonian Empire around 1750 B.C.

Stage3

Despite change of empires thereafter, the only new document of interest was Code of the *Hittites.*

2.3- Greek law

- Greek civilization reached its climax during 5th century B.C.
- Greek civilization created a system of public and private life based on the great principles of liberty, individualism and liberalism.
- But the Greeks were unable to create elaborate system of private law, although public (constitutional) law was elaborately developed.
- Ancient Greeks lagged in private law in contrast to their achievements in science, philosophy and the arts due to the following reasons:
  a) *Political and geographical factor:* There was never one Greek nation but independent city states that did not require elaborate private laws;
  b) *The psychological and intellectual make-up:* Ancient Greeks were more interested in philosophy, politics and the arts. They were philosophers of law and not technicians of law. Their concern was in fair balance between the function of government and the rights of the citizens. Private law took secondary place.

c) *The institutional and technical failure:* the Greek system of procedure and interpretation of law was not favourable to the development of a highly theoretical system due to the following reasons:
   - There were no specialized or trained judges;
   - Judgments were pronounced according to ethics and equity;
   - Teaching of law was considered unnecessary;
   - There was no record of judgments.

2.4- Roman law

This law was characterized by the fullness of its philosophical basis and its solid theoretical base.

Stage 1: Old Roman Law

Rome was a small city from its earliest period (around 7th century B.C.) to the emergence of the Roman Empire. The law of this period Known as The XII Tables (that was inscribed on stone around 450 B.C.) was primitive.

Stage 2: The classical period

The period known as *Pax Romana* (from 2nd century B.C. to 2nd Century A.D.) was a period of expansion, order and prosperity. The development of Roman law was at its peak.

Stage 3: Code Justinian

The climax declined due to prolonged wars and unrest and particularly after Rome fell in 476 A.D. However, the Eastern Roman Empire survived with its capital at Byzantium (Constantinople). Roman Law also survived and lived its second period in the eastern part. This new peak was reached under Emperor Justinian in the 6th Century when Roman law was codified (528 to 533 A.D.). The city of Byzantium (currently Istanbul) and its Empire retained the legacy of Roman Law until the Turks invaded it in 1453.

The static nature of Roman law

The Romans were in large degree traditionalists. Their method of changing the law was that of creating exceptions to old principles to adjust them to the new needs of a changing society. In effect, Roman law prevailed for centuries. Code Hammurabi also stayed static for one thousand years. Thus the nature of law in ancient societies remained stable, unlike modern laws which, after the French revolution have shown deep reaching changes. The French Revolution in ten years changed French law more profoundly than it had been changed in the preceding ten centuries.

2.5- Old French law

During the centuries after the fall of the Western Roman Empire, old French law underwent through the following three periods:

Period one

From the 5th to 10th century, the Franks (barbarian German tribes who settled in what was later called France), were primitive people with rudimentary customary laws. Their laws were *empirical* which merely regulated ordinary everyday needs.

Period two

From the 11th up to the 15th century, there was lack of political and social unity. Authority of local landowners prevailed and the monarchy was weak. As a result, there was lack of unity in law. There were several systems of law, none of which was highly developed.

Period three

Absolute monarchy reigned for about three centuries before the French Revolution. The two features of this period were unification and centralization. However, unification was not fully achieved. Thus local legal systems were retained and meanwhile, new systems and rules of law aiming at unification developed. This made the legal system in France more intricate than before.

2.6- Laws of the French Revolution

The 1789 French revolution and the events that ensued brought about general changes in French society, which penetrated into every field. The bourgeois moderate revolution lasted from 1789 to 1792 followed by fierce popular revolution (1792 to 1794). The bourgeois revolution was then resumed from 1794 to 1799. During these years, French law was deeply modified. Yet, neither codification nor unification of the law was achieved during the decade.

2.7- The French Codes (Code Napoleon)

The revolutionaries could not establish the social system of their dream and vision. Nor could the old system be retained. Napoleon filled the power vacuum and came to power. Codification began (in 1801) during Napoleon's reign, and was finalized in 1811. The French Civil Code was enacted in 1804. Moreover, the Code of Commerce (1808), Code of Criminal Procedure (1808), and the Penal Code (1811) were subsequently enacted. The change in French law during the twenty two years from 1789 to 1811 was greater than the change it had during the preceding thirteen or fourteen centuries.

3. Religious conceptions with regard to the origin of the law

3.1- General feature of ancient laws

Ancient laws were considered as a part of religion. Legal rules were believed to be disclosed by gods and were mostly enforced by spiritual leaders such as priests) by means of penalties and sanctions. The law was believed to have "divine origin." The top of the stele on which Code Hammurabi is inscribed shows the representation of Emperor Hammurabi receiving the Code from a seated god.

In Ancient Greece, the law was (until the later centuries) personified by the two goddesses Dike and Themis. And Roman law (at its earliest stage) was thought to have been disclosed by a nymph.

3.2- Babylonian law (The religious conception)

Hammurabi, who prepared the Code, might have believed that he had a divine inspiration, or he might not have had such a belief. However, Babylonians believed that the Code was an object of divine inspiration. The system was both autocratic and theocratic. The emperor (even where he usurped power through coup d'etat) was considered as a representative of god.

> " … (I)n early times obedience was only to the tribal heads. When cities arose, the concepts of solidarity and self-discipline had not developed and so the ruler, in order to get authority over these people, had to anchor it in religious conception. It was considered to be god-given and so incapable of being challenged."

The religious conception of Babylonian law had two features:

The empirical character of Babylonian law

> The rules were simple and direct; and there were neither general principles nor legal literature. The rules were particular and were meant to specific circumstances. This was so because law was believed to be a set of rules disclosed by god and not worked out by man's reason or logic, there was no need for an elaborate justification; the law contained its own justification from divine source".

The stability of the law

> Babylonian law "endured for a millennium without change … because it was considered to be god-given or inspired and the gods did not change the law and the gods did not change: to change the law would in some sense be an affront to the will of the gods."

4. The philosophical conception of Ancient Greek law

Before the beginning of cities (10^{th} to 6^{th} century B.C.), Ancient Greeks conceived their laws as having a religious origin. In due course of time, the philosophical conception with regard to the origin of the law gradually developed and the notion of the law was divided into the concepts of ***Dike*** (the eternal natural order that is the expression of divine will) and ***Themis*** (the advice from gods to rulers on the higher principles of the law of nature).

The political changes of the 7^{th} Century B.C. in the most advanced cities such as Athens led to the enactment of new legal rules. Thereafter, it was impossible to retain the religious conception of law because it was clearly observed that the new laws were written down by human beings pursuant the compromise made between the popular classes and the aristocracy. Thus the concept of laws as human rules, referred to as ***Nomoi*** emerged.

Dike

> *In the abstract sense*, Dike refers to the general order of the world, the eternal order, which is the expression of the divine will to which human decisions and rules must conform. The natural order was believed to be the ideal model for human society. It was thus equated to rights and justice, and was personified as a goddess. *In its concrete sense*, "Dike was the judicial process through which human justice strove to meet and express the commandments" of the eternal natural world order.

Themis

> Themis was more precise than Dike. "*In its abstract sense*, Themis adds a philosophical meaning to the religious concept of Dike. It refers to the higher principles on which the advice given by the gods rested". And, "In *its concrete sense*, Themis refers to the advice given to the request made by rulers to the gods."

Nomos: Function of Nomos

> As stated earlier, Nomos were conceived as human rules. The *function* of Nomos (the law) was to regulate relations between individuals (private law) and relations of government with individuals (public law) with the view of guaranteeing "all the fundamental values of Greek society; the democratic order; the city, liberty and equality". According to Ancient Greeks, civilized people are subject to "the sovereignty of the law".

The Nature of Nomos (the law)

> The Greeks believed that such law draws its power from nature itself, i.e. from the general order of the world. "The Greeks distinguished two

levels of organization: the organization of the city and the organization of the world". In the abstract sense, *Nomos* "referred to the whole of unwritten norms which derive from nature itself." And, in the concrete sense, it referred to every legal rule whatever its form.

On the basis of these conceptions, positive laws (i.e. laws enacted by human beings) should be in conformity with natural law. "The Greeks conceived two kinds of laws (two *nomoi*): the positive law of the city, and the philosophical *nomos* or natural law."

With regard to the issue whether positive law (same as natural law) is eternal, unchanging and universal, the Greeks held that "positive law was variable and apt to change', because of changes in the will of the legislatures and due to the "changing needs of the society." Yet, ancient Greeks devised mechanisms and procedures to keep *nomos* stable by restraining the tendency to change.

A special process was required for the creation of the law, according to which the project had to be approved by the *Boule* (City Council) before it was submitted to the popular assembly. A committee called "*Nomothetai*" (makers of the law) could alone propose new changes. The effects "were bad, since it was impossible for a city such as Athens, which was constantly growing and becoming more complex, to live under a strict, immutable law."

Jean Maillet's concluding remarks on Greek law (Excerpt)

"We can see that the Greek philosophers failed in one part of their task in the field of the conception of law: they failed to translate the universal principles (*nomos*) into the positive law of their cities: private law remained undeveloped. But the Greek philosophers achieved great success in the other branch of their search: they established the relation to exist between positive law and justice: they constructed the concept of natural law: they taught us that law is not pure technique – but that it refers to philosophical principles which are far above technique."

"It was left for the Romans to complete the task. They were no philosophers: they were however excellent technicians; and so with these latter talents the completion of the task of development of private law could be accomplished for the ancient world."

5. The ethical conception of Ancient Roman law

Initially, Ancient Romans had a religious conception with regard to the origin of law. The revolt of the lower classes in the 5th Century B.C. brought about fundamental changes, and new laws were written in 450 B.C. These new laws that are referred to as the *Twelve Tables* were apparently written by men; and in effect, the religious conception of law could not thereafter retain its influence.

For centuries, the empirical laws in the XII Tables were adequate. The laws were brief and unelaborated. But, the emergence and expansion of the Roman Empire rendered the empirical system of law inadequate. From the "*quantitative point of view*", there were a tremendous number of statutes, decisions, opinions, etc., and from the "*qualitative point of view*", Roman law began to be "based on scientific reasoning handled by authorities and experts with care." Controversies in support of different jurist opinions and theories developed.

> "In the wake of these changes, Roman law changed from an *empirical* system of law to an *ethical, moral and universal* conception of law. Here we must distinguish the fact that while the Romans had a technical conception of law, namely, each rule of their law was justified by logical reasons, reached through specific methods of reasoning, analyzed by the applications of technical concepts to the problems, and formulated in technical terms, yet this technical approach did not divert them from ethical approach."

The ethical approach developed on two levels. The ***first level*** pertains to the law itself. With regard to the definition and analysis of law, the Romans believed that law is related to justice. For example, Ulpianus (late 2nd Century and early 3rd Century A.D.) emphasized "on the moral sense of law, not on its technical sense." And, he defined justice as "the constant and perpetual desire to give to everyone that to which he is entitled."

> "To take another example, Celsus, who lived in the 2nd century A.D., wrote that law is the art of knowing what is *good* and *just*". Law as an art was regarded as technical or scientific means i.e., a technical skill and tool that is handled by experts. And as regards its ultimate source, it was sought from what is "*good* and *just*".

At the ***second level*** of the development of the technical approach, the "Romans borrowed from the Greeks the notion of natural law … (and) equated ethics with natural law".

6. The empirical conception of Old French law

(Jean Maillet, Excerpts with some omissions)

"In the centuries which followed the collapse of Roman law in Western Europe, no new conceptions arose. The new societies limited themselves to laying down particular rules to meet particular needs as they arose. It was only at the end of the period of Old French law … that the question of the nature of law begins to be asked again. And so for nearly ten centuries the question was not posed.

Middle Ages: (5^{th} until the later 15^{th} century)

"The law was purely empirical not only in France but throughout Europe; the rules were simple: there were no theoretical conceptions; the ends were immediate and practical. For example, feudal law had special pragmatic rules but there was no theory or conception of feudalism. In addition, during this period the rules themselves were not precise: we would call them general customary rules. For these reasons, we can see that when Roman law reappeared in Europe, it was not to be understood in the sense in which the Romans knew it, as an ethical system, but it was seen rather as a mine or depositary out of which the new societies could extract practical solutions to particular problems.

"The only exception to these remarks was the *canon law*, which governed a large portion of … marriage and divorce, testaments and contracts. This canon law was inspired not only by practical needs but by higher principles (religious percepts of Christianity) as well. However, the canon lawyers were satisfied to say that law was the operation of divine precepts, grounded in Christianity, and they did not seek to build general theory of law." …

The latter period of Old French Law

"From the 16^{th} to the 18^{th} centuries, change took place in the old French law in certain ways: lawyers began to think in theoretical terms about law; they had to comment upon customary laws in order to improve them; they had to attempt to merge numerous customary laws …; they had to shape from time to time a new law based on the royal edicts and statutes; and they had to study Roman law in order to combine it with French law. These tasks were numerous and difficult and they kept the French lawyers so busy that they had little time to think about the ends and nature of law.

"The result of this evolution was that French law was much improved, but only from the technical point of view. In the theory of law, there was almost no advance during this period. … Nevertheless … the work of the lawyers during this period prepared the way for later lawyers to turn to the question of theoretical analysis of law. … "

7. The ideological conception of law during the French Revolution

(Jean Maillet, Excerpts with some omissions)

"The French Revolution used law as a vehicle for political and social purposes and illustrated that law is finally a technical tool apt to serve various ends. The French Revolution … brought profound and general changes in French society. In order to accomplish these changes, it used the methods of revolutionary action, war propaganda and law. It used law as a means for the overthrow of the old society and for the building of a new one. Thus we see that the end of law was for them not actually a technical one but rather an *ideological* one.

"… There are certain parts of the law in any society which are more directly governed by *technical concepts* and which depend upon legal logic rather than upon *sociological ideas;* and these do not vary with each change in ideology.

"To take some examples of sociological content: the question whether the heirs of the deceased are designated by the law itself or by the deceased in his testament is a sociological one: it involves the individual's right to dispose of his own goods. The question of the general rules according to which the heirs are designated by the law is also a sociological one.

"To take some examples of technical content: the question of the forms by which the deceased may make his testament is a technical one. The law of contracts is almost entirely technical. On the other hand … family law is purely sociological.

… "During the brief period of the French Revolution, attempt was made to adjust both the technical level and the sociological content of the law to the changed times and ideas. Several drafts of *general* codes were prepared during this period but it was too large a task and they were not effective.

"… The French Revolution was primarily interested in legal problems having political and ideological involvements, and therefore we speak of their conception of law as an 'ideological' one. As we remarked earlier, the period of the French Revolution having made the ideological changes required by that revolution, the next period of Napoleon and the Codes could concentrate on the technical concept of law.

"Thus at the close of the French Revolution, the problem which remained for Napoleon was to change the technical parts of law which had not been touched by the revolution and to put into definitive technical form the ideological concepts of the revolution."

8. The technical conception in the Codes enacted by Napoleon

(Jean Maillet, Excerpts with omissions)

"The problem confronting Napoleon and the draftsmen was that of stabilizing the law, since French law was now ripe for systematization. In accomplishing this, they had the task of reaching the best technical solutions for problems arising in the field of individual relations, of sharpening the technical devices afforded by law, and of conforming its solutions to the requirements of technical science and to legal logic itself. Thus for the first time, law (became) independent of other fields and (became) an autonomous art or science.

"… On the one hand, the awareness was retained that law is not completely independent of morals, but it is no longer governed by the moral requirements. … On the other hand, awareness is retained that law must meet the sociological needs of society. But in the period in which Napoleon worked, the societal framework had been overhauled and fixed so that the task of law was now that of maintaining a general accord between the contents of law and the basic principles of societal organization established for western society. Therefore, law could now concentrate on technical problems, since the ideological problems had then been settled. …"

Conclusion

"… If we wish to understand a system of law, we must note its content, its methods, its origins and its ends. But if we wish to know its deeper nature (nature of the law) we look to its origins and its ends." The following diagram sums up the points that are highlighted above: ■

Laws	Content	Method	Origins
Babylonian Law	Rough and unelaborated	Pragmatic (Empirical)	Religious
Ancient Greek Law	Rough and unelaborated	Pragmatic (Empirical)	Philosophical
Roman Law	Law	Scientific	Ethical
Old French Law	Rough and unelaborated	Pragmatic (Empirical)	Practice (Empirical)
French Revolution	Law	Scientific	Ideological
Napoleonic Code	Law	Scientific	Technical