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Federalism in Ethiopia and Foreign Relations: Regional States Diplomacy

Dagannoon Nama Ajjeesuu Ilaalchisee Firiwwan Dubbii Seerichaa Irratti Hundaa'uun
Hojjachuun Walqabatee Rakkoolee Qabatamaan Mul'atan

Bigamous Marriage and the Division of Common Property under the Ethiopian Law:
Regulatory Challenges and Options

The Chance to Improve the System of EIA in Ethiopia: A Look at the New Investment
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Same Sex Marriage: Nigeria at the Middle of Western Politics

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FEDERALISM IN ETHIOPIA AND FOREIGN RELATIONS: REGIONAL STATES DIPLOMACY*

If federal government is given exclusive power on foreign relations, regional states powers will be the shared powers between the regional states and the federal government or simply the exclusive powers of the federal Government. John Kincaid, 1990

*Tesfaye Assefa **

INTRODUCTION

Traditionally, it was conceived that federalism shapes only the internal functioning of a political system and foreign relation is conceived as exclusive power of federal government. However, such long last assumption dormant exclusive power of foreign relations by the federal government in federal polity confronts challenges from the sub-national units¹. Sub-national units

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*The term constituent diplomacy/regions diplomacy /para diplomacy was coined by John Kincaid for the first time to refer to the sub-national involvement in foreign relations within their capacity as oppose to representation in the foreign policy of the federation. For him, constituent governments are states, provinces, cantons, Lander, municipalities, and port authorities that “may represent local or regional, and sometimes national public sentiment more accurately than the elected leaders of opposition parties and the unelected leaders of interest groups to whom democratic pluralism accords a policy role. The scope of this paper is also limited to constituent diplomacy. There are many contentious issues related to this concept but not covered in this paper.

¹ The term component units, federated entities, sub-national units, states in the case of US, provinces in the case of Canada, Cantons in Swiss Confederation, Lander in the case of German, and Austria, Regions in Ethiopia and Belgium are employed to describe the same thing. That is, non central governments confer with power derived from the federal constitution. Those terms are used in this paper alternatively *mutatis mutandis*.

usually yearn for decentralization of foreign relation competency. Nowadays, notwithstanding that foreign relation competency is constitutionally assigned to the federal government in most of federations, they are highly involved in foreign relations. Sub-national unit's involvement in the foreign relations activities assumes two forms: sub-national involvement in federation foreign relations through their representative (usually through the second chamber) and the constituent diplomacy.² In the former case, sub-nationals seek representation and consultation on formulation and implementation of federation (country's) foreign relations, while in the case of constituent diplomacy, sub-national units seek to influence the formulation of national policies as primary actors using their own resources and machineries.³

The main purpose of the sub-national units involvement in foreign relations in both cases is more or less the same, and that is, involving in the major decisions, including treaty making in effecting the economic, social, cultural and etc.⁴ Of course, in some federations, sub-national unit's involvement in foreign relations is granted under the constitution of the federal state to which they belong. In contrast, in some federations, sub-national units are constitutionally outlawed from foreign relations activities.

In some federations rather than claiming use of equivalent legal instruments to involve in constituent diplomacy, sub-national units have often preferred to be effectively associated with the way their state conducts its international

² John Kincaid, *Foreign Relations of Sub-national Units Constituent Diplomacy in Federal Systems*, Subtheme Papers (Published by Forum of Federation), P 162.

³ Ibid.

⁴ Ibid, P11.

relations.⁵ Whereas, in most federations, sub-national units are keen on constituent diplomacy and involved in their foreign relations.

In Ethiopian federal set up, foreign relation is federal government's exclusive power.⁶ There is no constitutional and institutional set up that enables regional state to participate in federation foreign relation nor does the federal constitution allow the regional states to involve in their foreign relation. The federal government is given exclusive power even domestically exclusive power of regional states as far as foreign relation is concerned.

At present, regardless of the formal constitutional and institutional arrangement, Ethiopian Regional States are involving in federation foreign relations and their own foreign relations. Regional states lead overseas missions in the areas of investment, trade, culture, training and technical assistance, and bench marking. They also meet with heads of government, sign treaty with other sub-national actors, represent the federal government in some cases, and voice their views in foreign policy.

The article tried to draw and attempted to respond to the following central questions with regard to foreign relation in federal countries. The first and foremost question traced in this article is the place of foreign relation in federations and in Ethiopian federal set up. In other expressions, should foreign relation competency exclusively given to the federal government, or should it be divided between the tiers of government and domestic exclusive power of sub-national units be their exclusive power externally too? What are the socio-

⁵ Yves Lejeune, Participation of Sub-national Units in the Foreign Policy of the Federation,(Forum of Federation), P 169.

⁶ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta,1st year No.1, Addis Ababa, 21st, August 1995(herein after, FDRE Constitution), Art.51(8).

political and economic effects on regional state if foreign relation is monopolized by the federal government? How and why sub-national units (regional states in our case) need to involve in their own foreign relations (constituent diplomacy). To what extent, constituent diplomacy should be allowed by the federal constitution, how should it be institutionalized?

The main objective of this article is, exploring how Ethiopian regional states voice their views in the international arena under the current federal set up and look at to the practice of constitutional and institutional mechanisms provided, if any. But before undertaking this, the writer tried to look the matter in the wide context. Accordingly, so as to enable the readers to have general understanding on the matter and to speculate the problems of assignment of foreign relation competency in federal countries in general and in Ethiopia in particular, an attempt was made to put theoretical framework and the practice of some federations. The practice of other federations is overviewed not to make comparison but to set a lesson to be learned from those federations.

The study reveals that foreign relations in our federation is strongly centralized and argues for decentralization. The arguments of the writer are drawn up on the theories of federalism, effects of globalizations, and the paramount significances of constituent diplomacy for regional states to exercise their political autonomy and to strengthen their economy.

Structurally, the article is divided in to five parts. Part I of this article attempted to pin down the theoretical framework for the remainder of the work by explaining the concepts and responding to the above stated central questions. This part is devoted in speculating the origins and developments of regional diplomacy.

Part II of this article is dedicated to looking at the practice of some federations in relation to the subject underline. Of course, the compression is not as such extensive one, but only to show the disparity and to set a lesson for Ethiopian federation.

In part III of this article, the contemporary status of Ethiopian regional states constituent diplomacy is presented. An attempt is made to present the federal constitution *as it is* and federal constitution *as ought to be*. This is because constitution is one of the most crucial elements of any democratic state that defines the principal features of its political system design such as: the structure of the state and the system of distribution of powers. However, since it might be superficial to rely only on the language of the constitution to understand the political discourse of a given country, the immense of this part is devoted to the practice. An effort is also made to present empirical data and finding of regional diplomacy in this part.

Appreciating the practice and paramount importance of constituent's diplomacy for the nation as a whole and for regional states in particular, the writer has tried to show the problem of the practice which lack legal framework in federation in part IV of this article. Federal constitution, regional states constitution, other laws and the practice are reviewed in this part.

Finally, part V summarizes the whole work by justifying constituent diplomacy on different dimensions and recommending decentralization of foreign relation competency in federation as a whole and legalization of the current Ethiopian regional states practice which lack legal framework.

For the purpose of this article, foreign relation is defined as the scope of involvement in abroad relations and the collection of goals, strategies, and

instruments that are selected by governmental policymakers either by federal or regional government organ. It construed extra national security and waging war. Hence, any contacts, coalitions, and interactions for economy, culture or/ and social interaction across state boundaries that are not controlled by the central foreign policy organs of governments, but by the state organs or municipality are construed as foreign relations of regional states. Despite there might be differences among them, the terms *foreign relation, foreign policy, foreign affairs and diplomacy* are interchangeably employed in this paper.

1. WHY CONSTITUENT DIPLOMACY?

What are the causes of the blooming of the constituent diplomacy? And what are the channels employed by sub-national units to undertake constituent diplomacy?

With regard to the first question, scholars classified the factors that cause constituent diplomacy into two: *viz., external and internal/domestic* factors.⁷ External factors are those factors that have a worldwide nature and fuel the acceleration of constituent diplomacy in particular areas as part of some universal tendency, proper to the contemporary stage of global development. Globalization, regionalization, democratization, foreign policy domestication, and internalization of domestic politics are the principal external factors that cause constituent diplomacy.⁸

Whereas, internal factors are causes that are determined by the specific political, historical, cultural, economic or other problems localized in particular area that push regions to go abroad. Federalization and decentralization,

⁷ Alexander Kuznetsov, *Sub national Governments in International Affairs: A Study on Theory and Practice of Para diplomacy* (Unpublished, 2011) P 199-207.

⁸ *Ibid.*

problems associated with the nation-building process, central government insufficient effectiveness in foreign relations, asymmetry of constituent units, and the role of regional leader (political party) are internal factors that bloom constituent diplomacy.⁹ Time and space does not permit to evaluate how each of the above stated factors bloom constituent diplomacy. But to speculate theoretical framework, an attempt is made to show how of globalization and federalizations exacerbates constituent diplomacy.

1.1.THE NOTION OF FEDERALISM

Does federalism advocate decentralization of foreign relation competency? Federalists did not reach on the consensus on this point. The dilemma is whether to compromise sub-national autonomy by centralizing foreign relations or to compromise policy segmentation by decentralizing foreign relation competency. Constitutional vertical division of powers between the tiers of government and sub-national units' right to participate in the administration, and decision-making of the federation is a yardstick feature of federalism¹⁰. In federal state, sub-national units have autonomy that directly emanated from its federal constitution. One of the central decision federations have to make when undertaking division of power is determining which specific power should be accorded to which layer of government¹¹. There is no specific guiding rule in this regard. The general assumption, on which allocation of responsibilities has usually been based, is the vague concept that matters of national importance

⁹ Ibid

¹⁰ Daniel Elazar, Exploring Federalism (Tuscaloosa: University of Alabama 1987), P12.

¹¹ Flora A.N Guadappel, Powers and Control Mechanisms in European Federal systems (Goud Quint, Sanders Institute, 1997) as cited in Assefa Fiseha, Federalism and the Accommodation of diversity in Ethiopia (2nd ed. Wolf Legal Publisher 2007), P 297.

should be reserved to the federal government while matters of regional importance should be devolved to the regional states¹².

For a long period of time, international relations were synonymous with relations between *sovereign states*¹³ with clearly defined national borders, where the nation state was the principal actor in foreign affairs.¹⁴ Due to this, foreign relation was regarded as the exclusive power of the federal government. Furthermore, International laws which developed on the basis of unitary states fail to accommodate development of federalism.

It was conceived that federalism shape only the internal functioning of a political system.¹⁵ Distribution of powers between federal state and its constituent units is regarded as domestic matters which international law is not concerned with. The idea is that, central government is the spokes person of the component units externally even for the matters which are under the competence of component units. Absurdly, the notion of federalism in the past was reduced to the succinct formula- “external unity; internal diversity.”¹⁶

However, this traditional conception of the nation state’s foreign policy was being called into question as the result of far-reaching changes in the international system, and in international relations, the nature of what constitutes statehood, and the growing influence of non-governmental actors on

¹² *Ibid*, P297.

¹³ It is a state whose citizens are in the habit of obedience to it and which is not itself subject to any other (or paramount) state in any aspect. These powers, seen from two perspectives, i.e., external and internal – constitute sovereignty. Federalism may seem to present a conflicting picture. On the one hand, the federal state is a state side-by-side with each and every member state, while, on the other hand, competence is shared between member states and the federal state – but this is strictly on domestic matters in most of federations. A few federal state constitutions had by their constitution allowed member states to sign international treaties and participate in the works of international organizations.

¹⁴ Lejeune, *Supra* note 5, at P169.

¹⁵ Ivo D. Duchacek, *Federated States and International Relations: The International Dimension of Sub-national Self-Government*, *Publius*, Vol. 14, No. 4 (1984), P 5.

¹⁶ *Ibid*.

international relations mostly to resist from the chill wind of globalizations and to exercise their political autonomy. There are plenty of literatures pro and against division of foreign relations competency between tiers of government. Yet there is no agreement among the scholars on this appealing issue.

To be clear, the dilemma in relation to foreign relation in federal countries is whether it should exclusively be given to the federal government, or should it be divided between the tiers of government and what mechanism should be employed in dividing foreign relation competency. So far, no political system has developed new effective processes or institutions to handle the sub-national government involvement in the international scene. The opponents of decentralization of foreign relations usually hold that, if power of co-decision is granted regarding foreign relation, it would paralyze a state's foreign affairs.¹⁷ The idea is that, if foreign relation is decentralized, every player would have a veto power resulting in harm to the state's image in the international arena. They went on to say that, the federal states are not different from the unitary states as far as foreign relation is concerned and federation should speak in one voice.¹⁸ Louis Henkin, in supporting the constitutionally centralized foreign policy of US federation argued as follows:

Federalism... was largely irrelevant to the conduct of foreign affairs even before it began to be a wasting force in U.S. life generally... Revolution in the national mood in the 1990s has tended to seek to take from the federal government and give to the states, but this trend is not likely to have impact on foreign affairs. At the end of the twentieth

¹⁷John Norton Moore, *Federalism and Foreign Relation*, Duke Law Journal, Vol. 1965, No 2, P248.

¹⁸Louis Henkin, *Foreign Affairs and the United States Constitution*, (2nd ed. 1996), P145.

*century as at the end of the eighteenth, as regards U.S. foreign relations, the states do not exist*¹⁹.

The proponents of decentralization of foreign relation competency, on the other hand, sought sub-national involvement in foreign relation as the extension of domestic competency and it became the area of controversy not only for the lawyers but also for the politicians. K.C. Wheare, who argues for decentralization of foreign policy, in asserting the qualities of foreign policy in federations; namely, its rigidity and lack of adventurousness hypothesized that “federalism and a spirited of foreign policy go *ill together*.”²⁰ According to this leading authority:

*There are at least two important problems confronting the framers of a federal constitution in respect of the conduct of the foreign relations of the federation. There is the problem of whether the power to control foreign relations should be given in its entirety to the general government or divided between general and regional governments, more particularly so far as the carrying of treaties into effect is concerned. And there is the problem of how the power of the general government in foreign affairs, whatever its extent may be, is to be so controlled that in its exercise the divergent interests of the component regions in the federation shall be duly safeguarded.*²¹

Wheare, drew the attention to the problem that inquires how the power of the general government in foreign affairs is to be so controlled and how the divergent interests of the component regions in the federation shall be duly safe- guarded.²² The argument goes that in robust and democratic federalism

¹⁹ Ibid.

²⁰ K.C. Wheare, *Federal Government* (4thed, London, Oxford University Press), 1963, P 183.

²¹ Ibid.

²² Ibid.

there must be constitutional and institutional arrangement with regard to division of foreign relations between the tiers of governments. Hence, the query is how to compromise the tension between policy incoherence and sub-national units participation in foreign relations in the federal set up. It is the opinion of this writer that, monopoly power on foreign relations by central government defeats the very purpose of adoption of federal form of government. The argument that federation should speak in one voice in the international scene and federations should act as unitary country as far as foreign relation is concerned is perhaps anti-democratic influence on the federal polity, and it has serious shortcomings.

In the federal polity, the sovereignty is divided between the orders of government on the basis of advocating unity without affecting the diversity of constituent units. Accordingly, matters which could fit with pursue of unity shall be given to the central government whereas those powers that are capable of reinforcing the sub-national autonomy go to the sub-national government²³. Thus, how could it be possible to give the latter powers (that possibly endorse diversity and sub-national self autonomy) to the central government if such matters become under the international themes? Is that possible for the federal government to represent the sub-national government on the exclusive power of the latter?

Certainly, if foreign relation is monopolized by the central government, the sub-national autonomy will be at risk in that, the central government under the guise of foreign relations takes over the power of sub-national governments, i.e., by making treaties with other countries on the matters which are domestically the exclusive powers of sub national units. In such scenario, the regional states' powers will be the shared powers between the regional states

²³Elazar ,Supra note 10, at P 12.

and the federal government or simply the exclusive powers of the federal government. Theoretically, since constitution is the *covenant* between the people and the central government how could such *covenant cease to function* if the country enters into another *covenant* with the third state?

On the other hand, each region may have different financial or social priorities in matters within its constitutional jurisdiction. Yet these priorities might be thwarted if the federal government committed itself internationally to a contrary course of action without at least consulting the regions. One undeniable fact is that foreign relation may result in policy segmentation. Segmentation of policy in federation is a necessary evil and must be accepted. Federalism is multi- level in character and rarely able to speak strictly with one voice in every situation.²⁴ J. Kincaid, in support of this position holds that:

*In federal democratic polity, non-violent conflict and competition are not only facts of political life but also accepted principle of politics. In federal democracies, conflict and competition between governments are intrinsic element of politics along with cooperation.*²⁵

Hence, the domestic division of powers between the two tiers of governments should equally apply in the foreign relations too, though cooperation is necessary²⁶. This is because, federated entities are able to keep their political significance according to their constitutionally granted rights only if they participate effectively in foreign relations. Kincaid, in explaining the importance of decentralization of foreign relation for component units emphasizes that:

²⁴JohnKincaid,Constituent Diplomacy in Federal Polities and the Nation State: Conflict and Co-operation in: H.J. Michelmann and P. Soldatos,(eds) (published by Oxford University Press, 199), p54

²⁵Ibid

²⁶Id, P 58.

Sub-national unit's participation in the foreign relation is another tool or weapon for asserting the political community's autonomy within its federation by projecting its identity internationally, gaining international political leverage over its federal government, and acquiring a particular national status – a matter of considerable political importance to some constituent communities²⁷.

It should be noted that decentralization of foreign relation may not necessarily lead to policy incoherence in which their laws always neither conflict each other, nor is sub-national involvement in the international relation dangerous for the nation interest. Although tension between federal and state do merge periodically, sub-national activities in the international relation usually benefit the nation state officials to create better position to promote trade and investment opportunities at home.²⁸ Thus, policy incoherence is necessary evil in federations.

More interestingly, federations can overcome the problem of policy segmentation through cooperation. In a federal system though sovereignty is split between the tiers of governments, both tiers exercise their power on the same land and the same people. There is a common interest between the orders of governments that appeals the cooperation of governments. It is subordination which defeats the value of federalism but not coordination. The latter is a sense of partnership in which governments come together for common interests. Intergovernmental relation has its paramount role in this regard.

²⁷Kincaid, Supra note 2, p 162

²⁸Daniel Halberstam, *The Foreign Affairs on Federal system: A National perspective on the benefits of state participation*, Villanova Law Review, Vol. 46 , NO. 3, p 1016

1.2.EFFECTS OF GLOBALIZATION

Another key factor that has given rise to constituent diplomacy is the yearning of constituent units to resist chill winds of globalization. Globalization refers to a certain tendency towards an approximation of societal and community ways of life, identity and culture beyond national borders.²⁹ In this respect, the change in everyday life all over the world is probably the most revolutionary and most sustained effects of globalization.³⁰ Globalization originated in the economic sphere, but has since expanded rapidly into other areas. It altered theories and themes of international relations and its actors.

Globalization changes the very perception of political processes.³¹ The increase in the number of actors shaping international relations is a characteristic the changes brought by globalization. Within the scope of the nation state, for instance, constituent member states are demanding more opportunities to participate in foreign relations. Sub-national unit's involvement in foreign relations in accelerated rate is basically the step taken in response to chilling effects of globalization. Since 1960s and 1970s the themes of international law expanded to the new areas which are traditionally of the domestic agenda.³²

In contrast to previous eras, international relations, trade, investment, cultural exchange, migratory and commuting labour, and transferring drug traffic and other issues which are areas of competency of the component units have forced

²⁹ Bernhard Ehrenzeller et al. *Federalism and Foreign Relations*, (Published by Forum of Federation), P,96.

³⁰ Ibid.

³¹ Ibid, P102.

³² Brian Hocking, *Regional Governments and International Affairs: Foreign Policy Problem or Deviant Behavior?* International law Journal, Vol. 41, No. 3,(1986), P 479.

their way on to foreign policy agenda, usually in parallel with the great issues of national security, military balance and diplomatic status.

Changes in the international and domestic economic patterns have provided a major stimulus to the desire of regions to concern themselves with foreign relations pressures in the sense that, component units became more conscious of, and sensitive towards the growing impact of international economic forces bearing down on them, and desire to protect themselves from the chill winds of economic change grew.³³

Sub-nationals became aware of that they are champion of expressing and promoting their respective cultures and in attracting the investors through promotion of their favorable environments so as to strengthen their economy and maximize their residents' way of life. As policy areas falling under regional state jurisdiction have acquired international significance, regional governments have found themselves involved in international affairs.³⁴ Nowadays, it is not unusual to see sub-nationals constituencies participating in the international scene. More interestingly, it seems that the international community and international law recognize such developments.³⁵ Ivod Duchacek, in describing the fact of sub-national existence in international arena and its feasibility mark that, "Sub-national presence on the international scene has become a fact of life in an interdependent world. It is neither a blessing nor

³³ Ibid.

³⁴ Ibid.

³⁵EllioJ.Feldman and Lily Gardner Feldman, Canada the Role of Province in Foreign Policy in Michelmann and Soldatos, eds. supra note 7,P176. In Canada provinces are not allowed, but in practice four provinces of Canada, Quebec, Ottawa Alberta, and Ontario became international actors not less than Canada involvement. They usually design and implement international trade policy, promote export, recruit foreign investment, conduct negotiation for economic and cultural exchanges with governments of foreign countries and independently monitor domestic activities. They have their own office and representative in most of US state and Cities.

a curse.”³⁶ True that international law did not fully recognize sub-national units involvement in foreign relations. A draft provision in the Vienna Convention on the Law of Treaties concerning the right of component states to enter into treaties adopted in 1965, under article 5(2) provides that:

*States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits laid down.*³⁷ [Not included in the 1969 treaty law]

The extent and way of sub-national units’ involvement in the foreign relation varies from federation to federation. Below, the attempt is made to present trends of some federations.

2. MERITS AND NATURE OF CONSTITUENT DIPLOMACY

Scholars pay high attention to the impact of centralization of foreign relation in federal polity. However, rather than insisting only on the impact, it is wise to focus on the advantage that sub-national units achieve by participating in foreign relations.

Sub-national units voice their view in foreign relations for many reasons. Constituent units engage in international activities essentially for three reasons as coined by Kincaid.³⁸ One major reason is economic, mainly connected with trade. It concerns especially the export of goods and services; inward investment for economic development, employment expansion and tax-base growth; and tourism – all of which are highly competitive globally. A second major reason is cultural, whether such activities be merely friendly goodwill

³⁶ Duchacek, Supra note 15, at P5.

³⁷ *International Law Conference Year Book*, 1965, vol. 1, 118 meeting, P 251.

³⁸ Kincaid, Supra note 2, p 164.

cultural exchanges popular with many citizens, or more concerted efforts to achieve global recognition of a region's distinct cultural or "national" identity, or desire to connect with compatriots abroad. A third reason is cross-border housekeeping, namely, the need to resolve numerous cross-border issues, such as wandering cows, automobile traffic and water pollution, between contiguous regions divided by an international border.

Here, it should be noted that constituent diplomacy is far different from nation diplomacy basically in terms of extent and scope. First, constituent diplomacy usually allowed on *low politics areas*.³⁹ Constituent diplomacy devoted, but not limited on cooperation on trade, economic issues, technology, science, education, tourism and culture and etc. Sub national units can, in fact, be involved on foreign relation in all areas in which they have domestic capacity without endangering the nation foreign relation. Exclusive powers of sub-national states by their nature are *low politics* and policy segmentation in those areas is tolerable.

Secondly, many federal states permit their constituent governments only to enter into treaties, compacts, contracts, or agreements, not with foreign nation states, but with constituent regional or local governments of other nation states.⁴⁰ This is because the so called *low politics* areas are under the exclusive area of sub-national units in most of federation and there is no way in which component units enter into compact with foreign nation state.

Ivo D. Duchaecek, who has made an extensive study on this area, categorizes constituent diplomacy namely as: Trans border regional and Global micro-

³⁹ Issues that deals with promotion of trade, attracting investor, truism, cultures, but not policy area, that regard as *low politics*.

⁴⁰ Samuel Lucas McMilla, *Sub-national Foreign Policy Actors: How and Why Governors Participate in U.S. Foreign Policy* (Published by Blackwell Publishing, 2008), P.231.

diplomacy.⁴¹ Trans-border constituent diplomacy, as it can be grasped from its name, is the term employed to describe the contact between adjacent states through formal or informal means.⁴² Global micro-diplomacy on the other hand, describe that pattern of constituent diplomacy that searches for cooperative contacts and compact far beyond the immediate neighborhood and establishes relations with distant centers of economic and political power⁴³. It brings constituent governments, including those of major cities into direct contact with foreign constituent governments. Since the constituents are not adjacent to each other global micro-diplomacy involves, the stationing of permanent missions (state offices) in distant corners of the world.

The other central issue that might be posed in relation to constituent diplomacy is ‘how do sub-national units involve in constituent diplomacy?’ Sub-national units deploy different channels in undertaking their foreign relations. Hence, it is common to see variations in this regard, too. However, there are some common channels in which sub national units undertake constituent diplomacy. Alexander Kuznetsov, who conducted an extensive study on the constituent diplomacy mainly on the practice, identified the following channels of constituent diplomacy:⁴⁴

- i) Establishment of a special regional ministry or department which is responsible for the international affairs of the constituent unit.
- ii) Opening of permanent sub-national offices in foreign countries.

⁴¹ Duchaecek, *Supra* note 15, at P7, Some Regional governments give high attention to trans-border diplomacy than micro Para-diplomacy due to their geographical situation and the inevitability of such contacts. Frequently they host border development commissioners meeting. Gambella Regional State for instance mainly involves in this kind of contact. This includes discussion on solution on the attacks involved killing, abduction of children, illegal movement of cattle, looting of properties and taking of weapons.

⁴²*Ibid.*

⁴³*Ibid*, p 9

⁴⁴Kuznetsov, *Supra* note 7, at p. 217-219.

- iii) Official visits of regional authorities to foreign regions and countries.
- iv) Participation in various international events like exhibitions, forums, etc. organized by foreign actors.
- v) Establishing and participation in global and trans border multilateral regional networks and working groups on specific problems like agriculture, sustainable development, energy, transportation, etc.
- vi) Participation of regional authorities in the international events organized by foreign entities within the official delegation of their central government.

In most of federations, a sub-national unit employs one or the combination of these channels. I have tried to show the channels that have so far employed by Ethiopian regional states referring to the practices.

3. TRENDS OF FEDERATIONS

There are variations among federations with regard to the assignment of foreign relations. Foreign policy in the United States,⁴⁵ Indian,⁴⁶ and Ethiopian,⁴⁷ federations is highly centralized that component units constitutionally have no say on foreign policy. In contrast, in Switzerland,⁴⁸ German,⁴⁹ though in

⁴⁵The 1787 US Constitution, Art. 1.

⁴⁶RobJenkins, *India's States and the making of foreign economic policy: the limits of the constituent diplomacy paradigm*, Publius, Journal of Federalism Vol. 33, No. 4, (2003), P 63.

⁴⁷ FDRE Constitution, Art51(8).

⁴⁸The1999 Federal Constitution of Swiss Confederation,Art. 55, Federal Constitution of Swiss Confederation (1999), Article 8 of the Swiss Constitution says that Confederation has sole right to declare war and peace and to conclude alliance and treaties. However, as per article 9, exceptionally Canton can conclude treaties, on matters of public economy, neighborly, and police relations provided that such treaty should contain nothing contrary to the Confederation interest.

⁴⁹The 1949 German Basic Law, Arts.32 and 23.

principle foreign policy is an exclusive power of federal government, component units have given subsidiary powers on foreign relations. Component units in these federations are constitutionally empowered to enter into the international treaty in matters which are under their respective exclusive powers in the federal constitution.

Sub-national units in some federations are also allowed to be represented in international arena, to maintain diplomatic or consular relations and the right to take part in international conferences or join international organizations.⁵⁰ This is because, international organization and conference frequently deal with matters which are under the exclusive area of competency of sub-national units. The 1993 Belgium constitution makes striking balance in this regard. It incorporates *intro infro extro infro* principles (empowering regions/ community externally with matters which they are domestically empowered) and allow regions and communities appoint their representatives called *community or regional attachés* in Belgium diplomatic and consular posts to foreign states or to international organizations.⁵¹ Sub-nationals in this federation have also the right to appoint “attachés” or “delegates” within Belgium’s permanent representation to the EU.⁵²

⁵⁰ RobJenkins, Supra note 46, at P, 65

⁵¹ Halberstam, Supra note 28, at P1019.

⁵² Ibid.

4. THE ETHIOPIAN EXPERIENCE:

4.1. OF FEDERAL CONSTITUTION

The 1995 FDRE Constitution forms two orders of governments which are parallel.⁵³ Likewise, it divided the competency between the two tiers of governments.⁵⁴ In an unequivocal manner, foreign relation competency is categorized as federal government exclusive power. Suffice to mention here, this power is listed under provision listing exclusive powers of the federal government. As stipulated under article 51(8) of the FDRE Constitution, federal government has the power to formulate and implement foreign policy. Constitutionally speaking, there is no room left for regional states to conduct constituent diplomacy. Worth thing, as the House of Federation has no constitutional mandate to participate on the formulations of federation policy, there is no chance for regional states to participate in federation foreign relation formulation.

The federal government alone designs foreign policy and negotiates, concludes and ratifies the international treaty.⁵⁵ Only federal government can open embassy and appoint diplomat. Thus, it could be said that federal government can exercise exclusive power over the exclusive powers of regional states as far as foreign relation is concerned. True that, elsewhere in the constitution it is stipulated that, the tiers of government are independent and one should respect the powers of the other⁵⁶. However, these valuable principles cease to apply in the area of foreign relation and constitutional division of powers between the regional states and federal government is functional only domestically. Hence,

⁵³ FDRE Constitution, Art.50 (1).

⁵⁴ FDRE Constitution, Arts.51and52.

⁵⁵ FDRE Constitution, Arts 51(8) and 55(12).

⁵⁶ FDRE Constitution, Art 50.

it is fair to say, Ethiopia is not federal country but a ‘*unitary country*’ as far as foreign relation is concerned.

In nutshell, the 1995 FDRE constitution fails to incorporate both constitutional and institutional mechanisms to secure regional governments’ involvement in foreign relation. Worse thing, there is no Constitutional limitation which obliges the federal government to take into account the interest of the regional states while designing the foreign policy. The only limitation on federal government is, to take into account the country’s foreign relations principles as set under chapter ten of the Constitution. Accordingly, while exercising its power of foreign policy designing the federal government shall,⁵⁷

- *Protect national interest and respect the sovereignty of the country.*
- *Ensure that the foreign relation policies of the country are based on mutual interests and equality of states as well as those international agreements promote the interest of Ethiopia.*
- *Observe international agreements which ensure respect for Ethiopia’s sovereignty and are not contrary to the interest of its peoples*
- *Forge and promote ever growing economic and fraternal relation of peoples with Ethiopia’s neighbors and other African countries.*
- *Seek and support peaceful solutions to international relations.*

It is not clear whether federal government can enter into international treaty which its implementation affects the constitutional competency of the regional states. True that, constitutionality of foreign policy and the treaties made by federal government could be contested if federal government fails to observe the country’s foreign policy principles as underlined under the federal

⁵⁷FDRE Constitution, Art 86.

constitution. In fact, if the federal government fails to adhere to those principles, it amounts to unilateral amendment of the Constitution.

In sum, despite all aforementioned drawbacks of centralization of foreign relations and the paramount importance of constituent diplomacy, the newly emerged Ethiopian federations did not allow constituent diplomacy. More importantly, in addition to justification aforesaid for constituent diplomacy, there are other unique factors (some authors call it *internal factors*) that appeal to constituent diplomacy in Ethiopian federation as noted by the writer. The fact that regional states are not represented in federation foreign policy designing, the driving force behind the adoption of federal system which is to decentralize power and resource, that regional states highly need foreign aid in technical and economy from abroad, call for the regional states diplomacy. Regional states also seek to communicate with their respective ‘Diasporas’ on the region’s economic and political issues and invite them to invest in their respective regions.⁵⁸ Similarity of ethnic groups of peripheral region with the neighbor countries is also another unique ground that bloom regional diplomacy.⁵⁹ For instance, the Gambella regional state has the same culture, language, ethnic and religious groups with its adjacent country, South Sudan. Somali regional state has also similar ethno–linguistic with Somalia, Tigray and Eritria are also comprised of similar ethnic group. Oromo people are said to have ancestors with Oromo people living in Kenya and *Gada system* is the root of institution not only in Oromia but also in most of Kenya provinces.⁶⁰

⁵⁸ Interview with Ato Assefa Niguse, Department of Public Diplomacy Director A/Directorate FDRE, Ministry of Foreign Affairs, Addis Ababa (2/11/2010).

⁵⁹ Even though it is difficult to prove this by concrete evidence, it suffices to look at the factual to substantiate the assertion. For instance, it is noticed by the writer most of Gambella people prefer to admit to the South Sudan hospitals than Tikur Anbessa for medical treatment.

⁶⁰ Asmarom Legesse, *Oromo Democracy, An Indigenous African System* (Published in the Red Sea Press, Inc 2006), P72.

Here, it will be misleading not to mention the horizontal division of foreign relations competency among federal organs and the recent *de facto* recognition of regional states participation in foreign relations. Foreign relation competency is divided among the federal organs. Accordingly, conclusion of international treaty is the competency of executive organs whereas ratification is the competency of House of People Representatives (hereinafter HPR). Likewise, treaty making power is distributed among the executive organs. As it is provided in the proclamation no 471/2005, which affirms the exclusive power of federal government over foreign policy though it is foreign minister which is empowered to conduct foreign relation, other ministers may also involve in designing foreign relations with their respective function.⁶¹

Nevertheless, notwithstanding constitutional deny of constituent diplomacy, time and finding witnessed both constituent diplomacy and regional state participation in federation foreign relation is recognized to some extent. However, such recognition lacks legal framework.

4.1.2. OF REGIONAL STATES CONSTITUTION

Under article 51 of FDRE Constitution, the exclusive powers of federal government are listed and article 52 of the same document lists down the regional state exclusive powers. Accordingly, article 51(8) states that “Federal government shall formulate and implement foreign policy; it shall negotiate and ratify International agreements.” As per article 55(12) of FDRE Constitution, ratification of any international treaty is the power of HPR. Thus, from the wording of the constitution, it is clear that only federal government is empowered to conduct foreign relation and no room is left for regional states constitution to empower regional state with foreign relations competency.

⁶¹ A Proclamation Issued to Define the Powers and Duties of the Executive Organs of the Federal Government, Proc. No 471/2005.

In the federation, the power of both tiers of government shall emanate only from the federal constitution. Hence, regional states constitution cannot empower their respective region with new power other than powers allocated to them by the federal constitution. If regional states constitution assigns new power for either of the government both the notion of federalism as a whole and supremacy of federal constitution will be futile. Regional states constitutions are meant to paraphrase the powers assigned to regional state in working language of that particular state and provide the regional state administrative structure. Of course, that is why the revised regional states constitution is replica of federal constitution in most of issues. The revised regional constitutions of all regional states in affirming the position of federal constitution, limited the regional states diplomacy competency only to the internal diplomacy.

To clarify this point, it is noteworthy to see some articulation of federal constitution and revised regional states constitutions related to foreign relation competency as follows:

Art. 51(8) of FDRE Constitution,

Federal government shall formulate and implement foreign policy; it shall negotiate and ratify international agreements.

Art. 55(12) FDRE of Constitution,

[It] shall ratify international agreements concluded by the executive.

Art. 49(3) (c) of the Revised Constitution of Oromia National Regional State,⁶²

Without prejudice to the jurisdiction of federal state, [it] ratifies agreements concluded with neighboring national regional state adjoining thereto.

Art. 49(3) (3.3) of the Revised Constitution of Amhara National Regional State,⁶³

Without prejudice to the jurisdiction of federal state, [it] ratifies agreements concluded with neighboring national regional state adjoining thereto.

From the above federal and revised regional constitutions, it is clear that regional states have no say on foreign relations of federation, and regional diplomacy (constituent diplomacy) is not recognized. Moreover, internal diplomacy by itself is limited to, neighboring national regional state adjoining thereto. That regional state can enter into bilateral or multilateral agreements

⁶² Oromia National Regional State Revised Constitution, Proclamation No.64/2001, Magalata Oromia, 7th year No.2, Adama 2001. Here, the fact that these provisions employ the term, *without prejudice to* federal governments seems as if regional states shared some powers in foreign relations (i.e., as if constituent diplomacy were recognized). However, it is very confusing to articulate in such a way if it is not constituent diplomacy. Previously, I myself understood this provision as if it permits constituent diplomacy and my comment was that it violates federal constitution. However, the close analysis, those provisions depict that, regional states let alone to involve in contact with trans-regional states, constitutionally (regional constitutions) they are not empowered even to sign treaty with national regional states other than adjacent regional states. For instance, Oromia regional state cannot enter into agreements with Tigray national regional state since they are not adjacent. It is not clear whether internal diplomacy is limited to adjacent regional states and whether adjacent regional states can enter into agreement in relation to their entire constitutional competency or only issues related boundary demarcation and related issues.

⁶³ See the Revised Constitution of the Amhara National Regional State, Proclamation No.59/2001, Zikre Hig, 7th year No.2 Bahir Dar November 5, 2001 Art.49(3); See also the Revised Constitution of Tigray National Regional States, Proclamation No 45/2001, Negarit Gazeta Tigray 10th year No. Mekalle, November 16, 2001, Art 49(3). Though it is common that, executive power of regional state is coextensive with legislative competency, the power to conclude agreements with neighbor national regional state is not given for executive organ. This is also true in all regional state constitutions. But, the practice depicts that regional state executive organ exercises this power.

only with adjacent national regional states.⁶⁴ In a nutshell, regional states constitutions did not empower the regional states to have their own constitution diplomacy, as the same is not made by federal constitution.

4.2. A GLANCE FROM PRACTICE

4.2.1. Regional States' Participation in Foreign Relations of Federation: Towards Decentralization⁶⁵

An inquiry on the understanding of the governments' external relations within a particular federal set-up shall start from constitutional dispositions. However, anyone interested in the true functioning of a political system has to go beyond formal structures. In order to gain a better understanding of federal systems, it is necessary to study both their constitutional laws and their political processes and practices.⁶⁶ The political practices and the interplay of the sub-national units with each other, as well as the relationship between the federal and the sub-national level, must be examined since the practices not in line with wording of the constitution.

In Ethiopian federation, for instance, despite foreign relation is constitutionally assigned to the federal government, practice depicts that there is *de facto* recognition of regional states' participation in federation foreign relation. Even though treaty making is the exclusive power of the federal government and consultation requirement is absent, in practice federal government request

⁶⁵ Decentralization, in federal context is not merely decentralization of power from top to down rather competency should constitutionally be divided between the tiers of the governments. In this regard, *de facto* recognition of regional state involvement in foreign relation hardly constitutes decentralization as it is not stipulated under the federal constitution.

⁶⁶ Ronald Watts, *Comparing Federal Systems* (Montreal and Kingston: McGill-Queen's University Press, 1999), P, 14.

the regional governments if they are willing to participate in the negotiation and conclusion of the bilateral arrangements that federation negotiate.⁶⁷ Frequently, regional government delegates participate in the international scene representing the federal government in different conference and hosts bilateral meetings.

The finding shows that, frequently, Ethiopian delegates were represented by the regional states' Presidents on various meetings with adjacent countries in boundary bordering development meeting. For instance, in 12th Ethio-Sudan joint border development meeting held on Mekelle, Tigray Regional State, and the Ethiopian delegation was led by H.E Ato Tsegaye Berhe, Ex- President of Tigray National President⁶⁸. The Southern Nations, Nationalities, and Peoples of National Regional (SNNP) hosted the 26th Ethio-Kenya joint border development commission meeting held in February 2010. The then SNNP Regional State president H.E Shiferaw Shigute gave the opening speech⁶⁹. The Amhara Regional States President H.E Ato Ayalew Gobeze led the Ethiopian delegation on the 1st Ethio-Sudan border development commissioners' committee meeting held in Gidariff, Sudan⁷⁰. When the 27th Kenya-Ethiopia Joint Border Commissioners and Administrators' Meeting was held in Mombasa, Kenya, between 30 April and 1 May, the Ethiopian delegation was led by Ato Shiferaw Shigute, Ex- President of the SNNP.

⁶⁷ Interview with Ato Assefa Niguse, Supra note 58.

⁶⁸ Agreed Minutes of the 12th Ethio-Sudan Joint Border Administrators/Commissioners meeting 28-30, December 2009, Mekelle, Tigray National Regional State.

⁶⁹ Agreed Minutes of the 26th Ethio-Kenya Joint Border Administrators/Commissioners meeting 15-16, February 2010, Hawasa, Ethiopia.

⁷⁰ Agreed Minutes of the 1st Ethio-Sudan Joint Border Administrators/Commissioners meeting 24-25, April, 2000, Gidariff, Sudan. The 13th Ethio-Sudan Joint Border Administrators / Commissioners meeting was held in Sunja town of Sinar state, Sudan, from 25-27/12/2010. The Ethiopian delegates were represented by the chief administrators of Tigray, Ahmara, Gambela and Benishaangul states.

More frequently, delegates from regional government and federal government jointly sent to oversee either for political reasons or for economic purpose⁷¹. What makes things interesting is that the regional states have their own speech time in such occasion. They promote their cultures and their resource so as to attract the investors and tourists⁷². Fascinatingly, such official promotion of their respective regions for the outside world has now become the day to day activities of our regional states officials even if it is not uniform across all regional states. Furthermore, regional governments send fact finding to abroad, make visit and send the profile of their regions and cities to regions and cities that have similar features in geographical location, climate, and history, economic and other cleavages and sign memorandum of understanding in which our regions obtain considerable financial and technical assistance.⁷³

Here, one may ask the importance of constitutional declaration of regional powers on foreign relations as long as they are practicing it de facto. In other words, does it matter whether or not such competency is stipulated in the federal constitution as far as political system recognized it? In this regard, Prof. Noe Cornago argued that political systems should recognize this phenomenon even if there is no provision for it in their constitutions. Constitutions must be open to transformation⁷⁴. This is because, sometimes

⁷¹ Interview with Ato Assefa Niguse, Supra note 58.

⁷² Ibid.

⁷³ Interview with Ato Dawano Kadir, Deputy Foreign Minister, Addis Ababa (11/11/2010). He went on saying that such relation is even becoming at sector level in that some sector of regional states make a contact with their counterparts (He was Legal Advisor of Oromia Regional State President at the time of interview).

⁷⁴. Noe Cornago on the speech in Gilberto, Marcos: The *Global Dialogue on Foreign Relations in Countries*, Meeting report forum of federations, Ottawa (Oct. 25, 2006), available at http://www.forumfed.org/pubs/20070615_GlobalDialogue.doc accessed on 9/10/2012.

constitutions of the countries do not operate within strictly legal frameworks, but are interpreted politically and in the light of history⁷⁵.

In my opinion, even though the practice usually deviates from the constitutional framework, clear constitutional demarcation on foreign policy should not be undermined. This is because, for one thing, division of power between the tiers of governments avoids conflict on the jurisdictional competency between the orders of governments and it gives regional states confidence.⁷⁶ Besides, this constitutional division of foreign policy enables the third party to clearly know the area of competency on the matters it needs to negotiate⁷⁷.

On the other hand, today, regional states are involved in foreign relation not because they have constitutional foundation but because it is recognized by the political scheme and welcomed by the federal government. However, in a federation the capacity of one tier of government should not depend on the charity of the other. The findings show that currently conducting foreign relation in Ethiopia is not challenged by the adoption of federalism.⁷⁸ This is because, for one thing, there is no robust federalism that regional states rarely claim their constitutional autonomy. On the other hand, regional states are in

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ GochaLordkipanidz, Segmentation and Integration. Proposal for a Federalization of Foreign policy in Georgia , P170, available at

<http://poli.vub.ac.be/publi/orderbooks/federal/07lordkipanidze.pdf> accessed on 9/10/2012.

⁷⁸ Interview with an anonymous, legal and Administrative standing committee, House of federation Addis Ababa (11/11/2010). According to him, who personally believe in decentralization of foreign relations, though currently there is regional states involvement in both para -diplomacy and trans border foreign relations there is a bureaucracy from federal government even to get Visa and regional states has to baby foreign affairs to facilitate them Visa and other processes. And this will have adverse effect on regions foreign relations. Though some official of regional states believe in the decentralization of foreign relations, the fact that it is constitutionally assigned for federal government makes thing worth. Both federal and regional government official never like to criticize any provision of the constitutions.

their infant stage and hardly capable to conduct their own foreign relations⁷⁹. Furthermore, there is party line contact (strong link) between regional states and the federal government that helps the federation to undertake foreign relations smoothly.

Here, it should be noted that the current requirement of consultancy itself is not stipulated in the Constitution or other laws. Of course, the country has not yet come up with a law which set treaty making procedures. Proclamation No. 25/80, which sets treaty making procedure under the unitary system, is the only law dealing with the procedure. It is the opinion of this writer that it is essential to set a legal framework since changes in respect of capacity of regions and party structures are inevitable in the future. Likewise, it is judicious to have a new treaty making procedures which takes the federal structures into consideration. The interview with some federal officials revealed that the authorities do rarely make reference to this law for it is developed on the basis of unitary structure and a treaty making draft law is under way.⁸⁰

⁷⁹ In Ethiopia, one can observe that there is de facto asymmetry between the regions in the sense that five regions (Ahmara, Oromia, Harar, Tigray, & SNNP) are relatively strong enough to exercise their administrative responsibility; whereas, regional states of Somalia, Gambela, Benishangul Gumuz, and Afar Regional States are left under the guardianship of Federal Government, and hardly exercise their administrative responsibility. The reality of such could be demonstrated by the establishment of capacity building department under the federal affairs to help the less developed regions in all affairs.

⁸⁰ Interview with W/rt Yanet Shifaraw, Department of Legal Affairs Directorate, FDRE Ministry of Foreign Affairs, Addis Ababa (9/11/2010). The adoption of this draft may clarify certain vague issues. It might help in providing legal framework for the consultancy requirement which currently lack legal basis. Moreover, it may come up with clear cut provision as to the treaties which need ratification and those that do not require one. Currently, it is difficult to ascertain whether a certain treaty needs ratification or not due to absence of treaty making procedure

4.2.2. Regional States Constituent Diplomacy

Despite the FDRE constitution stipulates that foreign relation is the exclusive power of federal government, the practice so far has showed that regional governments have involved in various constituent diplomacy. Though there is no strong empirical data on the extent of regional participation in foreign relations, there is *de facto* recognition that regional states constituent diplomacy to the extent of concluding agreements with *low politics*.⁸¹ Regional States have been in contact with foreign embassies residing in Addis, international organization, other regions and cities of different countries through twining.⁸²

Today, it is not unusual to see regional governments exchanging letter of intent (Memorandum of understanding (MoU) on trade, investment, culture tourism, HIV/AIDS protection, education, human resource, capacity building, environmental protection and etc with their counter parts.⁸³ One question that might be raised as practical matter is how regions got their counterpart and exchange memorandum of understanding? As an interview with Assefa Niguse revealed, proposal for exchange of MoU may be offered by our regions /cities/ mainly through MOFA or it may come from the foreign countries through their embassies residing in Addis.⁸⁴

Time and space does not permit to list all constituents diplomacy held by our regions and towns. However, it is worth mentioning some constituent diplomacy and the results obtained. Until the beginning of the initial work of this paper, Addis Ababa city administration has made contact through twining with fourteen counter parts, Harar city with six foreign cities, Dire Dawa city

⁸¹ Ibid.

⁸² Interview with Ato Assefa Niguse, Supra note 58.

⁸³ Ibid.

⁸⁴ The Regional States report on their foreign relation performance in 2001, P 3.

administration with four cities.⁸⁵ Oromia regional national states, Amhara national regional state, Tigray regional states and South Nations, Nationalities, and Peoples of Ethiopia have also made-para diplomacy with their counter parts, frequently with provinces of China.⁸⁶ The regional states have also formed a relationship with their adjacent countries⁸⁷.

The experience of Harari national regional state stands could be a great example as it was recognized by MoFA itself. The Harari has created a good relation with international organizations, non-governmental organizations, foreign missions residing in Addis and foreign cities. It created city bonds with different countries, such as Charlvilmizier of French, Sanliverfefe of Turkey, Klarsten of Atlanta, and Arta of Djibouti.⁸⁸ An agreement was signed between the government of Harari and Charlvilmizier of French on developmental projects focused on women income generation, capacity building, renewal of Jugal Hospital of fistula, culture and education, as well as water executed by the sector offices of the government of Harari.⁸⁹ From this agreement, the Harari state received about 116,548.43 Euro to undertake the above mentioned projects.⁹⁰ The Harari government in turn gave a catalogue that contains detailed information of Harari city's economic, social and historical growth including the structure of the cities municipality to its counter parts of charvlmizier city⁹¹.

⁸⁵ Ibid; see also the MoU between the respective cities.

⁸⁶ Ibid.

⁸⁷ Id,P5.

⁸⁸ Id,P6.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

Similarly, the city of Harari has created a sisterly twining relation with its counter parts of Sanliverfefe of Turkey⁹². Turkey and Harari have had historical relation and Turkey once had a consulate in Harari⁹³. The relationship of these cities itself was initiated by the Turkish Ambassador residing in Addis⁹⁴. On the invitation of Harari, the Turkish Ambassador with high level delegates of Sanliverfefe, including the city mayor and Turkish chamber of commerce visited the region for three days and at the end Sanliverfefe delegation exchanged MoU with the Harari Regional State Government. The delegation promised to give around 1.72 million birr to enhance the water problem of the region, a lorry of water container, children medicine, capacity building, technical support, environmental protection, and map preparation. Similar invitation was also extended to the Harari officials to visit Sanliverfefe⁹⁵. The regions have also made contact with Klarsten of Atlanta, in which the team containing senior officials, experts and academician's culture and heritages of the region visited the small city of Atlanta in June, 2009 G.C.⁹⁶

Amhara regional state has also exchanged MoU with Schiwan province/ China since 2006 and majority of the cities in the region have been involved with their respective sister-city relationships.⁹⁷ Likewise, Oromia regional government made considerable diplomacy. The delegation led by H.E Aba Dula Gameda Ex-president of the region severally visited other countries and cities mainly for the promotion of trade, cultures and investment. The region entered into

⁹² Interview with Ato Robel Admasu, Department of Political Relations Affairs Directorate, FDRE Ministry of Foreign Affairs, Addis Ababa (3/11/2010).

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ The Regional State Performance on foreign relation, Supra note 81, P6.

⁹⁶ Ibid, P7.

⁹⁷ Interview with Ato Assefa Niguse, Supra note 58.

agreement with Constanbul cities of Turkey.⁹⁸ In 2002 E.C, H.E Aba Dula Gamada signed agreement with Hunan, China province.⁹⁹ Here, it is worth mentioning the agreement between Ethiopian government and big textile company of Turkey. The objective of the investment is establishing industrial zone in Legatafu, Oromiya Region that worth more than 20 billion birr. As interview with W/rt Nasise Didesa (Protocol Official in the Oromia Regional State President Office) revealed, the then president of Oromia Regional State, H.E Ato Aba Dula Gemada, played paramount role among others in convincing the investors by visiting Turkey and the aforementioned company, facilitating provision of required land for investment, and reaching on the investment agreement within a short period of time¹⁰⁰.

Addis Ababa City administration external diplomacy attained its momentum in comparison with the rest of the Regional States. The City administration organized separate department, headed by a director, which is responsible in twining the city with other cities and conduct others external diplomacy. The City administration has established a strong link with Johannesburg of South Africa, Chun Chun of North Korea, Ankara of Turkey, Sana'a of Yemen, Leipzig of German, and Lion of France. As the result of the relationships, the City administration has secured various technical and financial supports. The municipality got 21 Ambulances, 1 fire extinguisher car, and 180 computers from Chun Chun of North Korea. In return, the Municipality dedicated a park found in Gulelle sub-city to the Korean veterna's memorial monument and

⁹⁸ Interview with W/o Nasise Didesa, Protocol Official in Oromia Regional State President office, Adama (2/10/2010).

⁹⁹ Ibid.

¹⁰⁰ Ibid

museum.¹⁰¹ From the agreement made with the Leipzig of Germany, the city of Addis Ababa got a medical treatment for its lions in *sidist kilo* Zoo and assistance on a project on park zoo, consultancy and public transportation and generation of electricity from bio-products. A partnership was also made between the schools in the two cities, as a result of which education materials and free language training was provided to local schools.¹⁰² Likewise, the municipality got consultancy on BPR and public administration and other assistance from the sister relation with Lion of France, and Johannes berg of South Africa. Efforts are also underway to establish sister city partnership with Washington DC, and the District of Columbia. Recently, a high-level city delegation led by the then Mayor Kuma Demeksa paid a working visit to the Russian Federation from March 22 to March 28, 2011. The Addis Ababa delegation met and held talks on bilateral issues with governors of the cities of Moscow and St. Petersburg. Indeed, the purpose of the visit was to sign a protocol agreement with the city of St. Petersburg. The then Mayor Kuma Demeksa and the Deputy Governor of the city of St. Petersburg inked the protocol agreement.¹⁰³

Some regional governments pay high attention to trans-border diplomacy than micro Para-diplomacy due to their geographical location and the inevitability of such contacts. Foreign relation with adjacent countries is common for regions in most federations due to their physical proximity which enables them to have a stronger relationship with their neighbor than they have with the central government. More frequently, regions devoted their time in settling conflict with adjacent countries on the areas of low politics, such as conflict over

¹⁰¹interview with W/rt Kalkidan Girma, protocol official , department of domestic and foreign relation ,Addis Ababa City administration, Addis Ababa (4/11/2010).See also MoU entered between the two cities in 2004, MOFA report on regional states foreign relations

¹⁰² Ibid

¹⁰³ City Administration Foreign Relation Performance, Annual Report, P5.

grazing land, looting, unlawful transfer of goods, etc. They often host border development commissioners meeting.¹⁰⁴ For instance, Gambella regional state is known for developing this type of relation. Its foreign relation mainly focused on maintaining peace and security with the adjacent states of Sudan. This includes discussion on solution as to attacks, killings, and abductions of children, illegal movement of cattle, looting of properties and taking of weapons.¹⁰⁵ The Gambella Regional State and Jongeli State of South Sudan meet to take actions and resolve attacks and lootings regularly.¹⁰⁶

Tigrai regional state too, mainly involves in strong relation with the adjacent state of Gedariff and Kessla of Sudan and maintains the peace and security, border trade in accordance with capital ceiling formulated by the federal government.¹⁰⁷ The Road that link Tigrai region with Kessela and Gedariff states of Sudan is under construction.

Amhara Regional State has also contact with Gedariff of Sudan; Oromia with Kenya border provinces.¹⁰⁸ It is common to see Borana child in the land of Kenya in search of water and grass for their cattle. More frequently, Borana *Abba Gada* enters to Kenyas' territory without any passport to visit Oromos in Kenya, or to mediate the conflict between Oromo pastoralist and that of Kenya. The Ethiopian currency and Kenya currency is interchangeably used in some town of the region and Kenya provinces. One may get surprise by the fact that

¹⁰⁴Interview with Ato Gezehagn Tilahun, Ministry of Federal Affairs, IGR Expert, Addis Ababa, 9/13/2010).

¹⁰⁵ Interview with Ato Assefa Niguse, Supra note 58.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

majority of the resident in this area use the Kenya line for their wireless phone.¹⁰⁹

5. OBSERVED CHALLENGES OF THE CURRENT DEVELOPMENTS

Some federations revised their federal constitutions and treaty making laws to empower their sub-national units with treaty making power and to ensure their representation in federation foreign policy and participation in the regional organization, international conference and internal organization partly to realize the federated constituent autonomy and to enable them to overcome the chilling winds of globalization.¹¹⁰

The Ethiopian federation which is unique in various aspects follows the USA paradigm by centralizing foreign relation competency but differ from it in absence of institutional and legal framework that secure regional state participation in formulation of federal policy. The country did not amend the treaty making procedure law which was adopted when the country was ruled by unitary system. The *de facto* recognition of regional participation in foreign relations of federation and regional diplomacy lacks legal frame work and regularity.

The so called *de facto* recognition, if taken seriously, it is on its infant stage that some regional states show a considerable incompetence and reluctance to involve in foreign relations. This could be evidenced by the fact that only five

¹⁰⁹ Personal observations of some border towns of Borana regions and informal talks with individuals from Borana zone.

¹¹⁰ The revised 1993 Belgium constitution accorded the federated entities to be the real actor in the international scene. The specific character of the Belgian system lies in the coexistence of two different federated entities: the regions and the communities. The three regions – the Wallonia, the Flemish, and the Brussels-Capital regions – are territorial entities, whereas the three communities – the French, the Flemish, and the German communities – reflect the cultural diversity of the country.

regional states involve on their own foreign relations and some regional states fail to involve in foreign relations. Regional states lack clear legal and institutional framework, awareness of their contribution in foreign policy for the country's foreign relation as a whole and benefit of constituent for themselves. That is why foreign relation is conducted arbitrarily, i.e. without plan and corresponding budget in some regions.

The current constituent diplomacy under the guise of sister city relations are usually undertaken under the supervision of the federal government and typically it is after the two countries agreed on the main areas that regional government takes step with its counter parts. It doesn't have direct impact on the substance of national foreign policy and embarked only with sub-national counterpart or cities whose countries have diplomatic relation with Ethiopia. Participation on international conference dealing on the area of their competency, opening mini-embassy and representation in international organization such as UNESCO, WHO, and regional organization like IGAD is not yet experienced by our regional states.

6. CONCLUSIONS AND REMARKS

Federalism and regionalization are the key factors for the raise and development of constituent diplomacy. In federal systems, competency is divided between the central government and component by the federal constitution. As there is no hard and fast rule as to which tiers of government should be empowered with what type of powers, there is dissimilarity among federations in dividing the powers between the tiers of government. In the field of foreign relation too, it is common to see variations among the federations.

In some federations, foreign policy is exclusively assigned to the center whereas in some other federations sub-national units have constitutional power

to participate in foreign relation as an extension of domestic competency or through representation in the federation foreign relations.

The dilemma in relation to foreign relation in federal polity is, whether it should be exclusively given to the federal government or should it be divided among the tiers of governments. And how the federal government could fairly reflect the divergent interest of sub-national unit's interest if the power to implement foreign policy is accorded exclusively to it and what mechanism should be employed to overcome the segmentation of foreign policy if foreign policy is divided between the tiers of government. So far, no political system has developed an effective process or institution to handle the sub-national government involvement in the international scene.

Traditionally, it is viewed that the central government monopoly over foreign relation is the right approach to promote and protect national interest, i.e., it enables the country to speak in one voice externally and for the implementation of international law which presume a unitary system. However, due to globalization and regional integration, the sub-national units' participation has become a matter of fact. In response to this development, international law seems to consider component units as actors in international relations though it is a *de facto* recognition.

Today, in most of federations, the federal constitution recognized the sub-nationals units' foreign relation. They usually take part in international conferences dealing with matters under their competency, conclude agreement, and open offices abroad representing their particular interest. In Ethiopia, the involvement of the regional states in foreign relations is a recent phenomenon. Constitutionally, foreign relation is the sole mandate of the federal government. However, there has been a *de facto* recognition for the states to undertake foreign relations. Regional states have been in contact with foreign embassies

residing in Addis Ababa, international organization, and cities of different countries, through twining without a legal framework. Regional governments also involved themselves in boundary bordering development, usually by sending their delegation with the federal representative. Trans-boundary para-diplomacy has become a common practice for the regional government. As a result of their involvement in foreign relation, regional governments managed to obtain various economic aids, technical, and capacity building assistance, etc.

Despite *de facto* recognition of constituent diplomacy, regional states are not able to manage their pace due to lack of expertise, planning, and institutional arrangement. Sub- national units in other federations, Ethiopian regional governments do not have offices and representatives abroad nor do they have any participation in international conferences and have no seat in international organization.

Hence, it is the remark of this writer that, in order to adopt robust federalism in country of diverse ethno-linguistic group through recognition of self determination of these ethnic groups, regional states should involve in the foreign relations. To this end, there should be a legal frame that confers the regional states with the power to involve in foreign relations and it should be stipulated in the Federal Constitution. So, Article 51(8) of the FDRE Constitution, which gives the federal government exclusive power on foreign policy and treaty making should be amended. The Federal Constitution should incorporate the principle of *intro infro externo infro* principle like that of Belgium and there shall be institutional set up to secure regional states involvement in federation foreign relations.

DAGANNOON NAMA AJJEESUU ILAALCHISEE FIRIIWWAN DUBBII
SEERICHAAN KAA'AMAN IRRATTI HUNDAA'UUN HOJJACHUU FI
ADABBII SIRRII TA'E MURTEESSUUN WALQABATEE RAKKOOLEE
QABATAMAAN MUL'ATAN

Tolosaa Damee Jimaa *

ABSTRACT

Homicide committed by negligence is one of the topics that require better emphasis by criminal specialists. In this regard, the New Criminal Code of Ethiopia came up with new elements to be considered in order to prove whether the defendant is guilty of this offence or not. This article aims to explore the issue of negligent Homicide at Oromia Regional State with the following two major purposes: (1) to investigate and analyze the major problems that exist in the justice sector regarding negligent homicide, and (2) to demonstrate how to solve the existing misunderstandings among legal professionals while dealing with such cases. The article has scrutinized few practical cases to show the major problems in the region's justice system in relation to the issue at hand. On the basis of the findings, the article concludes that there is a problem, among legal professionals of the region in consistently understanding and implementing the laws dealing with negligent Homicide particularly in relation to the elements that constitute the offence. Moreover, when we consider the proportionality of punishments stated under article 543(1) in comparison with the punishment stated under injury caused by negligence (article 559(2)), it doesn't go in line with principle of proportionality of punishment. It is clear that this, by creating difference among similar offenders, will affect the prevalence of criminal justice system. For these reasons, it is good to provide training for justice sector professionals as well as to those interested on the area. The article also recommends further amendment to the punishments stated under article 543(1) of the Criminal Code.

SEENSA

Seerri Yakkaa Rippabliika Dimokraatawaa Federaalawaa Itoophiyaa bara 1996 A.L.I bahe (kana booda: seera yakka, yookin seera yakka haaraa) Caamsaa 1 bara 1997 irraa jalqabee hojiirra ooluun isaa ni beekama.¹ Seerri Adaba Yakkaa bara 1949 (A.L.I) bahee ture jijjiirama hundeerraa gama siyaas-dinagdee fi hawaasummaatiin mul'ate keessummeessuu waan hin dandeenyeef seera yakkaa haaraa kanaan bakka bu'ameera. Sababoota kanaan keewwattoota fooyya'insi irratti taasiifame keessaa yakki dagannoon nama ajjeesuu isa tokko dha.² Gocha yakkaa kana ilaalchisee seera yakkaa haaraa keessatti firiwwan dubbii haaraan dabalataan haammatamaniiru.³

Himatamaa irratti himannaa gahumsa qabu dhiyeessuu fi murtii balleessummaa sirrii ta'e kennuu waliin walqabatee qabxiilee murteessaa ta'anii fi ilaalamuu qaban keessaa tokko jiraachuu fi jiraachuu dhabuu firiwwan dubbii keewwaticha hundeessuudhaaf kaa'amani dha. Falmiileen manneen murtiitti gaggeeffaman hedduun firiwwan dubbii keewwatichaa irratti kan taasifaman waan ta'eef adeemsa falmii keessatti firiwwan dubbii keewwaticha jalatti argaman ragaadhaan mirkaneessuun dhimma murteessaa dha. Nama yakkaan himatame tokko irratti murtii balleessummaa dabarsuudhaaf, namni himatame sun firiwwan dubbii keewwata itti himatame jalatti argaman raawwachuu isaa ragaa qabatamaa fi amansiisaa ta'een

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¹ Seera Yakkaa Rippaabilika Dimokraatawaa Federaalawaa Itoophiyaa bara 1996 bahe, Lab.lak. 414/1996, kwt 1 fi 4.

² *Akkuma lak.1ffaa, kwt.543 fi Seera Adaba Yakkaa bara 1949 (kan haqame) kwt 526.*

³ *Akkuma lak.2ffaa, kwt.543 (3).*

mirkanaa'uu qaba. Haata'uyyuu malee, yakka dagannoon lubbuu namaarratti raawwatamu ilaalchisee, firiiwwan dubbii keewwatacha hundeessan irratti hubannoon walfakkaataa ogeessota qaamolee haqaa naannoo keenyaa - keessattuu abbootii seeraa fi abbootii alangaa biratti waan hin jireef hojjiimaatni jirus garaagarummaa kan qabu ta'ee mul'ata.

Qabatamni jiru akka agarsiisutti tumaalee seera yakkaa fi seerota biroo rogummaa qaban bu'uura kaayyoo seera baastuutiin hubachuudhaan himannaa dhiyeessuu, murtii (balleessummaa) kennuu, adabbii cimina yakkichaa fi haala dhuunfaa yakkamaa tilmaama keessa galcheen kennuu irratti bakka tokko irraa bakka birootti, ogeessa seeraa tokkorraa isa tokkotti garaagarummaan bal'aa ta'e ni mul'ata.⁴ Kun immoo amanamummaa bulchiinsa sirna haqa yakkaa naannichaa miidhuu bira darbee wal qixxummaa namootni seera fuulduraatti qaban daangeessuun mirgootaa fi bilisummaa lammiilee irratti dhiibbaa mataa isaa kan hordofsiisu dha.

Kaayyoon barruu kanaas inni jalqabaa yakka dagannoon lubbuu namaarratti raawwatamu ilaalchisee haalawwan yakkicha hundeessaniin walqabatee rakkoo hubannoo ogeessota qaamolee haqaa bira jiru addaan baasuun kallatti furmaataa kaa'uu dha. Kayyoon barruu kanaa inni lammataa, yakka dagannoon nama ajjeesuu ilaalchisee rakkoolee adabbii sirrii fi wal fakkaataa ta'e murteessuu fi akkaataa adabbiin itti daangeeffamaa jiru seera waliin

⁴ Barreessaan Naannoo Oromiyaa Godinaalee Jimmaa, Shawaa Bahaa fi Adda Adaamaa keessatti haala qabatamaa hojii jiru hubachuuf carraa argate irraa akka hubatetti, Abbaan Alangaa himanna yommuu saaqu, Abbaan Seera immoo murtii balleessummaa yommuu dabarsu firiiwwan dubbii keewwatacha jalatti argaman sirritti xiinxaluun bifa kaayyoo fi yaada seerichaatiin hojjachuu osoo qabani, faallaa kanaa yommuu raawwaatan bal'inaan ni mul'ata. Rakkoon kun iddoo adda addaatti haala bal'ina qabuun mul'achuun isaa hangam ulfaataa fi gadi fageenya kan qabu akka ta'e kan agarsiisu dha.

xiinxaluun kallatti furmaataa agarsiisuu dha. Kana malees, qaawwa seericha bira jiru gama qajeeltoo madaalamummaa adabbiitiin mul'atu addaan baasuun agarsiisuun yaada furmaataa kaa'uuf yaalameera. Keessattuu firiiwwan dubbii keewwata 543 jalatti kaa'aman keessaa yaadoota ogeessota seeraa gidduutti faajji (confusion) uuman addaan baasuun rakkoo qabatamaan mul'atu hanbisuudhaaf bifa gargaaruu danda'uun hiikkoowwan barbaachisaa ta'an ni kaa'aa. Kun kan raawwatamus, rakkoon qabatamaan mul'atu hangam hammaataa akka ta'e agarsiisuudhaaf dhimmoota filatamoo adda addaatiin deeggaramuun ta'a.⁵ Kanaafis, barreeffamni kun kutaa saditti caaseffamuun dhiyaateera. Kutaa duraa keessatti yakki dagannoon nama ajjeesuu seera yakkaa keenya jalatti haala itti fudhatame keessattuu keewwata 543 jalatti keewwattootni xixiqqaan 1, 2 fi 3 walitti dhufeenyi isaan qaban kallatti adda addaan ni sakatta'ama. Kutaan lammaffaan, keewwata kana ilaalchisee adabbii murtaa'u malu haala kamiin hubatamuu akka qabu gadi fageenyaan kan xinxaluudha. Dhumarratti, kutaa sadaffaa keessatti yaada guduunfaa fi kallattii furmaataa agarsiisuun barruun kun ni goolabama.

1.1. YAKKA DAGANNOON NAMA AJJEESUU: SEERA YAKKAA RDFI JALATTI

Namni kamiyyuu meeshaa miidhaa qaqqabsiisuun yookiin tooftaa akaakuu kamiiniyyuu fayyadamee dagannoon nama biroo kan ajjeese yoo ta'e, namni kun ajjeesaa lubbuu waan ta'eef seeraan gaafatamuu qaba.⁶ Yakkamtoonni

⁵ Dhimmootni xiinxalamani fi osoo hin xiinxalamiin akka maddaatti caqafaman kun Seera Yakkaa keewwata 543'n walqabatee rakkoon hubannoo jiru hangam hammaataa akka ta'e agarsiisuu ni danda'u jadamani kan filataman yommuu ta'an, barreessaan rakkoowwan mul'atan kanaaf ka'umsi isaa rakkoo hubannoo qofa dha yaada jedhu kan hin qabne akka ta'e hubatamuu qaba.

⁶ *Seeraa yakkaa, oliti yaadannoo lak. 1^{ffaa}, kwt.538(1).*

gocha dagannoon nama ajjeesuutiin himatamanii balleessa jedhaman irratti murtii balleessummaa fi adabbiin murtaa’u haalawwan yakkicha hundeessuuf keewwata 543 kwt xiqqaa 1, 2 fi 3 jalatti kaa’aman irratti hundaa’uun garaagarummaa kan qabu yommuu ta’u, namni tokko keewwata 543 kwt xiqqaa 1 ykn 2 ykn 3 jalatti kan himatamuu fi adabamu firiwwan dubbii keewwata kana jalatti argaman keessaa maalfaa guuttatee yoo argame akka ta’e akkasumas murtiin balleessummaa erga kennamee booda adabbii murteessuuf yaadoota xiinxalamu qaban akka armaan gadiitti ilaalameera.

1.1.1. Walitti Dhufeenya Tumaalee Xixiqqaa Seera Yakkaa Keewwata 543 (kwt xiqqaa 1, 2 fi 3)

Tumaan Seera Yakkaa keewwatni 543, keewwattoota xiqqaa sadi firiwwan dubbii adda addaa irratti hunda’an qaba. Isaanis:

(1) Namni kamiyyuu keewwata kana keewwata xiqqaa (2) fi (3) jalatti haalawwan tumamaniin ala dagannoon nama kan ajjeese yoo ta’e; hidhaa salphaa ji’a jahaa hanga waggaa sadii gahuu danda’uun ykn adabbii maallaqaa qarshii 2000.00 (kuma lamaa) hanga 4000.00 (kuma afur) gahuu danda’uun ni adabama.

(2) Lubbuu, fayyaa ykn nageenya nama biroo eeguuf dirqama ogummaa ykn kan biroo nama qabu kan akka ogeessa yaalaa ykn konkolaachisaa ta’ee dagannoon nama kan ajjeese yoo ta’e; adabbichi hidhaa salphaa waggaa 1 (tokkoo) hanga waggaa 5 (shan) gahuu danda’uufi adabbii maallaqaa qarshii kuma sadii hanga kuma jahaa gahuu danda’u ni ta’a.

(3) Yakkamaan namoota lama ykn isaa ol kan ajjeese yoo ta'e, yakkicha kan raawwate dambii yookiin qajeelfama ifa ta'e darbuun yoo ta'e, wahiiyyoota ykn dhugaatiwwan nama macheessan ykn fajajsan fudhachuun haala itti gaafatamummaa irraa bilisa isa taasisu keessa erga of galchee booda yoo ta'ellee; adabbichi hidhaa cimaa waggaa 5 (shanii) hanga waggaa 15 (kudha shani) gahuu danda'uufi adabbii maallaqaa qarshii 10,000.00 (kuma kudhanii) hanga 15,000.00 (kuma kudha shanii) gahu ni ta'a.⁷

Keewwatootni xixiqqaan 1 fi 2 Seera Adaba Yakkaa Itoophiyaa Bara 1949 A/L/I bahe keewwata 526 jalatti kan hammatamanii turan yommuu ta'u, yaadni keewwata 543(3) jalatti ibsame garuu seera yakkaa Bara 1996 A/L/I bahe keessatti dabalamuun kan tumame dha. Firiwwan dubbii yakkicha hundeessuuf keewwata 543(1-3) jalatti argaman kan armaan olitti caqafaman yommuu ta'an; haalawwan kunneen walqabatee hojimaataa qabatamaan mul'atu irratti falmiin ogeessota qaamolee haqaa biratti jiru maal akka fakkaatuu fi firiwwan dubbii kun yaadaa fi kaayyoo seerichi qabu waliin bifa walsimuu danda'uun haala kamiin hubatamani hojii irra ooluu akka qaban armaan gaditti xiinxalameera.

Seera yakkaa keewwata 543'n walqabatee ogeessota qaamolee haqaa biratti ijoowwan seerichaa falmisiisoo ta'anii fi garaagarummaan akka uummamu taasisan keessaa tokko qabxiilee keewwata 543(3) jalatti argaman kan hojiirra ooluu danda'an haala keewwata 543(2) jalatti ibsameen "...lubbuu, fayyaa

⁷ Keewwatichaaf hiikkaan Afaan Oromoo kan kenname barreessaa barruu kanaatiini dha.

ykn nageenya nama biroo eeguuf dirqama ogummaa ykn kan biroo qabaachuu kan akka ogeessa yaalaa ykn konkolaachisaa...” warreen jedhamaniif qofa dha moo; haala seera yakkaa keewwata 543(1) jalatti kaa’ameen yakkamaan namoota lama ykn isaa ol ajjeesee yoo argame raawwatiinsa qaba? kan jedhu dha. Qabxiilee armaan olitti caqasaman keessaa qabatamaan ogeessotni qaamolee haqaa tokko tokko haala seera yakkaa keewwata 543(1) jalatti kaa’ameen balleessichi namoota lama ykn isaa ol ajjeesee yoo argame bu’uura keewwata 543(3) tiin gaafatamuu akka qabu kaasuun ejjennoo kana qabatamaan tarkaanfachiisaa jiru.⁸ Ogeessotni kun seerichi keewwata 543(3) jalatti baay’ina namoota du’anii lama ykn isaa ol yoo ta’an jechuun akka ulaagaa of-dandaa’e tokkotti techiiseera waan ta’eef namoota dirqama ogummaa ykn kan biroo hin qabneefiis ni hojjeta jechuun falmu. Ibsa biraatiin, namni kamiyyuu dagannoon namoota lama ykn isaa ol kan ajjeese yoo ta’e seera yakkaa keewwata 543(3) jalatti itti gaafatamummaa qaba yaada jedhu tarkaanfachiisu.

Akka barreessaa kanaatti, yaadni ogeessota kanaa seericha waliin yommuu madaalamu yaadaa fi kaayyoo seerichaa kan hin hordofnee fi rakkoo qabatamaa seensa barruu kanaa keessatti kaasnee kan babal’isu dha. Sababni isaas seerri yakkaa keewwata 543(3), keewwata 543(1) waliin kan hin deemnee fi kan inni dhaabbates keewwata 543 (2)’f qofa akka ta’e seera yakkaa keewwata 543 kwt xiqqaa 1, 2 fi 3 jala jiran gadi faggeenyaan xiinxaluun hubachuun ni danda’ama.

⁸Qajeelfama Adabbii Itoophiyaa Lak.1/2002 fooyyessuudhaaf marii ogeessota qaamolee haqaatiin taasifamerraan kan fudhatame (Hoteelaa Diriiim Laaynarii, Finfinnee), 29/12/2005 A.L.I.

Kunis, keewwatni 543 (3) seera adaba yakkaa isa durii keessatti kan hin turree fi yaada haaraa seera yakkaa bara 1996 bahe keessatti kan hammatame akka ta'e olitti ilaalleerra.⁹ Dabalammu keewwata kanaa ilaalchisee “*Hatataa Zamikiniyaaf*”ii keessatti ibsi teechifame akka agarsiisutti keewwata xiqqaa 3ffaa keewwata 543 galchuun kan barbaachise bay'ina balaa geejjibaa uumama jiru xiqqeessuun miidhaa lubbuu namoota irratti dhufu salphiisuuf yaadamee ta'uu caqafameera.¹⁰ Ibsa kana irraa kan hubatamu keewwatni 543 (3), yaada keewwata 543 (2) jalatti kaa'ame ilaachisee ulaagaalee keewwaticha jalatti argaman keessaa inni tokko guuttame yoo argame hojiirra akka oolu kan tumameedha malee; yaada keewwata 543 (1) jalatti argamuuf yaadamee kan tumame akka hin taane kan agarsiisu dha.¹¹

Dabalataan, Murtee Mana Murtii Waliigalaa Federaalaa Dhaddacha Ijiiibaataatiin kenname tokko yoo ilaallee, yaada armaan olii kan cimsuu dha. Kunis:

በዚህ የህግ ድንጋጌ 543(3)) አንድ ሰው ተጠያቂነት የሚከተለበት የሌላ ሰውን ህይወት ፣ ጤንነት ወይም ደህንነት የመጠበቅ የሙያ ወይም ሌላ ግዴታ ያለበት እንደ ህክምና ባለሙያ

⁹ Seera adaba yakkaa bara 1949 A.L.I bahe, kwt. 526.
¹⁰ *Hatata Zamikniyat* 'ii Seera yakkaa RDFI, kan hin maxxanffamne, F 258.
¹¹ Asirratti wanti hubatamuu qabu yakkootni ajjeechaa ogeessaan raawwataman hundi isaanii dagannoon raawwatamu jechu miti; himatamaan (yakkamaan) gocha ajjeechaa kan raawwate itti yaadee yoo ta'e ykn gocha dagannoon calqabe tokko fedha guutuun hanga dhumaatti kan raawwate yoo ta'e, gochicha raawwachuuf meeshaa itti fayyadame konkolaata ta'uun alatti wanta dagannoon jira jechisiisu hin jirreef, akkuma haala isaatti Seerri Yakkaa RDFI keewwatoota 539 hanga 541tti jiran keessaa isa tokkoon ykn daddabalamaan kan gaafatamu akka ta'e hubatamuu qaba. Dabalataan, *Hatata Zamikniyat* 'iin keewwatni 543(3) namoota ajjeechaa dagannoo balaa geejjibaan raawwataman kan ilaalatu akka ta'e akka fakeenyaatti kaasee malee isa qofaaf kan tajaajiluu otoo hin taanee, namoota dirqama ogummaa ykn kan biroo qabanis kan ilaallatu akka ta'e hubatamuu qaba.

ወይም አሽከርካሪ ያለ ሰው ሁለት ወይም ከዚያ በላይ የሆኑ ሰዎችን የገደለ እንደሆነ፣ ወይም ወንጀሉን የፈፀመው ግልፅ የሆነ ደንብ /መመሪያን/ ተላልፎ እንደሆነ ወይም የሚያሰክሩ ወይም የሚያፈዙ ንጥረ ነገሮችን ወይም መጠጦችን በመውሰድ እራሱን ከኃላፊነት ነጻ በሚያወጣ ሁኔታ ውስጥ ካሰገባ በኋላ በቸልተኝነት ሰው የገደለ እንደሆነ ስለመሆኑ በህጉ ተመልክቷል። የወንጀሉ ማቋቋሚያ ነጥቦች ከላይ የተመለከቱት ሲሆኑ.....¹²

Yaada murtee kanarraa akka hubatamu nama tokko seera yakkaa keewwata 543(3) jalatti himachuuf ykn balleessaa qaba jechuudhaaf lubbuu, fayyaa yookiin nageenya nama biroo eeguuf dirqama ogummaa ykn dirqama biroo kan qabu kan akka ogeessa yaalaa ykn konkolaachisaa yoo ta'e hojiirra ooluu akka qabu ni agarsiisa. Kanaaf, keewwata xiqqaa kana jalatti murtii balleessummaa kennuuuf ulaagaalee keewwata 543(2) jalatti argaman keessaa yoo xiqqaate qabxiin tokko guuttamuu isaa mirkanneessuun dirqama akka ta'e hubachuun barbachiisa dha. Ibsa biraatiin, firiileen dubbii keewwata 543 (3) jalatti argaman: *namoota lama ykn isaa ol kan ajjeesee ykn yakkicha kan raawwate dambii ykn qajeelfama ifa ta'e darbuun yoo ta'e, ykn wahiyyoota ykn dhugaatiwwan nama macheessan ykn fajajsan fudhachuun haala itti gaafatamummaa irraa bilisa isa taasisu keessa erga of galche booda [...]*¹³ jedhamanii kan kaa'aman kun tokkoon tokkoon isaanii of danda'anii kan dhabbatan osoo hin ta'iin yaadota keewwata 543 (2) waliin ilaalamuu qabani dha. Kanaafuu, yaadni seerichi qabu akka oggeessotni qaamolee haqaa armaan olitti caqafaman jedhan osoo hin-ta'iin, namni daggannoon nama lamaa fi sana ol ajjeese tokko bu'uura keewwata 543(3) tiin kan gaafatamu ulaagaalee seera

¹² Eliyaas Diggaa fi Abbaa Alangaa Federaalaa, Jiildii.12^{ffaa}, Murtiwwan Dh/Ij MMWF(kan maxxanfame) F.286-290, Lakk-Galmee 55649.
¹³ Seeraa yakkaa, oliti yaadannoo lak.1ffaa, kwt.543(2).

yakkaa keewwata 543(2) jalatti argaman keessaa yoo xiqqaate firiin dubbii tokko guuttamee yoo argame qofa dha.

Kana malees, keewwatni 543(1) jalqabumayyuu yeroo tumamu namni kamiyyuu keewwata kana keewwata xiqqaa (2) fi (3) jalatti haalawwan tumamaniin ala dagannoon nama kan ajjeese yoo ta'e keewwata 543(1) jalatti kan gaafatamuu akka ta'e seerichi ni tuma.¹⁴ Akkuma keewwata kana jalatti ibsameen, namni tokko keewwata 543(1) jalatti kan gaafatamu haalawwan keewwata-xiqqaa (2 fi 3) jalatti tumamaniin ala dagannoon nama ajjeese yoo argame dha. Kunis firiin dubbii keewwata 543 (1), firiwwan dubbii keewwata 543 (2 fi 3) waliin walitti hidhamiinsa tokkollee kan hin qabne akka ta'e kan mul'isu dha. Haaluma kanaan, firiwwan dubbii keewwata 543 (2 ykn 3) jalatti ibsameen guuttamanii yoo argaman keewwatni 543 (1) raawwatamiinsa kan hin qabne akka ta'e hubachuun barbaachisaa dha. Kanaafuu, ka'uumsa irraa seera baastuun keewwatni 543 keewwatni xiqqaan 3, keewwata xiqqaa 1'f hojiirra ooluu akka hin qabne daangesseera jennee afaan guutuun dubbachuu ni dandeenya. Kana jechuun garuu keewwatni 543(3) firii dubbii *balleessichi namoota lama yookiin isaa ol kan ajjeese* jedhame akka ulaagaa tokkootti waan kaa'ameef, yeroo hunda keewwatni 543(1) firii dubbii du'iinsa nama tokkoo qofa kan ilaallatuu fi keewwatni 543(3) immoo firii dubbii du'iinsa nama lamaa ykn sanii olii kan ilaallatu dha jechuu akka hin taane sirritti hubatamuu qaba. Sababni isaas gama tokkoon namni tokko haalawwan keewwata 543(2,3) jalatti ibsaman ala dagannoon nama lama ykn sanaa ol haalli itti ajjeessuu danda'u kan jiru yommuu ta'u, gama biraatiin immoo kan

¹⁴ Keewwatichaaf hiikkaan Afaan Oromoo kan kenname barreessaa barruu kanaatiini.

du'e nama tokko qofa yoo ta'ellee ulaagaalee keewwata 543(2) jalatti kaa'aman keessaa firii dubbii isa tokko haala guuteen yoo ta'ee fi yakkamaan yakkicha kan raawwate dambii yookiin qajeelfama ifa ta'e darbuun yoo ta'e, yookiin wahiyyoota yookiin dhugaatiiwwan nama macheessan yookiin fajjisan fudhachuun haala itti gaafatamummaa irraa bilisa isa taasisu keessa erga of galchee booda yoo ta'e keewwata 543(3) jalatti kan gaafatamu ta'a.

Egaa yaada armaan olitti kaasne waliin yakkamaan tokko haalawwan SY keewwata 543(2, 3) jalatti tumameen ala dagannoon nama lama ykn sana ol yoo ajjeese haala kamiin gaafatamuu danda'a gaaffiin jedhu nu keessatti uumamuun isaa wanta hafu miti. Dhimmootni akkanaa kun qabatamaan yommuu quunnaman waanti itti yaadamuu qabu waa'ee yakkoota daddabalamaa ti. Akkuma beekamu seera yakkaa keenya keessatti tokkoon tokkoon miidhamtootaaf yakkaaf eegumsi taasiifameera. Haaluma kanaan, namni dagannoon yakka raawwateen tumaa seeraa tokko darbuun mirga ykn faayidaa namoota lakkoofsi isaanii lama ykn sanaa ol ta'an irratti miidhaa akaakuu tokko qabu kan hordofsiise yoo ta'ellee akka yakka daddabalamaa raawwateetti fudhatamee baay'ina namoota miidhamaniin himatni isarratti dhiyaachuu akka qabu tumameera.¹⁵ Dhimmi akkasii kun seera adaba yakkaa Itoophiyaa bara 1949 bahee ture (A.L.I) keessatti akka yakka daddabalamaatti tuumamuu osoo qabuu, osoo hin tuumamiin waan hafeef akka yakka tokko qofaatti lakkaa'amee adabsiisaa tureera. Haata'u malee, rakkoon kun seera yakkaa haaraa keessatti bifa armaan olitti ibsameen furmaata argateera. Kanaaf, namni haalawwan seera yakkaa keenya keewwata 543(2, 3) jalatti

¹⁵ *Seeraa yakkaa, oliti yaadannoo lak.1ffaa, kwt. 60(C).*

tumameen ala dagannoon nama lama ykn sanaa ol ajjeesee yoo argame yakki inni raawwate tumaa seeraa tokko (kwt-543(1)) qofa bira darbuun miidhaa akaakuu tokko qabu hordofsiise kan argame yoo ta'ellee mirga namoota lakkoofsi isaanii tokkoo ol ta'an irratti miidhaa waan dhaqqabsiiseef shakkamaa irratti himanni dhiyaatu baay'ina miidhamtootaa irratti hundaa'ee keewwata 543(1) jalatti himannaan tokkoo ol kan dhiyaatu ta'a malee, haala keewwata 543 (3) jalatti ibsameen himanni iddoo tokkotti dhiyaachuu hin qabu.

1.1.2. Dirqama Ogummaa ykn Dirqama Kan Biroo

Yakka dagannoon nama ajjeesuun walqabatee qabxiin falmiisiisa ta'e inni biraan firiiwwan dubbii keewwata 543(2) jalatti argamani dha. Ogeessotni qaamolee haqaa tokko tokko firiiwwan dubbii keewwata jalatti argaman keessaa “...*dirqama kan biroo*” isa jedhuun yommuu fayyadamani hojjatan hin mul'atu.¹⁶ Namni keewwata kana jalatti gaafatamu nama dirqama ogummaa ykn dirqama kan biroo qabu akka ta'e seerichaan tumameera. Keewwatni xiqqaan kun *dirqama ogummaa* isa jedhuuf ogeessa yaalaa ykn konkolaachisaa akka fakkeenyaatti kaa'uun ala ogummaawwan biroo tumaa kana jalatti haammataman tarreessuun kaa'ee hin jiru. Sadarkaa jalqabaatti dirqama ogummaa (professional duty) jechuun maal jechuu akka ta'ee fi ulaagaaleen guuttamuu qaban maal fa'a akka ta'an adda baasuun barbaachisaa dha. Kana malees, *lubbuu, fayyaa ykn nageenya nama biroo eeguuf dirqama biroo kan qabu* yaadni jedhu dhimmootaa fi namoota akkami ilaallata gaaffii

¹⁶ Ogeessotni seeraa tokko tokko firii dubbii “dirqama kan biroo” jedhamee seerichaan ibsame iftoomina kan hin qabne waan ta'eef hojii keessatti kan itti gargaaramaa hinjirree akka ta'e ni ibsu (*Akkuma lak.8ffaa*)

jedhu kaasiisuun isaa wanta hafuu miti. Kanaafuu, gaaffilee kanaaf deebii gahaa ta'e kennuun qaamolee haqaa naannichaa biratti hubannoo wal-fakkaataa ta'e uumuun murteessaa dha.

Dirqama ogummaa (professional duty) jechuun maal jechuu akka ta'e hubachuudhaaf jalqaba hiikkoo jechoota “*professional*” fi “*duty*” jedhanii ilaaluun barbaachiisa dha. Kuusaan jechoota seeraa *Black's Law* jecha “professional” jedhu “*A person who belongs to a learned profession or whose occupation requires a high level of training and Proficiency*”¹⁷ jechuun hiikeera. Hiikkaa kuusaa jechoota kanaan kennamerraan kan hubatamu ogummaa jechi jedhu hojii ykn dalagaa baruumsa ykn leenjii ga'uumsa addaa ta'e gaafatu akka ta'e dha. Namni tokko immoo hojii ykn dalagaa baruumsa ykn leenjii fi ga'uumsa addaa gaafatu fudhateera ykn qaba kan jedhamu leenjii ykn baruumsa sana walqabatee hayyama mirkaneessa ga'uumsa a yoo qabaate dha.¹⁸ “Duty” isa jedhu immoo dirqama ogummaan sun namoota ogummaa sana qaban irratti seeraan kaa'ame akka ta'e hubachuun ni danda'aama. Kanaaf, namni tokko keewwata kana jalatti gaafatamuuf haaldureewwan guuttamuu qaban keessaa dirqamni ogummaa isaa tokko dha.

Ogeessonni seeraa tokko tokko haalawwan armaan olitti ibsaman irratti hundaa'uun namni tokko bu'uura keewwata kanaan kan gaafatamu akka armaan olitti ibsameen dirqama ogummaa yoo qabaate ta'uun isaa ibsameera. Kanaaf, namni hayyama konkolaachisaa osoo hin qabaatiin konkolaata

¹⁷ Kuusaa jechoota seeraa “Black's Law” ; Maxxansaa 7^{ffaa}, Maxxansiisaan Dhabbataa “West Group-St Paul”; Ameerikaa, Bara 1999 A.L.A

¹⁸ Ogeessa jechuun ogeessa yaalaa, ogeessa ilkaanii, carreessaa, deessiftuu fi namoota dhukubsattoota yaaluuf (hordoofuuf) aangeeffaman kamiyyuu fi k.k.f kan dabalatu dha.

konkolaachisu, ulaagaa ogummaan sun gaafatu kan hin guunne waan ta'eef keewwata kana jalatti gaafatamuu hin qabu yaada jedhu kaasuu. Ibsa biraatiin, keewwata 543 kwt xiqqaa 2 ykn 3 jalatti namootni akka konkolaachisaatti gaafataman namootni hayyama konkolaachiisummaa qaban lubbuu namaa irratti miidhaa yoo qaqqabsiisan malee, keewwatootni kun namoota hayyama konkolaachisaa hinqabne hin ilaallatu jechuudhaan falmu.¹⁹ Yaadni kun seera yakkaa keenya keessatti haala kamiin keessummaa'a isa jedhu ilaaluun keenya dura, qabxiilee (firiwwan dubbii) keewwaticha jalatti argaman keessaa gaaleen *dirqama kan biroo* jedhu maal agarsiisuuf akka tumame xiinxaluun barbaachisaa dha.

Keewwata 543(2) jalatti lubbuu, fayyaa ykn nageenya nama biroo eeguuf (*dirqama ogummaan ala*) *dirqama kan biroo kan qabu* gaaleen jedhu dhimmootaa fi namoota akkamii ilaallata isa jedhuuf keewwaticha keessatti wanti ifatti kaa'ame hin jiru. Yaada kana hubachuuf dirqamni tokko maal irraa akka madduu danda'u sakataa'uun barbaachisaa dha. Gaalee *dirqama biroo* lubbuu, fayyaa ykn nageenya nama biroo eeguuf gargaaru fi keewwata 543(2 fi 3) jalatti akka dagannoon nama ajjeesuutti ittigaafatamummaa hordofsiisuu danda'u bakka saditti qooduun ilaaluun ni danda'ama. Isaanis:

A. Ittigaafatamummaa Dirqama Seeraa irraa Maddu

Dirqamni tokko dirqama seera irraa maddu kan jedhamu gochaan tokko seeraan ala ta'uu fi kan adabsiisu ta'uun isaa seeraan ifatti tumame yoo

¹⁹ Marii daree, leenjii hojii marsaa 8ffaa Leenjifamtoota ILQHQSO, gaafa 06/03/2006 Adaamaa.

argame dha.²⁰ Seerichi dirqama kana haala ifa ta'een yommuu kaa'u, dirqama seerichaan kaa'ame kana bira darbuun dagannoon lubbuu namaa irratti miidhaan kan dhaqqabe yoo ta'e hojiirra kan oolu dha. Yaada kana haala ifa ta'een hubachuuf dirqamoota seera irraa maddan muraasa akka fakkeenyaatti haa ilaallu. Namni tokko guddistuu daa'ima gaa'ila hin geenyee yoo ta'e nageenyummaa daa'ima kanaa eeguuf dirqama seeraa qaba.²¹ Daa'imni gaa'ila hin geenye kun yoo dhukubsateefi tarkaanfiiwwan daa'imni sun akka fayyu dandeessisan osoo hin fudhatamiin hafanii daa'imichi dagannoon kan du'e yoo ta'e, guddistuun daa'ima kanaa daa'ima isa jalatti buluu yaalchisuuf dirqama tarkaanfii barbaachisaa fudhachuu seeraan ajajame kan hin raawwannee waan ta'eef akka haala dubbichaatti keewwata 543(2 ykn 3) jalatti kan gaafatamu ta'a jechuu dha.

Haala walfakkaatuun, haati tokko daa'ima isheef kunuunsa isaaf barbaachiisuu hunda godhachuun guddisuuf dirqama seeraa qabdi. Bu'uura kanaan da'uuf ciniinsuun yommuu qabamtetti ykn miirri ciniinsuu ishee osoo hin darbiin itti yaaddee daa'ima ishee kan ajjeeste yoo ta'e; akka haala dubbichaatti hidhaa salphaan akka adabamu qabduu tumameera.²² Haalawwan keewwata kanaan ala daa'imashii dagannoon kan ajjeeste yoo ta'e garuu; tumaaleen seeraa idilee ajjeecha ilaallatan raawwatamoo kan qabaatan akka ta'e keewwatuma kana jalatti kaa'ameera. Kanaafuu, haati tokko daa'iima ishee kunuunsa barbaachiisu gochuu dhabuun dagannoon kan ajjeeste yoo ta'e, haadha ta'u ishee irra kan ka'e dirqamni seera waan qabduuf yaadni dirqamni kan biroo

²⁰ *Seeraa yakkaa, oliti yaadannoo lak.1ffaa, kwt. 23.* Gocha jechuun kan seeraan dhorkame raawwachuu ykn kan seeraan ajajame raawwachuu dhiisuu dha.

²¹ Seera Maati Oromiyaa, Magalata Oromiyaa Lakk.83/1996 fooya'ee bahe, kwt.274(2).

²² *Seeraa yakkaa, oliti yaadannoo lak.1ffaa, kwt. 544.*

inni jedhu haala armaan olitti ibsmeen raawwatamiinsa ni qabaataa jechuudha.

B. Ittigaafatamummaa Dirqama Waliigaltee irraa Maddu

Namni tokko dirqama waliigaltee irraa madduun lubbuu, fayyaa ykn nageenya nama biroo eeguuf dirqama haalli itti seenuu danda'u ni jira. Kunis namni lubbuu miidhamaa nama biraa miidhaa irraa eeguuf dirqama waliigaltee kan seene yoo ta'e haalawwan waliigaltee sanarratti kaa'ameen dirqama seene bahuu dhabuun nama sanarra miidhaan kan dhaqqabu yoo ta'e bu'uura tumaa seeraa kanaatiin kan gaafatamu ta'a. Gahee baraartotni lubbuu (life guards) bakkeewwan daakkitii bishaaniitti qaban akka fakkeenyaatti kaasuun ni danda'ama.

C. Ittigaafatamummaa Gocha Balaaf Saaxilu Raawwachuu irraa Maddu

Namni tokko gochoota balaaf nama saaxiluu danda'an adda addaa raawwachuu isaatiin seeraan gaafatamuu ni danda'a. Gocha inni raawwateef ittigaafatamummaa seerri hordoofsiisu akkuma jirutti ta'ee, gocha dagannoo balaaf saaxilu raawwatamuudhaanis namni tokko lubbuun isaa yoo darbe namni gocha balaaf saaxiluu raawwate yakka daddabalamaadhaanis kan gaafatamu ta'a. Fakkeenyaaf, namni tokko meeshaalee tajaajila geejjiba uummataaf oolan irratti ykn meeshaa fi mallatoolee karaa, hadiida baaburaa, bishaan yookiin qilleensa irratti taasifamu mijeessuuf yaadamanii hojiirra oolan dagannoodhaan mancaasuu fi balleessuun imala taasiifamuu irratti danqaa uumuun lubbuu namaa balaaf saaxiluu ni danda'a. Gochootni haala kanaan raawwataman seeraan kan nama gaafachiisan akka ta'e seera yakkaa

keenya keessatti tumameera.²³ Gochootni kun lubbuu yookiin qaamaa yookiin qabeenya namaa balaaf saaxiluu bira darbanii, lubbuu yookiin qaamaa yookiin qabeenya nama irratti qabatamaan miidhaa dhaqqabsiisuu ni danda’u. Sababa gocha balaaf saaxiluu kanaan lubbuu yookiin qaama yookiin qabeenya namaa irratti miidhaan kan dhaqqabe yoo ta’e, akka haala dubbichaatti seerootni roggummaa qaban hojiiarra ooluu qabu. Kanaaf, lubbuu namaa irratti haala kanaan miidhaan kan dhaqqabee yoo ta’e, seerri yakkaa keewwata 543 (2 ykn 3) dabalataan hojiiarra ni oolaa jechu dha.

Namni hayyama mirkaneessa ga’uumsa konkolaachisaa osoo hin qabaatiin konkolaataa konkolaachiisu tokko balaa qaqqabsiisuun nama ajjeesee yoo argame dhimmi isaa seera yakkaa keessatti haala kamiin keessummaa’a gaaffii jedhu armaan olitti kaasuun keenya ni yaadatamaa. Yaadni kun haalawwan yakkicha hundeessuuf keewwata 543(2) jalatti argaman keessaa yaada *dirqama ogummaa* jedhu waliin qofa kan ilaalamu yoo ta’e, konkolaachisaan tokko bu’uura keewwata kanaan kan gaafatamu mirkaneessa ga’uumsa konkolaachisaa qabaatee miidhaa dhaqqabsiisee yoo argame kan hojiiarra oolu waan ta’uuf yaadni ogeessota armaan olitti kaasan yaada sirrii fi fudhatamummaa qabu ta’a. Haata’u malee, dhimmi kun itti gaafatamummaa gochoota balaaf nama saaxiluu danda’an raawwachuu irraa kan maddu isa jedhu waliin kan ilaalamuu qabu dha. Tumaan seerichaa haala itti aanuun teechiefameera.

- 1) *Any driver or pedestrian who exposes to danger the life, body, health or property of another by negligently violating traffic regulations, is*

²³ *Seeraa yakkaa, lak.1ffaa, kwt. 506.*

punishable with simple imprisonment from one month to three years, or fine not less than one hundred Birr or both

2) *Where the act has caused injury to the life, body, health or property of another, the relevant provisions of this Code and those of the infringed traffic regulation shall apply concurrently.*²⁴

Namni kamiyyuu hayyama mirkaneessa ga'uumsa konkolaachisaa osoo hin qabaatiin konkolaataa kamiyyuu konkoolachisuu kan hin dandeenye akka ta'e dambii geejjiba naannoo keenyaa keessatti tumameera.²⁵ Namni dirqama kana dagannoon cabsuun lubbuu, qaama, fayyaa yookiin qabeenya nama biroo balaaf saaxiluu bira darbee sababa gocha isaatiin lubbuu namaa irratti miidhaan dhaqqabuu danda'a. Kun ta'ee yoo argame immoo dhimmi isaa seera yakkaa keewwata 543 (2 yookin 3)n dabalataan kan ittigaafatamummaa hordofsiisu akka ta'e keewwata 572(2) irraa hubachuun ni danda'ama. Seensa keewwata kanaa irraa "*any driver*" jedhamee bifa waliigala ta'een tumamuun isa seerichi kan irratti xiyyeeffate yeroo miidhaan dhaqqabe sanatti namni konkolaaticha konkolaachiisuuf qabatee jiru ittigaafatamummaa isaa kan fudhate akka ta'e kan agarsiisudha malee, ogummaa qabaachuu yakkamaa ilaalchisee wanti ifatti kaa'ame hin jiru.

Yaadni armaan olitti ilaalle akkuma jirutti ta'ee, konkolaachisaa jechuun nama hayyama ga'uumsa konkolaachisummaa mirkanaa'e qabudha jedhamee dambii geejjibaa (lakk.143, kwt 2(6)) jalatti hiikkoon kennameefi jira. Hiikkoon kun nama hayyama ga'uumsa konkolaachisummaa mirkanaa'e hin

²⁴ *Seeraa yakkaa, lak.1ffaa, kwt. 572.*

²⁵ Dambii Geejjibaa Naannoo Oromiyaa Irra-deebiidhaan Murteessuuf bahe lak.143 /2004, kew.104(1).

qabne kan hindabalanne yoo ta'ellee yaadni kun tumaalee dambichaa adda addaa fi yaada kwt 572 waliin xiinxalamee hojjiraa ooluu kan qabu dha. Dambicha gadi fageenyaan yommuu ilaallu namni hayyama ga'uumsa konkolaachisummaa mirkanaa'e osoo hin qabaatiin konkolaachisu kamiyyuu akka konkolaachisaatti fudhatamee balleessaa konkolaachisaa sadarkaa 2^{ffaa} jalatti kan gaafatamuu akka ta'e dambicha irratti haala ifa ta'een tumameera.²⁶ Kanaaf, mirkaneessa ga'uumsa konkolaachisaa qabaachuufi qabaachuu dhabuun balleessummaa ilaalchisee garaagarummaa kan hin uumne akka ta'e kan mul'isudha.

Imalootni konkolaataa yommuu yaabbatan nama konkolaataa qabate konkolaachiisaadhaa jedhanii tilmaamuun tajaajila inni kennu fayyadamuun alatti, namni sun mirkaneessa ga'uumsa konkolaachisaa qabaachuufi qabaachuu dhabuu isaa sirni ittiin qulqulleessuu danda'an waan hinjirreef seerichi dirqama ogummaan ala dirqama kan biroo haala kanaan kaa'uun balleessitootni akka gaafataman taasiifamuun isaa dhimma filannoo hin qabnee fi baay'ee murteessaa dha. Namni tokko hayyama osoo hin qabaatiin konkolaataa qabatee konkolaachisuun lubbuu namaa irratti miidhaa kan dhaqqabsiise yoo ta'e kwt.543(2) jalatti firiwwan dubbii yakkicha hundeessan keessaa dirqama kan biroo isa jedhu kan guutu waan ta'eef keewwatni 543(2, 3) hojiirra akka hinoolle sababni daangeessu hin jiru. Namni haala kanaan yakka raawwatu, gochicha yommuu raawwatu dambii ifa ta'e cabsuun waan ta'eef ulaagaa keewwata 543(2) ala ulaagaa keewwata 543(3) jalatti caqafaman keessaa inni tokko “*dambii ifa ta'e cabsuu*” dabalataan guuttamee waan argamuuf seera yakkaa keewwata 543(3) jalatti kan gaafatamu ta'a.

²⁶Akkuma lak.25ffaa, Miltoo A, Lakk-78.

Seerichi haala armaan olitti ibsameen hubatamee hojiirra ooluu kan qabu yoo ta'eltee, hubannoo fi hojimaatni qabatamaan raawwattoota qaamolee haqaa barruu biratti mul'atu faallaa fakkaata. Itti aansuun, rakkoolee kanneen agarsiisuu kan danda'an dhimmoota lama walduraa duubaan haa ilaallu.

Dhimma isa 1ffaa keessatti himatamaan tumaa Dambii Geejjibaa Naannoo Oromiyaa lak.143/2004 kwt.104(1) fi Seera Yakkaa kwt.543(1) bira darbuun hayyama konkolaachisummaa osoo hin qabaatiin daandii bal'inni isaa meetiraa 7.90 ta'e irratti mirga isaa qabatee konkolaachisuu osoo qabuu gara bitaatti meetira 5.40 seenee miidhamtuu (duutuu) tti buusee waan ajjeeseef himatame. Manni Murtii Ol'aanaa dhimmicha ilaale himatamaa kana keewwatuma itti himatame jalatti balleessaadhaa jechuun murtesseera.²⁷

Dhimma 2ffaa keessatti himatamaan Dambii Geejjibaa lak.143/2004 kwt.44, 46 fi 100 fi Seera Yakkaa keewwata 543(3) bira darbuun hayyama konkolaachisummaa osoo hin qabaatiin mootarsaaykili lakkoofsa gabatee hin qabne ariiti cimaadhaan osoo konkolaachiisuu lafoo deema rukutuun waan ajjeesseef himatame. Manni Murtii Ol'aanaa dhimmicha ilaale murtii kenneen ragaan abbaa alangaa bu'uura himannaa isaatiin kan raagaan yommuu ta'u, ragaan ittisaa himatamaa immoo jecha ragoota abbaa alangaa cimsuun alatti wanti himatamaarraa ittisan hin jiru jedheera.²⁸ Dabalataanis, *“keewwatni abbaan alangaa caqasan seera yakkaa kwt.543(3), kwt.543(2) waliin kan walqabatuu fi waliin duubbifamu yoo ta'u bu'uura kew.543(2) tiin ogeessa kan jedhamu konkolaachiisa yoo ta'u, konkolaachisaan ammoo akkaata*

²⁷ A/Alangaa fi Tasfaayee Kabbadaa, L. G. Mana Murtii Ol'aanaa G/Jimmaa, 26691

²⁸ Abbaa alangaa fi Anuwar Badiruu, L.G. Mana Murtii Ol'aanaa G/Jimmaa 26819.

dambii Geejjibaa Naannoo Oromiyaa lak.143 /2004 kew.4' tiin nama hayyama konkolaachisummaa qabu dha. Kanaaf, namni akkaata kwt.543(3) tiin himatamu nama hayyama konkolaachisummaa qabuu fi dambii ifa ta'e darbuun nama balaa geessise waan ta'eef, himatamaan ammaa immoo nama hayyama konkolaachisummaa qabu waan hintaaneef gochi himatamaan raawwate Seera Yakkaa kwt.543(3) jalatti kan kufu miti'' jechuun himannaa dhiyaate bu'uura Seera Deemsa Falmii Yakkaa kwt.113(2) tiin gara tumaa Seera Yakkaa kwt.543(1)tti jijjiruun murtii balleessummaa kenneera.

Dhimmoota qabatamoo armaan oliirraa waanti ifatti mul'atu akkaataa abbaan alangaa himannaa itti dhiyeessee jiruu fi abbaan seeraa murtii balleessummaa itti kennaa jiran hanqina kan qabu akka ta'e dha. Galmeewwan kana keessatti himatamtootni kunneen gochaa fi badiin isaan raawwatan kan wal fakkaatu yoo ta'ellee, sababa hubannoo fi hojjiimaata abbaa alangaa fi abbaa seeraa irraa kan ka'e yakkamtoonni kun keewwatoota adda addaa jalatti akka himataman taasiisuun, akkasumas keewwata sirrii yakkamaan itti himatamee gara keewwata sirrii hin taaneetti jijjiruun isaan gidduutti garaagarumman akka uumamu taasifameera.

Kunis dhimma isa jalaqabaa yommuu ilaallu ka'uumsa irraa akkaataan abbaan alangaa himannaa itti bu'uuresse rakkoo kan qabu dha. Kunis, namni kamiyyuu hayyama mirkaneessa ga'uumsa konkolaachisaa osoo hin qabaatiin konkolaataa kamiyyuu konkoolachisuu kan hin dandeenye akka ta'ee fi kana bira darbuun lubbuu namaa irratti miidhaa kan dhaqqabsiise yoo ta'e immoo haala armaan olitti ibsameen himatamaan dirqama ogummaa yoo qabaachuu baateellee, itti gaafatamummaa gocha balaaf nama saaxilu inni raawwateerraa

maddu waan qabuuf, akkasumas gochicha kan raawwatee dambii cabsuun waan ta'eef keewwata 543(3) jalatti gaafatamuu osoo qabu keewwata 543(1) jalatti himachuun sirrii miti. Kana malees, abbaan alangaa mata duree himannaa irratti seera yakkaa kwt.543(1) fi dambii geejjibaa lak.143/2004 kwt 104(1) walqabsiisuun maaliif akka dhiyeesse ifa miti. Sababni isaas firii dubbii Seera Yakkaa kwt.543(1) jalatti gochoota dambii darbuu jedhamani dambii geejjibaa keessatti caqafaman waliin walitti dhufeenya tokkollee kan hin qabne akka ta'e keewwaticha irraa hubachuun ni danda'ama.

Gara ijoo xiinxala dhimma 2^{ffaa}tti yommuu ceenuu, ragaan abbaa alangaa bu'uura himannaa dhiyaateen kan mirkaneessan ta'uu isaanii manni murtichaa kan itti amane yoo ta'ellessa namni akkaata kwt.543(3)tiin himatamu nama hayyama konkolaachisummaa qabuu fi dambii ifa ta'e darbuun balaa geessisedha jechuun kwt.543(3) gara 543 (1)tti jijjiruun isaa tumaalee seera yakkaa keewwata 543, 572 fi dambii geejjibaa lak.143 /2004 kew.104(1) hubatanii hojiirra oolchuu dhabuun walqabatee rakkoon seerota kanneen hubachuun hojiitti hiikuu gama mana murtiin jiraachuu isaa kan agarsiisudha.

Akkuma olitti ibsuuf yaalame dirqamni keewwata 543(2) jalatti argamu dirqama ogummaa qofa osoo hin taane, dirqama biroos kan dabalatu dha. Namootni hayyama mirkaneessa ga'uumsa konkolaachisummaa osoo hin qabaatiin konkolachiisuu akka hin qabne dambii geejjibaa irraa tumamuun isaa kaa'uumsa irra namootni ga'uumsa gahaa osoo hin qabaatiin konkolaachisan lubbuu, fayyaa fi qabeenya nama miidhaaf saaxiluun rakkoo cimaa ta'e dhaqqabsiisuu kan danda'an akka ta'e waan hubatameefi dha. Kanaaf, seera yakkaa keessatti gocha raawwatame dirqama kan biroo fi dambii ifa ta'e

cabsuun kan raawwatame yoo ta'e keewwata 543(3) jalatti akka nama gaafachiisu tumameera.²⁹ Ragaan dhiyaates gochichi haalawwan firii dubbii keewwata abbaan alangaa caqaseen kan raawwatame akka ta'e osoo ibsaa jirani keewwatichaaf hiikkoo sirrii hin taane kennuun gara keewwata 543(1) jijjiiruun isaa deeggarsa seeraa kan hin qabnee fi gonkuma kan nama amansiisu miti.

1.1.3. Lafoo Deemtota Ilaalchisee

Lafoo deemtota bitaafi mirga isaani osoo hin qulqulleessii karaatti seenuun ykn daandiin lafoo deemtota osoo jiruu daandii konkolaataatti seenuun yookin qaxxaamuruun yookin karaa isaaniif hayyamameen ala fayyadamuun rakkoo qabatamaan mul'atu dha.³⁰ Gochi isaanii kun sochii daandii dhiphisuun namoota balaaf saaxiluu bira darbee konkolaattota gidduutti, akkasumas konkolaataa fi lafoo deemtoota gidduutti walitti bu'iinsa uumuun lubbuu, fayyaa ykn nageenya namaa irratti miidhaa qaqqabsiisuu ni danda'a. Kanaaf, gocha haala kanaan raawwatamuun namni kan du'ee yoo ta'e, ka'uumsa gochichaa kan ta'e lafoo deemaan gaafatamuu akka qabu seerichi ni akeeka.³¹

Seera yakkaa keessatti dagannoon nama ajjeesuun walqabatee keewwatoota tumaman irraa dambii geejjibaa cabsuun gocha lubbuu namaa balaaf saaxiluu

²⁹ Bara 2006 A.L.I kurmaana 1^{ffaa} keessatti qofa galmeelee armaan olitti caqafaman dabalate G/Jimmaatti galmeewwan Lakk-26643, 26685, 26712; G/Sh/Bahaatti galmee Lakk- 161789*; fi G/Arsiitti Galmee Lakk-161888* fi Godinaa Harar Lixaatti Galmee Lakk-160649* ta'an irratti rakkoowwan wal-fakkata ta'e kan mul'ate akka ta'e sakkataa'insa galmeewwan irratti gaggeeffameen hubachuu danda'ameera.

³⁰ Akkuma lak.25ffaa, kwt 98 fi balleessaawwan lafoo deemtoota itti adabaman ilaaluun gochootni lafaa deemtootaaf hin hayyamamne maalfaa akka ta'an hubachuu ni danda'ama.

³¹ Lafoo deemaan haala kanaan dirqama akka fudhatu taasiisuun biyya keenya keessatti seera adaba yakkaa keessatti kan hin turreefi yaada haaraa seera yakkaa kwt.572(2) jalatti akka haammatamu taasifame dha.

fi sababa gochichaatiin lubbuu namaa irra miidhaa geessisuun lafoo deemaa kamiyyuu kan ilaallatu yoo ta'ellee, ogeessotni qaamolee haqaa naannoo keenyaa yaadaa fi kaayyoo seerichaa hubachuun yeroo hojjiitti hiikan hin mul'atu. Seerichi haala kanaan tumamuun isaa ka'umsa yakkichaa gocha lafoo deemtotaatiin raawwatamu waan ta'eef karaa tokkoon lafoo deemtotni gochoota dagannoon lubbuu, qabeenya ykn qaama namaa irratti miidhaa dhaqqabsiisuu danda'an irraa akka of qusatan taasisuuf yommuu ta'u, karaa biraatiin balleessaa ta'ani yoo argaman immoo isaan adabuudhaan gocha wal fakkaatu raawwachuu irraa akka of qusatani fi lafoo deemtota biroo akeekkachiisuuf yoo ta'ellee; qabatamaan seerichi haala barbaaduun yommuu hojjatamu hin mul'atu.

Muuxannoo qabatamaa naannicha keessa jiruun dhimmoonni wal fakkaataa akkanaa kun yeroo quunnaman abbaan alangaa fi qorataan poolisii dhimmicha kallattii lafoo deemtotaatiin xiinxaluun himannaa dhiyeessuurra, galmee qorannoo shakkamtootaa kallatti konkolaachiisaatiin qofa madaaluun ragaan shakkamaa himachiisuu danda'u hin jiru jechuun galmee shakkamtoota bu'uura S/D/F/Y kwt.42 tiin ni cuufuu.³² Adeemsi kun firii dubbii seerichaan kaa'amerraa kan baay'ee maqee fi qaamoleen haqaa naannicha (keessattuu A/Alangaan) seericha hubachuun gara hojjiitti jijjiruuf tattaaffiin taasiisaa jiran gad-aanaa akka ta'e kan hubachiisu waan ta'eef; rakkoo hubannoo kana furuun balleessitootni seeraan akka gaafataman taasiisuun barbaachisaa dha.

³² Marii Garee Abbootii alangaa Godina Jimmaa waliin waajjira isaaniitti gaafa 17/03/2006, A/Alangaa Godina Shawaa Bahaa waliin waajjira isaaniitti gaafa 24/03/2006 gaggeeffameen A/Alangaa galmee haala kanaan dhiyaatu ragaan gahaa hin jiru jechuun kan cufan akka ta'ee fi seericha irratti hubannoo gahaa kan hin qabne ta'uu isaanii kaasaniiru.

1.2. DAGANNOON NAMA AJJEESUUN WALQABATEE RAKKOOWWAN ADABBII MURTEESSUUN WALQABATANII MUL'ATAN

Dagannoon nama ajjeesuun walqabatee adabbii murtaa'u ilaalchisee karaa tokkoon seerichi qaawwaa kan qabu yommuu ta'u, gama biraan immoo manneen murtii keessatti akkaata adabbiin itti murtaa'u rakkoo irraa bilisa miti. Keessattuu adabbiin kwt.543(1)f tumame adabbii miidhaa qaamaa cimaa dagannoon raawwatamu (kwt.559(2)) waliin yommuu madaallamu gama seerichaatiin qaawwa jiraachuu isaa haala salphaa ta'een addaan baasuu ni danda'ama. Namni keewwata 543(1) jalatti balleessaa jedhamuun adabbii hidhaa salphaa ji'a 6 hanga waggaa 3 ykn adabbii maallaqaa qarshii 2000 hanga 4000 gahuu danda'uun kan adabamu yommuu ta'u, namni keewwata 559(2) jalatti balleessaa jedhamu garuu adabbii hidhaa salphaa ji'a 6 gadi hin taanee fi adabbii maallaqaa qarshii 1000 gadi hin taaneen kan adabamu ta'a.

Adabbiwwan keewwattoota lameen jalatti teechifaman garaagarummaa guddaa kan qaban yommuu ta'an, adabbiin keewwata 559(2) jalatti tumame adabbii dirqisiisaa gad-aanaa (mandatory minimums) waan ta'eef Manni murtii haalawwan sababoota waliigalaa adabbii salphisu danda'an kaminiyyuu fayyadamee daangaa adabbii gad-aanaa keewwaticha jalatti tumameerra gadi bu'uun adabbii salphisuu kan hin dandeenye yommuu ta'u, adabbiin kwt.543(1) jalatti tumame garuu dirqisiisaa gad-aanaa waan hintaaneef manni murtii sababoota kanaan fayyadamee adabbii gad-aanaa keewwaticha jalatti tumamerra gadi bu'uun hanga adabbii gad-aanaa kutaa waliigalaa seerichaa keessatti tumametti gadi-buusuun murteessuu ni danda'a. Kana malees, keewwata 543(1) jalatti adabbiin maallaqaa adabbii hidhaaf akka filannootti

kan tumame yommuu ta’u, keewwata 559(2) jalatti garuu adabbiin maallaqaa adabbii hidhaa waliin kan murtaa’u dha. Kun ifatti kan agarsiisu keewwatoota kana cimina isaan qabaniin yommuu madaalaman miidhaa qaama cimaa dagannoon raawwatamurra, ajjeechaan dagannoon raawwatamu cimaa yoo ta’ellee adabbiin keewwata 559(2) tiif tumame kan keewwata 543(1)f tumameerra cimaa akka ta’e dha. Kun immoo yakkamtootni dagannoon nama irratti miidhaa cimaa erga qaqqabsiisan booda miidhamaa lubbuun dhiisuurra, yakkicha hanga dhumaatti hordoofuun dagannoo fakkeessuun ajjeechaa akka raawwatan kan isaan jajjabeessu ta’a. Kanaaf, rakkoon seericha keessatti mul’atu kun dhimma furmaata argachuu qabu waan ta’eef gara fuula duraatti seerichi yommuu fooyya’u seera baastuun dhimma kanaaf furmaata kaa’uu qaba.³³

Yakki kun dagannoon kan raawwatamu waanta’eef manneen murtii dagannoon yakkamaan qabu kan beekkamuu (advertent negligence) ykn kan hin beekkamne (inadvertent negligence) ta’uu isaa addaan baasuun; bifa garaagarummaa isaanii yaada keessa galcheen adabbii murteessuu qabu. Kana malees, yeroo tokko tokko miidhamaan raawwatamuu yakkichaatiif hirmaannaa qabaachuu kan danda’u waan ta’eef, adabbii murtaa’u keessatti dhimma kana yaada keessaa galchuun barbaachisa dha.³⁴ Haata’u malee, Manneen murtii tokko tokko keessatti keewwata kanaan walqabatee adabbiin

³³ Garaagarummaa seerichaan uumame irraa kan ka’e keewwatoota lameen gidduutti adabbiin murtaa’u garaagarummaa guddaa akka qabaatu kan taasifame akka ta’e qajeelfama adabbii Itoophiyaa Lakk-2/2006 fuula 38 fi 47 ilaaluun hubachuu ni danda’ama.

³⁴ Fiigee itti seenu, karaa sibilaan cuufameefi saffisaan itti deemamuu qaxxaamuruun (የቀለበት ሙንገድ ውስጥ ገብቶ መሞት) fi k.k.f akka hirmaannaa miidhamaatti fudhachuun adabbii irratti garaagarummaa uumuu ni danda’ama.

murtaa’u kaayyoo fi yaada seerichaa kan hin hordoofnee dha. Dhimmootni itti aanuun dhiyaatan rakkoo gama kanaan jiru ni agarsiisu.

Dhimma isa 1^{ffaa} keessatti abbaan alangaa himatamaa Fallaqa Sibhaatuu jedhamu (lak.galmee 24745 ta’e irratti) seera yakkaa kwt.543(2) darbuun dagannoon nama ajjeese waan argameef kan himatame yommuu ta’u; Manni Murtii Ol’aanaa G/Sh/Ki/Lixaa falmii bitaaf mirga irraa dhiyaate dhagahuun himatamaa keewwatuma itti himatame jalatti murtii balleessummaa kennuun adabbii ilaalchisee “qajeelfama adabbii hordofuu osoo hin barbaachifne” jechuun hidhaa salphaa guyyaa 10 (kudhan) fi adabbii maallaqaa 3,000.00 (kuma sadii) tiin akka adabamu erga murteesse booda adabbichaa daanga waggaa lamaatiin daangeessuun ajaja dabalataa tokko malee galmee cuufeera.

Dhimma 2^{ffaa} keessatti himataan Abbaa alangaa himatamaan Abdulnaasiir Sammaan jiddu seera yakkaa kew.543(3) bira darbuun konkolaata Ayisuuzii uummataa osoo konkolaachisaa jiruu of-eegannoo isa irraa eegamuu gochuu dhabuun konkolaaticha garagalchuun imaltoota konkolaata keessaa turan keessaa namoota sadii dagannoon waan ajjeesseef himanna dhiyaate dha. Manni murtii Ol’aanaa Godinaa Shawaa Bahaa (lak.galmee 3873) falmii bitaafi mirga irraa dhiyaate erga ilaalee booda himatamaa keewwata itti himatame jalatti balleessaa taasisuun duuchumaan gochi himatamaan raawwaate sadarkaan isaa gad-aanaadha jedhee adabbii hidhaa salphaa baatii 6 (jahaa) fi maallaqaa 10,000 (kuma kudhan) tiin akka adabamu murteesseera.

Dhimma 1ffaa ilaalchisee yaada keewwata yakkamaan balleessaa itti jedhame irraa akka hubatamu manni murtii adabbii hidhaa salphaa waggaa tokkoo hanga waggaa shanii gahuu danda’uufi adabbii maallaqaa qarshii kuma sadii

hanga kuma jahaa gahuu danda’u murteessuu ni danda’a. Kana malees manni murtii sababoota adabbii salphisuun fayyadamee hanga adabbii gad-aanaa keewwata 179 keessatti ibsameen adabbii salphisuu ni danda’a. Haala manni murtii kun adabbii itti murteesse yommuu ilaalluu garuu adabbichi duuchumaan kan murtaa’e waan ta’eef adabbiin murtaa’e haala kamiin salphatee akka murtaa’e galmicha irraa hubachuu hin danda’amu. Dabalataan, adabbii ka’uumsi isaa hidhaa cimaa waggaa tokkoo ta’e yommuu salphiisu adabbii hidhaa salphaa ji’a jahaa gadi adabbii murteessuu kan hin danda’amne akka ta’e seerichaan tumamee osoo jiru, adabbii gad-aanaa seerichaan tumameerraa gadi bu’uun adabbii murteessuun isaa dogoggora biroo Manni murtiichi dhimmicha irratti raawwate dha.³⁵

Haala walfakkaatuun dhimma 2^{ffaa} ilaalchisee manni murtichaa bu’uura keewwata kanaatiin adabbii salphisuu akka danda’u seeraan kan tumame yommuu ta’u adabbii salphisuun barbaachisaa ta’ee yommuu argu, kutaa addaa seerichaa keessatti ka’umsi adabbii hidhaa cimaa olka’ee tumamee yoo jiraate, bakka adabbii kanaa kutaa waliigalaa seerichaa keessatti ka’umsa ta’ee kan tumame waggaa tokko irraa eegalee adabbii hidhaa cimaa murteessuu akka danda’uu fi haala kamiiniyyuu adabbii kanaa gadii murteessuu akka hin danda’amne seerichaan tumame osoo jiru,³⁶ manni murtichaa yakka hidhaa cimaa waggaa 5 (shan) hanga waggaa 15 (kudha shan) gahuu danda’uun adabsiisuuf sababoota waliigalaa adabbii salphisuun fayyadamee yakkamaan adabbii hidhaa salphaa baatii 6 (jahaan) akka adabamu murteessuun isaa

³⁵ *Seeraa yakkaa, oliti yaadannoo lakk. 1ffaa, kwt. 179(1D).*

³⁶ *Akkuma 35ffaa, kwt. 179(1C).*

murtiichi dogoggora bu'uura seera kan qabu akka ta'e kan mul'isu dha.³⁷ Walumaagalatti dhimmoota qabatamoo 1^{ffaa} fi 2^{ffaa} irraa kan hubatamuu manneen murtii kun wanta qabatamaa seerichaan tumamerraa maquun haala kanaan murtii adabbii kennuun isaanii dogonggoora bu'uuraa seeraa yommuu ta'u, rakkoon wal fakkaata manneen murtii naannoo keenyaa keessatti bal'inaan waan jiruuf dhimmoota kanarraa barachuun barbaachisaa dha.

Adabbii yakka dagannoo ajjeechaan murtaa'uun walqabatee qabatamaan rakkoo manneen murtii keessatti mul'atu inni biraan akkaata adabbii osoo hin murteessiin itti tursiisanii fi erga adabbiin murtaa'e booda akka hin raawwatamne ittiin dhorkamu dha. Yakkichi akka raawwatamu dhimmoota sababa ta'an hunda ilaaluun, adabbii balleessicha irratti murtaa'e yeroof daangaan akka dhorkamu gochuun amala yakkamtichaa sirreessuufi fooyyessuuf, jireenya hawaasummaa idileetti deebisuuf kan fayyaduu danda'u ta'uu isaa manni murtichaa kan mirkaneesse yoo ta'e adabbii daangaan dhoorkuu ni danda'a. Haata'u malee akkaataa adabbiin itti daanga'aa jiru seericha waliin yommuu ilaallamu raawwiin isaa rakkoo kan qabu dha. Rakkoon kun dhimmoota adda addaa irratti kan calaqqisu yoo ta'ellee, yakka ajjeechaa dagannoon lubbuu namaa irratti raawwataman walqabatee bal'inaan ni mul'ata.³⁸

Seera yakkaa keessatti yakkamaa irraa adabbiin daangeefamee yeroo qormaataa waggaa 2 hanga waggaa 5 keessatti amallii fi gochi isaa madaallamee haalli adabbiin itti dhiifamuufi danda'u lamatu jira. Inni

³⁷ *Akkuma 36ffaa, kwt.* 179(1C) fi 180.

³⁸ Sababoota adda addaa irraa kan ka'e adabbiin akka daanga'u seerichaan hayyamamuun isaa kaayyoon seerichaa inni guddaan yakkamtoota adabuu osoo hin ta'iin, isaan barsiisuu irratti kan xiyyeeffate akka ta'e kan agarsiisu dha.

jalqabaa, manni murtii murtii balleessummaa erga kennee booda adabbii osoo hin murteessiin yeroo qormaataa murtaa'e kennuun murtii balleessummaa yakkamaa daangessuu dha. Manni murtii murtii akkasii kennuu kan danda'u yakkamtichi kanaan dura yakkaan kan hin adabamne ta'ee amalli isaa balaafamummaa akka hin qabne yoo itti amaname; badiin isaa adabbii maallaqaatiin, hojii dirqamaatiin ykn hidhaa salphaa waggaa 3 hin caalleen kan adabsiisu yoo ta'e qofa dha. Kana malees, manni murtii yakkamaan kun amalli isaa nageenya hawaasaaf kan hin sodaachisne ta'uu fi yeroo qormaataa keessatti haalli isaa yoo hordofamee sirraa'uu kan danda'u ta'uun isaa yoo itti amanamee kan raawwatamuu akka ta'e keewwata 191 jalatti tumameera. Qormaatichi bu'aa gaarii kan argamsiise yoo ta'e, murtichi akka hin turretti lakkaa'ama.

Akkaataa adabbiin itti daangeffamuu danda'u inni biraan immoo, manni murtii murtii balleessummaa fi adabbii erga murteessee booda adabbicha raawwachiisuuf yeroo qormaataa yakkamtichaaf kennuun carraa kanaan amallii fi fooyya'iinsi yakkamtichaa ilaalamee raawwiin murtii adabbii isaa daangeffamee itti hafu dha. Raawwiin murtii adabbii haala kanaan daangeffamu ykn hafu murtii balleessummaa daangessuu irraa kan adda isa taasiisu qormaatichi bu'aa gaarii kan argamsiise yoo ta'ellee, maqaan yakkamaa galmee yakkamtoota irraa hin haqamu.

Manni murtii adabbiin murtaa'e akka hin raawwatamne kan dhoorku balleessichi amala gaariidhaan akka qajeelfamu, dirqama akka raawwatuuf kennameef akka fudhatu, akkasumas karaa danda'ame hundaan miidhaa balleessaa isaatiin geessiseef beenyaa akka kaffaluu fi yeroo murtaa'e keessatti

baasii mana murtichaa akka kaffalu mirkaneessa erga kennee booda ta'uu akka qabuu seera yakkaa keenya keewwata 197(1) jalatti tumameera. Kana malees, manni murtii raawwii dirqamaa seeneef wabii amansisaa tokko akka seenu ni dirqisiisa. Wabiin kunis haala dubbichaa fi hamma dandeettii balleessichaa waliin ilaallame kan ajajamudha. Haata'u malee, manneen murtii naannoo keenyaa keessatti argaman haalli adabbii yakkamaa irratti murtaa'e itti daangessaa jiran akkaata seerichaan tumameen ulaagaaleen guuttamuu qaban guuttamuu isaanii erga mirkaneessan booda osoo hin ta'iin, ulaagaalee seericha keessatti kaa'aman osoo hin guuttamiin adabbii daangeesuun yakkamtoota kan gadi dhiisaa jiran akka ta'e galmeewwan haala kanaan murtii argatan irraa hubachuun ni danda'ama.

Dhimma qabatamaa Mana Murtii Olaanaa Godina Shawaa Bahaatti ilaalame tokko keessatti himatamaan Salamoon Zannabaa seera yakkaa kew.543(2) bira darbuun konkolaataan daguu nama waan ajjeeseef himateera. Manni murtichaa falmii bitaaf mirga irraa dhiyaatee kana (lakk.Galmee 31451 ta'e irratti) erga dhagaahaa booda himatamaan keewwata itti himatame jalatti balleessaa qaba jechuun adabbii hidhaa waggaa 1 (tokko) fi maalaqaa kuma sadiitiin (3000) akka adabamu murteesseera. Adabbii kana erga murteesse booda adabbii hidhaa ilaalchisee yakkamaan kun balleessaa inni raawwate dagannoon ta'uu isaa fi yeroo gocha kana raawwate miidhamaaf gargaarsa gochuu isaa yaada keessaa galchuudhaan adabbiin kun irratti raawwatamuurra yoo daangeffameef kan isa barsiisuu danda'u dha jechuun bu'uura tumaa seera

yakkaa kwt.196 (2) tiin adabbiin irratti murtaa'e kun waggaa lamaaf akka daangeeffamu murteessuun, ajaja dabalataa tokko malee galmee cuufeera.³⁹

Dhimma kana irraa akka hubatamuutti Manni murtii adabbii yakkamaa tokko irratti murtaa'e akka isaaf daanga'u kan ajaju yakkamaan sun amala gaariidhaan kan qajeelfamu, ajaja mana murtii irraa isaaf darbu kan raawwatu ta'uu isaa; akkasumas, karaa danda'u hundaan miidhamtootaaf beenyaa barbaachisuu fi baasii mana murtii kan kaffalle yookiin kanffalu ta'uu isaatiif waadaa akka galu erga taasiisee booda ta'uu akka qabu keewwata 197 jalatti kan tumamee yoo ta'ellee, manneen murtii ulaagaalee kana cinaatti dhisuudhaan adabbii hidhaa duuchuumaan daangessaa jiru. Kanaafuu, ajjeechaa dagannoo lubbuu namaa irratti raawwatamu ilaalchisee akkaataan adabbiin itti daanga'aa jiru firiiwwan dubbii seerichaa irratti kaa'amerraa kan maqe waan ta'eef itti yaadamuu qaba.

1.3. YAADA GUDUUNFAA FI FURMAATAA

Akkuma beekamu kaayyoon seera yakkaa biyya keenyaa fayidaa waliigalaatiif jecha nageenya, tasgabii, sirna, mirgootaa fi faayidaawwan uummattootaa fi jiraattota biyyattii eeguufi mirkaneessuu dha. Yaadni kun hojiirra ooluu kan danda'u immoo qaamoleen haqaa firii dubbii seericha keessatti kaa'aman irratti hundaa'uun nama balleessaa jedhamuu qabu balleessaa taasisuun yoo danda'ame, nama balleessaa jedhamuu hin qabne immoo bilisaan gaggeessuun yoo danda'mee fi yakkamtoota irratti adabbii sirrii fi madaalawaa ta'e yoo murteessuu danda'an qofaa dha.

³⁹ Rakkoon kun dhimma Abbaan alangaa v Fallaqa Sibhaatuu, L.G. 24745 armaan olitti xiinxalame keessattis ni mul'ata.

Ogeessotni qaamolee haqaa naannichaa firiiwwan dubbii seera yakkaa keewwata 543 jalatti argaman sirritti hubatanii hojjachuun kaayyoo fi yaada seerichaa galmaan gahuuf itti gaafatamummaa olaanaa kan qaban yoo ta'ellee, ogeessotni qaamolee haqaa tokko tokko itti gaafatamummaa isaaniif kenname kana akka barbaadametti yeroo bahan hin mul'atan. Dhimmoota qabatamoo armaan olitti xiinxalaman irraa kan hubatamus gama tokkoon namootni firii dubbii keewwatacha keessatti kaa'ameen ala kan himatamaa fi adabamaa jiran yommuu ta'u, gama biraatiin immoo bu'aa bahii hedduu booda yakkamtoota keewwata sirrii ta'e jalatti balleessaa jedhaman irratti akkaataan adabbiin itti murtaa'u rakkoodhaaf kan saaxilame ta'uu isaati.

Yakki ajjeechaa dagannoon raawwatamu fayidaa hawaasa waliigalaa irratti balleessaa raawwatamu akka ta'e yaadni waliigalaa yoo jiraates, qabatamaan nama kamiyyuu caalaa miidhaan miidhamtoota irra gahu ol'aanaa dha. Keessattuu namni tokko keewwata gochaa isaa madaaluun alatti kan himatamu ykn balleessaa jedhamee adabamuu yoo ta'e, miidhamtoota irratti rakkoo hawwasummaa fi diinagdee qaqqabsiisuun alatti xiinsamuu isaanii irratti miidhaa olaanaa hordoofsiisu danda'a. Rakkoon hojimaataa qaamolee haqaa keenya biratti gama kanaan mul'atu haaluma kanaan kan itti fufu yoo ta'e mirgii fi fayidaan hawaasaa, miidhamtootaa fi yakkamtootaa gama diinagdeefi hawaasummaan kan miidhamu waan ta'eef amanamummaan bulchiinsa sirna haqa yakkaa naannichaa gaaffii keessa kan galu ta'a.

Maddi rakkoolee kanaa firiiwwan dubbii seera yakkaa kwt. 543 jalatti kaa'aman, akkasumas firiiwwan dubbii kana keewwatoota seera yakkaa biroo fi qajeelfama fi dambilee adda addaa waliin walitti dhufeenya qaban haalaan

hubatanii hojiirra olchuun walqabatee ogeessota seeraa jidduutti garaagarummaan guddaa ta'e waan jiruufi dha. Kana malees, adabbiin gocha yakkaa keewwata 543(1) tiif tumame kan keewwata 559(2) jalatti tumame waliin yommuu xiinxalamu gama seerichaatiinis rakkoon jiraachuun isa ni hubatama.

Walumaagalatti, himanni dhiyaatus ta'e murtiin balleessummaa kennamu haala barruu kana keessatti ibsameen tokkoon tokkoon firiwwan dubbii keewwaticha jalatti argaman xiinxaluun yaadaa fi kaayyoo seericha gidduugaleessa kan godhate ta'uu qaba. Rakkoollee qabatamoo armaan olitti xiinxalaman furuun kan danda'amus ogeessotni qaamolee haqaa naannichaa tokkummaa fi garaagarummaa haalawwan yakkicha hundeessuuf seera yakkaa keewwata 543 kwt xiqqaa 1-3 jalatti tumaman akkasumas walitti dhufeenya firiwwan dubbii keewwatichaa tumaalee seera yakkaa biroo, qajeelfamootaa fi dambiilee adda addaa waliin qaban hubatanii hojiitti hiikuu akka danda'an yoo taasifame dha.

Himatamtoota yakka dagannoon nama ajjeesuutiin balleessaa jedhaman irrattis adabbii sirriifi walfakkaataa ta'e murteessuun akkaataa itti danda'amu irratti xiyyeeffachuun ogeessota qaamolee haqaa naannichaaf leenjii kennuun qaamolee kana gidduutti hubannoo walfakkaataa ta'e uumuun bulchiinsa sirna haqa yakkaa naannoo keenyaa fulduratti tarkaanfachiisuuf hojjachuun dhimma murteessaa fi booruuf hin jedhamne dha.

Kana malees, adabbiin ajjeechaa daguu keewwata 543(1) jalatti tumame adabbii miidhaa qaama cimaa dagannoon raawwatamu keewwata 559(2) jalatti tumame waliin yommuu madaalamu baay'ee kan xiqqaatuu fi

yakkamtootni dagannoon nama irratti miidhaa cimaa erga qaqqabsiisan booda miidhamaa lubbuun dhiisuurra yakkicha hanga dhumaatti hordoofuun dagannoo fakkeessuun ajjeechaa akka raawwatan kan isaan jajjabeessu waan ta'eef seerichi gara fuula duraatti yommuu fooyya'u rakkoo kana bifa furuu dandaa'uun adabbii keewwaticha jalatti tumame sirreessuun barbaachiisa dha.

BIGAMOUS MARRIAGE AND THE DIVISION OF COMMON PROPERTY UNDER THE ETHIOPIAN LAW: REGULATORY CHALLENGES AND OPTIONS

Jetu E. Chewaka*

INTRODUCTION

The practice of bigamous marriage in rural and urban Ethiopia is deeply rooted in religious and customary practices. According to the Ethiopian Demographic and Health Survey Report of 2011 (EDHS), eleven percent of married women in Ethiopia are in bigamous marriage, with nine percent having only one co-wife and two percent having two or more co-wives.¹ Similarly, five percent among the married men in Ethiopia live as a bigamous marriage having two or more wives.² Despite its prevalence, however, the practice of bigamy is prohibited under the Family and Criminal Code of Ethiopia. Though the prevalence of bigamous marriage in developed countries is defended on the basis of the right to religion and culture,³ the socio-economic justification for its prevalence is stronger and more felt in developing countries such as Ethiopia. Particularly, given the low economic

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¹Ethiopia Demographic and Health Survey, 2011, Central Statistical Agency Addis Ababa, Ethiopia ICF International Calverton, Maryland, USA March 2012. [Hereinafter Ethiopia Demographic and Health Survey 2011].

² Ibid.

³ See Martha Bailey and Amy J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy*, (USA: 2010), p. 7.

and educational status of women in rural area, the likelihood of contracting bigamous marriage would inevitably be high. Therefore, the idea that bigamous marriage is an affront to gender justice and equality hitherto remains a paradox. As such, an attempt to legally prohibit bigamous marriage has laid bare the legal status of women in bigamous family unit due to lack of specific regulatory option that would be contemplated to address matters that relates to dissolution and division of common property.

The purpose of this paper is, therefore, to provide an insight into the legal principles that ought to be contemplated in regulating dissolution of bigamous marriage and the division of common property. Given the prevalence of bigamous marriage practice in Ethiopia, the paper argue that the regulation of dissolution of bigamous marriage and division of common property requires the weighing of the rebounding effects of either legalizing or prohibiting bigamous marriage on the rights of bigamous spouses. The paper further contends that bigamous marriage in Ethiopia, if remains unregulated, generates specific costs and vulnerabilities, as well as opportunities for exploitative and opportunistic behavior.

Against the above backdrops, this article intends to address the following two major questions. First, given the prevalence of bigamous marriage practice in Ethiopia, what will happen to the effects of a bigamous marriage where its practice is criminalized and its recognition denied on what so ever grounds? Second, what additional steps are contemplated to fully regulate the effects of bigamous marriage in case where polygamy is criminalized but yet recognition is imposed for the purpose of granting relief? Alternatively, what appropriate

and alternative legal principles could Ethiopian courts seek to address the puzzle of common property division in bigamous marriages absent specific and clear legal regime to be contemplated?

In order to address these questions and other interrelated legal issues, the paper is divided into six major parts. The first part provides general highlights on the meaning and rationalizations of bigamous marriage. Part two examines the legal aspects of bigamy in both human rights and Ethiopian legal contexts. Part three attempts to analyze rules that regulate dissolution of bigamous marriage. It investigates conventional family and general contract law principles including judicial decisions applicable to dissolution of bigamous marriage. Part four analyze appropriate principles and evaluates judicial practices governing the division of common property in case of dissolution bigamous marriage by one of the spouses. This part also looks into the principles enshrined in the conventional Ethiopian family laws and critically examines whether these principles would be applicable to common property division in bigamous marriage in case of its dissolution. Part five juxtapose the jurisprudence of Ethiopian Federal Supreme Court Cassation Division regarding the division of common property in bigamous marriage and the theoretical and legal principles analyzed in the preceding part. The final part provides concluding remarks.

1. DEFINITIONS AND RATIONALIZATIONS OF BIGAMOUS MARRIAGE

The term bigamy refers to “the act of marrying one person while legally married to another.”⁴ As the name indicates the term bigamy connotes the duality of marriage in which a man or women marries another spouse while bound by the previous monogamous marriage. On the other hand, the state of bigamy in which a man and women marries to more than two spouses could be termed as polygamous marriage. Black, in his Law Dictionary, defines the term polygamy as “the state or practice of having more than one spouse simultaneously.” According to this definition polygamy may be considered as “one-marriage-at-a-time if more than one spouse is present simultaneously”.⁵ However, as a plural marriage, polygamy can also be successive “if spouses are married one after the other”.⁶ Hence, it should be noted that, in strict legal terms, polygamy and bigamy have a more specific meaning. Yet, it is very common in the literature to see the term polygamy at times employed as a synonym of bigamy and at other times to indicate simultaneous marriage of two or more spouses.⁷

Another point worth mentioning is that the term polygamy is inclusive of both polygyny and polyandry as the condition or practice of having more than one wife and more than one husband respectively.⁸ In Ethiopian context, polygyny

⁴ Black’s Law Dictionary (8th ed. 2004).

⁵ Marry Ann Glendon, *The Transformation of Family Law* (1989), p. 52.

⁶ *Ibid.*

⁷ Marjorie A. Shields, *Annotation, Validity of Bigamy and Polygamy Statutes and Constitutional Provisions*, *American Law Review*, Vol. 6 No. 1, and 2 (2007), p. 22.

⁸ *Ibid.*

is much more prevalent and it is difficult to find evidence that show the tradition of marriage practice in which a woman is publically married to more than one husband. Likewise, as far as the knowledge of the writer is concerned, the practice of simultaneous polygamy in Ethiopian society is also not observable. Thus, bigamous marriage in Ethiopia could also be used to refer to a polygamous marriage in which a man maintains conjugal relations with more than two spouses forming a single matrimonial entity.⁹ As such, in this paper, the term bigamy and polygamy will be used interchangeably to denote a plural marriage in which a man has more than one women spouse.

The prevalence of bigamy has been also continued to be rationalized mainly based on socio-economic grounds.¹⁰ The social rationalization for the prevalence of bigamous marriage emanates from the widely held belief that bigamy/polygamy “ensures the stability and continuity of the family and clan due to its capability of producing a large family in a given time period.”¹¹ O'Donovan, for instance, noted that “having several wives has been a symbol of power, wealth, and influence in traditional African societies for many

⁹ In Ethiopian Context, it should however be noted that in case of *de facto* dissolution, it may happen that a woman may marry to another man without dissolving the first marriage. In such case one may argue that up until dissolution of the first marriage is pronounced by the court of law, such woman is in bigamous legal status. Amy J. Kaufman, *Polygamous Marriages in Canada, Canadian Journal of Family Law*, Vol. 21 (2005), p.317.

¹⁰ See Obonye Jonas, *The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Critical Appraisal, Journal of African Studies and Development*, Vol. 4 No.5 (2012), p. 143.

¹¹ Chavunduka GL., *Polygyny among Urban Shona and Ndebele Christians: A Case study, The Southern Rhodesia Native Affairs Department Annual*, Vol. 12, No.1 (1979), p. 19.

centuries”¹² as “the numerous children produced from these wives can assist in building and strengthening a power base.”¹³

The economic justification for the prevalence of polygamy contends that polygamy is capable of delivering benefits to women as long as substantial resource inequality prevails among men and women.¹⁴ It is argued that economic rationality dictates women to contract bigamous marriage through cost and benefit analysis. According to Becker, a woman in bigamous marriage may be economically advantageous sharing a high-status male with other women than monopolizing access to low-status partner in monogamous relationship, if male inequality is sufficiently pronounced.¹⁵ Bigamy in these contexts, not only benefits woman, but also provides “economic and social security for her family especially in societies where bride price [dowry] at the time of the marriage is practiced.”¹⁶ Therefore, as Dlamini argued, bigamy cannot be seen as discrimination against women in favour of it and benefit from it. He further argued that “it is not a form of general indiscriminate and invidious discrimination against women.”¹⁷ That is why some argue that “monogamy is either a self-denying ordinance, in the sense that a man

¹² O'Donovan, Wilbur, *Biblical Christianity in African Perspective* (Paternoster Press, 2nd ed., 1995) pp. 281-289.

¹³ Chavunduka, *Supra note 11*.

¹⁴ Walter Scheidel, (2009), *Monogamy and Polygyny*.

<http://www.princeton.edu/~pswpc/pdfs/scheidel/010903.pdf>. (accessed February 20, 2013)

¹⁵ Gary S. Becker, *A Treatise on the Family* (USA: Harvard University Press, 1991), p. 87.

¹⁶ Donovan, *Supra note 12*.

¹⁷ CRM Dlamini, *Should We Legalise or Abolish Polygamy? Comparative & International Law Journal of South Africa*, Vol. 22, (1989), p.341 .

voluntarily renounces or abstains from polygamy, or it is dictated by an inability to afford more than one wife.”¹⁸

In Ethiopia, official reports and case studies also unfold similar reasons for the prevalence of bigamous marriage practice. According to the 2011 EDHS report, “rural women are more likely to be in bigamous unions (12 percent) than urban women (five percent).”¹⁹ As per this national statistical report, “women in the lowest wealth quintile are the most likely to be in a bigamous union (16 percent), compared with just six percent of women in the highest wealth quintile.”²⁰ Another economic reason for the prevalence of polygynous marriage practice is attributable to the agreement between husband and wife to welcome a co-wife for its “merits of co-operation among co-wives in homestead and farms and activities of religious and social festivity.”²¹ In rural Ethiopia, rich men opts plural marriage as their farm land is so vast that makes it difficult for the first wife to cope with extensive agricultural activities. Particularly, she is expected to provide food and thirst-quencher for a large group of workmen and women who come in support of their farm activities (locally called *daboo*) in the homestead. So, ultimately she agrees with her husband or encourages him to marry another woman to share the labour force.

¹⁸ Phillips, (eds) Survey of African Marriage and Family Life (London: published for the International African Institute by Oxford University Press, 1953) xiii-xiv.

¹⁹ Ethiopia Demographic and Health Survey 2011, *Supra note 1 p. 61*.

²⁰ Donovan, *Supra note 12*.

²¹ Minale A. Beyene, *Polygamy and its impact on the life of women among the Oromos of Western Ethiopia: A case study of Illubabor Zone*(Addis Ababa University unpublished Research report, 2000).

Furthermore, lack of women's education is also another reason for the practice of polygamy in Ethiopia. For instance, according to the 2011 EDHS, "there is an inverse relationship between education and polygamy." That is, "the proportion of currently married women in bigamous union decreases from thirteen percent among women with no education to less than one percent among women with more than secondary education."²² Similarly, "older men living in rural areas, those with little or no education, are more likely to be in bigamous unions than other men."²³ The following table indicates the prevalence of both women and men living in polygamous marriage in percentage according to the 2011 EDHS Report.²⁴

Regions and Cities	Women (%)	Men (%)
Tigray	0.8	0.4
Afar	21.8	9.7
Amhara	2.5	0.3
Oromia	13.8	6.6
Somali	27	13.8
Harari	5.5	2.2
Benishangul-Gumuz	18.3	13.3
SNNPR*	18.1	9.4
Addis Ababa	1.9	0
Diredawa	3.6	1.5

*Southern Nations Nationalities and Peoples Region

²² Ethiopia Demographic and Health Survey 2011, *Supra note 1*.

²³ Ibid.

²⁴ Ibid.

2. THE LEGAL ASPECT OF BIGAMOUS MARRIAGE

A. Bigamy Under the Human Rights Law

The legality of bigamous marriage under international human rights instruments are debatable due to the contentions of the rights involved. On the one hand, “bigamy is viewed as a discrimination against women that promotes sex inequality.”²⁵ On the other hand, bigamy as a variety of marriage is also viewed as the right of women “to marry and form a family” in the exercise of their free consent and choice per national and international bills of rights.²⁶ The legal authority which is often invoked to support the former claim emanates from the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its General Comment no. 28. According to this legal instrument, state parties are obliged to take appropriate steps to modify the social and cultural patterns of conduct of men and women in order to eliminate prejudice and customary practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.²⁷ However, this legal instrument is criticized for its failure to expressly prohibit bigamy as a “discrimination against women and violation of their right to dignity.”²⁸

²⁵ Kaufman, *Supra note 9*, p. 332. For more detailed discussion of Human rights treatment of bigamous marriage see Samuel Chapman, *Polygamy, Bigamy and Human Rights Law*, (USA: Xlibris Corporation, 2001).

²⁶ *Ibid.*

²⁷ See Convention on the Elimination of Discrimination Against Women, Article 5(a).

²⁸ See Ruth Gaffney-Rhys, *Polygamy: A Human Right or Human Rights’ Violation? Women in Society*, Vol. 2, (2011), pp. 2-13. This writer noted that though both Human Rights Committee and the Committee on the Elimination of Discrimination against Women have asserted that polygamy should be eradicated, the instruments that they uphold do not make this

In view of the critique, the United Nations treaty-monitoring bodies – the Human Rights Committee (HRC) and CEDAW Committee have both interpreted the provisions relating to equality within a marriage under the International Convention on Civil and Political Rights (ICCPR) and CEDAW as requiring States to abolish polygamy. According to this General Comment, “equal treatment with regard to the right to marry is noted to imply that polygamy violates the dignity of women since it discriminates against women.”²⁹

The African Charter on Human and Peoples’ Rights on the Rights of Women in Africa Protocol “recognize polygamous marital relationships as a compromise which takes cultural and religious diversity” into account.³⁰ According to this Protocol, state parties are obligated to enact appropriate national legislative measures to guarantee the enjoyment of equal rights between women and men in marriage.³¹ However, though the protocol encourages monogamy as the preferred form of marriage, the rights of women in marriage and family, including that of polygamous marital relationships are promoted and protected.³² Though this protocol may be criticized for its failure to reject polygamy outrightly, it is crucial to note that it has attempted

clear’. Hence, an instrument that explicitly outlaws polygamy is unlikely to be ratified by the states that condone the practice.

²⁹ See Human Rights Committee, General Comment 28, Equality of Rights Between Men and Women, Article 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000). Para. 24.

³⁰ Manisuli Ssenyonjo, *Women’s Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and The Role of Uganda’s Constitutional Court*, *International Journal of Law, Policy and the Family* Vol. 21 (2007), pp. 341-372. See also Jonas, *Supra* note 10.

³¹ See African Charter on Human and Peoples’ Rights on the Rights of Women in Africa Protocol, Art. 6(c).

³² Ibid. [My emphasis]

to respond to the plights of women in polygamous marital relationships by obliging state to ensure the promotion and protection of their rights in such status quos. Hence, unlike the former legal instrument which outrightly rejected the practice of polygamy in disregard of the treatment of women in polygamous marriages, the African protocol is perceptive in responding to the equal treatment of women and men even in bigamous marriage where ever it already become a lived reality of women.

On the other hand, the practice of polygamy is viewed as human rights of women to marry and form a family.³³ The gist of this argument lies on the fact that a women who contracts a bigamous marriage “do so in exercise of their right to free choice – choosing for themselves the form of marriage to enter, whether it being monogamous or bigamous.”³⁴ This argument further contends that if one can genuinely ensure the “full and free consent” of a woman who wants to contract a bigamous marriage, regard for “the nature of the marriage, whether bigamous or monogamous, counts for nothing.”³⁵ Dlamini noted this very fact as follows:

If a woman voluntarily waives her right, should we prevent her from doing so on paternalistic grounds of protecting her from

³³ Dlamini, *Supra note 17* p. 341. See also G. Keith Nedrow, *Polygamy and the Right to Marry: New Life for an Old Lifestyle*, *Memphis State University Law Review*, Vol. 11 (1981), p. 326. It is argued that polygamy is not always immoral, and it is a woman’s right to choose to be married to a man who has more than one wife. See Plea for Polygamy (Panurge Press 1929), p. 24, cited in Amy Fry, *Polygamy in America: How the Varying Legal Standards Fail To Protect Mothers and Children From Its Abuses*, *Saint Louis University Law Journal*, Vol 56, No. 967 (2010), P. 977.

³⁴ Ibid, see at Nedrow.

³⁵ Nhlapo T., *African Family Law Under an Undecided Constitution.*, in Eekelaar J, Nhlapo T (eds), *The Challenge for Law Reform in South Africa* (2008), p. 116.

*herself? There is nothing unusual if a woman decides to waive her right to her dignity or autonomy and consents to being part of a bigamous establishment, unless of course the legislature feels so strongly that the right which is involved is so fundamental that even the holder of this right should be precluded from waiving it – acts which are so objectionable as to be contra bonos mores.*³⁶

This argument may also be equally persuading for the first wife who in exercising her right to free choice may require dissolution of marriage in opposition to the second bigamous marriage if her husband insists. As precisely noted above, given the compelling social and economic reality of African women in general and Ethiopian women in particular divorce won't be a rational decision for the first wife. Furthermore, suppose also an infertile or sick woman in Ethiopian monogamous marriage. Does this woman suggest her husband to marry another woman to bare him a child or opt for divorce? Or at least, can she convince her husband not to marry another woman? A case study on polygamous marriage practice in Ethiopia noted above reveals that, "infertility, sickness and old age of the first wife is a prevalent cause for married men to contract polygynous marriage with the second co-wife."³⁷ According to this case study, polygamy is practiced to maintain the stability of first marriage that would have been broken had it not been for the occurrence of second marriage.³⁸

B. Bigamous Marriage under the Ethiopian Law

³⁶ See Dlamini, *Supra note 17, p.342*.

³⁷ Minale, *Supra note 21*.

³⁸ Ibid.

The legitimacy of regulating plural marriage raises a host of debatable questions in terms of the role of state in the interference of private family relationships. This section tries to analyze and evaluate how the FDRE Constitution, the Criminal Code and the Family Law respond to these tensions so as to ensure states commitments to gender equality.

I. Bigamy and the FDRE Constitution

The FDRE Constitution stipulates that “family is the natural and fundamental unit of society and is entitled to protection by society and the State.”³⁹ Accordingly, every men and women has the right to marry and found a family.⁴⁰ It is also provided that marriage shall be entered into only with the free and full consent of the intending spouses – man and woman.⁴¹ Furthermore, it also provides for the equal rights of man and woman while entering into, during marriage and at the time of divorce.⁴² Thus, as indicated before, bigamous marriage in which a man exercises another bigamous and bigamous marriage, as the case may be, would be an infringement of the equality clause in marriage. But, if a woman, for different reasons indicated before, enters into a marriage with a married man only with her “free and full consent”, could this act be considered as the “right to marry and found a family” or a violations of the equality clause that discriminates such woman?

³⁹ The Federal Democratic Republic of Ethiopian Constitution (1995) Proclamation No. 1/1995, Fed. Neg. Gaz. Year 1 No. 1, Art. 34 (3) [hereinafter the FDRE Constitution].

⁴⁰ FDRE Constitution, Art. 34(2).

⁴¹ FDRE Constitution, Art. 34(1).

⁴² FDRE Constitution, Art. 34(1).

As the case one may argue this question begs the answer as to the legality or recognition of multiplicity of marriage under the FDRE Constitution.

On this matter, Meaza and Zenebeworke argued that Article 34 of the FDRE Constitution does not stipulate any minimum requirements for a legally valid marriage, such as monogamy.⁴³ According to this writers, Article 34 of the FDRE Constitution lacks clarity regarding any minimum requirement for a “men and women” to found a legally valid marriage – monogamous or bigamous marriage? However, this writer has the opinion that a constitution as a general law is not expected to provide each and every particular that regulates marital, personal and family matters. It is a generally agreed legal principle that a constitution should provide only the basics and leave the particulars for subordinate legislations for any further dispensation. This is very important given the plurality of marriage practice in Ethiopia signified also by the plurality of family laws in the federating units that in turn equips regional states to treat different aspects of marriage practice differently depending on their own context. Hence, the answer for the question should be

⁴³ Meaza Ashenafi and Zenebeworke Tadesse, *Women, HIV/AIDS, Property and Inheritance Rights: The Case of Ethiopia*, (2005)

<<http://www.pe.undp.org/content/dam/aplaws/publication/en/publications/hiv-aids/women-hiv-aids-property-and-inheritance-rights-the-case-of-ethiopia/23.pdf>> (accessed on February 20, 2013). Meaza Ashenafi has been a legal advisor to the Ethiopian Constitution Commission of the Transitional Government, which drafted the constitution in 1993. She also ‘produced the first drafts of the constitution’s articles on the rights of women and children which ultimately led to its inclusion in the 1995 Constitution of Ethiopia. But it is not clear for this writer why she criticized the provision of the constitution which has been utterly contributed by her own effort that would otherwise have been rectified in the first place. See, Meaza Ashenafi: *Fighting for Women’s Rights in Africa*. <<http://africaisdonesuffering.com/2013/01/20/meaza-ashenafi-fighting-for-womens-rights-in-africa/>>

sought closely in Article 34(4) of the FDRE Constitution. The Constitution provides that “in accordance with provisions to be specified by law, a law giving recognition to marriage concluded under systems of religious or customary laws may be enacted”. In other words, personal, marital and family law that specifies and recognize marriage practice concluded under the systems of religious or customary laws may be adopted.

Thus, it could be strongly argued that the FDRE Constitution impliedly hint at the possibility of recognizing bigamous marriage practice “in accordance with the provisions to be specified by law” provided that such marriage derives its source of validity from the religious and customary laws of the intending spouses in their own community. It is also further stipulated that “the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute is not precluded under the constitution.”⁴⁴ Thus, one may argue that the above constitutional provisions show the existence of legal plurality for the regulation of marital, personal and family rights. But, the problem is what happens if the adjudication of disputes relating family laws in accordance with religious or customary laws is discriminatory? The FDRE Constitution seems to address this very problem. It stipulates that, “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.”⁴⁵ Yet, the problem lies not on the normative prohibition but on taking practical measures to identify, and describe what constitutes “harmful

⁴⁴ The FDRE Constitution, Art. 35(5).

⁴⁵ Id. Art. 35(4).

customs” to tackle it. As indicated so far, polygamy is harmful to women as it is discriminatory by its very nature. But, as we shall see in what follows, little effort is done to regulate it in Ethiopian family codes despite its outright prohibition.

In general, the writer has the opinion that the right to marry and found a bigamous family under the FDRE Constitution requires constitutional interpretation by the House of Federation if gender equality is to be fully realized. Yet, one thing is certain from the plain reading of the constitutional provision. As indicated above, the legitimacy of bigamous marriage under the FDRE Constitution is conditional upon the provisions of specific law yet to be enacted by subordinate legislations. By so doing, the FDRE Constitution reserved itself from clearly permitting or prohibiting bigamous marriage practice in Ethiopia. It opted for specific matters to be regulated by enabling legislation to be enacted by the parliament or state councils in recognition of marriage concluded under religious and customary laws as a legitimate exercise of the right to religion and cultural freedom on condition that these rights are limited if their practice “oppress or cause bodily or mental harm to women”. On top of this, as noted before, the FDRE Constitution clearly stipulates that both men and women “have equal rights while entering into, during marriage and at the time of divorce”. Hence, a husband contracting a second marriage during marriage discriminates against the first wife and violates the constitutional principle of equality clause during marriage. Likewise, a legal norm or any judicial decision which fails to recognize

equality of the husband and the second bigamous women spouses during divorce is also equally discriminatory.

II. Bigamy under the FDRE Criminal Code

As indicated above, the practice of bigamy as a plural marriage in Ethiopia is a social reality in both urban and rural areas despite disparities in percentages. So, the pertinent question is given the prevalence of bigamous marriage to what extent its criminalization in Ethiopia would be justified? Let us look at what the Criminal Code says regarding polygamy in Ethiopian context. According to the FDRE Criminal Code, bigamy is generally casted as an offence punishable by the law. It reads as follows:

Whoever, being tied by the bond of a valid marriage, intentionally contracts another marriage before the first union has been dissolved or annulled, is punishable with simple imprisonment, or, in grave cases, and especially where the criminal has knowingly misled his partner in the second union as to his true state, with rigorous imprisonment not exceeding five years.⁴⁶

It is previously noted that there exists a definitional difference between polygamy and bigamy. Needless to mention it, while bigamy relates to the intentional act of marrying another person while legally bound by the first marriage, polygamy may be about the practice of having more than one spouse simultaneously or successively. In some jurisdictions such as

⁴⁶ The Federal Democratic Republic of Ethiopia Criminal Code (2004), Art. 650(1) [hereinafter the Criminal Code].

Canada, the Criminal Code treats both “bigamy” and “polygamy” under separate sections indicating instances of how criminal legislation construed these terms differently.⁴⁷ According to the Canadian Criminal Code, while the former offence involves participating in the ceremony of marriage while already married, or with someone who is known to be married, the offence of polygamy, however, does not necessarily focus on the act of “marriage” *per se*, but rather on the status of having more than one spouse, or being in conjugal union with more than one person, simultaneously.⁴⁸ However, given the successive nature of polygamous marriage, the debate on the distinction between bigamy and polygamy becomes more theoretical. It should be also noted that practically whether a bigamous marriage is successive or simultaneous does not matter since both cases contravenes the legal principle of marriage as union of man and woman. Hence, it should be clear from the outset that given the prevalence of successive bigamous marriage in Ethiopia, the term polygamy would be used in this paper to refer to bigamous marriages, which as noted above, is illegal under the Ethiopian Criminal Code save in cases provided by the law. As such, it is crucial to examine the decriminalizing provision stipulated under the Criminal Code.

The exception clause of bigamy reads that “[the provisions of Article 650] shall not apply where bigamy is committed in conformity with

⁴⁷ Kelly Lisa M., *Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy*, *University of Toronto Faculty of Law Review*, Vol. 65 (2007), p. 21.

⁴⁸ *Ibid.*

religious or traditional practices recognized by law.”⁴⁹ Here, it should be noted carefully that the fact that the practice of polygamy is in conformity with customary or religious practice does not make it an excuse under the Criminal Code of Ethiopia. Rather, it is only when bigamy is practiced in conformity with traditional or religious practices but this time duly recognized by the law. Yet the issue worth examination is whether there exists a law recognizing polygamy as a legitimate customary or religious practice. The following sub-section embarks on this task

III. Bigamy under the Ethiopian Family Codes

It is previously indicated that the enactment of family law is reserved for respective Regional states under the FDRE Constitution.⁵⁰ Currently, in addition to the Revised Family Code of 2000⁵¹, the State of Tigray, Amhara, Oromiya, Harari, and SNNPR enacted their own Family Code.⁵² But, the State of Afar, Somali, Benishangul-Gumuz, and Gambela still don't have their own

⁴⁹ Id. Art. 651.

⁵⁰ The FDRE Constitution, Art. 52.

⁵¹ The Revised Family Code of 2000, Fed. Neg. Gaz. 6th year Extra Ordinary Issue No. 1, It is revised version of Ethiopian Civil Code by the Federal government [hereinafter the RFC]. This family Code is applicable only in Addis Ababa City Administration and Diredawa City Council.

⁵² One of the peculiar features of these family codes in the federal system of Ethiopia is that except for very few departures such as marriageable age, all codes are directly copied from the RFC even with similar article. Though it is beyond the ambit of this paper, this issue may raise the necessity and demand of enacting different family laws in the absence of substantial differences that reflect its plural nature signifying the federal structure. It should be noted that in this paper the provisions of the RFC will be used unless there exist clear differences between States family codes and RFC in which case separate reference will be made.

Family Code.⁵³ Now, let us see whether the customary and religious practice of polygamy is recognized under the above respective family codes.

To begin with, under the RFC, three forms of marriage can be identified – Civil Marriage and marriages concluded in accordance with the religion or custom of the future spouses.⁵⁴ A Civil Marriage is concluded between a consented ‘man and woman’ appeared before an Officer of civil status.⁵⁵ Therefore, Civil Marriage is purely monogamous marriage. On the other hand, Religious Marriage is concluded when “a man and a woman” have performed such “acts or rites as deemed to constitute a valid marriage by their religion or by the religion of one of them.”⁵⁶ Similarly, Customary Marriage is concluded when “a man and a woman” have performed such “rites as deemed to constitute a valid marriage by the custom of the community” in which they live or by the custom of the community to which they belong or to which one of them belongs”.⁵⁷ So, it is very easy to compare the three types of marriage.

Accordingly, all forms of marriages are the same except for the manner of their conclusion or celebration. In other words, all types of marriages are monogamous in form with varying set of procedures where one is concluded before the Officer of Civil Status and the others taking place according to the ceremonial acts of religious and customary practices of the intending spouses. It is also mandatory for all forms of marriage to be “registered by a competent

⁵³ It should be noted that these regional states are required to resort to the Civil Code of the 1960 since the scope of application of the Revised Family Code of 2000 is reserved for Addis Ababa and Direedawa only.

⁵⁴ RFC, Art. 1.

⁵⁵ RFC, Art. 2.

⁵⁶ RFC, Art. 3.

⁵⁷ RFC, Art. 4.

Officer of Civil Status”.⁵⁸ This shows us that a competent Officer of Civil Status should decline the registrations of both bigamous customary and religious marriages even if celebrated in conformity with the customary and religious practices of the intending spouses. Furthermore, it is also expressly provided that, “a person shall not conclude marriage as long as he is bound by bonds of a preceding marriage.”⁵⁹

Coming to the Regional Family Codes, the provisions on bigamy and recognition of only monogamous marriage is verbatim of the RFC.⁶⁰ However, under the State of Harari, the only exception to bigamy is the recognition of religious bigamous marriages. Like the RFC and Family Codes of other Regional States, the Harari Family Code also recognizes monogamous Civil, Customary and Religious marriages.⁶¹ In principle, like other Family Codes, it also prohibits the conclusion of bigamous marriage.⁶² Its major departure from other regional family codes is it exceptionally permits bigamous marriage specifically concluded according to religious practice.⁶³ But, like other family codes, the Harari Family Code does not permit the practice of bigamous customary marriage. As noted before, the State of Harari host men and women with a low percentage of bigamous marriage compared to other regions such

⁵⁸ RFC, Art. 28.

⁵⁹ RFC, Art. 11.

⁶⁰ Family Code of the Oromiya Regional State clearly recognized bigamy when it was first enacted. But later on the Regional State legislators are forced to amend this Family Code to abolish the bigamy provision for reasons that is not specified. It should be noted that in this paper the provisions of the RFC will be used unless there exist clear and substantial differences between States family codes and RFC in which case separate reference will be opted.

⁶¹ Harari Region Family Code (2000), Neg. Gaz. year 13, extraordinary issue No. 1/2000, Art. 1, 2 and 3.

⁶² Harari Region Family Code, Art. 11(1).

⁶³ Harari Region Family Code, Art. 11(2).

as Oromia and Southern Nations Nationalities Peoples Region. However, the Family Codes of the two Regional States failed to recognize or at least acknowledge the practice of both customary and religious bigamous marriages.

In a nutshell, the above consecutive topics attempted to investigate the legal aspects of bigamous marriage. The investigations of the legal regimes indicate that, except for the permission of religious “bigamy” under the State of Harari Family Code, bigamous marriage in Ethiopia is generally prohibited. Therefore, in the present context, two issues are at stake. First, what will happen to the effects of a bigamous marriage where its practice is totally banned or criminalized and recognition denied on what so ever grounds? The second issue is what additional steps are contemplated to fully regulate the effects of bigamous marriage in an area where it is criminalized yet recognition is imposed for the purpose of granting relief or decriminalized yet there is no legal framework to regulate its legal effects? The following parts try to shed lights on these issues.

3. DISSOLUTION OF BIGAMOUS MARRIAGE

In our navigation so far, attempt is made to provide a brief background regarding the conception, rationalization and legal aspects of bigamous marriage. Accordingly, despite the prevalence of bigamous marriage practice in Ethiopia, it is generally concluded that except for the recognition of bigamous marriage celebrated according to religion under the Harari Family Code, bigamous marriage in Ethiopia is illegal and a crime punishable under

the Criminal Code. Therefore, given the prevalence of bigamous marriage in Ethiopia but absent the legal regimes that regulates the matter, how would a bigamous spouses attempt to seek dissolution of such marriage before the court of law? As we shall see latter on, marriage produces legal effects as regards the common property division after its dissolution has been pronounced by the court of law.

As indicated before, all Family Codes in the Federal Republic of Ethiopia enacted so far are designed to regulate monogamous marriage. In the absence of specific legal provisions that governs bigamous marriage practice, there are host of questions that require answer. Would a woman in bigamous marriage be able to seek safe exit and require any relief from the situation? In what way would courts be able to regulate the dissolution of bigamous marriage compared to that of monogamous marriage? These questions are very critical and deserve separate treatment in this paper. In the following, conventional family law principles, contract law principles and judicial decisions will be considered as regulatory options for the dissolution of bigamous marriage in Ethiopia.

A. Termination of Marriage in Bigamous Union: Dissolution vis-à-vis Annulment

Dissolution or annulment of marriage in bigamous union *per se* is regulated under the bigamy provisions of the Criminal and Family Codes. On the one hand, bigamous marriage may be “dissolved or annulled” by a court order where an application is made by either of the spouses of the bigamous

marriage or by the public prosecutor.⁶⁴ The term dissolution is defined as “the act of bringing to an end” while the term annulment is defined as “the act of nullifying or making void.”⁶⁵ According to this definition, annulment and dissolution of marriage are fundamentally different. An annulment renders a marriage void from the beginning, while dissolution of marriage terminates the marriage as of the date of the judgment of dissolution. On the other hand, a marriage may be dissolved through a court ordered divorce though such cause of termination of marriage presupposes a validly concluded marriage.⁶⁶ Thus, the major distinction between a divorce and an annulment is that the former severs the bonds of matrimony, whereas the latter asserts that such bonds never existed. Thus, a bigamous marriage is an annulable marriage that would be considered as never to have occurred. But a marriage terminated by divorce is considered to have legal existence and produces legal effects after its termination.

In Ethiopia, except for religious bigamy under Harari Family Code, it could be argued that a bigamous marriage is an annulable marriage but only unless and until such marriage is annulled. But, what would be the pecuniary effects of the couple who had been married and during which they laboured together to accumulate wealth? This question clearly shows the repercussions of declaring bigamous marriage as “null and void.”⁶⁷ In Uganda, for instance, the judicial

⁶⁴ RFC, Art. 33(1) and see also same provision of Harari Family Code, *Supra note 61*.

⁶⁵ Black’s Law, *Supra note 4*.

⁶⁶ RFC, Art. 75(c).

⁶⁷ For more detailed discussion on legal issues of void and voidable marriage in the context of bigamous marriage see *The Effect of Void and Voidable Marriages, Arkansas Law Review*, Vol. 10 (1956) pp.189-190. The Cassation Division of the Federal supreme Court of Ethiopia ruled that bigamous marriage may not be considered as “*void ab initio*”. See Aregawi Abache

doctrine has long vindicated the reluctance of declaring bigamy as null and void. The judgment of Ugandan court which is more relevant to the present case can be re-cited as follows:

It would be sheer hypocrisy to shut our eyes to realities of life in Africa in general and Uganda in particular. In this part of Uganda, bigamous marriages are not rare. Many customs and traditions do not frown upon second marriages during the pendency of the first marriage (...) many a man here have married second wives without any penal sanctions visiting them. I would therefore be reluctant to declare the second marriage (...) null and void for the simple reason that problems have since cropped up between husband and wife. (...) This is however not to declare that it is legal.⁶⁸

In Ethiopia, the judicial recognition of bigamous marriage in Regional and Federal Supreme Cassations vary even though Federal Cassation has a final say on the matter.⁶⁹ For instance, in the National Regional State of Oromia, bigamous marriages are silently recognized by courts simply by dissolving it and liquidating its pecuniary effects. According to an informant judge in the Oromiya National Regional State Supreme Court, judges are not much

v. Mrs. Aster Abegaz *et al*, Federal Supreme Court, Civ. Cassation No. 39408, published Federal Supreme Court Cassation Decisions, Vol. 10, 2002.

⁶⁸ Lynn Khadiagala, *Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda*, *Journal of African Law*, Vol. 46, No. 1 (2002) p. 9.

⁶⁹ See Federal Courts Proclamation Re-amendment Proclamation No. 454/2005, Art. 2 sub article 4 and 5. It should be noted that since the decisions passed by five judges of the Federal Supreme Court Cassation Division pass binding interpretation of laws to all levels of courts and other relevant bodies, it could be said that the position of the regional courts should reflect the interpretation of laws given by the Federal Cassation.

concerned with the criminality of bigamous marriage since it is dominantly practiced in Oromia.⁷⁰ He further noted that though bigamous marriage is an offence punishable by the Criminal Code, most bigamous marriages were revealed before the court of law not as a dispute over their bigamous nature but on division of matrimonial property after the dissolution or divorce of bigamous spouses has been successfully declared by the lower courts.

The practice of Amhara Supreme Court is clearer on the illegality of bigamous marriage. In a matrimonial property dispute case between *Aminat Ali v. Fatuma Wubet*, the Supreme Court and its Cassation division declared the marriage of petitioner Aminat Ali bigamous since she married to Mehammad Hussein in 1990 Ethiopian Calendar (EC) as a second co-wives to respondent Fatuma Wubet whose marriage is prior in time (1987).⁷¹ Though State lower courts passed a judgment recognizing the existence separate monogamous marriage, the Supreme Court and the Cassation division reasoned out that the law does not encourage bigamous marriage and the decision on the disputed matrimonial property should be given in such a way to protect the first legal marriage.⁷² The Amhara Supreme Court further reasoned that the decision of the lower courts that the common property acquired after the second marriage should be divided between the three spouses affects the interests of the first legal spouse.⁷³ Accordingly, the Supreme Court held the view that though

⁷⁰ Interview with Ato Nasir Faris, Oromiya Supreme Court, Judicial Service Delivery Process Owner, (March 4, 2013 at his office).

⁷¹ *Aminat Ali v. Fatuma Wubet*, Federal Supreme Court, Civ. Cassation No 45548, Published Federal Court Cassation Decisions, Vol. 13.

⁷² *Ibid.*

⁷³ *Ibid.*

Aminat Ali may take her personal property by adducing evidence, the common property acquired until the first marriage is dissolved should be equally divided only between the first monogamous spouses – Fatuma Wubet and Mehammad Hussein.⁷⁴ But, though the marriage of Aminat Ali and Mehammad Hussein is now become a monogamous marriage due to the dissolution of the first marriage of Fatuma Wubet, the Amhara Supreme Court declared it a bigamous marriage without having legal effect.

On the other hand, the judgment of Federal Supreme Court Cassation (FSCC) is sympathetic to the situations of women in bigamous marriage who clearly declared it a “social reality” that breeds “social chaos” unless prudent decision is made by the courts of law.⁷⁵ In the previous case, Aminat Ali pleaded the committal of basic error of law by the Amhara Regional Supreme Court Cassation before the FSCC, where she argued the inappropriateness of declaring her marriage bigamous without giving considerations to the dissolution of the first bond of marriage and without giving considerations to the proof as to the existence of separate marriage bond between herself and Mehammad Hussein.⁷⁶ On the other hand, Fatuma Wubet argued since the marriage of Aminat Ali is bigamous it should not have to be considered as if her marriage has been legally existed. Hence, Fatuma Wubet argued that in the absence of marriage bond, there is no legal basis where Aminat Ali could embark on the division of common property which is the effect of marriage.

⁷⁴ Ibid.

⁷⁵ Aminat Ali v. Fatuma Wubet, *Supra note 71*.

⁷⁶ Ibid.

The FSCC noted the fact that bigamous marriage is prohibited under both RFC and regional family codes and the lower courts should have dissolved such bigamous marriage on the application of Fatuma Wubet or the public prosecutor long before the matrimonial property disputes.⁷⁷ However, the court realized that Fatuma Wubet was in bad faith and was not just or fair to bring an action for nullifying the second marriage right at the time when disputes over the division of property ensue in the absence of evidence that shows opposition at time of conclusion of marriage or during the marriage for more than ten years.⁷⁸ The FSCC noted that once the existence of consecutive marriages between the spouses is proved as was done in the case at hand, the important legal issue that needs to be addressed is the principle governing the division of property acquired during the life of marriage if the first marriage is dissolved and the second marriage continued.

The FSCC further noted that the reason for controversy in such kinds of marital disputes arises from the fact that both Regional and the RFC do not allow bigamous marriage that in turn resulted in lack of legal clarity as to the division of property acquired between the spouses. So, though the FSCC rebuked the bigamy claim of Fatuma Wubet as “untimely and in bad faith,” nothing is said as to whether such bigamous marriage should be given judicial recognition despite its legal prohibition and judicial recognition for relief purpose. But, the writer contends that the present judicial discretion of the FSCC reveals the implicit judicial recognition of bigamous marriage and its

⁷⁷ It should be noted that the Federal Cassation failed to take notices of the fact that Harari family Code permits religious bigamous marriage as clearly indicated before.

⁷⁸ See *Aminat Ali v. Fatuma Wubet*, *Supra note 71*.

legal effects. The fact that the FSCC declared bigamous marriage as a social reality in Ethiopia unfolds the recognition of bigamous marriage for relief purpose though it is difficult to conclude that the position of the Federal Cassation represents clear and net positions of Ethiopian State on the legality of bigamous marriage.

In general, our understanding of annulment or dissolution of bigamous marriage should be tuned in such a way that justice be done to the concerned parties in bigamous union. Hence, the use of the terms “dissolved or annulled” in the Ethiopian Criminal Code is not without reason if the meanings of the two terms are taken seriously. So, the court in rendering a bigamous marriage either annulled or dissolved must be careful in weigh its far-reaching effect on the parties concerned. As noted previously, conventional family law is designed to regulate dissolution of monogamous marriage but not bigamous marriage.⁷⁹ As such, the argument that bigamous marriage produces no legal effect since it’s legally non-existent from the very beginning may end up in being unfair to the bigamous spouses as the FSCC commented on the descions of Regional Supreme Court indicated above. Therefore, justice requires that rules governing dissolution of monogamous marriage should be applied to the dissolution of marriages in bigamous union in order to proceed to the pecuniary effects of such bigamous marriage.

⁷⁹ The RFC, Art. 74 and *et seq.*

B. Applying General Contract Principles

Though marriage is more than a contract, its genesis hinges in a contract, for it cannot come into existence unless the spouses have entered into an agreement with full and free consent – the one to marry the other.⁸⁰ Cheshire noted that, on the one hand, marriage is more than a contract due to its nature of creating personal status to both the spouses and their community.⁸¹ On the other hand, the genesis of marriage is a matter for the ordinary law of contract, but its prolongation is regulated by personal status law of the spouses, who have no power to modify its attributes as fixed by that law.⁸² But, what Cheshire failed to mention is as to whether contract or personal laws of the parties regulates its dissolution. Thus, as we are now very much concerned with dissolution of bigamous marriage, the importance of regulating the genesis of marriage as a matter of contract hint us the existence of regulatory options or alternative possibility of applying general principles of contract law in the absence of specific law governing bigamous marriage. Can we argue that contract law is still best suited to determine the effects of dissolution of bigamous marriage?

As noted before, one can contract a valid monogamous marriage but can't contract a valid bigamous marriage due to its illegality. So, what would be the effect of such illegal contract at least in so far as its common property aspect is concerned? A reference to the Ethiopian Civil Code Contract provision reveals

⁸⁰ G. C. Cheshire, *The English Private International Law of Husband and Wife*, *Recueil des cours*, Vol. 108 (1963), p. 119.

⁸¹ *Ibid.* Under Ethiopian RFC, the ambit of a contract of marriage is not restricted to the regulation of the pecuniary effects of marriage but also regulates the reciprocal rights and obligations in matters concerning the personal relations of spouses save in case of the mandatory provisions of the law. See RFC Art. 42.

⁸² *Ibid.*

the answer.⁸³ It stipulates that “a contract whose object is unlawful or immoral or a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party.”⁸⁴ It is indicated that a bigamous marriage may be invalidated on the opposition made by the prior spouse or by the public prosecutor.⁸⁵ However, the RFC do not provide the period of time within which action for the invalidation of bigamous marriage could be brought before the court in case where such action is not brought during the conclusion of bigamous marriage.⁸⁶ Be it as the case may be, the pertinent question, however, is what contractual provisions could be contemplated to regulate the effect of invalidation of bigamous marriage as regards the matrimonial property effects under Ethiopian contract law once such a marriage is dissolved on the request of the first wife, the public prosecutor or by one of the bigamous spouses?

The pertinent provisions of the Civil Code on the matter provides that “where a contract is invalidated the parties shall as far as possible be reinstated in the

⁸³ It should be noted that Federal Supreme Court Cassation in the case of *Dinke Tedla v. Abate Chane et al.*, crystallized the applicability of contract law relating to period of limitations on matrimonial property dispute. In this case, the Federal Cassation Court, by citing Art. 1677 of the Civil Code on general contract, argued that in case of legal gaps in the family code regarding the matter under dispute, the relevant provision of the contract law (art. 1845) could be applied to fill this gap. See *Dinke Tedla v. Abate Chane et al.*, Federal Supreme Court, Civ. Cassation Decision No. 17937, Published on Vol. 4.

⁸⁴ The Civil Code of the Empire of Ethiopia, 1960, Neg. Gaz. Art. 1808(2). See also Art.1677 (1) regarding the scope of the application of Contract in General: ‘the relevant provisions of this title [Contract in General] shall apply to obligations notwithstanding that they do not arise out of a contracts.’ It is also important to note that Ethiopian courts have just analogized contract law period of limitation in determining the right to bring court action regarding the pecuniary aspects of marriage.

⁸⁵ The RFC, Art. 18(c). See also Ethiopian Civil Code, Art. 1677 on the applicability of the “general contract rules to obligations notwithstanding that they do not arise out of contract.”

⁸⁶ It may be argued that the general contract principles enshrined under the Civil Code (Art. 1810 cum. Art. 1808(2)) could be applicable.

position which would have existed, had the contract not been made.”⁸⁷ But paradoxically, it continues to stipulate that “acts done in performance of the contract shall be of no effect.”⁸⁸ Does the latter provision signify the performance of acts such as building a house and buying cars during the life of bigamous marriage “shall be of no effect”? A closer look at another general provision of contract law provides a way out in case where “restoring previous position is not possible”.⁸⁹ Accordingly,

*[A]cts done in performance of the contract shall not be invalidated where such invalidation is not possible or would involve serious disadvantages or inconveniences. The parties shall as far as possible be reinstated in the position which would have existed, had the contract not been made, by the payment of damages or any other remedy which the court thinks fit.*⁹⁰

So much so that, acts performed in a bigamous marriage have legal effects if invalidation “involve serious disadvantages or inconveniences” to the parties concerned. It goes without saying that in the absence of specific legal provisions governing marital property in the context of bigamous marriage, invalidation may involve serious disadvantages or

⁸⁷ Id. Art. 1815(1) [my emphasis]. It should be noted that in bigamous marriage there is an agreement between the husband and the latter wives though it is not sustainable in the eyes of the law. It should be noted also that noted the difference between void and voidable contract result from the wording of Articles 1808, 1811, 1814. But, the effects of an invalidation decree obtained on either ground are the same under Ethiopian contract law(see Ethiopian Civil Code, articles 1815 to 1818) See George Krzeczunowich, Formation and Effects of Contracts in Ethiopian Law (Faculty of Law, Addis Ababa University, 1983), p. 16.

⁸⁸ Id. Art. 1815(2).

⁸⁹ Id. Art. 1817.

⁹⁰ Id.

inconveniences to spouses. Therefore, even if bigamous marriage is annulled in Ethiopia effects shall have a legal effect under the contract law in so far as the property interests of spouses are concerned.

4. DIVISION OF COMMON PROPERTY IN BIGAMOUS MARRIAGES

It goes without saying that as soon as dissolution spells termination of marriage disputes over property reigns. Once the legal issue that a bigamous marriage produces legal effects as regards property division is resolved, next most daunting task is determining the appropriate legal principle applicable to the division of matrimonial common property in the absence of specific legal regimes. This part subsequently considers the general principles applicable to common property in monogamous marriages and then critically examines whether these principles are apt to govern the division of common property in bigamous marriage in a similar logical equivalence.

A. General Rules Governing Matrimonial Common Property Regime

In order to avoid disputes between intending spouses, the widely established principle of family law is that their pecuniary effects are regulated by contract of marriage concluded either before or after its celebration.⁹¹ In default of such contractual agreement the matrimonial property of spouses are regulated by law.⁹² In Ethiopia, though it is difficult to come across statistical data, it can be

⁹¹ RFC, Art. 42(1).

⁹² RFC. Art. 48(7) and Art. 85(2).

easily observed that most court cases over matrimonial property disputes are devoid of contract of marriage that are designed to regulate their pecuniary relationships. This is particularly true in most rural Ethiopia and in marriages celebrated in religious institutions in which the sanctity of marriage is believed to depend on the divine will rather than on the contractual regulations of the rights and obligations of the intending spouses.

Generally, in default of any contract of marriage, two tenets of matrimonial property principle can be identified. The first legal principle is that any property owned by spouses in common comes into being as distinct from the personal or “separate property” of either spouses during marriage. The gist of this principle emanates from the fact that properties acquired through labour of each spouses by their personal efforts and all of the proceeds therefrom during the life of the marriage becomes the common property of spouses.⁹³ Yet as both Sileshi and Bekele noted, the idea that requirement of proof of “joint contribution or joint effort” by Ethiopian Courts for the existence of a common property has no legal basis but only indicates a fabricated legal interpretations.⁹⁴ It is also important to distinguish what the law regards personal property on the one hand and common property on the other hand. As indicated before, during the life of marriage, all income derived by personal

⁹³ The RFC, Art. 62(1).

⁹⁴ Bekele Haile Selassie, *Settlement of Matrimonial Disputes in Case of Divorce: A Case Comment on Civil Appeal No. 2133/78*, *Journal of Ethiopian Law* Vol. 18 (1982), p. 86. See also Silashi Bedasie, *Determination of Personal and Common Property During Dissolution of Marriage under Ethiopian Law: An Over view of the Law and Practice*, *Oromia Law Journal*, Vol. 2, No. 2 (2013), pp. 159 and 163.

efforts of the spouses and from their common or personal property is regarded as common property.⁹⁵

According to this legal principle, even incomes received from the “personal property”⁹⁶ of each spouse which is administered and kept separate from the common property falls within the ambit of matrimonial common property. Furthermore, a personal property acquired by an onerous title, the act of donation or will, property donated or bequeathed conjointly to the spouses’ during marriage become common property unless otherwise declared personal or stipulated.⁹⁷ Thus, no property acquired in manners indicated above may be described as personal property unless it is unequivocally designated as personal in the eyes of the law or any court proceeding only upon proof.

The second legal tent involves the principle of legal presumption as to the existence of common property. The RFC declare that, “all property shall be deemed to be common property even if registered in the name of one of the spouses unless such spouse proves that he is the sole owner thereof.”⁹⁸ The words “all property” is generic and hence includes all movable and immovables, no matter how and when they are acquired, falling within the scope of the legal presumption – matrimonial common property.⁹⁹ However,

⁹⁵ Id. Art. 62(2).

⁹⁶ Id. Art. 58(1); personal property may refers to a property acquired before the celebration of the marriage but which is provided on the contract of marriage or proved to be personal property in case of disputes by one of the spouses or a property acquired by onerous title after the marriage has been made by exchange for property owned personally, or with money owned personally or derived from the sale of property owned personally.

⁹⁷ Id. Art. 57 cum. 62(2)(3).

⁹⁸ Id. Art. 63(1).

⁹⁹ Bekele, *Supra note p.94*. For more detailed discussions see Silashi, *supra* note 94 at pp.144-164. But, it should be noted that the discussions of this two articles relates to the conventional

this legal principle is rebuttable in which case the burden of proof as to the existence of personal property lies on the party who alleges the fact. So, any spouse in a marriage who alleges the existence of common property must not be called upon to adduce evidence in support of her/his affirmation. According to Bekele, the significance of the cardinal principle of legal presumption of common property in the Family Code should not be underestimated since it serves a point of departure in the adjudication of all disputes of proprietary nature arising from the termination of marriage that ensue the division of matrimonial estate.¹⁰⁰ He further argue that the presumption must be given full legal application and the court need not look for evidence in favour of common property as it is legally required to take judicial notice. Obviously, the complete observance of the presumption of matrimonial common property is particularly crucial when doubts exist as to the personal nature of a given property in dispute. Therefore, the benefit of doubt must go to the spouse who affirms common property which of course is justified since it serves as a safe haven to the matrimonial interests of each spouses on equal terms.

B. Principles Applicable to Division of Common Property in Bigamous Marriage

As indicated above, the general principles applicable to common property per the conventional family law is utterly designed to govern marital property in monogamous marriage. So, having the cardinal principles indicated above in mind, the rule is simply to change the game in situations of plural marriage. Suppose a married couple in monogamous marriage where the husband after

family law principles and do not delve into the specific nature of common property divisions in bigamous marriages.

¹⁰⁰See *Ibid.* at Bekele.

some years was married to other woman. As indicated above, the husband and the second co-wife were engaged in the criminal practice of bigamy. Now, after the second marriage, husband would have two spouses but the first and second co-wives would each have only one. In such plural marriage what legal regime or principle regulates the division of common property in case where either the first marriage or the bigamous marriage is dissolved as per the law governing dissolution or divorce of marriage previously contemplated? After the husband, who is already married, marries the second spouse, is there now a single common property regime, including all three of them? Or are there multiple common property regimes – one pertaining to the first monogamous marriage and the other pertaining to the second bigamous marriage? Is the husband part of the common property regime with more than two spouses as a unison or part of multiple but separately dyadic common property regime?

It is very crucial to determine how many common and personal property regimes have been created in order to characterize the property of married persons correctly. Therefore, it goes without saying that the number of common property regimes has a repercussion on the principles of division that will apply when one of the marriage ends and the other continues, making the structure of the marriage a very important decision that the court should need to make when confronted with such problem. Accordingly, it is important to analyze some principles governing the division of property in case where each marriage noted above opted either for single common property regime or multiple common property regime model and the challenges associated with it.

In a single common property regime, all incomes or earnings of spouses in bigamous marriage would simply be added to the common estate without distinction between the spouses and without regard to the priority of order of time.¹⁰¹ It is argued that this approach may be more appropriate and better reflect the expectations, intentions and behaviours of the parties in two cases. First, for marriages concluded simultaneously or very close together in time.¹⁰² Second, for marriages in which every spouse live together as group members thinking of themselves as one family and all earnings are pooled together without making separate distinction.¹⁰³

On the other hand, multiple common property regimes refer to the existence of different common property regime depending on their order in time.¹⁰⁴ This form of common property regime is argued to be more crucial since “analyzing each marriage as creating a new common property regime is simpler than regarding plural marriages as creating an ever-larger common property regime with a variable number of members.”¹⁰⁵ In support of this assertion, there exists a growing authority in the literature that pushes both monogamous and bigamous marriages as “variant forms of the same genus and they each create the status of husband and wife.”¹⁰⁶ For instance, it has been authored that, polygamy in reality is not so much a form of marriage fundamentally distinct from monogamy. It rather represents multiple

¹⁰¹ Diane J. Klein, *Plural Marriage and Community Property Law*, Golden Gate University Law Review, Vol. 41, (2010), p. 61

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Id.* p.59.

¹⁰⁵ *Ibid.*

¹⁰⁶ See *Encyclopedia Britannica*, Vol. 14, p. 949.

monogamies. According to this authority, bigamous marriage is in fact the repetition of a marriage contract, entered into individually with each wife, establishing an individual relationship between the man and each of his consorts.¹⁰⁷

The multiplicity of monogamous marriage in bigamous marriage also in turn implies the multiplicity of common property regimes. Accordingly, distinct common property regimes would be created depending on the order of time within which such properties were acquired. However, how are we to determine the contribution of husband to the new common property regime in circumstance where the spouse's labor already belongs, in its entirety, to the first common property regime of the first marriage? In other words, how much of husband's marital earning or income go to the first common property in the first marriage and how much to the second common property regime of the second bigamous marriage? By analogizing common property principle applicable to monogamous marriage under the RFC to the situation of multiple marriages, common property regime in each case is divided equally between the spouses without prejudice to the provisions of the law and agreement entered into by the spouses.¹⁰⁸ But, to apply this legal analogy and to ensure fairness to all the spouses concerned, each common property regimes in the bigamous marriage should be separately administered and the earnings likewise should be separately accounted under the contract of each marriage.

¹⁰⁷ Ibid. See also Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, And Bargaining For Equality*, *Columbia Law Review*, Vol. 110, (2010), p. 1955 Citing Gary S. Becker, *A Treatise on the Family* (ed. 1991), pp. 80–107 and Richard A. Posner, *Sex and Reason* (1992), pp. 253–60.

¹⁰⁸ The RFC, Art. 90.

In addition, it is also indicated that the subsequent women spouses of the bigamous marriage depends on the wealth of the polygamist husband requiring the determination of whether half of the common property acquired before each subsequent marriage to become part of such each subsequent marriage. Therefore, the application of the principles of common property under the RFC and other regional family laws of Ethiopia to bigamous marriage a don not only depends on the existence of separate contract of marriage, but also depends on the determination of whether the fractional share of the husband should constitute part of the second and subsequent separate common property regimes or remain part of the personal property of the polygamist husband.¹⁰⁹

But, the big trouble in the accounting of common property regime in bigamous marriage is where a prenuptial agreement that regulates separate common property regime is absent. In such situations, it becomes difficult to identify whether the disputed common property falls in the matrimonial estate of the first marriage or subsequent bigamous marriages. Thus, this state of conditions creates a default scenario in which all marital earnings of all the spouses boils down to an entire single common property regime irrespective of the accounting of the order of time within which the property has been acquired. As noted above, the principle behind existing monogamous property division rules is that dissolution of marriage that ends common property regime requires the distribution of that common property to the former spouses in *pro rata*. So, it wouldn't be difficult to extend this principle in case where the

¹⁰⁹ As already noted, this principle assumes that intention of the husband to sustain and support his second wife without which the second marriage would be in jeopardy.

numbers of spouses that are part of the single community property regime are multiplied subsequently.

Accordingly, dissolution of bigamous marriage that spells the end of a default single common property regime in which three spouses were present, end up in the distribution into three equal shares.¹¹⁰ This kind of accounting considerably avoids unfairness of property division to all spouses after the first marriage. But, it is not fair to the first wife, as the subsequent marriages diminish any prior common property share of the preceding marriage. In other words, the first wife and the subsequent wives according to the order in time during which they laboured a wealth contributed to the common property become less advantageous because a fractional share of the first common property will be transmuted into the second and subsequent common property regimes. For instance, if the husband is the bread winner of the first family, his incomes or earnings are going to be allocated to the subsequent marriages which become part of the second and subsequent single common property regime in which all spouses are expected to share.

However, one has to closely look the purposes of legal principles governing common property regime in monogamous marriage to forward an alternative arguments that tries to alleviate the problems of property division in bigamous single common property regime of this type. First, in the absence of written agreements that regulates multiple common property regimes, no matter how it affects the property interests of prior wives, the social policy that should be

¹¹⁰ This method of accounting matrimonial property is engaging particularly in dividing rural landholding as in most cases the title of the land is registered in the name of the husband and that every spouse has no better right to the land than the other as ownership of land belongs to the state and people of Ethiopia.

attained by the law is to ensure that the benefit of doubts must go to the spouses who asserts single common property regime, which as noted before, is a measure that safeguards the proprietary interests of all spouses on equal basis. Thus, the cardinal legal principle of presuming common property in the context of monogamous marriage once again could be contemplated in bigamous marriage on similar legal reasoning. One may find that pursuing this approach is practical to the present situation of Ethiopia in which contract of marriage that regulates the pecuniary effects of monogamous marriage is not accustomed and where the economic life of the incoming bigamous women spouses depends on the viability of such common property.¹¹¹

The second alternative solution could be providing an opportunity for a woman spouse who is aggrieved by the unfairness of the marital single common property division to show that the property under dispute is acquired prior to the celebration of the subsequent marriages with her husband. As indicated in the first alternative approach, the presumption is still single common property regime in bigamous marriage but, this time, with the rebuttal right of the woman spouses in the prior marriages. At this juncture, one may ask why this principle is not equally worth mentioning to the husband concerned. It could be strongly argued that by contracting second and subsequent illegal bigamous marriages, the husband has risked his property interest which he willfully ventured to sustain his second and subsequent illegal marriages. Therefore, denying him the opportunity to adduce evidence to prove common property acquired during the first marriage strikes the

¹¹¹ In rural area, this fact also holds true even to certificate of marriage where most spouses rely on procession of civil status to proof the existence of marriage.

balance between the discriminatory nature of bigamous marriage,¹¹² and reduce the effects of such property division on the life journey and stakeholders of the subsequent marriages. This approach combines the previous two regimes of common property and hence vital to ensure fairness to the first monogamous wife by safeguarding against the abuse of her husband while at the same time maintains the economic viability of the subsequent wives who depend on him.

Generally, in the absence of separate contract of marriage regulating multiple common property regimes of the bigamous marriage, the principle governing single common property regime indicated above could be validly invoked. But, in case where women spouses are succeeded in proving the existence of distinct common property regime both individually or in group that is acquired before any subsequent marriage, the division of such marital property could be accounted on that separate basis. The share of a dissolving woman spouse may be calculated simply based on the proved common property regime acquired before the subsequent marriage with the husband plus the fractional share of the property acquired during the subsequent marriage generally earned by all the spouses. For instance, if the first wife dissolves her marriage after some time her husband is married to the second co-wife, the division of the ascertained common property of the first wife becomes half plus one-third of the additional fraction of the common property acquired during the second marriage during which the life span of the first marriage has persisted. In the

¹¹² If the right of the husband to marry other women is recognized despite its negative effect on the right of the first woman spouse, there is no wrong in recognizing the illegality of the husband who tries to benefit from such illegality, expressed in waiver of right to adduce evidence on equal footing. This point is better appreciated by reversing the scenario: take simply a woman in polyandry.

same vein, if the second wife dissolves her bigamous marriage ending distinct common property regime, she also deserves half of such property plus one-third fractional share of the property earned by all spouses during the life of the second marriage. On the other hand, a situation in which group of women spouses may proof the existence of distinct but single common property regime acquired before the celebration of the subsequent bigamous marriage. In the same fashion, if someone dissolves a marriage that ends such single common property regime, the calculation becomes the fractional share of the property that is divided by the number of spouses plus any additional fractional share earned by all spouses in common during the subsequent marriage.

Hence, in the presence of evidence and contractual arrangements, this rule creates a condition in which the *pro rata* shares of the women spouses would be treated as their “personal property” acquired before the husband entered into the subsequent marriages.¹¹³ Accordingly, in case where fractional share of such “personal property” of one of the women spouse is transmuted to the subsequent common property regime, the principle of re-taking personal property under the RFC could be consulted.¹¹⁴ This rule clearly stipulates the possibility of withdrawing personal property, money or things of value corresponding to such price that has been alienated or fallen in the common property provided that one of the spouses has succeed in proving such allegation. At this juncture, it has to be noted that though marriage

¹¹³ This idea simply extends the logic of the legal principle under monogamous marriage that dictates the separate treatment of the personal property acquired by each intending spouses before the conclusion of marriage.

¹¹⁴ The RFC, Art. 86.

presumptively requires distribution of common property on equally terms, the shares of spouses may be also accounted in proportion to their contribution in case where the personal property of one of the spouses thereof has fallen in the common property. Hence, the burden of proof would be on each spouse to prove that either of the spouses contributed from their personal property (but not from the income derived from such property) more than the other and deserve greater proportion compared to the other partner.¹¹⁵ In the same token, the family code also provides spouses with the right to claim indemnity if one of the spouses proves that the personal property of the other spouse or of the common property has been enriched to the prejudice of the others personal property.¹¹⁶

Generally, two important cautions should be made at all times while bothering for the division of common property as analyzed so far. First, it should be noted that all incomes derived from each and every personal property including earnings acquired by the personal efforts of all spouses' falls within the scope of common property that emerges into an entire single common property regime of the bigamous marriage absent contractual arrangements. Second, the departure of one spouse or two spouses at the same time or at different times does not warrant a separate property award to the other remaining spouses. Therefore, while the dissolving spouse takes the fractional share from the single common property regime, the remaining property continues to be the common estate of the remaining spouses until the day dissolution makes them apart. Having the above legal principles in mind, the

¹¹⁵ RFC, Art. 86(3).

¹¹⁶ RFC, Art. 88.

following section further recapitulates how Federal Cassation approaches these issues in practice.

5. THE JURISPRUDENCE OF THE FEDERAL SUPREME COURT CASSATION

The FSCC holds the view that bigamous marriage is a multiplication of monogamous marriage in which women spouses are capable of establishing multiple common property estate during respective marriages.¹¹⁷ One of the landmark decisions crystallizing this legal interpretation is in the case of *Aminat Ali v. Fatuma Wubet* indicated before. In this case, the FSCC recognized the problem of legal lacuna regarding matrimonial property division in such bigamous marriage but it, however, capitulated the existence of clear legal provisions in both RFC (Art. 86.1) and regional family codes that could be analogized to this situation.¹¹⁸ The FSCC reasoned that the principles governing the common property under the RFC and other regional Family Codes, though adapted to regulate monogamous marriage, could “*for stronger reasons*” and “*by the operation of the law*”, be applicable to marriages in which two or more wives exist.¹¹⁹

Accordingly, it is decided that each wife shall have equal right to divide the property acquired with their own husband during the life of each marriage. Based on the legal presumption of equal division of common property noted before, the FSCC decided that a property acquired during the first marriage

¹¹⁷ *Aminat Ali v. Fatuma Wubet, Supra note 71.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

should be equally divided (50 percent each) between the first wife, Fatuma Wubet and her husband, Mehammad Hussein as forming part of the distinct common property regime.¹²⁰ In the same fashion, the FSCC also reasoned out that, the property acquired during the second marriage between the personal or common efforts of the second wife, Aminat Ali and her husband, Mehammad Hussein is decided to be equally divided (50 percent each) between the two spouses.¹²¹ However, on top of establishing the multiplicity of common property regime, the FSCC decided that both Fatuma and Aminat has the right to fractional share from the property acquired by the personal efforts of their husband, Mehammad Hussein, during the first and second marriages respectively.¹²² Accordingly, Mehammad Hussein and Fatuma shall equally divide the common property acquired during the first marriage and the fractional share (50 percent) of Mehammad Hussein from the first marriage goes to Aminat Ali (25 percent each) while Fatuma shall also equally divide the 50 percent fractional share of Mehammad Hussein from the second marriage after equally divided between Mehammad Hussein and Aminat Ali.¹²³

The analysis of the FSCC in short projects from the spectrum of Mehammad Hussein as a center of all the marriages. The calculation is accounted from the point in which each wives share a distinct common property acquired with

¹²⁰ Ibid.

¹²¹ Ibid. The court however noted that as the second marriage between Aminat Ali and Mehammad Hussein is not dissolved it does not imply that such common property should be divided during the pendency of marriage.

¹²² Ibid.

¹²³ Ibid.

their husband, Mehammad Hussein, irrespective of the order of time during which the marriage is concluded and the property is earned. It is in this context that the FSCC permitted Aminat Ali to equally share half of Mehammad Hussein's fractional share of the common property acquired from the first marriage for reasons not provided in the judgment. As noted before, a fractional share of Mehammad Hussein from the first marriage constitutes a personal property acquired before the second bigamous marriage concluded with Aminat Ali. On the other hand, Fatuma Wubet has the right to fractional share from the second bigamous marriage since her marriage obviously co-exists until it is dissolved by divorce. In this particular case, the interpretation of the FSCC is cogent since the earnings of Mehammad Hussein during the second marriage constitute an earnings acquired by the personal efforts during the life of the first marriage forming also part of the common property regime of the first marriage. In the same logic, unless other parameter is used, there is no legal ground in which the property acquired by the personal efforts of Mehammad Hussein before the second marriage becomes the common property of the second bigamous marriage.

The pertinent issue overlooked by the FSCC was, therefore, whether it would be fair to equally divide half of the property acquired by the personal efforts of Mohammad Hussein during the first marriage to the second wife, Aminat Ali? As indicated before, it is a clearly established legal principle under the conventional Family law that a property acquired by the personal efforts of an intending spouse before marriage remains the private property of the spouses after marriage with the onus of proof to that effect. Of course, in the absence

of proof, the second and subsequent wives are more advantageous than the husband and the first wife as revealed by the decision of the FSCC in which Aminat Ali ripe 75 percent (25 plus 50) of the two common property division compared to the time order and contributions of Fatuma and Mehammad Hussein. As noted before, the decision made by the FSCC could be justified in so far as Mehammad Hussein is concerned since he consented to contract bigamous marriage thereby risking his own personal interest that otherwise would have become a sole personal property. But, as indicated before, it is possible to divide the second common property regime as it generally forms a single community property regime acquired during the life of Aminat's bigamous marriage in which Fatuma's marriage co-existed.

The writer shares the reasoning of the FSCC regarding the division of the fractional share of Mehammad Hussein acquired from the first common property to Aminat Ali since it sends a clear message to potentially polygamist husbands to take a good lesson. Accordingly, the calculation of the FSCC division in the case at hand somehow would be reshuffled in a more favourable way to the first monogamous wife and treat the bigamist husband equally with the bigamist wife. Thus, by applying the formula indicated above, the common property division should have been as follows. While Fatuma Wubet ripe half of the common property from the first marriage, she also deserve one-third (not one-fourth as the FSCC allocates) fractional share from the second marriage since the common property acquired with the efforts of her husband during the second marriage co-existed with the first marriage, forming part of the single common property regime. Likewise, while Aminat

Ali “deserves” one-fourth fractional share from the common property regime of the first marriage as it is acquired by the personal effort of her husband (in the same way allocated the FSCC) she however only deserves one-third (not half as the FSCC allocates) equal share from the common property acquired during the second marriage as it forms part of a single common property regime of the bigamous marriage. Thus, the share of Mehammad Hussein equals the share of Aminat Ali – which is one-fourth plus one-third.

The second landmark FSCC decision regarding bigamous matrimonial property dispute is the case of *Kedija Siraj v. Zeinaba Khalifa*.¹²⁴ Kedija Siraj married to Hadji Mehammad in 1984 Ethiopian Calendar (EC). While the first marriage is in force, Zeinaba Khalifa concluded a bigamous marriage with Hadji Mehammad in 1987 EC. However, due to the dissolution of the bigamous marriage between Kedija Siraj and Hadji Mehammad Halis, Zeinaba interfered in the dispute regarding the division of the house claiming that she deserves a share in the house built by her husband, Hadji Mehammad and Kedija Siraj. The lower court decided in favour of the second bigamous marriage arguing that Kedija Siraj failed to prove that she contributed to the house which was allegedly built by Kedija Siraj and Hadji Mehammad Halis. After the exhaustion of lower courts through appeal and Regional Cassation, Zeinaba petitioned to the FSCC for *basic error of law* over the division of a house acquired during the bigamous marriage between Kedija Siraj and Hadji Mehammad Halis arguing that she has the rights to share from the property earned by the personal efforts of her husband during the life of her marriage.

¹²⁴ Zeinaba Khalifa v. Kedija Siraj, Federal Supreme Court, Civ. Cassation. No 50489, Division, (Published Federal Court Cassation Decisions, Vol. 11, 2004).

The FSCC by citing article 62(1) of the RFC reasoned out that, despite any contrary proof as to the existence or no-existence Zeinaba's contribution to the common property estate of the bigamous marriage, she is entitled to half of Hadji Mehammad's fractional share since it is acquired by his personal efforts during the life of the first marriage.¹²⁵ As noted before, article 62(1) of the RFC is designed to regulate all incomes derived by the personal efforts of the spouses and from their common or personal property during marriage to be considered as a common property. Accordingly, as long as the first marriage of Zeinaba and Hadji Mohammad co-existed with the bigamous marriage of Kedija, the property acquired by the personal efforts of Hadji Mohammad in the meantime constitutes an income of spouses acquired during the life of the first marriage thereby forming part of the common property. However, in order to ensure fairness to the three spouses as clearly indicated before, the FSCC should have applied the principle of single common property regime since the property acquired during the second marriage belongs to spouses in common earned during the co-existence of the two marriages. Pursuing this track of interpretation, Kedija should have been entitled to one-third of the share but not half of the share in the house as decided by the FSCC. This approach provides an opportunity for spouse to the share of the property acquired during the life of marriage without the need to require the spouses to prove contribution to the common property. Of course, it goes without saying that first wife shares half of her husband's fractional share from the house

¹²⁵ Ibid.

acquired during the second marriage so long as such property was earned by the “personal efforts” during the subsistence of the first marriage.

Eventually, an exemplary decision crystallized by the FSCC in the case that complement the complex situation of property division in bigamous marriage is the reasoning that provides the opportunity to reclaim property that was allegedly unlawfully enriched by the other spouses resulting in the *inappropriate lose of the effects of one’s own labour*.¹²⁶ The FSCC held the view that in such state of affairs, a spouse who is able to proof an *exceptional contribution directly to the estate may claim a better right to the property during division* in such a way to accomplish the overall purpose for which the family law has been designed.¹²⁷ So, again the forum to re-take one’s own product of labour is open for the just and equitable dispensation of matrimonial property. However, this writer has the opinion that the jurisprudence of the FSCC that spouses who would proof exceptional contribution to the matrimonial estate may exercise a *better right* should have to take the legal principle that considers all incomes derived by personal efforts and personal property of one of the spouses as the common property and the legal presumption that accompany it.

6. CONCLUDING REMARKS

The introduction part of this article posed research questions to which the forgoing discussion targeted to provide analytical answers. The first of those

¹²⁶ Aminat Ali v. Fatuma Wubet, *Supra note 71*.

¹²⁷ Ibid.

questions was: what will happen to the effects of a bigamous marriage where its practice is criminalized and its recognition denied on what so ever grounds? As is obvious from the preceding discussion, in such self-denying legal trajectory, woman cannot seek relief that resulted from the effects of such illegal marriage. Therefore, if a marriage of a woman happens to be bigamous, she will, in the eyes of the law, end up discriminated for the mere fact that such institution happens to be outlawed. If one general conclusion were to be drawn, it would be a clear discrimination between women in bigamous marriage and women in monogamous marriage. Thus, women who for different social, cultural, religious and economic reason contracted a bigamous marriage will ultimately face double discrimination – that she is unequally treated with her husband due to the discriminative nature of polygamy *per se* and that she would again unequally treated with the other women who contracted monogamous marriage by the mere fact that her marriage happens to be bigamous.

However, this article provides an alternative legal regime to which the eye and ears of our judicial system is yet unturned. Even if bigamous marriage is criminalized and recognition for the purpose of relief is still denied under the conventional family law, it is still legally possible to resort to the general principles of Ethiopian contract law to govern the legal effects of illegal or [immoral] bigamous marriage. The resort to general contract law principles in case of family law lacuna have been already crystallized in the binding legal interpretations passed by the FSCC. The contract of bigamous marriage can be “dissolved or annulled” on the ground of its illegality under both family and criminal law but can still produce legal effects under the ordinary contract law

being invalidated on the ground of its illegality or immorality. By resorting to general contract principles, we can still uphold the rubric of family and criminal law as a designation to regulate only monogamous marriage but still being fair to the claim and plights of bigamous spouses in bigamous marriage through the application of ordinary contract principles.

The second question addressed in this article was: what additional steps are contemplated to fully regulate the effects of bigamous marriage in case where polygamy is criminalized but yet recognition is imposed for the purpose of granting relief? As revealed by the analysis of this article, even if polygamy is decriminalized, the current conventional family laws are futile to fully regulate the effects of bigamous marriage. Let alone the RFC and other state Family Codes, even the Harari Family Code that excepted religious bigamous marriage is designed to regulate the pecuniary effects only where one man is married to one woman. The landmark decision made by the FSCC crystallized the fountain of justice by expressly recognizing the effects of bigamous marriage in the absence of clear legal regime.

In this regard, the conventional family law of Ethiopia regulating the division of common property in monogamous marriage was critically analyzed. The finding of the legal and court case analysis indicates that Ethiopian courts may seek to address the puzzle of property division in *de facto* bigamous marriage if the legal principles enshrined under the conventional family law are properly sought. As indicated in this paper, the principles of common property designed to govern dyadic marriage can be logically extended to apply to the situations of bigamous marriage. The conception that polygamy is a

multiplicity of monogamous marriage has gained acceptance by FSCC when it decided the division of common property acquired during the first marriage between the husband and the first wife on the one hand and the common property acquired during the second marriage between the same husband and the second wife on the other hand.

However, the puzzle encountered by the FSCC in the cases analyzed is that it failed to scrutinize the repercussion of treating the property acquired during the second marriage as creating single common property regime in which all spouses' together labour to enrich the common property belonging to three partners. There is the possibility in which the property acquired during the first marriage could be transferred to the second marriage without properly accounting for it. In such situation, justice will be jeopardized unless the re-classification of the common property of the first marriage is properly accounted for.

Generally, the article attempted to picture two situations in which common property would be divided between the spouses in bigamous marriage. The first situation relates to a multiple common property regimes in which a bigamous marriage forms a multiplicity of monogamous marriages. According to this model, each marriages forming the bigamous union constitutes separate common property regime separately regulated and administered based on separate contract of marriages. But, the problem with this multiple common property regimes is that it does not account for the personal efforts of the husband that legally forms part of the common property of all marriages during their co-existence.

The second situation is a single common property regime in which a bigamous marriage forms the sum total of all marriages during which common property is acquired. This model of common property regime is workable where a separate contract of marriage to regulate each common property acquired during the life of multiple marriages is absent. Particularly, in rural Ethiopia, bigamous marriage is characterized by a situation in which every bigamous spouse lives together and the members think of themselves as one family, and all earnings are pooled together. The legal principle that “all earnings derived from the personal efforts of all spouses and from their personal and common property should be considered as the common property of the spouses” is more practicable in single common property model of the bigamous marriage. This model is particularly more effective and fair to all spouses concerned since it is very easy to divide the single common property regimes acquired after the first marriage on equal fractional shares given the economic dependence of bigamous women spouses on the wealth of the “common” husband. Therefore, like equal division of common property in monogamous marriage, the same principle dictates the equal division of common property in bigamous marriage where more than two spouses are present. However, in case the first monogamous wife succeeds in proof of a separate common property regime before the subsequent marriages, she must be entitled to half of such property plus an equal fractional share from the common property acquired during the subsequent marriages during which her first marriage has co-existed. This is important to protect the rights of first legal wife from transmutation of her fractional share of the common property acquired during the first marriage to the property of the bigamous marriage. Thus, after the division of common

property of the first monogamous marriage, the working formula changes from $\frac{1}{2}$ to $\frac{1}{n}$, where n represent the number of spouses in the bigamous union.

It is hoped that the foregoing analysis, while not necessarily definitive on the question of how best to accommodate the dissolution of bigamous marriage and the division of common property in the context of Ethiopia, it certainly made it clear that it is possible to do so in harmony with the principles that guide current Ethiopian contract and conventional family law if the legal principles are carefully weighed and properly accounted for. But, given the 11 percent of women living in bigamous union, the interpretations of the FSCC in favour property division in bigamous marriages is both a demanding and necessary judicial task despite some flaws of the decisions to effectively address the complexities of bigamous matrimonial property division in Ethiopia. It is submitted that the legislator should be equally sympathetic to the lived reality of women in bigamous marriage and should strive to enact the legal framework that is fully committed to regulate the situation of such women. Law as “the reflection of societal values, custom and norms” ought to address the social reality across a given time and space. If the legislator fears the official legal recognition of bigamous marriage, a legislation that regulates the effects of bigamous marriage should be enacted in order to avoid violations of rights in which the vulnerability of women spouse is high.

THE CHANGE TO IMPROVE THE SYSTEM OF EIA IN ETHIOPIA: A LOOK AT THE NEW INVESTMENT PROCLAMATION

Dejene Girma Janka (PhD)*

1. INTRODUCTION

It is common knowledge that all countries desire to bring about development (or more specifically economic development). It is equally known that such desire is high in developing countries and very high in the least developed countries like Ethiopia. Hence, while countries generally take many measures to progress economically, developing and the least developed countries seem to turn every stone to bring about development. For instance, as it is easily understandable, Ethiopia's decision to construct the *Grand Ethiopian Renaissance Dam*, which is expected to produce about 6000 MW of electric power, is a manifestation of how desperate the country is to bring about (economic) development.¹

However, at times, some of the measures taken to bring about economic development are not environmentally benign unless some sort of precautionary measures are taken. For instance, it is possible to bring about economic growth by destroying the environment. Yet, for development to be real and meaningful, it has to be sustainable, whereas making development sustainable

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¹The project for the *Grand Ethiopian Renaissance Dam* on *Abbay* River (commonly known as the Blue Nile) was launched on April 2, 2011 by the late Ethiopian Prime Minister, His Excellency Mr. Meles Zenawi.

requires taking environmental values into account.² Of course, in addition to making development sustainable, the consideration of environmental values in decision-making process leads to the achievement of another objective. It is now well accepted that citizens have the right to live in a clean and healthy environment.³ Therefore, the protection of the environment or the consideration of environmental values while adopting a given course of action can facilitate the realization of everyone's right to live in a clean and healthy environment. Consequently, the protection of the environment can be justified not only from the perspective of making development sustainable but also from enforcing a human right.⁴

If environmental protection is necessary because it serves various purposes, the question then is how to protect it. In this regard, while various measures

² More or less, nowadays, the need to protect the environment by using different means such as environmental impact assessment seems settled. In this regard, in addition to the different legal instruments-international, regional and national-demanding environmental protection, a number of writers have been writing to show why the environment has to be protected from different perspectives. For instance, arguments for environmental protection have been put forward from anthropocentric perspective, cultural perspective (indigenous peoples' perspectives) and religious perspectives. There are also arguments that claim that environment has to be protected for its own sake or because other beings in nature have the right to be protected and humans do not have the right to destroy them. This is an eco-centric argument. For more on these points, see generally, Dale Jamieson (ed.), *A Companion to Environmental Philosophy* (Massachusetts: BLACKWELL Publishers, 2001).

³ For instance, FDRE Constitution, article 44; Article 24, African [Banjul] Charter on Human and Peoples' Rights, Adopted June 27, 1981, OAU DOC. CAB/LEG/67/3 REV. 5, 21 I.L.M. 58 (1982), *Entered into Force* Oct. 21, 1986, Article 24 (African Charter *hereinafter*). One can mention provisions from other legal instruments such as the UDHR and the ICESCR which, if interpreted, deliver the right to clean environment.

⁴ In fact, one may mention different ideologies which have been put forward to justify why the environment should be protected such as for its aesthetic values or for nature's sake or as a natural duty of all of us because we do not have any better right to destroy the environment than everything in the environment. But for the purpose of this article, indulgence into such discourses is not necessary.

could be adopted to protect the environment, environmental impact assessment (EIA) is one of the most important mechanisms to serve this purpose because it enables us to examine the possible impacts of a given course of action on the environment before it is adopted.⁵ Indeed, current environmental laws recognize the importance of EIA as a tool capable of ensuring the integration of environmental values into decision-making process thereby promoting sustainable development and the enjoyment of the right to live in a clean and healthy environment.⁶ This is true also in Ethiopia where the EIA Proclamation endorses the need to use such a method by reiterating that EIA promotes sustainable development and fosters the implementation of the constitutionally guaranteed right to clean and healthy environment.⁷ Actually,

⁵ See, for example, David Hunter et al., *International Environmental Law and Policy* 3rd ed. (Thomson West: Federation Press, 2007), p. 531, Lana Roux and Willemien Du Plessis, *EIA Legislation And The Importance Of Trans boundary Application* in Nathalie J. Chalifour Et Al. (eds.), *Land Use Law For Sustainable Development* (UK, 2006), p. 89; Michael Kidd, *EIA And The Four Ps: Some Observations From South Africa* in Nathalie J. Chalifour Et Al. (eds.), *Land Use Law For Sustainable Development* (UK, 2006), p. 181; Michael I. Jeffery, *Environmental Impact Assessment: Addressing The Major Weaknesses* in Nathalie J. Chalifour Et Al. (eds.), *Land Use Law For Sustainable Development* (UK, 2006), p. 451-452.

⁶ Environmental laws aim at restoring, preserving, and protecting the environment, whereas EIA is one of the principles environmental laws recognize to achieve these objectives. See Steven Ferrey, *Environmental Law: Examples and Explanations*, 3rd ed. (Chicago: ASPEN Publishers, et al., 2004), p.1; Thomas F.P. Sullivan ed., *Environmental Law Handbook*, 4th ed. (Maryland, Government Institutes Inc., 1997), p. 1; *The New Encyclopaedia Britannica*, V.18, (2005), p. 468. Incidentally, one should know that environmental law is a public law as its primary purpose is regulating the relationships between individuals and governments (public) with regard to the environment. Duard Barnard, *Environmental Law for All: A Practical Guide for the Business Community, the Planning Professions, Environmentalists and Lawyers* (Pretoria: Impact Books Inc, 1999), p. 14.

⁷ See EIA Proclamation No. 299/2002, paragraphs 2 and 3 of the Preamble. Actually, because Ethiopia has had laws aiming at the protection and preservation of the environment including the EIA Proclamation, it may be argued that the country is deeply concerned about its environment. See, for example, Khushal Vibhute, *Environmental Policy and Law of Ethiopia*, *JEL*(2008), Vol. XXIII, p. 75, 76, 82-83.

because Ethiopia is one of the least developed countries and, as a result, it is taking various developmental measures, the recognition and use of EIA in the decision-making process is an indispensable mechanism for promoting sustainable development.

The government of Ethiopia also seems cognizant of the need to protect the environment to bring about sustainable development. For instance, the Growth and Transformation Plan expressly recognizes that environmental conservation has vital contribution for sustainability of development.⁸ It also states that it is necessary to formulate policies, strategies, laws and standards which foster social and economic development to enhance the welfare of humans and the safety of the environment sustainably, and to spearhead in ensuring the effectiveness of their implementation.⁹ Thus, the relevance of using EIA to achieve the objectives of the GTP is clearly discernable because EIA facilitates environmental protection which, in turn, promotes sustainable development.

What then is EIA? EIA is understood in slightly different ways by different writers. For instance, some define it as a process of anticipating or establishing

⁸ See Section 8.9.1 of the *Growth and Transformation Plan (GTP) 2010/11-2014/15*, p.77, Ministry of Finance and Economic Development, *The Federal Democratic Republic of Ethiopia*, (2010) (GTP *hereinafter*). However, the GTP does not include environmental protection in its pillars. The pillars of GTP are sustaining faster and equitable economic growth, maintaining agriculture as a major source of economic growth, creating favorable conditions for the industry to play key role in the economy, enhancing expansion and quality of infrastructure development, enhancing expansion and quality of social development, building capacity and deepen good governance, and promote women and youth empowerment and equitable benefit. Thus, environmental protection is not listed, at least expressly, as one of the pillars of the GTP.

⁹Id. Section 8.9.2.

the changes in physical, ecological and socio-economic components of the environment before, during and after an impending development project so that undesirable effects, if any, can be eliminated or mitigated.¹⁰ Others define EIA as a process by which information about the environmental effects of a project is collected and taken into account before a decision is made on whether an action should go ahead.¹¹ Still other writers define EIA as a procedure for assessing the environmental implications of a decision to enact legislation, to implement policies and plans, or to initiate development projects.¹² In Ethiopia, it is defined as the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed *project* or *public instrument*.¹³

According to the first two definitions, EIA is necessary to determine the possible impacts of developmental projects on the environment with a view to taking measures either to avoid or mitigate these impacts, as the case may be. On the other hand, the last two definitions provide for a broader meaning of the concept as they conceive EIA as a process necessary not only for an impending development project but also for strategies or public instruments.¹⁴

¹⁰ See generally John Ntambirweki, Environmental Impact Assessment As A Tool For Industrial Planning 75 In Industries And Enforcement Of Environmental Law In Africa (Nairobi, UNEP/UNDP,1997); Duard Barnard, supra note 6, p. 179; D.K. Asthana and Meera Asthana, Environment: Problems And Solutions (India, S. Chand and Company Ltd.), p.336.

¹¹Peter Morris and Rik Therivel eds., Methods of Environmental Impact Assessment, 2nd ed. (London and New York, Spon Press,2001), p. 3.

¹²Peter Wathern, ed., Environmental Impact Assessment: Theory and Practice (London and New York, Routledge Taylor and Francis Groups, 1988), p. 3.

¹³ Environmental Impact Assessment Proclamation, No. 299/2002, article 2(3). (Emphasis added)

¹⁴*Public instruments* refer to policies, strategies, programmes, laws or international agreements. Id. article 2(10).

However, all the definitions share the element that EIA is a tool that enables decision-makers to take environmental issues into account. This is why EIA is said to be a means that authorities can employ to choose actions and make decisions with full knowledge of their impacts on the environment.¹⁵

Now, the procedure of EIA has spread throughout the world and most developed and many developing countries practice some form of EIA.¹⁶ As a result, it is said that the legal requirement of EIA is now one of the principles of environmental law with universal acceptance.¹⁷ What enabled the system of EIA to gain almost a universal acceptance or to be accepted in many legal systems? The answer to this query is very simple: the merits of using EIA made it obtain almost universal acceptance. For example, firstly, since EIA is a study conducted to determine the possible negative and positive impacts of an action, it enables decision-makers to choose actions with full knowledge of their impacts on the environment. This means, EIA enables them to know

¹⁵ Duard Barnard, *supra note 6*, p. 179; see also generally John Ntambirweki, *supra note 10*.

¹⁶ William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 *COLUMBIA JOURNAL OF ENVIRONMENTAL LAW* (2000), VOL. XXV, P. 17; Mark Lancelot Bynoe 'Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy?', *LAW, Environment and Development Journal* (2006), Vol. 2, No. 1, p. 34. available at <http://www.lead-journal.org/content/06034.pdf>.

¹⁷ See generally John Ntambirweki, *supra note 10*; Mohammed A. Bekhechi and Jean-Roger Mercier, *Legal And Regulatory Framework For Environmental Impact Assessments: A Study Of Selected Countries In Sub-Saharan Africa* (Washington, D.C., The World Bank, 2002), p. 6; the Rio Declaration (1992) and the Convention on Biodiversity (1992) which recognizes the requirement of EIA. According to some writer, it is the undeniable benefits of EIA (preventing, reducing or off setting significant adverse environmental effects of development projects and enhancing the positive ones) that has promoted developed countries to make it a mandatory requirement and caused developing country to play catch-up. See Mellese Damtie and Mesfin Bayou, *Overview of Environmental Impact Assessment in Ethiopia: Gaps and Challenges* (Addis Ababa, Melca Mahiber, 2008), p.3-5.

actions that are likely to affect the environment and reject those that deserve rejection, or alternatively, formulate mechanisms for the reduction of their impacts on the environment. In this sense, therefore, EIA serves as a tool that aims at preventing and/or reducing environmental harms thereby facilitating sustainable development. Secondly, EIA helps developers avoid possible litigation by ensuring that they do not undertake obviously environmentally harmful projects. Since EIA involves public participation in deciding whether or not a project is desirable, positive public perception towards the project may be taken as an indication of the project's success.¹⁸ Therefore, the proper use of EIA can bring about many benefits-both to the environment and to the project itself.

However, despite its paramount importance to ensure environmental protection, EIA is sometimes used improperly or it is done for purposes other than environmental protection.¹⁹ For example, in some countries, EIAs were prepared and used to justify environmentally degrading activities. Moreover, some officials use EIA in an attempt to postpone the duty of making decisions. Further, sometimes, officials make decisions and order EIA to be made to determine the validity of their decisions. Likewise, EIA has been used to hide the truth behind reams of paper as the bulkiness of some reports has been used to impress a gullible audience. This is a misuse of EIA which is even worse

¹⁸ For the discussion in this paragraph and more, see generally, National Environmental Management Authority, Handbook on Environmental Law in Uganda, 2nd ed. Vol. 2 (2005), p. 31.; John Ntambirweki, *supra note 10*.

¹⁹ See generally Duard Barnard *supra note 6, p. 179*.

than not using it because it entails waste of time, energy and resources for no good reason.²⁰

2. EIA IN ETHIOPIA

As we have seen before, the legal requirement of EIA is now universally accepted in the sense that most developed and many developing countries have adopted some form of EIA. In this sense, Ethiopia is not an exception.²¹ One of its earliest commitments to undertake EIA came into being when it ratified the Convention on Biodiversity in 1994 to protect and conserve biodiversity.²² Article 14(1)(2) of the Convention requires every contracting party to introduce appropriate procedures requiring EIA of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and also introduce appropriate arrangements to ensure that the environmental consequences of its programs

²⁰Moreover, such use of EIA is contrary to a number of democratic principles. For instance, public participation in the decision-making process is a generally accepted practice. However, if decisions affecting the environment are already made and EIA is done subsequently, public participation in such EIAs does not amount to participation in decision-making; rather, it amounts to commenting on the validity of the decisions. This is clearly contrary to what is known as *environmental democracy*, which may be understood as a system where the public controls those who make decisions that affect the environment or its components. Or, alternatively, it could be defined as a participatory and ecologically rational form of collective decision-making. For more on the meaning of *environmental democracy*, see, for example, Michael Mason, *Environmental Democracy* (London: Earthscan Publications Ltd, 2006), p.1; Susan Hazen (1998), *Environmental Democracy*, <http://www.unep.org/ourplanet/imgversn/86/hazen.html> (accessed on 13 May 2010); Giulia Parola, *Towards Environmental Democracy* (unpublished Thesis, Faculty of Law, University of Iceland, 2009), p. 26-28.

²¹ In fact, as the previous discussion has revealed, although the express recognition of the principle of EIA is a recent phenomenon, one may argue that both the 1987 PDRE and the 1995 FDRE Constitutions have recognized EIA in as long as they require the protection of the environment and environmental protection becomes effective if EIA is recognized and used.

²² Ethiopia signed the Convention on 10 June 1992 and ratified it on 05 April 1994. See the ratification status of the Convention on Conservation.

and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.²³

There are also other instruments which Ethiopia has ratified and which support the use of the system of EIA. For example, the International Covenant on Economic, Social and Cultural Rights recognizes everyone's right to the enjoyment of the highest attainable standard of physical and mental health and stipulates that this right can be realized by taking different measures including the improvement of all aspects of environmental hygiene.²⁴ Thus, it is not difficult to see how the use of EIA may contribute to the improvement of all aspects of environmental hygiene thereby facilitating the enjoyment of the highest attainable standard of physical and mental health. Moreover, the African Charter on Human and Peoples' Rights recognizes the right of all peoples to have a general satisfactory environment favorable to their development.²⁵ On the other hand, this right could be understood as implying

²³ It is interesting to note that article 14(1)(2) of the Convention requires not only project level EIAs but also strategic EIA by demanding governments to introduce appropriate arrangements to ensure that the environmental consequences of their *programmes* and *policies* that are likely to have significant adverse impacts on biological diversity are also duly taken into account. According to the reviewer of this article, there were projects which were donor driven and subjected to EIA in Ethiopia as early as 1980. For example, the former Ethiopian Valleys Development Authority was one of the institutions that introduced EIA into Ethiopia. Of course, one can imagine how difficult it would be to conduct proper EIA without a proper legal and institutional frameworks being put in place.

²⁴See article 12 of the International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 3 January 1976.

²⁵African Charter, article 24. The Charter recognizes the right to have a general satisfactory environment as a group right than as an individual right. All the same, such recognition of the right does not in any way alter the obligation of a state to take the necessary steps to enforce article 24 of the Charter.

the use of EIA.²⁶ Further, although it is a soft law, article 17 of the 1992 Rio Declaration is also worth mentioning because it specifically requires undertaking EIA for proposed activities that are likely to have a significant adverse impact on the environment.²⁷

However, despite the existence of the above instruments, the express recognition of the requirement of EIA in a domestic instrument in Ethiopia is a recent phenomenon.²⁸ For example, in 1997, Ethiopia adopted its first comprehensive environmental policy, the Environmental Policy of Ethiopia (EPE), which expressly recognizes the need to use EIA for development programs and projects.²⁹ The policy is important, in particular, for its recognition of not only project level EIA but also strategic environmental assessment by emphasizing the need to use EIA for developmental programs as well. However, the EPE does not provide for adequate stipulations to facilitate the use of EIA. Therefore, it was not until 2002, with the enactment

²⁶ Of course, the fact that the recognition and use EIA facilitates the enjoyment of the above right is already recognized in Ethiopia. See EIA Proclamation, No. 299/2002, the Preamble.

²⁷ See Principle 17, the Rio Declaration on Environment and Development, 1992.

²⁸ The 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE) requires the environment to be protected and also recognizes the right of everyone to live in a clean and healthy environment. For example, article 92(2) of the FDRE Constitution states that the design and implementation of programmes and projects of development shall not damage or destroy the environment. Article 92(4) of the Constitution stipulates that the government and citizens shall have the duty to protect the environment. Article 44(1) recognizes everyone's right to live in clean and healthy environment. Therefore, it could be argued that the proper implementation of these constitutional provisions largely depends on the use of EIA as a tool for decision-making whenever appropriate.

²⁹ See Environmental Policy of Ethiopia, 1997, Section 4.9.

of Ethiopia's EIA Proclamation, that EIA became a real legal requirement for projects and public instruments.³⁰

At the moment, the 2002 EIA Proclamation is the single most important domestic legislation Ethiopia has ever had in relation to EIA. It conceives of the EIA procedure as multifunctional. In its preamble, it declares that EIA facilitates sustainable development, fosters the implementation of the right to clean and healthy environment, brings about administrative transparency and accountability, and promotes public participation in decision-making process. In its text, the Proclamation provides for a number of important stipulations pertaining to EIA which, if effectively put into practice, can actually facilitate the achievement of the above objectives.

For instance, the Proclamation recognizes EIA as a tool applicable to both strategies and projects. It declares that actions that are subject to EIA should be determined by the Federal EPA (FEPA) by issuing directives. It also imposes on any licensing agency³¹ the obligation to ensure that an environmental permit or environmental clearance certificate (ECC) is obtained

³⁰ Actually, there was a *de facto* EIA in Ethiopia even before the enactment of the EIA Proclamation because a few land developers, including government owned agencies, were doing EIA and approaching FEPA to review their EIA reports. See, for example, Mellese Damtie and Mesfin Bayou, *supra note 17, p. 1*. This claim seems acceptable in particular when it is seen in light of the issuance of the 2000 EIA Procedural Guidelines of FEPA to ensure that EIA is done although there was no EIA law by then. Moreover, the previous investment law, to be seen later on, required applicants for investment permits to observe environmental protection requirements which were pushing them to use EIA under certain circumstances. Moreover, the fact that institutions like the World Bank started using EIA as a loan condition before 2002 could be taken as another reason why there was a *de facto* EIA in Ethiopia before the enactment of the EIA Proclamation.

³¹ As we will see later on, licensing agencies include Investment Bureaus and Trade and Industry Bureaus.

for a project subject to EIA before issuing an investment permit or a trade or an operating license for any project. Likewise, the Proclamation imposes the duty to do EIA on proponents, not on government while it entrusts the power to ensure that EIA is done and to evaluate reports to environmental protection organs. Moreover, the Proclamation recognizes the relevance of public participation in the EIA process and demands that the public is engaged in the process. Further, the Proclamation gives FEPA and regional environmental agencies (REAs) the mandate to monitor the implementation of the projects they have authorized with a view to evaluating compliance with all commitments made by and obligations imposed on the proponent during authorization.

On the other hand, the Proclamation obliges environmental protection organs to provide incentives, within the limits of their capacity, to projects (not public instruments, though) that are destined to rehabilitate a degraded environment or prevent pollution or clean up environmental pollution. Again, the Proclamation provides for the pecuniary penalty those who violate its provisions and other laws pertaining to EIA will have to face. Finally, the Proclamation authorizes the Council of Ministers and FEPA to issue regulations and directives, respectively, to implement its stipulations.

Therefore, despite its late introduction, the EIA Proclamation attaches great importance to the procedure of EIA. Moreover, it contains a number of important stipulations which aim at making the system of EIA work effectively and produce its intended results. However, the effectiveness of the

Proclamation hinges upon the issuance of subsidiary laws to implement its general and vague stipulations. Besides, there are many gaps in the proclamation which need to be filled by subsidiary laws. In default of such laws, the EIA Proclamation alone can hardly achieve its intended objectives. Mindful of these facts, the Proclamation authorizes the issuance of such instruments by the Council of Ministers and the FEPA.

Nevertheless, there are few subsidiary instruments issued to enforce the EIA Proclamation up to date. For example, the 2003 EIA Procedural Guidelines and the 2008 EIA Directive which contains the list of projects subject to EIA³² are the only ones. Although more than a decade has elapsed since the enactment of the EIA Proclamation, the Council of Ministers has not issued EIA regulation which is necessary for the effective implementation of the Proclamation. Similarly, the Federal EPA has not yet issued a comprehensive directive to implement the Proclamation. Consequently, as it stands now, the EIA Proclamation is not capable of achieving its intended outcomes. This

³²The directive has various defects. One of such defects is that it contains only few projects which are subject to EIA. These projects are mining explorations that is subject to federal government permit, dam and reservoir construction (dam height 15m or more, reservoir storage capacity 3 million m³ or more, or power generation capacity 10MW or more), irrigation development (irrigated area of 3000ha or more), construction of roads (Design and Standard DS1, DS2, DS3) with a traffic flow of 1000 or more, railway construction, taking fish from lakes on a commercial scale, horticulture and floriculture development for export, textile factory, tannery, sugar refinery, cement factory, tyre factory with production capacity of 15,000 Kg/day or more, construction of urban and industrial waste disposal facility, paper factory, abattoir construction with slaughtering capacity of 10,000/year or more, hospital construction, basic chemicals and chemical products manufacturing factory, any project planned to be implemented in or near areas designated as protected, metallurgical factory with a daily production capacity of equal or more than 24,000 Kg, airport construction, installation for the storage of petroleum products with a capacity of 25,000 liters or more, condominium construction, establishment of industrial zone.

means, the legal framework on EIA in Ethiopia is not adequate to ensure environmental protection. This, however, does not mean that there is no EIA in Ethiopia. In fact, however inadequate it may be, the system of EIA is working.

3. SECTORAL LAWS AND EIA IN ETHIOPIA

In order to have an adequate legal framework on EIA, the best thing to do is issuing all the necessary legal instruments the EIA Proclamation authorizes because such instruments will ensure the effectiveness of the system of EIA. However, there are also other ways of contributing to the effectiveness of the system. One such way is mainstreaming the requirement of EIA into sectoral laws. If sectoral laws require the use of EIA for actions that take place in their respective areas, the institutions in charge of overseeing their implementation will ensure that EIA is also used when required. This will, in turn, ensure the consideration of environmental values in decision-making process to ultimately promote environmental protection.

For example, it is possible for any land law to require the preparation of EIA before access is given to land for some projects. Wildlife protection laws could also require the preparation of EIA before actions such as hunting are allowed for tourists. Likewise, investment laws can require the preparation of EIA before investors are issued investment permits. In this regard, some real examples could be given. The recent Ethiopia Mining Operations Proclamation No. 678/2010. Under article 60(1), the Proclamation states:

Except for reconnaissance license, retention license or artisanal mining license, any applicant for a license shall submit an

*environmental impact assessment and obtain all the necessary approvals from the competent authority required by the relevant environmental laws of the country.*³³

This implies that anyone, save for artisan miners, who intends to carry out *exploration* or *mining* activity must conduct an EIA and obtain an environmental permit from the relevant federal or regional body before he/it is issued a license. In fact, this Proclamation contains other provisions which attempt to ensure the protection of the environment in the course of undertaking mining activities.³⁴

Therefore, if the other sectoral laws contain similar provisions, it is likely that the system of EIA will be improved in Ethiopia. However, the truth is, many of such laws have thus far failed to contain similar provisions. For example, to take one recent example, the Commercial Registration and Business Licensing Proclamation, Proclamation No. 686/2010 could require the use of EIA but it has failed to do so. In any case, in the following section, we will explore the

³³ Emphasis added.

³⁴ See, for example, articles 34(1)(b), 44(1), (2)(3), and 61(4). At this juncture, it may be relevant to mention that the Urban Planning Proclamation No. 574/2008 contains some provisions which may be used to promote environmental protection through the use of EIA. For example, according to the third paragraph of its Preamble, one of the factors that necessitated the issuance of the Proclamation is the need to ensure that development undertakings carried out both by public and private actors are not detrimental to the protection of the environment. Similarly, article 5(7) recognizes safeguarding the community and the environment as among the basic principles that any process of urban plan initiation and preparation must comply with. Further, article 9(2)(f) requires any structural plan to mainly indicate, among other things, the environmental aspects of the plan. So, although it is not expressly mentioned, one may argue that, based on the above provisions, the Urban Planning Proclamation No 574/2008 may be used to ensure that EIA is done when urban planning takes place.

position of the Investment Proclamation No. 769/2012 and what it may mean for the system of EIA in the country.

4. THE INVESTMENT PROCLAMATION, PROCLAMATION No. 769/2012

So far, Ethiopia has issued many investment laws. The most recent one is Investment Proclamation, Proclamation No. 769/2012. This Proclamation is a substitute for Investment Proclamation No. 280/2002 as amended by Investment (Amendment) Proclamation No. 375/2003. The latter Proclamation, that is, Investment Proclamation No. 280/2002 as amended by Investment (Amendment) Proclamation No. 375/2003, did not recognize conducting EIA as a requirement to obtain investment permit. Indeed, its predecessor, Investment Proclamation, Proclamation No. 37/1996, somewhat recognized the need to observe the environmental laws of the country,³⁵ which could be interpreted to include EIA. However, Investment Proclamation No. 280/2002 as amended by Investment (Amendment) Proclamation No. 375/2003 failed to recognize the need to ascertain the observance of environmental laws before issuing investment permit. As a result, many investment authorities were not, even after the issuance of the EIA

³⁵ Article 14(1) of the Investment Proclamation, Proclamation No. 37/1996, states:

Upon receiving an application for investment permit made in full compliance with the provisions of Article 13 of this Proclamation, and after ascertaining within 10 days that the intended investment activity would not be contravening the operational laws of the country and that, *in particular, it complies with conditions stipulated in environmental protection laws*, the appropriate investment organ shall issue an investment permit to the applicant. (Emphasis added).

However, since there was not EIA law by then, it was not possible to compel investors to do EIA although they could be compelled to observe other environmental laws.

Proclamation, requiring investors to produce environmental permit as one of the requirements to obtain investment permits.³⁶

Nonetheless, unlike Investment Proclamation No. 280/2002 as amended by Investment (Amendment) Proclamation No. 375/2003, the new investment proclamation, Investment Proclamation No. 679/2012, contains some provisions which are pertinent to environmental protection. The question then is whether these articles have resurrected the chance of improving the system of EIA by effectively requiring investment bodies to require the production of environmental permit, for actions subject to EIA, before issuing investment permits. In the following paragraphs, the relevant articles of the new Investment Proclamation No. 679/2012 are identified and analyzed.

Article 38: Duty to Observe Other Laws and Protection of Environment

Any investor shall have the obligation to observe the laws of the country in carrying out his investment activities. *In particular, he shall give due regard to environmental protection.*³⁷

³⁶For example, many projects were implemented without EIA in Amhara, Tigray, Oromia, SNNPRS, whereas virtually no project passes through EIA in Somali and Afar. Similarly, many projects licensed by the federal government bypass the EIA step. This information was obtained from the relevant offices by the writer in the course of writing his PhD dissertation. The dissertation is unpublished yet and available with the writer and the Graduate School, University of Alabama, Tuscaloosa, USA.

³⁷ Emphasis added.

Article 30: One-Stop Shop Service

(4)The Agency [Ethiopian Investment Agency] shall provide the following services on behalf of investors:

- (d) execution of investors' requests for approval of impact assessment studies conducted on their investment projects.

Article 19: Suspension or Revocation of Investment Permit

(1)Where an investor violates the provisions of this Proclamation or regulations or directives issued to implement this Proclamation, the appropriate investment organ may suspend the investment permit until the investor takes due corrective measures.

(2)The appropriate investment organ may revoke an investment permit where it ascertains that:

- (a) the investor obtained the permit fraudulently or by submitting false information or statements.

(6) An investor whose investment permit is revoked may not be issued with a new investment permit before the lapse of one year from the date of revocation.

Now, it is important to realize that, if closely scrutinized, the above provisions could be used to strengthen the system of EIA in Ethiopia.

First, article 38 of the Proclamation attaches greater importance to environmental protection because, although it requires investors to observe all the laws of the country, it in particular requires them to give due regard to environmental protection. On the other hand, investors can give due regard to

environmental protection only if they observe the laws pertaining to environmental protection. At the moment, Ethiopia has myriad of environmental protection laws. Hence, according to article 38, investors must observe any of these laws which they may come across in the course of doing their business.

On the other hand, one of the environmental laws that investors may come across, as we have seen before, is the EIA Proclamation. The Proclamation bans anyone from commencing the implementation of a project for which EIA is necessary before EIA is done and authorization for its implementation is obtained from the appropriate environmental protection organ. As far as the project that is subject to EIA is concerned, the Federal EPA has an EIA Procedural Guidelines which provide for a detailed list of actions subject to EIA. Hence, article 38 of the new Investment Proclamation No. 769/2012 could (should) be understood to require the use of EIA for investment activities subject to EIA. This is so because an investor who fails to do EIA cannot be taken as observing the EIA Proclamation and, hence, the law pertaining to the protection of the environment within the meaning of article 38 of the new Investment Proclamation.³⁸

Second, article 30 of the new Investment Proclamation requires the Ethiopian Investment Agency to provide investors one-stop shop service. This article

³⁸ It is said that EIA is important to ensure environmental protection for it serves as an early warning about the possible impacts of a given course of action so that timely measures can be taken, if need be, to deal with such impacts. See Prasad Modak and Asit K. Biswas, *Conducting Environmental Impact Assessment in Developing Countries* (Tokyo et al., United Nations University Press, 1999), p. 13.

intends to relieve investors from running around to get various services. Then, the Proclamation goes on and, under article 30(4)(d), requires the Agency to execute investors' requests for approval of *impact assessment studies* conducted in relation to their investment projects. This means, investors are not expected to go to the relevant environmental protection organs to have their EIAs reviewed and approved. Instead, they can submit their EIAs to the Agency and the Agency will pass over the report to the appropriate environmental for review and approval.

But the most important point to figure out here is not that the Agency helps investors get the services they need but the message that article 30(4)(d) conveys. The article implies that investors are expected to do EIA when the activities they intend to carry out are subject to EIA according to the relevant EIA instrument. So, it is only after they have prepared their EIAs that this article relieves them of their duty to visit the appropriate environmental protection organs to have their EIAs reviewed and approved. Of course, article 30(4)(d) does not compel investors to do EIA. Yet, the cumulative reading of article 38, as discussed above, and article 30(4)(d) clearly tells that investors are duty bound to conduct EIA whenever it is necessary. This is a major departure that article 30 of Proclamation 769/2012 makes from its predecessor, article 24 of Proclamation 280/2002, which does not make any reference to the environment at all.

Third, article 19(1) and (2) of the new Investment Proclamation 769/2012 provide for the grounds to use to suspend or revoke already issued investment permits. According to article 19(1), an investment permit could be suspended

by the appropriate investment organ if an investor violates the provisions of Investment Proclamation 769/2012 or regulations or directives issued to implement its provisions until due corrective measures are taken. On the other hand, although it is not necessary to ensure the preparation of EIA because the article deals with the situation after investment permit is granted, it is important to ensure that EIA is used in the course of implementing a project. For example, the article is very important to ensure that investors implement the environmental management plan they include in their EIAs to avoid or mitigate the adverse impacts of their actions on the environment. This is part of the EIA process because the EIA process does not stop at the stage where reports are reviewed and approved. In any case, article 19(1) is a key stipulation to monitor how investors go about implementing their projects and whether they are using their EIAs during such period. This will contribute to the effectiveness of the system of EIA.

At this juncture, it is worth remembering that any person, in particular, environmental protection organs can bring to the attention of the investment organs that has issued investment permit any deviation by an investor which affects the environment adversely with a view to have the permit suspended. Then, the suspension can remain in force until the concerned investor takes due corrective measures.³⁹

³⁹ It is interesting to note that the Proclamation does not authorize the revocation of the license if the investor fails to take due corrective measures within a reasonable period of time. Of course, it could be argued that revocation is a logical extension of suspension if the concerned investor does not take due corrective measures within a reasonable period of time. See article 19(2) of the Proclamation on the grounds for revocation of investment permits.

Moreover, article 19(2) of the new Investment Proclamation provides for the possibility of revoking an investment permit. This can happen, for example, if it is proved that the investor obtained the permit fraudulently or by submitting false information or statements. This stipulation is of paramount importance to the quality of the EIA that is done. It is true that there are many investors who submit fictitious EIAs to the relevant environmental protection organs. However, according to this new Investment Proclamation, it is possible to revoke the license of the investor who submitted an EIA that lacks integrity and obtained investment permit. The stipulation clearly has a deterrent effect. It seems that investors will not risk having their licenses revoked if they know that any fraud or misrepresentation in the information they provide to the relevant investment organs, including the information in their EIAs, may cause the cancellation of their licenses.

Another important stipulation in the new Investment Proclamation is article 19(6). This article adds strength to the deterrent effect of article 19(2). It stipulates that investors whose permits are revoked will not be issued new permits before the lapse of one year from the date of revocation. Hence, investors whose permits are revoked must wait until one year passes from the date their permits are cancelled to obtain new investment permits. On the other hand, this is not a risk that rational investors may want to assume. What this means in relation to EIA is that rationale investors will abide by the requirements of the EIA instruments so as to avoid the possibility of having their permits revoked.

In conclusion, there is no question that the system of EIA is now in far better position than it was before the enactment of the Investment Proclamation 769/2012. Similarly, investment organs can no more argue that they have no legal obligation to require investors to produce environmental permits to obtain investment permits. Instead, they will have to receive EIAs from investors and seek the review and approval of same, on their behalf, by the relevant environmental protection organ. Environmental protection organs can also capitalize on this opportunity to work cooperatively with investment organs to ensure the effective use of EIA. For instance, Environmental protection organs, in particular, the FEPA can deposit its EIA Procedural Guidelines with investment organs so that the latter could check which actions are subject to EIA and which are not to ensure adherence to the system of EIA.⁴⁰

Therefore, it could be concluded that the new Investment Proclamation, Proclamation No. 769/2012, has revived and even created more opportunities to improve the system of EIA in Ethiopia. As a result, although the legal framework on EIA is inadequate mainly because some important instruments necessary for its effective implementation are still lacking, the recognition of the need to protect the environment in general and to use EIA in particular in the new Investment Proclamation No. 769/2012 will lessen the impact of such inadequacy.

⁴⁰ This is so because EIA is not necessary for every action although all development actions which may have significant impact on the environment are potentially subject to EIA. See, Norman Lee and Clive George (eds.) *Environmental Assessment in Developing and Transitional Countries* (New York et.al.: John Wiley and Sons Ltd, 2000), p. 1.

Nevertheless, there is still one question that is worth raising and examining. That is, although the better stance of the new Investment Proclamation No. 769/2012 on environmental protection in general and the use EIA in particular is now beyond doubt, it is still important to see if it has gone far enough. Here, two possible positions could be reflected.

First of all, as we have seen before, the relevant provisions of the New Investment Proclamation could be interpreted and used to ensure the implementation of the system of EIA. As a result, it could be argued that the Proclamation has gone far enough to contribute to the effectiveness of the system of EIA in the country. After all, the new Investment Proclamation is an economic law, not an environmental law. As such, it is not expected to provide for more stipulations than it already has provided.

On the other hand, one can argue that, without prejudice to the possibility of interpreting its provisions to ensure the use of EIA, the new Investment Proclamation does not go far enough to contribute to the effectiveness of the system of EIA in Ethiopia. Many examples could be given to support this assertion. One, if we look at the Mining Operations Proclamation No. 678/2010, as discussed before, it expressly requires applicants to submit an EIA and obtain all the necessary approvals from the competent authority in accordance with the relevant environmental laws of the country. However, the new Investment Proclamation lacks such clear statement on EIA which could be regarded as a manifestation of lack of serious commitment to strengthen the system of EIA, and, hence, environmental protection. Two, investment organs

are not expressly authorized to refuse the issuance of permits if EIAs are not done for projects subject thereto. As previous discussions have shown, interpretation can help us obtain the same result. All the same, the law-maker could have dispensed with the need to interpret the provisions of the new Investment Proclamation by simply inserting a clear statement on EIA in one of the articles dealing with the requirements to obtain investment permits.⁴¹ Three, article 17 of the new Investment Proclamation requires the renewal of investment permits every year until the investor begins marketing his products or services. Then, it provides for the guidance that investment organs have to use to renew or refuse to renew permits. However, the Proclamation does not seem to recognize the implementation of an EIA as one of the conditions to renew permits. Article 17(3) states that the appropriate investment organ shall renew an investment permit if it is satisfied that the holder has sufficient reason for not commencing or completing the implementation of his project. If the appropriate investment organ is not satisfied that the holder has sufficient reason for not commencing or completing the implementation of his project, it will not renew the permit. So, as one can understand from this provision, the failure of the permit holder to use EIA while implementing his project is not recognized as a ground for refusing to renew investment permit.

Therefore, although the new Investment Proclamation could have contained stipulations which expressly require and force the use and implementation of EIA with a view to improving or strengthening the system of EIA in the country, it does not do so *albeit* some of its provisions could be construed to obtain the same result.

⁴¹ See Investment Proclamation No. 769/2012, articles 12-16.

5. CONCLUSION

As we have seen in this article, Ethiopia has recognized the system of EIA to ensure effective environmental protection. Nonetheless, the legal framework on EIA has thus far remained inadequate. Moreover, some sectoral laws have also missed the chance of contributing to the effectiveness of the system of EIA by requiring the use of EIA. Fortunately, however, some new sectoral laws are emerging with stipulations pertinent to the system of EIA. In this regard, the Mining Operations Proclamation No. 678/2010 and the new Investment Proclamation No. 769/2012 could be mentioned. The new Investment Proclamation does not contain any express requirement on EIA. Instead, it contains some articles which impliedly recognize the relevance of the use of the procedure of EIA. Hence, it is now possible to require those who apply for investment permits to do EIA to obtain the licenses they seek provided, of course, that the activities they intend to engage in are subject to EIA. That being the case, it can be safely concluded that the new Investment Proclamation has revived the chance to improve the system of EIA in Ethiopia. Nonetheless, the issue of how far the Proclamation has gone, and how far it could have gone, remains a matter of opinion. Putting that aside, at least for the moment, all concerned organs, in particular, environmental protection organs, should take the opportunity presented by this new Investment Proclamation and seek to improve the system of EIA in the country.

REFORMING CORPORATE GOVERNANCE IN ETHIOPIA: APPRAISAL OF COMPETING APPROACHES

Hussein Ahmed Tura*

INTRODUCTION

Good corporate governance is vital to boost investors' confidence, expand the private sector, and stimulate economic growth.¹ In many developing countries, especially in Africa, heightened recognition of lost opportunities to mobilize financial resources on domestic and international capital markets through good corporate governance excited the interest of African Heads of States including Ethiopia, which inspired them to include corporate governance as one of the four thematic areas subject to review under the African Peer Review Mechanism (the APRM).²

The Commercial Code of Ethiopia (hereinafter the Commercial Code) contains a number of important provisions that have bearing on corporate governance. The pertinent provisions of the Commercial Code (Arts. 304-509) deal with the legal requirements of establishing a share company, the

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¹ Seward Montgomery Cooper, Corporate Governance in Developing Countries: Shortcomings, Challenges & Impact on Credit, *Modern Law for Global Commerce*, (9-12 July 2007), p 1.

² The APRM is a unique mechanism under which 26 African leaders, including Ethiopia, have agreed to submit their respective countries and themselves to review introspectively by their compatriots and review Africa-wide by their peers in selected areas of governance. The selected areas are (i) political governance and democracy, (ii) economic governance and management, (iii) socio-economic development, and (iv) corporate governance. See *Ibid.*

management aspects, the board of directors and its mandates, the auditors, the right of shareholders and the general assembly, the different types of meetings, voting process and voting rights, the right of minority shareholders, auditing and reporting obligations, transparency requirements, the involvement of ministry of trade and industry and grounds of liquidation and dissolution.

However, such provisions are inadequate to address issues in modern corporate governance related to board of directors, rights of shareholders as well as financial reporting, transparency and audit. Accordingly, there are some efforts of reforming corporate governance in Ethiopia. For instance, the Federal Democratic Republic of Ethiopia (FDRE) Ministry of Justice is revising the Commercial Code. A “Voluntary Code of Corporate Governance for Ethiopia” was also adopted by Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA) on 3 June 2011. These reform initiatives involve both formal (regulatory) and informal (non-regulatory) corporate governance approaches. Nonetheless, the discussion as to which approach of corporate governance would be more effective in the context of Ethiopia is a debatable one. While some scholars propose a voluntary code of corporate governance³, others argue in favor of a mandatory or regulatory corporate law to address problems in corporate governance.

This article assesses various approaches available to policy makers to reform the corporate governance in Ethiopia. It reviews competing models of corporate governance including shareholder model of common law and

³ Alemayehu Geda, *The Road to Private Sector Led Economic Growth*, (Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectoral Associations, 2009), p 111-112.

stakeholder model of European civil law; and the regulatory (formal or mandatory) and non-regulatory (informal or voluntary) approaches of corporate governance. It also critically analyses the suitability of such approaches to an emerging economy like Ethiopia. Although corporate governance is important for all types of business organizations including small and closely held companies in Ethiopia, this article is limited to publicly held share companies whose shares are dispersed among a number of shareholders which give rise to separation of ownership and control that in turn exposes them to agency cost.

1. DEFINITION OF CORPORATE GOVERNANCE

Scholars and practitioners approach to ‘corporate governance’ from various perspectives. As it is a multidisciplinary subject matter, lawyers, economists, managers, accountants and politicians attempt to define it from their own sides. For instance, corporate managers, investors, policy makers and lawyers define corporate governance as “a system of rules and institutions that determine the control and direction of the corporation and that define relations among key participants of a company.”⁴ The key participants are the shareholders, the management and the board of directors. Corporate governance is also defined as “the set of processes, customs, policies, laws and institutions affecting the way a corporation is directed, administered or controlled.”⁵ This definition is relatively narrower and mainly focuses on the

⁴ Hussein Ahmed Tura, Overview of Corporate Governance in Ethiopia: The Role, Composition and Remuneration of Boards of Directors in Share Companies, *Mizan Law Review* (2012), Vol. 6, No. 1, p 45-76.

⁵ A. Geda, *Supra Note* 3, p 98.

internal structure and operation of the decision making process of a company. In many countries it has been this definition which has been vital to public policy discussions about corporate governance. Typically the Organization of Economic Co-operation and Development (OECD) principles of corporate governance deals with only five topics mainly constituting the internal structure of corporation: the rights of shareholders, equitable treatment of shareholders, the role of stakeholders in corporate governance, disclosure and transparency and the responsibility of the Board of Directors.

Modern corporate governance may also involve corporate social responsibility with a view to dealing with the interests of various stakeholders including employees, suppliers, customers, banks and other lenders, regulators, the environment and the community at large.⁶ Generally, modern corporate governance refers to all issues related to ownership and control of corporate property, shareholders rights, and management, powers and responsibilities of board of directors, disclosure and transparency of corporate information, the protection of interests of stakeholders in addition to that of shareholders, enforcement of rights and so forth.⁷ The major problem in corporate governance lies in a separation of ownership and control as this gives rise to agency costs.

⁶ *Ibid.*

⁷ Hussein, *Supra Note 4*. See also Fekadu Petros, Emerging Separation of Ownership and Control in Ethiopian Share Companies: Legal and Policy Implications, *Mizan Law Review*, (March 2010), Vol. 4, No. 2, p 1-30.

2. THE GENESIS OF CORPORATE GOVERNANCE

The discussion of problems inherent with the separation of ownership and control goes back at least as far as Adam Smith who wrote:

The directors of such [joint stock] companies, however, being the managers of other people's money than their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartner frequently watch over their own...Negligence and profusion, therefore, must always prevail, more or less, in the management of such company.⁸

The agency problem was later framed in detail by Berle and Means, who were concerned with the rising prevalence of large corporations with diffuse ownership that insulated managers from the concerns of shareholders.⁹ According to them, the dispersed shareholders have no choice but to hire managers to manage the company, which has been creating the principal-agent relationship. In effect, an agency problem typically arises from the principal-agent relationship¹⁰ and as such, agents may expropriate the principals' investments. This can occur when the agents have more information and

⁸ Adam Smith, *The Wealth of Nations*, (Cannon Edition Modern Library, New York, 1776), p 790. Cited in Stephen C. Alford, A. C. Fernando, *Corporate Governance: Principles, Policies, and Practices*, (Pearson Education, 2006).

⁹ Adolf Berle and Gardiner Means are considered distinguished scholars in the field of corporate governance based on their seminal work on the separation of company ownership and control. After conducting a study of America's larger companies following the Wall Street crash of 1929, they concluded that the separation of ownership and control is attributable to widely fragmented company ownership. See Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property*, (1932).

¹⁰ Brian R. Cheffins, *Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies*, *Oxford Journal of Legal Studies* (2003), Vol. 23, No 3, p 4.

knowledge than the principals¹¹ or when information asymmetry between principals and agents exists.¹²

Moreover, two circumstances that have been the focus of the principal-agent framework can be identified. Firstly, “moral hazard arises when the agent’s action, or the outcome of the action, is only imperfectly observable to the principal.”¹³ For instance, a manager may exercise a low level of effort, waste corporate resources, or take inappropriate risks. Secondly, adverse selection can arise when the agent has some private information prior to entering into relations with the principal. Individuals with poor skills or aptitude will present themselves as having superior ones, people with low motivation will apply for the positions that involve the least supervision, and so forth.¹⁴ Due to this reason, Berle and Means corporate governance study mainly focused on the expropriation of shareholders’ assets by managers due to separation of ownership and control.¹⁵ In a nutshell, the divorce between ownership and control brings about the likely considerable free-rider dilemma between agents and principals.¹⁶

¹¹ Yuwa Wei, *Comparative Corporate Governance: A Chinese Perspective*, (2003), p 43.

¹² Joseph Heath and Wayne Norman, *Stakeholder Theory, Corporate Governance and Public Management: What Can the History of State-Run Enterprises Teach Us in the Post-Enron Era?*, *Journal of Business Ethics* (2004) vol. 53, p 252-253.

¹³ Miko Kamal, *Corporate Governance and State-owned Enterprises: A Study of Indonesia’s Code of Corporate Governance*, *Journal of International Commercial Law and Technology* (2010), Vol. 5, Issue 4, p 207.

¹⁴ *Ibid.*

¹⁵ Malla Praveen Bhasa, *Global Corporate Governance: Debates and Challenges*, *Corporate Governance: The International Journal of Business in Society* (2004), Vol. 4, No. 2, p 7.

¹⁶ Heath and Norman, *Supra Note 12*, p 252.

In the 1970s, due to the emergence of a number of important contributions, agency theory and issues of corporate governance became popular research topics. Ross provided one of the first formalized descriptions of macroeconomic foundations of Agency theory.¹⁷ Alchian and Demsetz examined contracting issues within a firm, noted the shirking problem that arises from the misaligned interests and discussed many of the issues that have subsequently dominated corporate governance research, including imperfect monitoring, labor market discipline of managers, the market for corporate control and issues of efficient compensation design.¹⁸ Jensen and Meckling provided an often-cited definition of agency relationship, formalized the agency cost concept by detailing its components and analyzed the impact of ownership structure on these cost components.¹⁹ Their assertion was similar to that of Berle and Means' work as they state that "the aim of all governance mechanisms is to reduce the agency costs that exist due to the separation of ownership and control especially in large public corporations".²⁰ Fama and Jensen²¹ similarly suggest that "the problem of corporate governance mainly arises in large organizations such as publicly held and listed corporations

¹⁷ S.A. Ross, The Economic Theory of Agency: the principal's problem. *American Economic Review* (1973) Vol. 63, p 134-139.

¹⁸ A. Alchian and H. Demsetz, Production, Information Costs and Economic Organization, *American Economic Review* (1972), vol. 62, p 777-795.

¹⁹ Michael C. Jensen and William H. Meckling, Theory of the firm: managerial behaviour, agency costs and ownership structure, *Journal of Financial Economics* (1976), vol. 3, p 305-360.

²⁰ Carol Padgett and Amama Shaukat, The UK Code of Corporate Governance: Link between Companies and Firm Performance (ICMA Centre Discussion Papers in Finance DP 2005), p 17.

²¹ Eugene F. Fama and Michael C. Jensen, Separation of Ownership and Control, *Journal of Law and Economics* (1983), Vol. 26, p 301-325.

whose ownership and controls are typically separated”.²² Even though the agency problem typically occurs in a company where shareholders are fragmented includes listed corporations, such a problem may also arise in other types of companies such as small companies, family firms and non-listed companies but the types and the degree of the agency problems would be different.²³

Furthermore, La Porta *et al*/ confirm the study of Berle and Means, Jensen and Meckling, and Fama and Jensen. By conducting a series of empirical works on investor protection,²⁴ La Porta *et al*/ argue that the nature of corporate governance is absolutely to protect outside investors from the diversion of their assets by insiders.²⁵ While both controlling shareholders and managers are classified as insiders, La Porta *et al*/ classify investors and minority shareholders as outsiders.²⁶ They emphasize that the diversion of outsiders’ money by insiders takes place because of an asymmetric information problem between outsiders and insiders. The asymmetric information problem typically occurs as insiders are the company’s majority shareholders and controlling

²² Jochen Zimmermann, Igor Goncharov and Joerg R. Werner, Does Compliance with the German Corporate Governance Code Have an Impact on Stock Valuation? An empirical analysis, *Corporate Governance International*, (2006), vol.14, p 434.

²³ Kamal, *Supra* Note 13, p 208.

²⁴ Rafael La Porta, Lopez-de-Silanes, Shleifer and Vishny, Legal Determinant of External Finance, *Journal of Finance* (1997), vol. 52; Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, “Law and Finance” *Journal of Political Economy* (1998), Vol. 106, p 1152; Rafael La Porta et al, Corporate Ownership around the World, *Journal of Finance* (1999), vol.54 ; Rafael La Porta *et al*, Agency Problem and Dividend Policies around the World, *Journal of Finance* (1999), vol. 55.

²⁵ Simeon Djankov *et al*, The Law and Economics of Self-dealing, *Journal of Financial Economics* (2008) Vol. 88, p 430.

²⁶ Rafael La Porta *et al*, Investor protection and corporate governance, *Journal of Financial Economics* (2000), Vol.58, p 4.

management do not share the company's vital information they have to the outsiders.²⁷ Therefore, La Porta *et al*/ defines corporate governance as “A set of mechanisms through which outside investors protect themselves against expropriation by the insiders.”²⁸

Generally, the agency problems that occur between principal and agents of a company necessitated the system of corporate governance. In the context of the modern corporation age, a company is normally owned by dispersed shareowners through the capital market²⁹ who cannot exercise direct control over the company. Besides, there is a major shareholder that often teams up with the company's management in making policies that are inconsistent with the interests of the dispersed owners. Therefore, codes of corporate governance around the world are specifically designed to fill the gap of unbalanced information between investors and companies,³⁰ to prevent insiders not to divert the outside investors' money to their own gain. Although corporate governance has focused traditionally on the problem of separation of ownership by shareholders and control by management, it is now accepted that firms should respond to the expectations of more categories of stakeholders. The wide range of corporate governance practices include business ethics, social responsibility, management discipline, corporate strategy, lifecycle development, stakeholder participation in decision making processes and promotion of sustainable economic development.³¹

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Djankov *et al*, *Supra Note 25*.

³⁰ Steen Thomsen, The Hidden Meaning of Codes: Corporate Governance and Investors Rent Seeking, *European Business Organization Law Review* (2006), Vol. 7, p 851, 848.

³¹ Fernando, *Supra Note 8*, p 18.

3. MODELS OF CORPORATE GOVERNANCE

Despite variations in terminologies used to describe systems of corporate governance classifications, scholars generally divide the world's systems of corporate governance into two categories. While Cheffins employs the outsider/arm's length and the insider/control-oriented terms,³² Moerland prefers market-oriented and network-oriented systems to describe the two corporate governance systems.³³ Furthermore, two models are employed to demonstrate the division: the Anglo-American model and the German-Japanese model.³⁴

3.1. THE ANGLO-AMERICAN MODEL

This model is labeled as arm's length because, according to Cheffins, the company's shareholders control their shares at a distance by putting their trust in the company's management to run daily activities.³⁵ It prevails in the common law countries, notably USA and UK, for the reason that most of their large companies are listed in stock markets.³⁶ The shareholders in these countries' companies are scattered than any other else in the world. And this model is viewed as an outsider model for its key focus is on a company's

³² Cheffins, *Supra Note* 10, p 3.

³³ Pieter W. Moerland, *Alternative Disciplinary Mechanisms in Different Corporate Systems*, *Journal of Economic Behavior and Organization* (1995), Vol. 26, p 19.

³⁴ Marry O'Sullivan, *Contests for Corporate Control Corporate Governance and Economic Performance in the United States and Germany*, (1978).

³⁵ Cheffins, *Supra Note* 10.

³⁶ Moerland, *Supra Note* 33.

shareholders' value and shareholder-management relations, and positions the market as a supervising tool.³⁷

There are two major theories that can be used to examine the Anglo-American corporate governance model: the principal-agent or finance model and the myopic market model. According to the principal-agent (finance) model, the maximization of shareholders' prosperity is regarded as a social function of a corporation.³⁸ The only role of a company in a community in a free market for the company's shareholders is making profits.³⁹ As a result, the proponents of this theory assert that "other social functions should not hinder the company in realizing its goal, and therefore should be undertaken by other government and charitable organizations."⁴⁰ They believe that the performance of the economic structure at large can easily be improved when corporations are managed properly to maximize the value of their shares.⁴¹

Although the myopic market model also supports the maximization of shareholders' wealth as the key company's goal, it criticizes the financial model for its main concern with the short-term interests of a company's performance, such as short-term return on investment, short-term corporate profits, short term management performance, short-term stock market prices,

³⁷ Irene Lynch Fanon, *The European Social Model of Corporate Governance: Prospects for Success in an Enlarged Europe*, in Paul Ali and Greg Gregoriou (eds), *International Corporate Governance After Sarbanes-Oxley* (2006) p 424.

³⁸ Steve Letza *et al*, *Corporate Governance Theorizing: Limits, Critics And Alternatives International Journal of Law and Management*, (2008) Vol. 50 p 18.

³⁹ Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, (1970) *The New York Times Magazine*.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

and short-term expenditure.⁴² The proponents of this model believe that the finance model neglects the corporation's long-term value and its competitiveness.⁴³ The myopic market model, as an alternative, suggests that shareholders and managers should be encouraged to share long-term performance perspectives while reforming corporate governance by:

*[i]ncreasing shareholders' royalty and voice, reducing the ease of shareholders' exit, restricting the takeover process and voting rights for short-term shareholders, encouraging relationship to lock financial institutions into long-term positions and empowering other groups such as employees and suppliers to form long-term relationship with the firm.*⁴⁴

In general, in the Anglo-American model, the corporation's shares are owned by dispersed shareholders; the maximization of shareholders' value is the corporation's principal objective;⁴⁵ and a well-developed financial market is placed as a firm's supervising instrument.⁴⁶

3.2. THE CONTINENTAL EUROPEAN OR GERMAN-JAPANESE MODEL

Japan⁴⁷ and Continental European countries such as Germany⁴⁸ are considered to be representatives of this model.⁴⁹ This model is characterized by a close

⁴² Steve Letza and Xiuping Sun, Philosophical and Paradoxical Issues in Corporate Governance, *International Journal of Business Governance & Ethics* (2004), p 32.

⁴³ Letza *et al*, *Supra Note* 38, p 19.

⁴⁴ Letza and Sun, *Supra Note* 42.

⁴⁵ Yuan Dujuan, Inefficient American Corporate Governance under the Financial Crisis and China's Reflections, *International Journal Law and Management* (2009), vol. 51, p140-141.

⁴⁶ Moerland, *Supra Note* 33.

⁴⁷ The Japanese model is the business network model, which reflects the cultural relationships seen in Japanese Keiretsu network, in which boards tend to be large, predominantly executive

relationship between the corporation and its capital providers including shareholders, bankers and other financial institutions. In addition to shareholders, it allows stakeholders to be members of the company's board (a supervisory board) and hence called insider model.⁵⁰ It is originated from Germany company structure termed as Codetermination or *betriebliche Mitbestimmung*, which gives an opportunity to the employees to become members of company's supervisory board.⁵¹ In Germany, in a large company, up to half members of supervisory board are elected by the company's employees under the Management Relation Act of 1952 and the Codetermination Act of 1976. There are three types of codetermination in

and often ritualistic. In this model, the financial institution has accrual role in governance. The shareholders and the main bank together appoint board of directors and the president. It has unique characteristics: the president who consults both the supervisory and the executive management is included and the importance of the lending bank is heightened. See Fernando, *Supra Note 8*, p 55.

⁴⁸ In this model, which is also termed as the *two-tier board model*, corporate governance is exercised through two boards, in which the upper board supervises the executive board on behalf of stakeholders. This approach is more societal oriented. Despite some differences between the German and Japanese models of corporate governance, there are certain significant features to justify their being bracketed together, including:

- Banks and financial institutions have substantial stakes in the equity capital of companies. In addition, cross holding among groups of firms is common in Japan.
- Institutional investors in both countries view themselves long term investors. They play a fairly active role in corporate managements.
- The disclosure norms are not very stringent, checks on insider trading are not very comprehensive and effective, and the emphasis on liquidity is not high. All these factors lead to the efficiency of the capital market.
- There is hardly any system of corporate control in these countries; mergers and takeovers are uncommon. See *Ibid.*

⁴⁹ Fanon, *Supra Note 37*, p 425.

⁵⁰ *Ibid.*

⁵¹ Gérard Hertig, Codetermination as a (Partial) Substitute for Mandatory Disclosure? *European Business Organization Law Review* (2006), Vol. 7, p 129.

Germany: Full Parity Codetermination, Quasi-Parity Codetermination and One-Third Codetermination.⁵²

The insider model is mainly aimed at counteracting the abuse of executive power in shareholder models.⁵³ The Anglo-American model is criticized for the abuse of executive power as it gives greater power to the executive management who can potentially distort their authority for their own interests at the expense of stockholders and society at large. For instance, exorbitant executive overpayment in which the executive managements are allowed to set their big salaries in a way that does not reflect the performance of the company is one of the areas susceptible to problem of abuse of power by the executive management, which cannot be resolved though the system introducing institutional restraints on managerial behavior such as executive directors, audit processes and threats of takeover, according to proponents of the insider model.⁵⁴ They also doubt whether corporate governance reforms such as non-executive directors, shareholder involvement in major decisions and transparency into corporate affairs are in fact appropriate monitoring instruments.⁵⁵

As an alternative, proponents of insider model propose the idea of “managerial freedom with accountability”, which involves letting decision-making

⁵² Jean J. Du Plessis and Otto Sandrock, The German System of Supervisory Codetermination by Employees, in Jean du Plessis, et al (eds), German Corporate Governance in International and European Context (2007), p 111.

⁵³ Letza *et al*, *Supra Note* 38.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*, p 20.

management build up the longer term plans of the company while ensuring the board is strictly responsible to all stakeholders involved in the company.⁵⁶ The corporation is seen to have a responsibility to a large number of individuals and groups, who are also considered stakeholders in addition to the company's capital providers.⁵⁷ This approach recognizes the existence of non-shareholding company groups, for example employees, suppliers, customers and managers who have a continuing connection with the company.⁵⁸

The major goal of the insider/stakeholder model of corporate governance is to maximize the business's values at large unlike the shareholder's perspective.⁵⁹ From the standpoint of stakeholder model, therefore, two groups exist: the primary stakeholders such as minority shareholders, lenders, consumers, employees, suppliers and managers, and the secondary stakeholders including the local community, the media, the court, the government, special interest groups and the general public.⁶⁰

In general, the German-Japanese model is characterized by affording an opportunity for company stakeholders other than shareholders to be on the company board. Moreover, this model recognizes and values the involvement of major shareholders and banks as providers of capital and controllers of the corporations.⁶¹ It is worth noting that these models are merely intellectual

⁵⁶ *Ibid.*

⁵⁷ James P Hawley and Andrew T. Williams, *Corporate Governance in the United States: The Rise of Fiduciary Capitalism: A Review of the Literature* (1996).

⁵⁸ Letza *et al*, *Supra Note* 38, p 20.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Moerland, *Supra Note* 33.

constructs.⁶² They are not mutually exclusive of each other with all their complexity. For one thing, the effort to make management, whether American or European, more responsive to other parties outside of management can only serve as helpful discipline on managers.⁶³ The movement towards more independent directors is also a step forward, whether the goal of the corporation is seen as shareholder profit or stakeholder benefits. The effort now well advanced in Europe to separate the positions of chairman and CEO would probably be seen as beneficial by the shareholders of most American corporations. A point of convergence between the bare shareholder model advanced by Americans and the extreme stakeholder model advocated by Europeans may reside in the notion of “socially responsible corporate governance”⁶⁴, a concept that seeks to bring together two important themes that really have not been joined thus far: corporate good governance and corporate social responsibility.

3.3. SUCCESSFUL STRATEGIES FOR DEVELOPING COUNTRIES: ONE SIZE DOES NOT FIT ALL

Corporate governance was long ignored as a matter of importance for developing countries. It remained virtually invisible in those countries until the East Asian financial crises of 1997-1998 drew attention to the problems of “crony capitalism,” and their perceived relationship to poor local corporate

⁶² Salacuse, W. Jeswald, *Corporate Governance in the UNECE Region*, (Paper commissioned for the Economic Survey of Europe, the Secretariat of the United Nations Economic Commission for Europe, UN/ECE, Geneva, December 2002), p 52.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

governance practices in several major emerging-market economies.⁶⁵ Yet, as the threat to the global financial markets raised by those crises has receded, efforts to significantly improve corporate governance in the developing world have flagged.⁶⁶ Indeed, even at the height of the international concern for corporate governance in the emerging market economies,⁶⁷ little attention was given to corporate governance in other developing countries, especially the smaller and poorer ones.⁶⁸ It is firmly asserted, to this end, that “the tendency to ignore the quality of corporate governance in the developing world is a mistake because the institutions of corporate governance play an essential role in the long-term process of development of a country.”⁶⁹ Thus, it is argued that “corporate governance should be an important element in developing countries’ strategies for growth, financial strength and productive private sectors.”⁷⁰

On the other hand, the countries in transition economies face problem of corporate governance in paradoxical situation. Their corporate sector consists of “instant corporations” formed as a result of mass privatization without the simultaneous development of legal and institutional structures necessary to operate in competitive market economy.⁷¹ The business environment is

⁶⁵ Charles P Oman, *Corporate Governance in Development: The Experiences of Brazil, Chile, India, and South Africa*, (OECD Development Centre, Centre for International Private Enterprise, 2003), p 2.

⁶⁶ *Ibid.*

⁶⁷ Called “emerging” because of the rapid growth of portfolio equity flows thereto in the early 1990s by large institutional investors based mainly in United States and Great Britain, See *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Salacuse, *Supra Note* 62, p 54.

⁷¹ Fernando, *Supra Note* 8, p 490.

without the set of elements needed for making competitive relationships, which provides an advantage to old, large, dominant companies and discourages entrepreneurship and the appearance of new companies.⁷²

The question is, therefore, not on the importance of good corporate governance for developing countries, it is rather how they should introduce it. Is it possible, after all, to reproduce all at once the institutions of developed market economies in transition economies? It is suggested that “merely transplanting these institutions is not possible because there are new conditions and many cultural differences.”⁷³ On the other hand, “to develop entirely new institutions would be an unpredictable adventure for transition economies.”⁷⁴

Salacuse strongly suggested that developing countries should examine carefully and critically the entire experience of both North America and Western Europe before adopting their laws and institutions. He put that “Rather than leap to a shareholder or stakeholder model or hastily choose a unitary or two-level board structure, each transition state needs to determine the system of corporate governance most appropriate to its own individual needs and circumstances.”⁷⁵ In a similar vein, Fernando maintains that: “[they] have to find a way to accept the existing institutional portfolio and to make it work in the specific cultural, historical and economic environment as they

⁷² *Ibid.*

⁷³ Slacuse, *Supra Note* 62, p 54.

⁷⁴ Fernando, *Supra Note* 8, p 490.

⁷⁵ *Ibid.*

cannot afford the luxury of searching for third system between socialism and capitalism.”⁷⁶

Furthermore, Salacuse argues that:

*Organizations and individuals from western developed countries inevitably press for the adoption by transition economies of “best practices” in corporate governance, best practices that have invariably originated in their own home countries. Those best practices were of course the product of specific national experiences and cultures; factors that may make their adoption by a given transition economy inappropriate or at least difficult without significant adaptation.*⁷⁷

Mere transplantation of Western models of corporate governance, according to Fernando, more often than not, fails to instill or improve corporate governance since these models are not designed for local realities and challenges because of which indigenous groups are then faced with task of adapting the international model to local conditions.⁷⁸

Therefore, policy makers in developing economies would do well to remember that to a large extent western corporate governance systems have evolved over time as a response to periodic and specific financial crises in individual countries in evaluating foreign models of corporate governance.⁷⁹ As has been

⁷⁶ *Ibid.*

⁷⁷ Salacuse, *Supra Note 72*, p 53.

⁷⁸ Fernando, *Supra Note 8*, p 488.

⁷⁹ Salacuse, *Supra Note 62*, p 53.

predicted by Salacuse in 2002 that "... while recognizing that those crises have come and gone, they should also remember that others, leading to still further corporate governance reforms, are probably yet to come"⁸⁰, the 2008 Financial and Economic Crises has cleared doubts surrounding the importance of good corporate governance for every countries around the world irrespective of their level of economic development.

4. CODES OF CORPORATE GOVERNANCE

A number of codes of corporate governance are developed following the recognition of importance of good corporate governance for firm performance and investor and minority shareholder protection at the global level. Broadly speaking, these codes can be classified as mandatory and voluntary. The mandatory code of corporate governance emerged with the introduction of the Sabanes-Oxley Act (SOX) of 2002 in the United States following the collapse of some colossal companies such as Enron, WorldCom and Tyco International in 2001.⁸¹ This law is considered as a foundation tale for the new era of corporate governance in the US. The law requires all companies that have registered equity or debt securities with the Security and Exchange Commission (SEC) to adhere to it. Therefore, the publicly held companies in America have to meet all the requirements contained in the SOX, the so-called

⁸⁰ *Ibid.*

⁸¹ In the wake of the disaster on 30 July 2002, the American Congress passed a new law, the Sarbanes-Oxley Act of 2002, which is known as the Public Company Accounting Reform and Investor Protection Act of 2002, which is the most important law reform relating to corporate governance in the US. See Paul S. Atkins, *The Sarbanes-Oxley Act of 2002: Goals, Content, and Status of Implementation* (2003). Available at:

<http://www.sec.gov/news/speech/spch032503psa.htm> [Last visited 18 February 2014].

mandatory model, which means “legally mandated, with penalties imposed on those who fail to comply with the legal rule in question”.⁸² This means, this law is binding on every listing company in the country and those who fail to abide by it must face penalties prescribed by this law. The proponents of the mandatory system of corporate governance claim that it would be a road to culminate the crucial problem of a corporation.⁸³

On the other hand, some countries like UK and Australia are applying the voluntary model of corporate governance. The Australia Stock Exchange Corporate Governance Council clearly states that the Australian Principles of Good Corporate Governance and the Best Practice Recommendation contain a voluntary system which requires publicly held companies that might not comply with the Principles to provide sufficient and reasonable arguments as to why they don't.⁸⁴ The Australian system functions on the basic principle of “if not, why not” as opposed to the “one size fits all” approach.⁸⁵ The basic concept of the Australia's code is that the market can come to its own conclusions about the significance of non-compliance based on the circumstances of individual companies.⁸⁶

⁸² Anita I. Anand, Voluntary vs. Mandatory Corporate Governance: Towards an Optimal Regulatory Framework, (2005). Working Paper 566, p 4.

⁸³ The crises were created while companies have been applying the voluntary concept of corporate governance.

⁸⁴ ASX Corporate Governance Council, *Corporate Governance Principles, Recommendations*, (August 2007) Available at: http://www.asx.com.au/supervision/pdf/corp_governance_principles_recommendations_2nd_edition.pdf [Last visited 20 May 2013].

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

The implementation of the voluntary system in the UK can be observed in paragraph 4 of the preamble of the Combined Code, which states two points. Firstly, listed companies are free to design the form of disclosure statement because the committee does not provide listed companies with a specific form. Secondly, there is no requirement for all listed companies to apply the content of the Code. Where listed companies do not adhere to the Combined Code, they must explain it; which is known as the “comply or explain” approach.⁸⁷ In the UK the philosophy of the “comply or explain” approach is to pay attention to smaller listed companies. This approach takes into account that there are many small listed companies for which the substance of the Code might not be suitable.⁸⁸ Therefore, the smaller listed companies are allowed to conduct their business under the other model by giving substantial reasons.⁸⁹ To put it briefly, the UK Combined Code and the Australian model provide that not all of listed companies need the same model.

The debate on mandatory and voluntary models is in essence not about which would be most suitable to apply to corporations at large. These are the two perspectives that aim to deal with the laws that are needed to support the agency problems facing companies with shareholdings that are fragmented. From a practical point of view, the Sarbanes Oxley Act of 2002 is a product of the “law matters” thesis, which essentially contends that law is important to protect shareholders, especially minority shareholders, from insider

⁸⁷The Combined Code on Corporate Governance (July 2003), <http://www.frc.org.uk/documents/pagemanager/frc/Web%20Optimised%20Combined%20Code%203rd%20proof.pdf> [Last visited 20 February 2014].

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

expropriation.⁹⁰ The critical goal of the “law matters” thesis is to promote capital markets and economic growth, which can be achieved by upholding shareholders’ property rights.⁹¹ This thesis, therefore, considers minority shareholders as primary players of capital markets.

5. CORPORATE GOVERNANCE IN ETHIOPIA

Currently Ethiopia has a number of companies formed by sale of shares to the wider public. The emergence of publicly held share companies in the country in turn gives rise to multitude of complex corporate governance issues. Ownership separates from control of dispersed shareholders and goes into the hands of few managers. In such situation, agents (managers) may expropriate the principals’ (shareholders’) investments as they have more information and knowledge than the principals. By the same token, in share companies where there exist few block holders, minority shareholders could be exploited in the hands of such block holders.

The emerging separation of ownership and control in the Ethiopian share companies has recently attracted the attention of a number of scholars to discuss ‘corporate governance’ from various perspectives. For instance, Minga Negash observes that “... weak corporate laws are serious voids for complying with international corporate governance standards.”⁹² Asnakech Getnet finds

⁹⁰ Troy A. Paredes, *Corporate Governance and Economic Development*, (Washington University, 2005), p 57.

⁹¹ *Ibid.*

⁹² Minga Negash, *Corporate Governance and Ownership Structure: the Case of Ethiopia*, *Ethiopian e-journal for Research and Innovation Foresight (Ee-JRIF)* (2013), Vol 5, No 1, p 33-50, Special Issue on the Ethiopian Economy.

that the overall standard of corporate governance of private banks in Ethiopia is inadequate due to the poor legislative framework, political party's involvement in business enterprises, inadequate shareholder protection laws and the ineffective judicial system as well as absence of an organized share market in Ethiopia.⁹³ Moreover, Hussein Ahmed critically analyses the Ethiopian company law in light of international best practices; and he finds that “the legal framework governing company governance in Ethiopia does not sufficiently address issues related to the roles, composition and remuneration of boards of directors in share companies.”⁹⁴ He further observes that “the governance powers of nonexecutive directors are not clearly provided separately from the management duties of company executives”; and that “there is no legal provision expressly articulating the need for the independence of directors.” He has also identified some legal and practical challenges surrounding the directors' remuneration in the Ethiopian share companies. Similarly, Fekadu Petros shows the deficiency of the Commercial Code in protecting the rights of minority shareholders in the context of publicly held companies where separation of ownership and control prevails.⁹⁵ Besides, Tewodros Mehiret discusses various issues related to governance of share companies in Ethiopia.⁹⁶ Likewise, Dr. Alemayehu Geda has conducted a research entitled “The Road to Private Sector Led Economic Growth” in

⁹³ Asnakech Getnet Ayele, “Revisiting the Ethiopian Bank Corporate Governance system: A Glimpse of the Operation of Private Banks”, *Law, Social Justice & Global Development Journal* (2013), Vol. 1 (LGD).

⁹⁴ Hussein, *Supra Note 4*.

⁹⁵ Fekadu, *Supra Note 7*.

⁹⁶ Tewodros Meheret, ‘Governance of Share Companies in Ethiopia’, in Seyoum Yohannes (eds.), “Starting and Building a Business Association in Ethiopia: The Legal and Institutional Dimensions”, *Ethiopian Business Law Series* (2011), Vol. IV, AAU, School of Law, p 53.

which he suggests the adoption of voluntary code of corporate governance in Ethiopia.⁹⁷

These prior works are of paramount significance in identifying the problems related to corporate governance in the Ethiopian context; and they also suggest possible solutions for the future legal and policy interventions. This article is also a kind of contribution to the subject matter at hand. It deals with issues that have not been addressed so far by making specific reference to the appraisal of competing approaches for reforming corporate governance in share companies in Ethiopia.

Before dealing with issues of reform of corporate governance, the foregoing sub sections briefly review some of the deficiencies in the existing legal frameworks regarding the governance of share companies in Ethiopia.

5.1. BOARD OF DIRECTORS

Although the Commercial Code and other relevant laws provide for the formal structure of corporate governance, they do not adequately address issues related to boards of directors in the governance of share companies. Some of the main deficiencies in the law with respect to boards of directors can be summarized as follows:

- Even if non-executive directors play a significant role in providing independent and objective guidance and direction of management and company, the Commercial Code and other relevant laws do not require companies to have independent non-executive directors and do not

⁹⁷ A. Geda, *Supra Note 3*, p 98-112.

distinguish the roles of the board from that of the management.⁹⁸

Besides, the law does not define independence of board of directors.

- The Commercial Code does not prescribe any formal qualifications for directors of companies as a result of which even incompetent and mediocre persons can become member of boards of directors;
- It does not provide for separation of the roles of a chief executive officer (CEO) and board Chairperson;
- Besides, the law does not require companies to have various board committees. While many committees on corporate governance have recommended in one voice the appointment of special committees for nomination, remuneration and auditing,⁹⁹ the existing legal framework does not address the importance of such committees in the context of Ethiopian share companies:
- The existing legal framework does not clearly address issues related to directors' remuneration such as transparency, pay for performance and process for determination. In addition, the amount of remuneration of a bank directors set by Directives No.SBB/49/2011 to be 50,000 (Fifty Thousand) Birr per annum is criticized for not consulting global best experiences and failing to align the interests of directors with those of the stakeholders, and for not taking into account risks and liabilities involved in the board room and the impact of ineffective compensation on the independence of the board from the management.¹⁰⁰

⁹⁸ Hussein, *Supra Note 4*.

⁹⁹ Fernando, *Supra Note 8*, p 24.

¹⁰⁰ Hussein, *Supra Note 4*.

5.2.PROTECTION OF MINORITY SHAREHOLDERS

One of the purposes of effective corporate governance is to protect minority shareholders from abuse, whether from managers with little ownership interest or controlling shareholders who dominate management. Some of minority rights protections are provided under the Commercial Code. For instance, voting by proxy is stipulated under Arts. 398 (1) and 402. The minimum percentage required for shareholders to call general meetings is 10% of the capital under Art. 391 (2). Likewise, the pre-emptive right of shareholders to buy newly issued shares in proportion to their shareholding is explicitly provided under Arts. 345 (4) and 470 (1). Similarly, the OECD Principles of Corporate Governance provide for such requirement on minority rights as reflected in the Annotations.¹⁰¹

Normally, there are two alternative mechanisms of minority rights protection: cumulative voting and minority representation in the board of directors. Cumulative voting relates to voting during board elections in which the votes of the contending groups will be multiplied by the number of the board seats and calculated for the contenders' nominees in accordance to the proportion of each group's summed up votes and believed to avoid a majority-take-all outcome.¹⁰² The means envisaged under Art. 352 does not seem to ensure proportional minority shareholder representation. Art. 352 of the Commercial Code which provides for proportional representation in a board reads: "where there are several groups of shareholders with a different legal status, the

¹⁰¹ Annotations to OECD Principles, p 42.

¹⁰² Fekadu, *Supra Note 7*, p 19.

articles of association shall provide for each group to elect at least one representative on the board of directors.” The message of this provision is not clear. Particularly, it is not clear with what it meant by legal status and whether the law is referring to the class of shareholders under Arts. 335, 336 and 337 of the Code. In other words, it seems to require a situation where shareholders are divided into several groups with each shareholder having some internal relationship by which to identify with its group and vote in concert. Nevertheless, this cannot be expected in share companies with numerous shareholders that are counted in thousands although it may be easier to realize in a closely held company.

The derivative suit mechanism, i.e., the right to initiate suits against directors or third parties on behalf of the company is not provided in the Commercial Code. However, it appears that the drafter of the provisions (Professor Escarra) had initially drafted the provisions in Art. 364-367 with the aim of providing for derivative suit mechanisms. This seems evident from his *exposé des motifs* in which he states:

*These very important provisions regulate the liability of directors and the procedure for enforcing this liability by individual or class action. These articles ... represent a sufficiently simple and precise statement of one of the most complex problems in company law, i.e., the action which can be brought by each shareholder in the case where the fault of the directors has prejudiced the company's property as well as his own property.*¹⁰³

¹⁰³ Peter Winship, Background Documents of the Ethiopian Commercial Code of 1960, (Addis Ababa, Faculty of Law, Haile Sellassie I University, 1974), p 64. It is more probable that the

If a remedy is to be sought from the directors themselves, as they work on behalf of a company, it would be difficult to enforce claims on behalf of the company.¹⁰⁴ In this case, directors may decline the legitimate claims of a company against third parties due to collusion with outside business partners or in return for some illicit considerations.¹⁰⁵ Consequently, the right to take action on behalf of the company should pass to individual shareholders¹⁰⁶ subject to defined conditions in order to prevent abuse of rights wherever any shareholder deems that the company should be taking legal proceedings against directors or some third party, but neither the board nor the general meeting does so. The OECD Principles incorporate this element:

*Experience has shown that an important determinant of the degree to which shareholder rights are protected is whether effective methods exist to obtain redress for grievances at a reasonable cost and without excessive delay. The confidence of minority investors is enhanced when the legal system provides mechanisms for minority shareholders to bring lawsuits when they have reasonable grounds to believe that their rights have been violated.*¹⁰⁷

original rules Prof. Escarra drafted were later changed either by prof. Jaufferet who replaced him upon his sudden death without completing the drafting, or by the Codification Commission.

¹⁰⁴ Tom Hadden, *Company Law and Capitalism*, (2nd eds., London: Weidenfeld and Nicholson 1977), p 277.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Annotations to OECD Principles, p 41.

It is worth noting that the derivative suit mechanism stipulated under Art.365 of the draft revised Code states that:

1. Actions for damages suffered by the company as a result of a tort committed by directors in the performance of their duties shall be instituted in the interest of the company by the board of directors.
2. One or more shareholders may institute action in the interest of the company after serving a formal notice to the board of directors to which they fail to react within a time limit of thirty days. The applicants would have the ability to sue for damages for injury suffered by the company. In the event of a verdict in favor of the Company's claim, damages shall be awarded to the company.

Thus, the Draft Commercial Code fills the deficiency of the existing Code regarding the derivative suit mechanism. Moreover, Art. 416 (2 to 5) of the Commercial Code provides for a right of shareholder to challenge decisions of the General Meeting. In addition, when fundamental changes are made to the objects or nature of the company or the transfer of the head office abroad, minority shareholders are accorded the right to withdraw from the company under Art. 463 of the Code. What's more, the "one share one vote" right is provided in the Commercial Code under Arts. 145 (3) and 407 (2).

By and large, although the Commercial Code incorporates the aforementioned rights which are believed to minimize minority shareholders' exploitation by managers or block holders, it also lacks other rights such as the right to proxy voting by mail; the derivative suit mechanism, and cumulative voting or

proportional representation of minorities on board of directors. The requirement under Art. 401 which obliges shareholders to deposit their shares prior to Shareholders' meeting also reduces the minority rights protection. Hence, the law is insufficient in shareholder protection due to the fact that the rights lacking under the Commercial Code are the most important ones which can minimize minority shareholder exploitation by managers or block holders. Moreover, the absence of stock markets affects the exit rights of minority shareholders.

5.3. DISCLOSURE AND TRANSPARENCY

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.¹⁰⁸ It has also been argued that the lack of transparency arising from inadequate disclosure allowed significant problems to build up in the financial and corporate sectors. For instance, when the financial condition is deteriorated in East Asian countries, the inability of investors and creditors to determine sound financial institutions and corporations due to the lack of transparency resulted in investors being reluctant to hold shares while creditors became reluctant to overturn maturing short-term debts for fear of an imminent loss.¹⁰⁹ It was believed that this has

¹⁰⁸ OECD Principles of Corporate Governance, Principle V (2004).

¹⁰⁹ Pik Kun Liew, *The (Perceived) Roles of Corporate Governance Reform in Malaysia: The Views of Corporate Practitioners*, (University of Essex, WP No. 06-02, April 2006), p 5.

contributed significantly to the erosion of investor confidence and in part exacerbated the crisis.¹¹⁰

In this regard, the Commercial Code contains basic rules relating to accounts record keeping. Under Art. 63 (1), all persons and business organizations carrying on a trade must keep such books and accounts as are required in accordance with business practice and usage, having regard to the nature and importance of the trade carried on. Petty traders may be exempted from keeping accounts. Art. 63 (1) is intended to be the basic legal requirement for record keeping by regulated persons. The requirement may be supplemented by more detailed requirements applying to particular forms of enterprise, but the basic legal requirement applies to all forms of business organizations.

The Commercial Code also states that “any trader shall keep a book of account where he shall make a daily record of his daily dealings and must, once a month reconcile the proceeds of such dealings”.¹¹¹ Moreover, “traders must also prepare, at the end of each financial year, an assets and liabilities account and a profit and loss account”.¹¹² Besides, “all books and accounting documents must be preserved for at least ten years”.¹¹³ However, there are no additional rules on accounting record-keeping for joint ventures, partnerships or companies (though there are more detailed requirements concerning the format of company accounts).

¹¹⁰ Ibid.

¹¹¹ Commercial Code of Ethiopia, Proclamation No.166/1960, Art.66 (2), Neg.Gaz. Extraordinary Issue No.3.

¹¹² Commercial Code of Ethiopia, Art. 67 (2)

¹¹³ Commercial Code of Ethiopia, Art. 69

Furthermore, the Commercial Code holds the directors responsible for the preparation of financial statements, including consolidated financial statements for group of companies and for ensuring that an audit of the financial statements is regularly conducted.¹¹⁴ Besides, Art. 362 of the Code requires board of directors to keep accounts and books; submit the accounts of the auditors and an annual report of the company's operations including a financial statement to the meetings. Moreover, the Code deals with duties and responsibilities of auditors under Arts. 368 - 387. Specifically, it provides for the appointment of auditors¹¹⁵, duties of auditors¹¹⁶, powers of auditors¹¹⁷ and liability of auditors.¹¹⁸ As it is provided under Art. 374, auditors have the following duties:

- audit the books and securities of the company;
- verify the correctness and accuracy of the inventories, balance sheets and profit and loss accounts;
- certify that the report of the Board of Directors reflects the correct state of the company's affairs; and
- carryout such special duties as may be assigned to them.

The auditors are civilly liable to the company and third parties for any fault in the exercise of their duties which occasioned loss.¹¹⁹ In addition, an auditor

¹¹⁴ Commercial Code of Ethiopia, Arts.446 and 45.1

¹¹⁵ Commercial Code of Ethiopia, Arts. 368-371.

¹¹⁶ Commercial Code of Ethiopia, Arts. 374-377.

¹¹⁷ Commercial Code of Ethiopia, Arts. 378-379.

¹¹⁸ Commercial Code of Ethiopia, Arts. 380.

¹¹⁹ Commercial Code of Ethiopia, Arts. 380 (1).

who knowingly gives or confirms an untrue report concerning the position of a company or fails to inform the public prosecutor is criminally responsible.¹²⁰

Nevertheless, the provisions for both preparation and audit of financial statements require improvement. In provisions for preparing financial statements, there is no requirement to comply with accounting standards, and the financial statements required to be produced are only balance sheet, and profit and loss account.¹²¹ In provisions for audit, there is no requirement to comply with auditing standards, no specified qualification of auditors,¹²² and no audit requirement for private limited companies with 20 or less shareholders. Nonetheless, there are two convincing points justifying the audits of all private limited companies. In the first place, the limited liability status granted to a company is meant to be accompanied by a mechanism of assuring the credibility of the financial affairs of a company and such mechanism can only be provided through audit.¹²³ Secondly, there may be private limited companies which, even though they have less than 20 members, are large enough to be public interest entities.

Another area of the Commercial Code which needs reconsideration is the issuance of shares to the public. Share companies are allowed to issue shares to the public, but there is no regulation for the issuance of these shares.¹²⁴

¹²⁰ Ibid, Art. 380 (2).

¹²¹ In comparison, IFRS require income statement, balance sheet, cash flow statement, and statement of changes in equity or statement of recognized gains and losses.

¹²² Qualification would be provided by defining auditors as those holding a practicing license issued in accordance with the country's legislation governing accountancy.

¹²³ Report on Observance of Standards and Codes (ROSC)-Ethiopia, (World Bank and IMF, Nov. 2007), P 6.

¹²⁴ Ibid.

Regulating public issue of shares protects the public interest by enabling the detection and rectification of frauds, errors and omissions before the information goes public.¹²⁵ Preferably, regulation requirements would include an audit report on the financial information to be included in the prospectus and registration, and approval of the prospectus, with a regulator, before its release to the public.¹²⁶

The banking industry is one of the financial sectors facing relatively strict oversight from its regulator, the National Bank of Ethiopia (NBE). The Banking Business Proclamation No.592/2008 deals with financial records and external audit inspection under its part six in which it has put additional disclosure requirements on commercial banks. Art. 23 (1) of the Proclamation provides that the NBE may direct banks to prepare financial statements in accordance with the *international financial statements standards*, whether their designation changes or they are replaced, from time to time. The problem in this provision is that '*International Financial Statements Standards*' is not defined, and there are no accountings standards set or adopted in Ethiopia. It further states that all banks must keep records as are necessary to: exhibit clearly and correctly the state of its affairs; explain its transactions and financial position; and enable the NBE to determine whether the bank had complied with these requirements.¹²⁷ For each type of transactions, all banks must register and keep documents. Art 24 of the Proclamation also deals with appointment of external auditors in all banks and that should be approved by

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Banking Business Proclamation, Art.23 (a-c), Proclamation No.592/2008, Fed.Neg.Gaz. 14th year, No.57.

the NBE. Pursuant to Art. 26 (1) of the Proclamation, the duties of external auditor include reporting his/her audit findings and conclusions, carried out on the basis of *international auditing standards*, to the shareholders of the bank and the NBE.

Moreover, this Proclamation deals with disclosure of information and inspection of banks. Art. 28 (1) of the Proclamation provides that “every bank shall, within a time period to be determined by the NBE, send to the NBE duly signed financial statements and other reports as prescribed by it.” Besides, it stipulates in sub Art. 2 that “every bank shall exhibit at every place of its business, including its branches, in a conspicuous place throughout the year, a copy of the last audited balance sheet and profit and loss account in respect of all of its operations; cause such balance sheet and profit and loss account, together with the notes thereto, to be published in a newspaper of wide circulation.” The exhibition and publishing of financial statements must occur within two weeks after the annual shareholders’ meeting.¹²⁸

By the same token, Art. 15 of Micro-financing Business Proclamation No.626/2009 provides for the *financial records and disclosure of information*. Thus any micro-financing institution must:¹²⁹

- a) prepare its financial statements in accordance with *acceptable accounting standards*;

¹²⁸ Banking Business Proclamation, Art.28 (3).

¹²⁹ Micro Financing Business Proclamation, Art.15 (1), Proclamation No.626/2009, Fed.Neg.Gaz. 15th Year, No.33.

- b) keep such records as are necessary to exhibit clearly and correctly the state of its affairs and to explain its transactions and financial position and to enable the NBE to determine whether the micro financing institution had complied with the provisions of this Proclamation and directives issued by the NBE; and
- c) register and keep documents for each type of transaction in accordance with directives of the NBE.

In addition, any micro financing institution shall, within a time period to be determined by the NBE, submit to it duly signed financial statements and mother reports as prescribed by it; and exhibit at all branches, in a conspicuous place throughout the year, a copy of the last audited balance sheet and profit and loss statement.¹³⁰ Furthermore, any micro financing institution shall, where it appears likely that it cannot meet its obligations to its depositors or other creditors or it may have to suspend payments to depositors or other creditors forthwith notify the NBE of the full facts of the situation and also provide such other information as the NBE may request.¹³¹

The Micro-financing Business Proclamation also stipulates for the *Appointment of External Auditors* under Art.12 that “every micro financing institution have to appoint an external auditor satisfactory to the NBE”. Where it is without an external auditor, it must immediately notify such fact to the NBE.¹³² The duty of an external auditor of a micro financing institution shall be to report his audit findings and conclusions, carried out on the basis of

¹³⁰ Micro Financing Business Proclamation, Art.15 (2).

¹³¹ Micro Financing Business Proclamation, Art.15 (3).

¹³² Micro Financing Business Proclamation, Art.12 (1).

accepted auditing standards, to the shareholders of the institution and the NBE.¹³³ The external auditor shall also be required to submit the management letter to the NBE. Nevertheless, *accepted auditing standards* is not defined in the Proclamation.

On the other hand, auditors for insurance companies are not subjected to any additional requirements other than the provisions of the Commercial Code. The Proclamation for Licensing and Supervision of Insurance Businesses No.86/1994 states that the balance sheet, profit and loss account and revenue account of every insurer shall be audited annually by an auditor; and the auditors for insurance companies shall have powers, functions and duties; and be subjected to liabilities and penalties under the Commercial Code.¹³⁴ There are no other regulations for auditors of insurance companies.

Furthermore, there is no accounting and auditing standards set in Ethiopia and there is no law or regulation that has set or requires accounting standards in preparation of financial statements.¹³⁵ Some laws require Generally Accepted Accounting Principles (GAAP) to be applied or Accepted Accounting and Auditing Standards (AAS).¹³⁶ However, in all cases, GAAP and AAS are not defined. Even though OFAG (Office of the Federal Auditor General) directed all auditors to conduct audits in compliance with ISA (International Standards

¹³³ Ibid Art.13 (1).

¹³⁴ Licensing and Supervision of Insurance Business Proclamation, Art.18 Proclamation No.86/1994 Ne.Gaz, No.46.

¹³⁵ Ethiopia – Accounting and Auditing ROSC, Supra Note 123, p 6.

¹³⁶ For instance, Public Enterprises Proclamation 25/1992, Art.27 requires state-owned enterprises to keep books of accounts following generally accepted accounting principles (GAAP), and proclamation No.626/2009, Art.12 requires micro financing institutions to keep books of accounts following Accepted Accounting Standards.

on Auditing), for auditing standards, the directive met resistance from auditors on the argument that it is impossible to apply ISA in the absence of accounting standards, as a result of which it was subsequently withdrawn.¹³⁷ Moreover, there are no penalties set for the noncompliance with the requirements of accounting and financial reporting. For instance, the Commercial Code does not set penalty for noncompliance with provisions for keeping accounting records, preparing financial statements, or filing and publication of the financial statements. Similarly, the laws and directives of insurance companies and state-owned enterprises have no penalties for noncompliance with accounting and other annual financial reporting requirements.

6. REFORMING CORPORATE GOVERNANCE IN ETHIOPIA

The preceding sections show that the overall standard of corporate governance in Ethiopia is inadequate. Thus there are certain efforts from the side of the government and private sectors to update the legal and institutional frameworks for corporate governance in the country. To this end, revision of the 1960 Commercial Code is underway by the FDRE Ministry of Justice, which is a vital part of improving and upgrading of corporate governance standards in Ethiopia. In cognizant of the fact that a certain level of standardized accounting and auditing is a prerequisite for corporate governance, the AACCSA PSD-Hub in cooperation with the Office of the Federal Auditor General and the Ethiopian Professional Association of Accountants and Auditors (EPAAA), is undertaking important work to

¹³⁷ Ethiopia – Accounting and Auditing ROSC, *Supra Note* 123.

standardize the accounting and auditing practices in the country.¹³⁸ The Ministry of Trade and Industry (MoTI) is also modernizing and computerizing the Company Register, which is another important input and requirement for engendering good corporate governance in collaboration with the PSD-Hub Program and the business community.¹³⁹ There is also an ongoing discussion on the establishment of a risk-capital trading institution, which has direct implications for corporate governance.¹⁴⁰ These reform efforts indicate that the importance of corporate governance in Ethiopia is well understood by stakeholders including the government. However, as these reform initiatives are not yet finalized, there remain debates regarding the tenability of reform initiatives particularly on the approaches being followed.

6.1. DEVELOPMENT POLICY CONSIDERATIONS FOR CORPORATE GOVERNANCE

The corporate governance reform should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities. Moreover, corporate governance law reform in Ethiopia should consider key development policy aspects which match with the country's plans for poverty reduction and wealth creation.¹⁴¹ In other words, the corporate governance framework should be developed with a view to its

¹³⁸ A. Geda, *Supra* Note 3, p 102.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ Dr. Gabor Bruszt and Zekrie Negatu, Draft Project Document for Development of Corporate Governance in Ethiopia, (AACCSA, June 2009), p 19. The AACCSA in consultation with the Government of Ethiopia and through support from the Swedish International Development Agency (SIDA), launched an ambitious private sector led initiative to institutionalize corporate governance in Ethiopia.

impact on overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and efficient markets in the country.¹⁴² The need to adopt best corporate governance principles and practices should also target the creation of vibrant share companies that would undertake corporate social responsibilities and act as active and integrated partners in the national development objectives of the country. Moreover, in preserving a company's sustainability, board of directors should be able to ensure the fulfillment of the company's social responsibility. To achieve these objectives, board of directors should have a clear and focused written planning in meeting the company's social responsibility.¹⁴³

6.2. APPROACHES TO REFORM CORPORATE GOVERNANCE IN ETHIOPIA

6.2.1. Shareholder vs. Stakeholder Models of Corporate Governance

As a developing country, Ethiopia should find a way to accept the existing institutional portfolio of corporate governance and make it work in its specific cultural, historical and economic environment as it cannot afford the luxury of searching for third system between socialism and capitalism. Thus it should carefully and critically examine the entire experience of both the North America and the Western Europe with a view to looking for principles to be adapted to its local needs. Rather than leaping to a shareholder or stakeholder model or hastily choosing a unitary or two-level board structure, the country

¹⁴² *OECD Principles of Corporate Governance*, principle I.A (2004).

¹⁴³ For instance, *Indonesia's Code of Good Corporate Governance, National Committee on Governance*, (2006).

needs to determine the system of corporate governance most appropriate to her own individual needs and circumstances. Organizations and individuals from western developed countries inevitably press for the adoption by transition economies of “best practices” in corporate governance, best practices that have invariably originated in their own home countries.¹⁴⁴ Those best practices are of course the product of specific national experiences and cultures, factors that may make their adoption by a given transition economy like Ethiopia would make inappropriate or at least difficult without significant adaptation. In evaluating foreign models of corporate governance, policy makers in Ethiopia have to note that, to a large extent, western corporate governance systems have evolved through time and as a response to periodic and specific financial crisis in individual countries.¹⁴⁵

The best approach that would fit the reality of Ethiopia is, therefore, to selectively adapt/adopt the best experiences from both Anglo American and European Civil Law systems of corporate governance. This is will be tenable for two reasons. Firstly, different corporate governance systems are converging to a greater extent.¹⁴⁶ A point of convergence between the bare shareholder model advanced by Americans and the extreme stakeholder model advocated by Europeans, may reside in the notion of *socially responsible corporate governance* which look for possibility of combining ‘*corporate good governance*’ and ‘*corporate social responsibility*’.¹⁴⁷ Secondly, some scholars have determinedly advised the transition economies like Ethiopia that

¹⁴⁴ Salacuse, *Supra Note* 62, p 52.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

“merely transplanting laws and institutions is difficult for the reason that there are new conditions and many cultural differences”¹⁴⁸ and “to develop entirely new institutions would be an unpredictable adventure for transition economies”.¹⁴⁹

Therefore, Ethiopia is expected to carefully adopt experiences of both models of corporate governance to her own local circumstances rather than wasting its time and resources to develop entirely new institutions of corporate governance. This would inevitably enable it to combine the concepts of *good corporate governance* and *corporate social responsibility*. Doing so will not be a difficult task as the Commercial Code is eclectic from its very beginning. To this end, in the *Exposé des Motifs* of the Code, professor Escarra explains the selection of best foreign laws while he was drafting the share company’s part of the Code:

The goal to attain is to encourage one day investment of Ethiopian savings in large broad based enterprises [...]. This is why, without taking into account the so called preference to be given to this or that model in the Continental or the Anglo American legal system, I had always in mind the interest of Ethiopia and I have selected the solutions which I believe to be the best no matter where they come

¹⁴⁸ Id, p 72.

¹⁴⁹ Fernando, *Supra Note* 8, p 490.

*from, on condition that they may be applied to Ethiopian conditions, if not immediately, at least within a reasonable time.*¹⁵⁰

Accordingly, professor Escarra has selected rules which he believes to be best to satisfy the interest of Ethiopia without taking account of the preference to different models in the Continental or the Anglo American legal system. By the same token, the approach to be followed in the process of reforming corporate governance of share companies in the country should be similar to the one followed by Professor Escarra. So long as the principles of corporate governance to be adopted in the country can bring the desired effect, it does not matter where they come from. In this manner, both the existing systems of corporate governance can be strengthened and new mechanisms can be introduced.

6.2.2. Regulatory vs. Non-regulatory Approaches to Corporate Governance

As it has been ascertained earlier, there are two basic approaches to assure managerial devotion to the interests of a company and its shareholders, which are classified as mandatory and voluntary approaches. The mandatory approach relies upon formal rules and institutions backed by the coercive power of the state's legal system.¹⁵¹ On the other hand, the voluntary approach emphasizes the market mechanism and contractual arrangements such as incentive compensation schemes involving stock and non-stock options, and

¹⁵⁰ Peter Winship, *Commercial Code of Ethiopia (1960) Book II. Expose Des Motifs*. (Addis Ababa, HSIU, Faculty of Law, 1970), p 5.

¹⁵¹ Salacuse, *Supra Note* 62, p 14.

efficient capital markets as means for inducing desired management behavior.¹⁵² Although both approaches are needed to achieve optimal systems of corporate governance, an important question for policy makers is what the appropriate balance should be.¹⁵³ The voluntary approach had many advocates and even seemed to be in the dominance until the recent financial scandals and their negative impact on securities markets.¹⁵⁴

In voluntary system of corporate governance, companies will be expected to “comply or explain” i.e., prove and report full compliance with the national code or explain deviation from it.¹⁵⁵ It is worth mentioning that a code entitled “The Voluntary Code of Corporate Governance for Ethiopia” was adopted on 3 June 2011 under the auspices of AACCSA. The adoption of the Code, without doubt, can be taken as a good step towards introducing standards of good corporate governance in Ethiopia in a detailed and comprehensive manner. It can be a point of reference for companies which are willing to adopt and apply the principles and practices contained in the Code voluntarily. The Code adopts best principles and practices regarding the boards of directors, rights of shareholders and corporate disclosure and transparency.

Nevertheless, this writer contends that voluntary approach of corporate governance cannot be a reliable system to effectively control the corporate

¹⁵² Ralph K Winter, State Law, Shareholder Protection, and the Theory of the Corporation, *Journal of Legal Studies* (1977), vol.6, p 251; Michael C. Jensen and William H. Meckling, The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, *Journal of Financial Economics* (1976), Vol.3, p 305; Henry G. Manne, Mergers and the Market for Corporate Control, *Journal of Political Economy* (1965), Vol. 73, p 110.

¹⁵³ Salacuse, *Supra Note* 62, p 14.

¹⁵⁴ *Ibid.*

¹⁵⁵ Bruszt and Negatu, *Supra Note* 141, p 11.

frauds in the context of booming of share companies in Ethiopia. First of all, voluntary code of corporate governance is normally adopted in countries where markets play strong disciplinary roles for companies unwilling to apply principles of good corporate governance voluntarily. For instance, the basic concept of the Australia's voluntary code is that the market can come to its own conclusions about the significance of non-compliance based on the circumstances of individual companies.¹⁵⁶

However, a disciplinary role of the market in Ethiopia is insignificant as the number and size of companies are very small. There is also weak culture of competition in the business community in general and among companies in particular. Furthermore, companies do not seem to apply principles and best practices of corporate governance voluntarily. For instance, share companies engaged in banking business, despite tight regulation of the NBE, are not free from frauds as evidenced by their former top executives being criminally prosecuted.¹⁵⁷ This shows a difficulty of regulating and controlling financial frauds in companies by employing a soft law. Therefore, both weak market and the conduct of Ethiopian companies point to the ineffectiveness of voluntary code to ensure good corporate governance in the country.

¹⁵⁶ *ASX Corporate Governance Council, Corporate Governance Principles Recommendations*, (August 2007)

http://www.asx.com.au/supervision/pdf/corp_governance_principles_recommendations_2nd_edition.pdf [Last visited 17 February 2014].

¹⁵⁷ For instance, on May 6, 2011 witnesses testified against Awash International Bank's Leikun Brehanu, former president, and nine other former employees who had been brought up on charges of mishandling letters of credit and approving a little over 6.1 million dollars in credit outside of the bank's foreign currency procedures. See *Addis fortune*, volume 12 No.575, (May 8, 2011).

Furthermore, the experiences of other countries which have already adopted voluntary codes of corporate governance support an argument that voluntary codes cannot prevent companies from misbehaving and ending up in crisis. For example, in the United States giant companies such as Enron, WorldCom and Tyco International were collapsed in 2001 while they were applying the voluntary system of corporate governance.¹⁵⁸ As a result, the American Congress had to adopt a mandatory code of corporate governance that culminated in the Sarbanes-Oxley Act of 2002, which is known as the *Public Company Accounting Reform and Investor Protection Act of 2002*.¹⁵⁹ Accordingly, publicly held companies in the US must meet all requirements contained in the Act, which prescribes formal rules and institutions backed by penalties imposed on companies that fail to comply with the legal rule in the Act.¹⁶⁰ One of the proponents of this system argues that:

The world needs a strict corporate governance regime, which is able to eliminate fraud, corruption and other misdeeds and practices; soft law and requiring a company to hire a number of non-executive directors, for instance, would not prevent corporate failures as evidenced from the experience of Enron and WorldCom, though

¹⁵⁸ Paul S. Atkins, *The Sarbanes-Oxley Act of 2002: Goals, Content, and Status of Implementation*, (2003) <<http://www.sec.gov/news/speech/spch032503psa.htm>> [Last visited 20 February 2014]. This is considered as a foundation tale for the new era of corporate governance.

¹⁵⁹ Larry E. Ribstein, "Market vs. Regulatory to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002" *Journal of Company Law* (2002), Vol. 28, No. 1, p 3.

¹⁶⁰ Anita I. Anand, *Voluntary vs. Mandatory Corporate Governance: Towards and Optimal Regulatory Framework* (2005) press Legal Series. Working Paper 5664.

*these companies had non-executive directors, they were unable to prevent these companies from falling into bankruptcy.*¹⁶¹

From a practical point of view, the Sarbanes Oxley Act of 2002 is a product of the *law matters* thesis, which essentially contends that law is important to protect shareholders, especially minority shareholders, from insider expropriation.¹⁶² The critical goal of the *law matters* thesis is to promote capital markets and economic growth, which can be achieved by upholding shareholders' property rights.¹⁶³

Similarly, there is no convincing reason and circumstance to rely on a voluntary code of corporate governance, which is proved to be a failing mechanism even in countries where vibrant markets play crucial disciplinary roles. Therefore, the appropriate approach of corporate governance to be adopted in Ethiopia should be the mandatory one. In other words, the government has to adopt principles of good corporate governance in a legislation which binds all companies and appropriate penalties should be imposed on those companies fail to comply with the law. Supporting this idea, paredes assets as follows:

If the goal is to protect shareholder interests from the abuses and mismanagement of directors and officers, and similarly to protect minority shareholders from the opportunism of controlling

¹⁶¹ Atkins, *Supra Note* 158.

¹⁶² Paredes, *Supra Note* 90, p 1-5.

¹⁶³ *Ibid.*

*shareholders, developing countries generally should turn to a mandatory model of corporate law instead of a market-oriented corporate governance system.*¹⁶⁴

The other related issue here is whether it is necessary to overhaul the Commercial Code with a view to incorporating best principles of good corporate governance, carefully and selectively in the forthcoming revised Commercial Code or enact independent corporate governance legislation. It is possible to follow either of the two approaches since it is possible to realize the expected objectives alike if similar principles and rules are to be adopted likely in either Commercial Code or independent corporate governance legislation. As the Commercial Code is currently under the process of revision, it will be cost efficient to incorporate such principles together with appropriate penalties to be imposed on companies that fail to comply with the law in the Code itself.

Moreover, the possibility of capital market development in the country with a future stock exchange and a broader category of corporate financial instruments should be taken into consideration. It should also be noted that the law is a dynamic subject which changes in light of new economic and social developments in the Ethiopian business environment and in accordance with experiences and evaluations of its practice.

¹⁶⁴ *Ibid.*

7. CONCLUSION

As a public policy issue, corporate governance emerged in 1932 by Adolf Berle and Gardiner Means. They pointed to the increasing dispersion of corporate shares among a growing number of persons, who, because they were numerous, widely scattered and had relatively small interests were not able to exercise control over the company they owned.¹⁶⁵ They discovered that a total separation between ownership and control creates agency cost, i.e., a risk of the agent (managers) working for their own interest at the expense of the principal (shareholders).

Different countries have approached to the agency cost prevalent in modern public companies through various mechanisms. While continental European countries devised dual board structure in companies in which minority shareholders and other stakeholders could be represented in the supervisory board; common law countries, notably the United Kingdom and the United States, address the agency problem by requiring sufficient disclosure on the affairs of companies and by infusing independent outside directors in unitary board of directors who have little or no conflict of interests with the management. Independent directors are in a position to supervise the managers or block holders in the best interests of the shareholders and the company.¹⁶⁶ Moreover, they have empowered minority shareholders to initiate derivative suits against a felonious board of directors or its members.¹⁶⁷ Besides, the existence of stock market serves as a disciplining instrument not only through

¹⁶⁵ Berle and Means, *Supra Note 9*.

¹⁶⁶ Salacuse *Supra Note 62*, p 48.

¹⁶⁷ Rafael La Porta *et al*, Law and Finance, *Journal of Political Economy* (2000), Vol.106, p 1113-1142.

its regulatory role but also indirectly by facilitating exit for minority shareholders from underperforming or oppressing companies.¹⁶⁸ In addition, in economically advanced countries, market disciplines corporate managers through mechanisms such as hostile takeovers for corporate control.

Currently, there is a tendency towards separation of ownership and control in Ethiopian share companies. Given this prevalent situation, there is a need to be cautious that shareholders may be subjected to exploitation in the hands of corporate managers or block holders. However, this study finds that the legal framework pertinent to corporate governance in the country is inadequate to protect shareholders from undue exploitation of managers and/or block holders in the context of publicly held share companies. Cognizant of this problem, the Ethiopian government and private sectors are undertaking certain corporate governance reform initiatives including the revision of the Commercial Code by the FDRE Ministry of Justice and adoption of voluntary code of corporate governance by AACCSA in June 2011. Nonetheless, reforming the legal and institutional frameworks alone cannot be a panacea for the problems unless it is carried out in light of the country's short and long term economic and social development objectives.

Therefore, Ethiopia should carefully examine the entire experience of various countries with a view to looking for principles of good corporate governance to be adopted for its local needs. Rather than leaping to a shareholder or stakeholder model, the country should determine a system of corporate

¹⁶⁸ *Ibid.*

governance most appropriate to her own individual needs and circumstances. It should also note that one size does not fit all.

Moreover, Ethiopia should predominantly adopt a mandatory law of corporate governance to protect shareholders (and other stakeholders) from the abuses and mismanagement of directors and other corporate officers or to sufficiently protect minority shareholders from the opportunism of controlling shareholders and to promote the accelerated economic development. This is in line with the *law matters* thesis. On the other hand, there are no adequate market institutions for the non-regulatory system of corporate governance to be relied on in the Ethiopian context. It is also worth noting that most countries which had earlier adopted market oriented corporate governance such as the United States are making a paradigm shift towards the regulatory corporate governance system after facing repeated cases of corporate scandals which culminated in widespread financial and economic crisis. Therefore, there is no a convincing justification for Ethiopia to rely on such a failing neoliberal aspect of corporate governance approach.

A HUMAN RIGHTS-BASED APPROACH TO COUNTERACT TRAFFICKING IN WOMEN: THE CASE OF ETHIOPIA

Bahar Jibriel*

1. INTRODUCTION

Trafficking in persons which is akin to contemporary slavery is highly prevalent across the world. It is affecting hundreds of thousands of persons every year. According to the latest ILO estimate, there are 20.9 million people who are trapped in forced labor¹ including human trafficking for labour and sexual exploitation.² When we breakdown this figure, it shows that at any given point in time, around three out of every 1,000 persons worldwide are victims of forced labour.³ With the illicit profit of 32 billion dollars for traffickers, Trafficking in Persons stands as the third largest organized crime next to arms deal and drug trafficking.⁴

While men are also exposed to trafficking, women and girls constitute a significant majority of victims of trafficking. According to the US State

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¹According to ILO documents the term Forced labour is used 'to denote situations in which the persons involved – women and men, girls and boys – are made to work against their free will, coerced by their recruiter or employer, for example through violence or threats of violence, or by more subtle means such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities'. See ILO 2012 Global Estimate of Forced Labour, June 2012.

² This new estimate updated the 2005 estimate. The estimate includes human trafficking. In words of ILO, 'Human trafficking can also be regarded as forced labour, and so this estimate captures the full realm of human trafficking for labour and sexual exploitation.' Ibid, executive summary.

³ Ibid.

⁴ Ibid.

Department report, 80% of people trafficked are women and girls.⁵ Women are trafficked mostly for sexual exploitation and domestic labor. Amnesty International reported in 2004 that two million girls aged 5-15 have been introduced into the commercial sex market across the world each year.⁶

Trafficking in women is affecting virtually all countries either as a source, transit or destination country. Ethiopia is among source countries highly affected by problem of women trafficking. In 2004, IOM reported that human trafficking is rising at an alarming rate in Ethiopia.⁷ Poverty, unemployment, widening income gap between rich and poor families, lack of women's ownership (possession) of land and other property, and women's lack of schooling opportunity coupled with ignorance of harsh consequences of human trafficking make Ethiopian women vulnerable to the trafficking business.⁸ Accordingly, thousands of women and girls are trafficked primarily to the Middle East every year mostly for domestic work and sexual exploitation. According to a recent IRIN (UN News agency) report, some 20,000 to 25,000 Ethiopians are trafficked to various countries annually.⁹ Ethiopian women in the Middle East face severe abuses, including physical and sexual assault, denial of salary, sleep deprivation, confinement,

⁵ Ibid.

⁶ Yoseph Endashew *etal*, Assessment of Trafficking in Women and Children in and from Ethiopia, IOM (2006).

⁷ <http://gvnet.com/humantrafficking/Ethiopia.htm> (Last accessed on February, 2011).

⁸ Yoseph, *supra* note 6.

⁹ IRIN News on 16 March 2010, available at, <http://www.irinnews.org/report.aspx?reportid=88438> (Last accessed on September 15, 2011).

incarceration, and murder.¹⁰ Many are driven to despair and mental illness while some end up committing suicide.¹¹

Regarding anti-trafficking measures, the human rights based approach – anti-trafficking response that considers trafficking in women as a human rights issue that requires a human rights oriented interventions – seems to be gaining ground in anti-trafficking discourses.¹² This approach addresses not only the process and consequences of trafficking but also seeks to dismantle the structural root causes of trafficking in persons such as: poverty, lack of education, unemployment and discrimination against women. Accordingly, the human rights based approach encompasses prosecution of trafficking cases, protection of victims of trafficking and prevention of trafficking in holistic manner.¹³

¹⁰ US Trafficking Report 2011, p.158.

¹¹ Ibid, regarding suicide case, a local newspaper has reported 67 cases of suicide of Ethiopian women working in Lebanon between 1997-1999, The Reporter, Addis Ababa, 29 September 1999 as quoted in GTZ, Study on Trafficking in Women in East Africa, 2003. The recent case of Alem Dechasa's death apparently due to a suicide out of despair and disappointment which is highly publicized across globe reminds us the enormity of suffering Ethiopian maids are facing even these days.

¹² Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Leiden, Martinus Nijhoff Publishers, 2006) p.35; Dina Haynes, 'Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers', 16 *Human Rights Quarterly*, (2004), p.221-272; Janie Chuang, 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy', 13 *Indiana Journal of Global Legal Studies*, (2006), p.137-163 ;Ann D. Jordan, 'Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings', 10 *Gender and Development*, (2002), p.28-37. On the pros and cons of Human rights based approach see Bahar Jibriel, *Adopting A Human Rights Based Approach to Counteract Trafficking-In-Women: The Case of Ethiopia*, LLM Thesis submitted to AAU School of law in 2011(Unpublished).

¹³ Obokata, Ibid.

Thus, the objective of this article will be to assess whether anti-trafficking measures adopted in Ethiopia are in line with the human rights based approach. The article is divided into five sections. Following this introduction, the second section tries to explain the concept of human trafficking and discuss elements of the definition of human trafficking. It also tries to elaborate the relationship between human rights and human trafficking. The third section deals with the tenets of the human rights based approach to anti-trafficking. The fourth section is devoted to the study of the case of Ethiopia. Accordingly, it will discuss the scale and magnitude of the problem of women trafficking and analyze the causes and consequences of the problem. It also attempts to make a detailed scrutiny of anti-trafficking responses adopted in Ethiopia under the lens of the human rights based approach. Further, it seeks to explain the factors inhibiting the adoption of the human rights based approach to combat women trafficking. The last section provides some conclusion and recommendations.

2. UNDERSTANDING HUMAN TRAFFICKING

2.1 DEFINITION

Human Trafficking¹⁴ is defined for the first time in international legal instrument in the 2000 Trafficking Protocol.¹⁵ Article 3(a) of the Trafficking Protocol provides that:

¹⁴The terms Human Trafficking, Trafficking –In- Persons and Trafficking of Human Beings are used interchangeably in this article.

[t]rafficking in person shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;¹⁶

The definition contains three constituent elements. These are:

1. Action (what is done), consisting of: recruitment, transportation, transfer, harbouring or receipt of persons;¹⁷
2. The Means (how it is done), consisting of : threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the

¹⁵Trafficking Protocol for excellent commentary on the Trafficking Protocol, see Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', 23 *Human Rights Quarterly*, (2001), p.975-1004. See also Janice G. Raymond, 'The New UN Trafficking Protocol', 25 *Women's Studies International Forum*, (2002), p. 491 – 502.

¹⁶ Art.3 (a) of Trafficking Protocol.

¹⁷ Ibid.

consent of a person having control over another person, for the purpose of exploitation;¹⁸ and

3. Purpose (why it is done), which is: Exploitation which includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;¹⁹

All these three elements must be present to establish the commission of the crime of trafficking in persons.²⁰ However, the requirement of means is waived when it comes to child trafficking.²¹ The adoption of such a broad and comprehensive definition is hailed as an important development because it provides a general guidance to different actors, such as scholars, governments, NGOs and Inter-Governmental Organizations to examine and respond to trafficking.²² In other words, it creates a global language and legislation to define human trafficking.²³ Thus, the Trafficking Protocol can be considered to be a global standard setting instrument which serves as a minimum bench mark for national

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Gallagher, *supra* note 15, p.987.

²¹ Art.3(c) of Trafficking Protocol states that '[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article.'

²² Obokata, *supra* note 12, p.3; Susan Kneebone, 'The Refugee-Trafficking Nexus: Making Good (The) Connections', 29 *Refugee Survey Quarterly*, (2010), p.152.

²³ Raymond, *supra* note 15, p.491.

governments to define the crime of trafficking in their domestic laws and policies.

2.2 HUMAN TRAFFICKING AND HUMAN RIGHTS

There is a growing consensus to consider human trafficking as a human rights issue as articulated by several authors and reports.²⁴ It has been widely acknowledged that violations of human rights are both a cause and a consequence of human trafficking.²⁵ As Special Rapporteur on Trafficking in Persons notes that ‘in a significant number of situations, the root causes of migration and trafficking can be attributed to the failure of States to guarantee the fundamental human rights of all individuals within their jurisdiction.’²⁶ The root causes of trafficking, i.e., poverty, discrimination, violence and

²⁴ Obokata, supra note 12, p.3; GTZ, Programme Promoting Gender Equality and Women’s Rights, Trafficking in Persons as a Human Rights Issue, 2008(hereafter GTZ 2008), available at <http://www.gtz.de/gender> [last accessed on June 5, 2011]; Marie Segrave, ‘Human Trafficking and Human Rights’, 14 *Australian Journal of Human Rights*, (2009), p.71-94; Patience Elabor-Idemudia, ‘Migration, Trafficking and the African Woman, Agenda, No. 58, African Feminisms Three (2003), p. 101-116; Elaine Pearson, ‘Human Traffic, Human Rights: Redefining Victim Protection’, (Anti-Slavery International, 2002); Jennifer S. Nam, ‘The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims’, 107 *Columbia Law Review*, (2007), p. 1655-1703; Anne Gallagher, ‘Trafficking, Smuggling and Human rights: Tricks and Treaties’, 12 *Forced Migration Review*; ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development, Report submitted by the Special Rapporteur on Trafficking In Persons, Especially Women and Children, Joy Ngozi Ezeilo, A/HRC/14/32 (4 May 2010); Anne T. Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’, 49 *Virginia Journal of International Law*, (2009), p.847-848; the United Nations High Commissioner for Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002) (hereafter OHCHR Principles and Guidelines).

²⁵ OHCHR Principles and Guidelines, *ibid*, Guideline 1.

²⁶ Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development, Report submitted by the Special Rapporteur on Trafficking In Persons, Especially Women and Children, Joy Ngozi Ezeilo, A/HRC/14/32 (4 May 2010), para.21.

general insecurity emanate from deprivation of human rights.²⁷ Furthermore, the phenomenon of trafficking itself entails a serious violation of human rights and human dignity.²⁸ The most common rights at stake are: the right to personal autonomy, the right not to be held in slavery or servitude, the right to liberty and security of person, the right to be free from cruel or inhumane treatment, the right to safe and healthy working conditions and the freedom of movement and the right to life.²⁹

Since human trafficking is a human rights issue, a human rights based anti-trafficking framework offers a helping hand to supplement and/or complement ongoing anti-trafficking initiatives.³⁰ Obokata in his book, 'Trafficking of Human Beings from a Human Rights Perspective' has identified two dimensions of the human rights based approach to combat human trafficking.³¹ The first dimension is that the approach serves as a framework of analysis which explores and identifies relevant human rights norms and principles in relation to human trafficking. Secondly, the approach also serves as a framework of action which articulates legal obligations imposed up on states, such as obligations to prohibit trafficking, prosecute traffickers, protect victims, and address the causes and consequences of trafficking.

²⁷ GTZ 2008, supra note 24.

²⁸ Obokata, supra note 12; Nam, supra note 24.

²⁹ GTZ 2008, supra note 24; Viviana Waisman, 'Human Trafficking: State Obligations to Protect Victims' Rights, The Current Framework and A New Due Diligence Standard', 33 *Hastings International and Comparative Law Review*, (2010), p.385-386; Conny Rijken and Dagmar Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice', p.8.

³⁰ Pearson, supra note 24, Segrave, supra note 24; Obokata supra note 12; the Joy Ngozi Ezeilo's report, supra note 24; Rijken and Koster, supra note 29, p.8.

³¹ Obokata, supra note 12, p.35.

In terms of normative framework, there are a plethora of international and regional human rights instruments which are relevant to combat human trafficking. For instance, Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) urges states to suppress all forms of trafficking in women and exploitation of prostitution of women.³² Article 35 of the Convention on the Rights of the Child (CRC) calls for the prevention of the abduction of, sale of or traffic in children for any purpose or in any form.³³ The provision of CRC is further strengthened through the adoption of the Optional Protocol to the Convention on the Rights of the Child on the Sales of Children, and Child Pornography (OP CRC on Sale of Child).³⁴ At regional level, the African Charter on Human and Peoples' Rights (ACHPR) states that all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited,³⁵ and the African Charter on the Rights and Welfare of Child (ACRWC) calls on states parties take appropriate measures to prevent the abduction, the sale of, or trafficking of children for any purpose or in any form, by any person including parents or legal guardians of the child.³⁶ Moreover, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa urges States Parties to take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those

³² The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979.

³³ The Convention on the Rights of the Child (CRC), adopted in 1989.

³⁴ The Optional Protocol to the Convention on the Rights of the Child on the Sales of Children, and Child Pornography (OP CRC on Sale of Child), adopted in 2000, arts.1-3.

³⁵ Art.5 of The African Charter on Human and Peoples' Rights (ACHPR), adopted in 1981.

³⁶ The African Charter on the Rights and Welfare of Child (ACRWC) adopted in 1990, art.29.

women most at risk.³⁷ Apart from these, there are some instruments which touch up on some aspects of human trafficking. For instance, the International Covenant on Civil and Political Rights (ICCPR) prohibits slavery, servitude, and forced labor.³⁸ Similar provision is also enshrined in the International Convention on Rights of All Migrants Workers and Members of Their Families (MWC).³⁹ Further, the International Covenant on Economic, Social and Cultural Rights (ICESCR) calls for the adoption of special measures to protect children from economic and social exploitation.⁴⁰

The Trafficking Protocol also deals with protection of human rights of victims of trafficking.⁴¹ Accordingly, its preamble provides the need to protect the ‘internationally recognized human rights’ of those trafficked.⁴² Article 2 also states that the protection of human rights of victims is one purpose of the Protocol.⁴³ Importantly, Articles 6-8 provides protection of human rights of victims of trafficking. These include, in particular, temporary resident status and temporary shelter, medical and psychological services, access to justice as well as compensation or restitution.⁴⁴

³⁷The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art.4 (2) (g).

³⁸ The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, art.8.

³⁹ The International Convention on Rights of All Migrant Workers and Members of their Families (MWC), adopted in 1990, art.11.

⁴⁰The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966, art.10 (3).

⁴²Preamble of Trafficking Protocol, para.1.

⁴³ Trafficking Protocol, Art.2 (b).

⁴⁴Trafficking Protocol, Arts.6-8.

Finally, the question may arise as to what is the value added of considering human trafficking as human rights issue. There are two main advantages accrued in putting human trafficking in human rights perspective.⁴⁵ First of all considering human trafficking as human rights issue facilitates the understanding of the problem of trafficking.⁴⁶ Consequently, the human rights regime considers those trafficked as victims of human rights abuses and calls for adopting victim-centered approach anti-trafficking response.⁴⁷ Secondly, human rights framework unlike criminal justice approach⁴⁸ adopts a holistic response to trafficking. Hence, it attempts to address not only the process and consequences of trafficking but also the root causes of trafficking.⁴⁹

3. A HUMAN RIGHTS-BASED APPROACH ANTI-TRAFFICKING RESPONSE

The Human Rights Based Approach Anti-trafficking response is a conceptual framework that is normatively derived from international human rights standards and that is operationally aimed at promoting and protecting human

⁴⁵ Tom Obokata, 'Trafficking and Smuggling of Human Beings in Europe: Protection of Individual Rights or States' Interests?' *Web Journal of Current Legal Issues*, available at 'www.webjcli.ac.uk' [Last accessed on June 7, 2011].

⁴⁶ See Jordan, *supra* note 12, p.30.

⁴⁷ Obokata, *supra* note 12, p.35; OHCHR Principles and Guidelines, Guideline 1.

⁴⁸ Criminal justice approach viewing trafficking as crime and immigration issues focuses on the process and consequence of trafficking. Hence it does not bother to address the underlying root causes of trafficking crime. For detailed discussion on the pros and cons of criminal justice approach vis-à-vis a human rights approach see Bahar Jibriel, *supra* note 12, chapter three.

⁴⁹ Obokata, *supra* note 12, p.35.

rights.⁵⁰ In the context of anti-trafficking measures, the approach requires analysis of the ways in which human rights violations arise throughout the trafficking cycle, as well as of States' obligations under international human rights law. It seeks to both identify and redress the discriminatory practices and unjust distributions of power that underlie trafficking, that maintain impunity for traffickers, and that deny justice to victims of trafficking. Under a human rights-based approach, every aspect of the national, regional and international response to trafficking is anchored in the rights and obligations established by international human rights law.⁵¹

A Human Rights Based Approach recognizes that trafficking is first and foremost a human rights issue. It holds that trafficking in human beings constitutes both a cause and a consequence of human rights violations. According to the former UN High Commissioner for Human Rights, Mary Robinson,

[T]rafficking is a cause of human rights violation because it violates fundamental human rights, such as the right to life, the right to dignity and security, the right to just and favorable conditions of work, the right to health, the right to equality and the right to be recognized as a person before the law.

⁵⁰ Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Office of High Commissioner for Human Rights, (2010) (hereinafter Commentary on Trafficking Principles and Guidelines), p.49-50. For further discussion on human rights based approach anti-trafficking programming, see Marjan Wijers, An Exploration of the Meaning of A Human Rights Based Approach to Trafficking , GAATW Alliance News, Issue 22, (2004), p.7-14.

⁵¹ Ibid.

*It is a consequence because it is rooted in poverty, inequality and discrimination.*⁵²

Accordingly, Human Rights Based Approach takes the protection of the human rights of victims of trafficking as the main guiding principle for adopting measures, policy, and legislation in the fight against human trafficking.⁵³ It views trafficked persons as victims of crime and human rights abuses who deserve protection and assistance.⁵⁴ Smith and Mattar argue that the foundation of the Human Rights Based Approach shifts the notion of criminalization from the trafficked persons to the traffickers through the decriminalization and protection of the trafficked persons in conjunction with the criminalization and prosecution of the traffickers.⁵⁵ In this approach, the position of the victims, the violations of their human rights and their vulnerable position are the starting points for taking counteracting measures against human trafficking.⁵⁶ In other words, it shifts the attention from a

⁵² Wijers, supra note 50, p.8.

⁵³ Rijken and Koster, supra note 29, p.9.

⁵⁴ Elizabeth Yuko, 'Theories, Practices and Promises: Human Trafficking Laws and Policies in Destination States of the Council of Europe', LLM dissertation submitted to Dublin City University, School of Law and Government, (September 2009), p.29; Jordan, supra note 12, p.30.

⁵⁵ Smith, Linda and Mohamed Mattar, 'Creating International Consensus on Combating Trafficking in Persons: US Policy, the Role of the UN, and Global Responses and Challenges', 28 *The Fletcher Forum of World Affairs*, (2004), p.1621-162, as quoted in Yuko, *ibid.*

⁵⁶ Rijken and Koster supra note 29; Haynes, supra note 12, p.247.

State's right to control trafficked persons to their obligation to protect them.⁵⁷ Accordingly, it requires that anti-trafficking responses have to be centralized on the needs and safety of victims of trafficking.⁵⁸

Human Rights Based Approach also promotes prosecution of traffickers. But it does not condition victim protection on the willingness or ability of the victim to assist with the prosecution.⁵⁹ Rather, it facilitates the prosecution of traffickers by securing confidence of victims to testify against their abusers. As Haynes observes, Human Rights Based Approach allows victims of trafficking to become better potential witnesses by securing their safety and physical presence and promoting their psychological capacity to testify.⁶⁰ It takes into account the agency of trafficked person in effecting prosecutorial efforts. Similarly, Pearson notes this approach will lead to more effective investigation and successful prosecution of traffickers. Thus, women who understand their rights and are protected from retaliation and prosecutions will cooperate in investigations.⁶¹ This means as some authors argue that

⁵⁷Yuko, supra note 54, p.30. Regarding states obligation in protection of trafficked persons see generally, Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge, Cambridge University Press, 2010), chapters 5 and 6; see also Obokata, supra note 12, chapter 5. For analysis of states obligation to uphold due diligence standards in protection of trafficked persons, see generally, Viviana Waisman, 'Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard',³³ *Hastings International and Comparative Law Review*, (2010),p.385-430.

⁵⁸Obokata, supra note 12, p.35. Since it puts victims at the center stage of anti-trafficking, it is also known as victim centered approach see Haynes, supra note 12.

⁵⁹ Haynes, supra note 12, p.247.

⁶⁰ Ibid, p.252.

⁶¹Pearson, supra note 24, p.66.

prosecution is part of the package of the Human Rights Based Approach to fight human trafficking.⁶²

The approach also goes beyond the immediate consequences and processes of trafficking phenomena and seeks to dismantle the structural factors causing and sustaining women trafficking.⁶³ It has been widely established that women trafficking is fueled by structural contexts exposing women and girls to the net of traffickers.⁶⁴ As Ray observes trafficking is ‘a symptom’ of socio-economic disease such as: feminized poverty, discrimination, lack of education, unemployment, lack of access to resource.⁶⁵ Unless these underlying root causes are uprooted, there is no way of breaking the vicious cycle of trafficking crime. Hence, Adopting Human Rights Based Approach would contribute to eradicate trafficking by addressing underlying ills fostering contemporary slavery.

⁶² Rijken and Koster, supra note 29. But note that in Human Rights Based Approach prosecution entails twin purposes of ending impunity and securing justice for victims. As such it seeks to establish effective criminal justice administration which include, inter alia, ensuring victims protections and remedies as well granting fair trial for suspects of trafficking crime. On prosecution of trafficking in context of Human Rights Based Approach see generally, Anne T. Gallagher and Nicole Karlebach, ‘Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice’, Background Paper, July, 2011, Geneva, Available at: http://works.bepress.com/anne_gallagher/18 (Last visited on August 12, 2011). See also Gallagher, supra note 57.

⁶³ Obokata, supra note 12, p.35.

⁶⁴ On this point see inter alia, Joy Ezeilo, Report on the Prevention of Trafficking in Persons, supra note 26; Commentary to Trafficking Principles and Guidelines, supra note 50; Jordan, supra note 12.

⁶⁵ Nilanjana Ray, ‘Looking at Trafficking through a New Lens’, 12 *Cardozo Journal of Law and Gender* (2006), p.909.

Further, the Human Rights Based Approach adopts a holistic anti-trafficking framework encompassing prosecution, protection, and prevention. It suggests that all three Ps⁶⁶ must be implemented simultaneously to counteract women trafficking in a ‘humanized fashion’.⁶⁷ It does not advocate preferences or prioritization among the three Ps; rather it views all of them as integral part of anti-trafficking package.

Finally, unlike the Criminal Justice Approach, it takes on board the agency of trafficked persons (victims) in designing and executing anti-trafficking strategies. It frames trafficked persons as active participants and beneficiaries of anti-trafficking initiatives. Accordingly, protection of human rights of trafficked persons including, the right to participation in designing, steering and evaluating anti-trafficking initiatives, permeates through all three Ps in Human Rights Based Approach framework.⁶⁸ Hence, it takes a full picture of the problem of women trafficking including the worse implications of designing exclusionist intervention strategies.⁶⁹ In other words, it attempts to ‘humanize’ anti-trafficking responses by shifting the perception from viewing trafficked persons as only instrumentalities of facilitating prosecution of

⁶⁶ Three Ps stands for shorthand prosecution, protection and prevention strategies. These so called three Ps frequently appear in anti-trafficking literatures and reports.

⁶⁷ See Conny Rijken and Renée Römkens, ‘Trafficking for Sexual Purposes as a Globalized Shadow Economy: Human Security as the Tool to Facilitate a Human Rights Based Approach’, in Rianne Letschert and Jan Van Dijk (eds.), *The New Faces of Victimhood Globalization, Transnational Crimes and Victim Rights*, (2011) p.73-98.

⁶⁸See Wijers, *supra* note 50; Joy Ezeilo, Report on the Prevention of Trafficking in Persons on the importance of Human Rights Based Approach in imposing the obligation to participate trafficked persons in designing, implementing and evaluating anti-trafficking initiatives, paras.49-53.

⁶⁹ Wijers, *supra* note 50.

traffickers to looking them as bearers of rights claimable against the state. Hence, it seeks to make the trafficked persons more visible as subjects of entitlements than objects of law enforcement.⁷⁰

In sum, the Human Rights Based Approach integrates all three Ps without requiring either trade off or prioritization among them with the protection of human rights as common thread. It simultaneously requires the closing of circle of justice to fight the impunity of traffickers and broadening of circumference of freedoms and rights of trafficked persons. Putting the rights of trafficked persons at the center of anti-trafficking initiatives, it has prospect of reducing and ultimately eradicating women trafficking. Due its inclusive nature, it takes the agency of trafficked persons to develop and implement anti-trafficking initiatives. Further, it seeks to go to dry the roots of women trafficking by calling for dismantling underlying structural factors causing and sustaining contemporary slavery. Hence, there is a better future in Human Rights Based Approach to counteract women trafficking. Although a golden opportunity to adopt a human rights based instrument at international level has been lost in Vienna process, the same opportunity does exist at national level especially for those countries that did not legislate a comprehensive anti-trafficking law such as Ethiopia.⁷¹ At this historic junction, it is thus far imperative to contemplate about adopting Human Rights Based Approach anti-trafficking initiatives in domestic arena. In what follows the author interrogates whether such approach is adopted in Ethiopia or not.

⁷⁰ Ibid.

⁷¹ Jordan, *supra* note 12.

4. ANALYSIS OF ANTI TRAFFICKING INITIATIVES IN ETHIOPIA

4.1. A BRIEF OVERVIEW OF WOMEN TRAFFICKING IN ETHIOPIA

While the exact data is hard to come by, trafficking in persons is highly prevalent in Ethiopia. According to the recent IRIN report, some 20,000 to 25,000 Ethiopians are trafficked to various countries annually.⁷² While men are also subjected to trafficking in Ethiopia, women constitute the majority of those victimized by traffickers.⁷³ Further, the ILO study indicates that women and girls aged between 19-30 years comprise the significant share of victims of trafficking in persons in Ethiopia.⁷⁴ Poor, less educated, residents of major regional towns are identified as the obvious victims of trafficking.⁷⁵ Majority of female migrants are mainly trafficked outside of the country for household labour purposes.⁷⁶ However, some female migrants may also be trafficked for commercial sex work, particularly in Djibouti, Yemen, Sudan and South Sudan.⁷⁷

Poverty, lack of employment opportunities, lack of prospect at home country, failure in educational endeavors, gender based discrimination, and the search for better opportunities and income to support themselves and their families are critical push factors behind high prevalence of women trafficking in

⁷² IRIN News on 16 March 2010, available at, <http://www.irinnews.org/report.aspx?reportid=88438>(last accessed on September 15, 2011).

⁷³Trafficking in Persons Overseas for Labour Purposes: The Case of Ethiopian Domestic Workers, ILO CO Addis Ababa (2011) (hereinafter ILO Study), p.ix.

⁷⁴ Ibid, p.26.

⁷⁵Yoseph, supra note 6, p.38-40.

⁷⁶ ILO Study, supra note 73.

⁷⁷ Ibid; US TIP Report 2013, p.165.

Ethiopia.⁷⁸ On the other hand, there are pull factors which attract women and girls into trafficking business. These include: rapid changes in the local and regional economies, restrictive immigration laws, weak protection regimes for migrant workers, an aging population in the receiving countries, the role of traffickers in artificially expanding demand for cheap labour, increased demand for unskilled labor in Middle East countries,⁷⁹ and the expansion of service sector requiring women involvement.⁸⁰

Trafficking in women has been mostly conducted by brokers (known as ‘*delala*’ in local vernacular), unlicensed employment agents, travel agents, import and export owners, relatives and family members of migrant workers.⁸¹ Further, a number of reports identify that Private Employment Agencies (PEAs) are also actors in the trafficking of migrants contrary to the law regulating their operation.⁸²

Popular destination countries for most of trafficked women outside Ethiopia are mainly Middle East countries including Lebanon, UAE, Saudi Arabia, Kuwait, and Bahrain, while Yemen, Djibouti, Egypt, Somalia and Sudan serve mainly as a transit country.⁸³ The Middle East is a popular destination due to its proximity and high demand for domestic workers.⁸⁴ Besides Middle

⁷⁸ Ibid; Yoseph, supra note 6, p.37.

⁷⁹For instance the Saudi government announces to recruit 30,000 labor workers from Ethiopia, Saudi gazette, on June 15, 2011 <http://www.thebigprojectme.com/2011/06/15/ksa-to-employ-30000-ethiopian-labourers/> (Last accessed on September 3, 2011).

⁸⁰ Yoseph, supra note 4, p.38; ILO Study, supra note 73, p.24.

⁸¹ Yoseph, supra note 4, p.41.

⁸² Ibid; ILO Study, supra note 73, p.33.

⁸³ US Trafficking in Persons Report 2011(hereinafter US TIP Report, 2011), p.158; Yoseph, supra note 6, p.46; US TIP Report 2013, p. 165.

⁸⁴Yoseph, supra note 6, p.46.

Eastern countries, other destinations for Ethiopian women and girls include Sudan, South Africa, Djibouti, and Egypt.⁸⁵

Ethiopian women in the transit⁸⁶ and destination countries face severe human rights abuses which include, inter alia, physical and sexual assault, denial of salary, sleep deprivation, withholding of passports,⁸⁷ confinement, incarceration, and murder.⁸⁸ Further, some commit suicide due to despair and mental illness.⁸⁹ For instance, from 1999-2005 the Quarantine Office of the Addis Ababa International Airport reported 129 female bodies returned from Jeddah, Dubai, and Beirut.⁹⁰ In all cases the cause of death was determined to be suicide.⁹¹ Having said this, the following section examines the anti-trafficking measures adopted in Ethiopia to address the problem of trafficking in women.

4.2.ANTI TRAFFICKING MEASURES IN ETHIOPIA

The high prevalence of trafficking in women and ensuing socio-economic problems necessitate strong and concerted anti-trafficking initiatives to eradicate the problem. As explained in the foregoing sections, trafficking in women constitutes a human rights issue and as such it requires a human rights oriented intervention measures. Hence, the purpose of this section is to examine anti-trafficking initiatives so far adopted in Ethiopia in light of the

⁸⁵ Ibid.

⁸⁶The recent US TIP Report notes that “[s]ome women become stranded and exploited in these transit countries, unable to reach their intended destinations.” US TIP 2013, p.166.

⁸⁷ US TIP Report 2013, p.165.

⁸⁸ Ibid, p.48.

⁸⁹ US Trafficking in Persons Report 2010 (hereinafter US TIP Report, 2010), p.144.

⁹⁰ Yoseph, supra note 6, p.53.

⁹¹ Ibid.

human rights based approach. To this end, the prosecution, protection and prevention measures put in place and the gaps therein will be discussed as follows.

4.2.1. Prosecution of Trafficking Cases

Prosecution of trafficking cases to combat trafficking in women requires enacting comprehensive legislative framework that proscribes trafficking as a punishable offence. It also requires establishing procedures and institutions adequately mandated, staffed and funded to undertake investigation and prosecution of trafficking cases. Effective investigation and prosecution of traffickers also lie at the heart of the prosecution of trafficking. This section seeks to examine the prosecution of trafficking cases in Ethiopia. In so doing an attempt is made to review laws, institutions and practices of prosecution of trafficking cases in Ethiopia in light of the human rights based approach.

While trafficking in persons is widespread and causing socio-economic problems, ironically Ethiopia has not adopted a comprehensive anti-trafficking law. But this does not lead one to conclude that trafficking in persons is not addressed under Ethiopian legal frameworks. While scattered and lack common policy guideline, there are laws in Ethiopia of particular relevance to combat trafficking in persons. Further, Ethiopia has ratified most of the international and African regional legal instruments relevant to combat human trafficking and related offences.⁹² According to the Federal Democratic Republic of Ethiopia (FDRE) Constitution, international treaties ratified by

⁹² Of late Ethiopia has ratified the Trafficking Protocol in 2012.

Ethiopia are recognized as integral part of law of the land.⁹³ Article 13 (2) of the Constitution also states that human rights chapter of the Constitution shall be interpreted in light of international human rights instruments. Thus, Ethiopia is bound by the obligations emanating from ratified international and regional legal instruments in combating women trafficking.

Moving onto domestic laws relevant to anti-trafficking, the FDRE Constitution under Article 18 (2) states that ‘trafficking in human beings for whatever purpose is prohibited.’ The Constitution prohibits trafficking in persons encompassing trafficking in children, women and men. It also prohibits trafficking in persons for whatever purposes. This can be interpreted to mean that it prohibits all exploitation purposes enumerated under the Trafficking Protocol. Further, the Constitution made the prohibition against trafficking non-derogable right which implies that the right cannot be suspended even during the state of emergency.⁹⁴

Apart from the Constitution, there are some subsidiary laws that prohibit trafficking in persons. The Criminal Code of the Federal Democratic Republic of Ethiopia of 2004,⁹⁵ for example, proscribes trafficking in persons as punishable act. Accordingly, trafficking in women and children for purpose of exploitation of prostitution is criminalized under Article 635. Similarly,

⁹³FDRE Constitution, Art.9 (4). But it is beyond the scope of this article to resurface the debate regarding the status of international treaties visa-a- vis the constitution and subsidiary of laws, for further discussion on this point see Takele Soboka Bulto, ‘The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia’, 23 *Journal of Ethiopian Law*, (2009).

⁹⁴Adem Kassie, ‘Human Rights under the Ethiopian Constitution: A Descriptive Overview’, 15 *Mizan Law Review*, (Spring 2011), p.62.

⁹⁵ Hereinafter, Criminal Code.

trafficking in women and children for labor exploitation is also criminalized under Article 597 of Criminal Code.

Furthermore, unlawfully sending Ethiopians abroad for work is penalized pursuant to Article 598 of Criminal Code. The provision states that ‘‘whoever, without having obtained a license or by any other unlawful means, sends an Ethiopian woman for work abroad, is punishable with rigorous imprisonment from five years to ten years, and fine not exceeding twenty-five thousand Birr’’. Similarly, the Employment Exchange Services Proclamation criminalizes sending Ethiopians abroad without license.⁹⁶

But none of the aforementioned laws comprehensively defined what constitutes trafficking in persons. The lack of comprehensive legal definition of trafficking in persons has seriously impeded the effective investigation and prosecution of human trafficking cases.⁹⁷ It has been noted that cases of trafficking have been prosecuted under different types of crimes.⁹⁸ In some instances astonishingly enough traffickers have been charged with petty offences.⁹⁹

In terms of the scope, the Criminal Code is limited to trafficking in women and children unlike the Trafficking Protocol. Another caveat is that the Criminal Code criminalizes trafficking for prostitution and labor exploitation

⁹⁶ Employment Exchange Services Proclamation No.632/2009 (hereinafter Employment Exchange Proclamation), Art.40.

⁹⁷ ILO Study, supra note 73, p.71; US TIP Report 2013, p.166.

⁹⁸ While article 598 on unlawful sending of Ethiopians for work abroad is commonly used to prosecute cases of trafficking in persons, some cases of trafficking of persons are charged using article 692 of the Criminal Code dealing with fraudulent misrepresentation, ILO, Study, supra note 73, p.72.

⁹⁹ Yoseph, supra note 6, p.77.

alone. Thus, trafficking for exploitative purposes other than prostitution and labor exploitation including other forms of sexual exploitation,¹⁰⁰ slavery or practices similar to slavery, servitude, and the removal of organs is not criminalized under Criminal Code. If we draw a comparison against the scope of trafficking in persons under the Trafficking Protocol, the Ethiopian criminal law falls short of international standards.

4.2.1.1. Investigation and Prosecution of Trafficking Cases

Although there is no specialized institution established to deal with trafficking in all its aspects, there are investigation and prosecution (adjudication) units in Federal Judiciary and Federal Police Commission which specifically handle trafficking cases. The Federal High Court's 11th Criminal Bench entertains all cases of external trafficking as well as internal trafficking cases reported and investigated in Addis Ababa. Further, the Federal Police established in 2009 a Human Trafficking and Narcotics Section under its Organized Crime Investigation Unit.¹⁰¹ The organized crime investigation team which works mainly on trafficking in persons has 30 staff members.¹⁰² Since the establishment of the team, there has been a relative improvement in investigation and prosecution of trafficking crimes as most of the cases are successfully decided. In a related development, the Ethiopian Federal Police started to form cooperation with the Federal Prosecutor's Office to bring an

¹⁰⁰Note trafficking in women and children for exploitation of prostitution is penalized under Art.635; but trafficking for other forms of sexual exploitation is not covered under this provision.

¹⁰¹ US TIP Report 2010, p.145.

¹⁰² Interview with Wondimu Chama, Senior Coordinator at Organized Crime Investigation Division of Federal Police Crime Investigation Sector (September 3, 2011).

increased number of cases to trial and conclusion.¹⁰³ Thus, in 2012 alone, the Ethiopian Federal Police's Human Trafficking and Narcotics Section investigated 166 trafficking offenders at year's end. Eight individuals remained under investigation while the remaining 158 individuals were prosecuted in the court, of which 58 prosecutions remain ongoing. In similar vein, the Federal High Court's 11th Criminal Bench secured 100 convictions (compared to 77 in 2011) and ordered punishments ranging from two to 16 years' imprisonment without parole in the same year.¹⁰⁴

Capacity building trainings have been given to law enforcement agencies though in a piecemeal and limited manner. The Ministry of Justice (MoJ) in collaboration with IOM has provided training for police, prosecutors, judges and immigration officials on the law, investigation techniques and services available to victims of human trafficking.¹⁰⁵ The Federal Justice Professionals Training Centre has also incorporated a module on trafficking in human beings into its routine training programs since 2009.¹⁰⁶ However, training needs are huge and the training provided is offered in a piecemeal basis, and is only provided depending on available resources and experts.

Further, there is a low rate of prosecuting trafficking offenders compared to the scale of the problem. There are some factors that have contributed to low rate of prosecuting trafficking offenders. These include: the low rate of reporting of trafficking offence, lack of evidence to hold offenders

¹⁰³ US TIP Report 2013, p.166.

¹⁰⁴ US TIP Report 2013, p.166.

¹⁰⁵ ILO Study, supra note 75, p.73.

¹⁰⁶ US TIP Report 2010, p.145.

responsible, work load on law enforcement agencies and judiciary, low level of victim cooperation, lack of coordination with regional law enforcement agencies, and less attention given to internal trafficking in persons.¹⁰⁷

4.2.1.2. Proportionality of Sanctions

The Criminal Code prescribes five years imprisonment for trafficking in women and children for prostitution,¹⁰⁸ and twenty years imprisonment for forced labor.¹⁰⁹ While the punishments set by law are more or less sufficiently stringent, in practice, often, the lesser penalties are handed down. For instance, among the 13 cases of trafficking in persons reported and prosecuted in 2010, the maximum sentence passed was three years and four months of rigorous imprisonment.¹¹⁰ Moreover, in some cases punishments are passed in the form of a fine instead of imprisonment. There are also various instances where sentences passed are suspended. This is due in part of relatively strong financial capacity of the majority of suspects who are able to evade criminal liability. In several instances the suspects meticulously tamper with the evidence. Thus, the sentences rendered in practice are very low that does not outweigh the benefit accrued and cannot deter others from engaging in similar crimes in the future.¹¹¹

¹⁰⁷Interview with Wondimu Chama, supra note 102, and Nabit Girma, Deputy Head of MoJ Arada Justice Office, (September 29, 2011).

¹⁰⁸ Criminal Code, Art.635.

¹⁰⁹ Criminal Code, Art.597.

¹¹⁰ ILO study, supra note 73.

¹¹¹ Ibid and interview with Wondimu Chama, supra note 102.

4.2.2. Protection of Trafficked Persons

Victims of trafficking presumably need proper protection support to recover from their experience of trafficking. As most victims of trafficking (VoT) suffer from multiple violation and abuse of rights, the protection efforts must seek to respond to heal their wounds. Further, the proper protection services contribute to the prevention of trafficking by avoiding likelihood of re-trafficking. Having said this, the ensuing paragraphs discuss protection measures available in Ethiopia to help trafficked persons.

Protection of VoT requires accurate and rapid identification of victims. Such identification, in turn, primarily requires active engagement of law enforcement and coordination with victim support agencies. In Ethiopia, in this regard, there are rare cases undertaken on the initiatives of police or prosecutorial office. The majority of cases are reported to law enforcement agencies either by the victims or their families and relatives.¹¹² Hence, there are low rates of proactive investigation of trafficking cases by law enforcement agencies. In a similar vein, there is low level of coordination between criminal justice agencies and victim support agencies in the process of identification of VoT. Consequently, the referral mechanism between criminal justice and victim support agencies (mainly NGOs) is of negligible significance.¹¹³

¹¹²Interview with Nabit Girma, supra note 107.

¹¹³Interview with Wondimu Chama, supra note 102 & Nabit Girma, supra note 107, as they put it most NGOs or victim support agencies are not interested in referring the victim to criminal justice agencies; US TIP Report 2013, p. 167.

In particular, victims of trafficking in destination countries are presumably in need of various protection and support services. Among other things, they require protection of safety and provision of psychological, medical and shelter services. In Ethiopia protection and support services to VoT in destination countries are primarily provided by the MoFA. According to the official in consular affairs directorate of the MoFA, the ministry provides temporary shelter for VoT in Kuwait and Lebanon via its embassies.¹¹⁴ It provides among other things, food, clothing, free telephone calls, and medical support for VoT in these countries. For example, the shelter run by the Ethiopian Consulate General in Beirut provided services to 300 women in 2010.¹¹⁵ But it has been noted that the shelters are run with limited resources.¹¹⁶ In addition, the consulate provides services such as mediation with domestic workers' employers, and visitation of workers held in the detention center.¹¹⁷ Accordingly, this Consulate General secured the release and repatriation of 117 victims in 2009, who were being held in Lebanon for immigration violations.¹¹⁸ Further, Ethiopian embassies in Kuwait and Yemen also provide limited services, though specific information regarding these efforts was not made available.¹¹⁹ But reports show that Ethiopian government provides a limited consular assistance to VoT which is partly attributable to the lack of deployment of labor attaché in Ethiopian embassies.¹²⁰ Hence,

¹¹⁴Interview with Zaleke Hirpa, officer at Consular Support and Monitoring Directorate of MoFA, (September 27, 2011).

¹¹⁵ US TIP Report 2011, p.159.

¹¹⁶ ILO study, supra note 73, p.69; interview with Zaleke Hirpa, supra note 114.

¹¹⁷ US TIP Report 2010, p.145.

¹¹⁸ Ibid.

¹¹⁹ US TIP Report 2011, p.159.

¹²⁰ US TIP Report 2013, p.167.

there exists an urgent need to enhance protection and support to VoT in abroad and at home to avoid the risks of re-trafficking of victims.

4.2.2.1. Legal Assistance to VoT in judicial Proceeding

The Ethiopian government provides limited legal assistance to VoT in destination countries unlike some labor sending countries.¹²¹ For instance, the Philippines has established a legal assistance fund under its Migrant Workers Act of 1995, to be used exclusively to provide legal services to migrant workers and overseas Filipinos in distress.¹²² This could partly be attributed to the lack of bilateral labor agreements in enforce with most of destination countries.¹²³ But the situation is relatively better at home as far as providing legal information to VoT is concerned. According to the interview with official in MoLSA, the staff of the ministry offers legal information to returned VoT regarding the relevant court, procedure and remedies available to vindicate their claims against wrong doers.¹²⁴ EWLA also provides legal aid to VoT through its volunteers.¹²⁵ According to a representative of EWLA, the organization provides free legal aid and representation to VoT in both criminal and civil court proceedings.¹²⁶

¹²¹ Philippine is case in point, ILO study, supra note 73, p.70.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Interview with Tsegabirhan Solomon, Employment Inspection, Follow up and Support Expert at MoLSA, (September 21, 2011).

¹²⁵ Interview with Genet Shume, program coordinator at EWLA, (Tuesday, October 11, 2011). She notes that owing to CSO law the overall work of the organization is seriously affected, regarding legal aid the incentives used to be paid to cover travel costs, etc of the volunteers are stopped.

¹²⁶ Ibid.

4.2.2.2. Repatriation and Reintegration of VoT

The MoFA facilitates the repatriation of VoT from destination countries including mainly Middle East countries. The ministry conducts the process of verifying victims' nationality or residence and issuing necessary travel documents. It has been noted that recently 2,000 Ethiopians had been repatriated from Tanzania, Yemen, Libya and other Gulf countries, with the support of the IOM, the UN Refugee Agency and other stakeholders.¹²⁷ The key challenge has been to determine the status of nationality particularly in cases of victims whose passports are either lost or confiscated by employer(s). Further, the verification of nationality is a bit challenging since several trafficked persons change their Christian names into Islamic names to facilitate their visa process.¹²⁸

Once the verification of nationality is made, then the MoFA undertakes the verification of whether the victim is sent by PEAs, and if so requires the latter to facilitate the return of victim.¹²⁹ If the victim is not sent by PEAs the ministry facilitates the return of VoT through raising funds from Ethiopian community in destination country.¹³⁰ However, there are complaints raised from PEAs and victims that the assistance provided by Ethiopian missions is minimal and staff members are not necessarily caring and understanding.¹³¹ In

¹²⁷ IRIN, supra note 72.

¹²⁸ B.Dessalegn 'FMO country guide: Ethiopia' (2004) 22 available at www.forcedmigration.org/guides/fmo033/fmo033.pdf (Last accessed on September 5, 2011).

¹²⁹ ILO study, supra note 73, p.69.

¹³⁰ Ibid.

¹³¹ Ibid.

general, the lack of financial and human resources have been reported as factors affecting assistance and support to VoT.¹³²

Returned women VoT relied heavily on the few NGOs and international organizations¹³³ working with adult victims and psychological services provided by one government's Mental Health Hospital. In 2004 a victims rehabilitation shelter named Addis Hiwot Centre has been established in Addis Ababa by the fund from USAID. The centre helps the victims to reintegrate in the society.¹³⁴ It provides VoT with, inter alia, counseling and skills training activities so that victims will not be re-trafficked. However, it can only give service to a maximum of 12 persons at a time. In 2009, the Addis Ababa City Administration provided land for use by 10 female victims repatriated from Djibouti as a site for a self-help project. In addition, the Ministries of Foreign Affairs and Women's and Children's Affairs provided assistance to 75 victims repatriated from Lebanon in 2009, and assisted 12 victims repatriated from Israel with starting a cleaning business.¹³⁵

Further, some NGOs such as AGAR provide vocational training to VoT to reintegrate them into society.¹³⁶ However, it has to be emphasized that

¹³² Ibid.

¹³³ The US TIP Report 2013, p. 167. The US TIP Report of 2011 notes that 'the government's over-reliance on donor-funded NGOs to provide direct assistance to most trafficking victims resulted in unpredictability in the availability of adequate care in the country. Many of these facilities lack sustainability as they depend on project-based funding for continued operation', p.159.

¹³⁴ The rehabilitation of victims of trafficking in group residential facilities in foreign countries: A Study Conducted Pursuant to the Trafficking Victim Protection Reauthorization Act, 2005 (2007), p.15.

¹³⁵ US TIP Report 2010, p.145.

¹³⁶ ILO study, supra note 73, p.70.

compared to the needs for services by victims of trafficking, and the challenges of returnees, the services available are very minimal, and are neither comprehensive nor immediate.¹³⁷ Here, it is fair to point out that the Charities and Societies Proclamation¹³⁸ which prohibits, inter alia, foreign-funded NGOs from engaging in human rights advocacy poses a negative impact on the ability of NGOs to adequately provide protective services by informing victims of their rights under Ethiopian law or advocating on their behalf.¹³⁹ For instance, as a result of this Proclamation, the joint police-NGO identification and referral units, known as Child Protection Units (CPUs) ceased formal operation in all Addis Ababa police stations as of 2010.¹⁴⁰ This includes the CPU at the central bus terminal that identified and obtained care for 1,134 trafficked children in 2009.

4.2.3. Prevention of Trafficking in Women

Although effective prosecution of trafficking cases and proper protection of trafficked persons contribute to prevention of women trafficking, addressing the root causes of the problem is essential to eradicate trafficking in women by drying up the push factors exposing women to trafficking. Besides addressing root causative factors, prevention measures entail conducting public awareness raising campaigns regarding the causes, process and consequence of the trafficking in women and undertaking research and data gathering about the scale of the problem and anti-trafficking intervention measures available.

¹³⁷ Ibid.

¹³⁸ The Charities and Societies Proclamation No.621/2009 (hereinafter CSO Proclamation).

¹³⁹ US TIP Report 2010, p.145.

¹⁴⁰ US TIP Report, 2011, p.159.

4.2.3.1. Addressing Root Causes of Trafficking in Women

Obviously, prevention of trafficking in women naturally requires addressing the underlying root causes. Poverty, lack of education opportunities, unemployment, and gender based discrimination are identified as major causative factors of trafficking in women. This section seeks to scrutinize prevention measures adopted in Ethiopia to address the root causes of trafficking in women. Accordingly, an attempt is made to discuss to what extent the existing legal frameworks, and practical measures taken to prevent trafficking in women in Ethiopia are in line with human rights based approach standards. However, it has to be submitted at the outset that prevention is at the lowest level of all three Ps implemented in Ethiopia. The lack of comprehensive national policy or national action plan on trafficking in persons¹⁴¹ and the absence of institution¹⁴² specifically mandated to deal with trafficking in persons can be cited as indication of inadequate attention given to prevention aspect of anti-trafficking measures. Even worse, the existing policy frameworks do not entertain prevention of trafficking in persons as policy objectives. However, there are some recent progresses and improvements in undertaking prevention of trafficking in persons in the country. One good example of progress is the signing of a Memorandum of Understanding between IOM and MoLSA in 2013 to implement a two-year

¹⁴¹ However, according to US TIP Report of 2013 the Ethiopian government has approved a National Action Plan to Eliminate the Worst Forms of Child Labor in December 2012, which includes provisions for preventing the trafficking of children, US TIP Report 2013, p. 167.

¹⁴² Although Inter-Ministerial Task Force on Trafficking has been established in 2004, so far it has yielded no significant achievement. For instance, a much awaited National Action Plan proposed in 2009 has not been adopted to date. See, ILO Study, *supra* note 73 and US TIP Report 2013, p.167.

project intended to enhance national capacities and cooperation for the prevention of Trafficking in Persons (TIP) and to ensure the protection of victims and prosecution of traffickers in Ethiopia.¹⁴³ According to IOM Website report the project will focus on the thematic areas of improving the capacity of the national Anti-Human Trafficking Committee to spearhead and coordinate nation-wide efforts against human trafficking; strengthening the national legislative and criminal justice capacities to effectively prosecute traffickers and adjudicate Trafficking In Person cases and improving identification, referral, protection and assistance services to victims of trafficking.¹⁴⁴ Having noted this, the following discussion seeks to expound the available legislative framework relevant in the prevention of trafficking in women and practical measures undertaken in the country in this regard.

4.2.3.1.1. Education Opportunities

While the right to education is not provided explicitly in the chapter of bill of rights of the Constitution, there are some provisions which the right can be read into.¹⁴⁵ For instance, Article 41(3) states that “[e]very Ethiopian national has the right to equal access to ‘publicly funded social services’. Education can be considered as one of the publicly funded social services. Article 41 (4) obliges the State to allocate resources to provide to the public health, education and other social services. Further, the Constitution urges the government to devise the policies that aim to provide all Ethiopians access to

¹⁴³ <http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2013/pbn-listing/ethiopia-to-enhance-national-cap.html> (Last accessed on July 2013).

¹⁴⁴ Ibid.

¹⁴⁵ Sisay Alemahu, The Protection of Economic and Social Rights in the Constitution of Federal Democratic Republic of Ethiopia, 22 *Journal of Ethiopian Law* (2008).

public health and education, clean water, housing, food and social security.¹⁴⁶ In practical terms, it has been noted that the government has taken commendable measures to increase women's and girls' access to all levels of education, such as affirmative action, awareness raising, support to disadvantaged girls, and incentives for parents to send their daughters to school, in particular in rural and pastoralist areas.¹⁴⁷

To the contrary, there are some shortcomings exhibited regarding the participation of women in education. Specifically, low enrolment rates of girls in primary education in rural and pastoralist areas and in secondary and higher education, as well as in traditionally male dominated fields of technical and vocational education; the high drop-out and low retention and completion rates of girls, in particular at the primary level and the limited access of poor girls to education due to economic and socio-cultural barriers needs to be addressed to enhance participation of women in education sector.¹⁴⁸ Moreover, there is no special attention given to women and girls who are at risk of trafficking in providing education opportunities.

4.2.3.1.2. Employment Opportunities

Regarding the right to employment while the Constitution does not clearly establish the right to employment incumbent on the state, nevertheless; it recognizes the right to engage freely in economic activity and to choose ones

¹⁴⁶ FDRE Constitution, Art.90 (1).

¹⁴⁷ Concluding observations of the Committee on the Elimination of Discrimination against Women, CEDAW/C/ETH/CO/6-7(July 2011), para.30.

¹⁴⁸ Ibid.

means of livelihood. The relevant provision states that every Ethiopian national has the right to engage freely in economic activity, and the right to choose his or her means of livelihood, occupation and profession.¹⁴⁹ The state is also obliged to pursue policies that aim to expand job opportunities for the unemployed and the poor and shall accordingly undertake programmes and public works projects.¹⁵⁰ Further, the state is under the duty to undertake all measures necessary to increase opportunities for citizens to find gainful employment.¹⁵¹

In a bid to enhance access to employment opportunities, particularly MoLSA is undertaking a job fair manual that attempts to provide databases of job seekers and employers. The ministry is also conducting market study to identify employment opportunities. Further, it is drafting national employment policy which, if it manages to see the light of the day, would be the first of its kind in Africa.¹⁵²

According to the information gained from the MoWCYA, regarding the need to reduce unemployment of women, the ministry is working on economic empowerment of women, strengthening saving and credit services, creating market linkages, giving training on business (marketing) skills, promoting accessibility of women to socio-economic facilities, organizing exhibitions

¹⁴⁹FDRE Constitution, Art.41 (1) & (2). It has to be noted that the Constitution does not provide for entitlement to employment to be sought against the state, rather than guaranteeing the right to get employment, it provides for protection to those have got jobs, read art.42 of the Constitution.

¹⁵⁰ FDRE Constitution, Art.41 (6).

¹⁵¹ FDRE Constitution, Art.41 (7).

¹⁵² Interview with Tsegabirhan Solomon, supra note 124.

and trade fares particularly to promote the achievements of small scale and micro association (enterprises).¹⁵³ However, as discussed elsewhere in this article, the lack of employment opportunities continues to fuel the increase of trafficking in women.¹⁵⁴ It has been also noted that the disproportionately high unemployment rate is exhibited among women.¹⁵⁵ Moreover, there is no special attention given to those at risk of trafficking in extending employment opportunities.

4.2.3.1.3. Safe and Non-exploitative Migration

In order to promote the right to movement¹⁵⁶ for employment and protect the rights and dignity of Ethiopian prospective migrant workers the legal framework has been established. Back in 1998, the Private Employment Agency Proclamation No.104/1998 to regulate the conduct of sending Ethiopian workers abroad for employment was enacted. In 2009, the Employment Exchange Proclamation revising the Private Employment Agency Proclamation is passed to enhance the protection of the rights, safety and dignity of Ethiopian workers going abroad for employment, and to strengthen the mechanism for monitoring and regulating the employment exchange services.¹⁵⁷ Accordingly, the newly revised proclamation outlaws extraneous commission fees, requires agencies or their local affiliates to

¹⁵³ Interview with Abiy Epherem, Director of Public Relation Directorate of MoWCYA, (October 5, 2011).

¹⁵⁴ The ILO study notes that high rates of unemployment and low levels of earning is cited as the main economic reason behind trafficking in persons in the country, see ILO Study, *supra* note 73, p.21.

¹⁵⁵ CEDAW Committee, *supra* note 147, para.32.

¹⁵⁶ Art.32 (1) of the Constitution recognizes that any Ethiopian national has the right to leave the country at any time he wishes to.

¹⁵⁷ Preamble of Employment Exchange Proclamation.

maintain a shelter for abused workers in each destination country, and increases agencies' cash and bond deposits as collateral in the event the worker's contract is terminated. The MoLSA is mandated to implement the duties enshrined under the proclamation. Accordingly, it is entrusted with the mandate to oversee the recruitment and sending of workers abroad by PEAs. Plus, in addition to ensuring that the requirements set by Proclamation are fulfilled before license is issued, MoLSA has the authority to assign inspectors to oversee that the operations of PEAs are in line with the requirements laid down under the Proclamation. PEAs are also required to report to MoLSA regularly on the profile, number and employment of migrant workers. They also have the duty to notify MoLSA if a migrant worker that they have deployed abroad has sustained a bodily injury or died. Moreover, MoLSA together with IOM is establishing a database to track PEAs, as well as worker complaints.¹⁵⁸

However, the study reveals that there are some irregularities and loopholes in the operation of PEAs which is indicative of some PEAs involvement in trafficking in persons. These are: receipt of payments and benefits regardless of an existing code of ethics and legal prohibition; lack of transparency with regard to their commission from employers and destination country agencies; their claim to cover all expenses, including those that should be covered by migrant workers; inadequate protection mechanisms for migrant workers they send; and their partnership with destination-point agencies and individuals who are known for human trafficking or are working closely with

¹⁵⁸ US TIP Report, 2010, p.146.

traffickers.¹⁵⁹ This calls for strengthening the monitoring and follow up of operation of PEAs.

The pre-departure orientation is regularly conducted by MoLSA to prospective migrant workers. Although boring and non-participatory, predeparture orientation is given for prospective migrant workers regarding causes, process and consequences of trafficking in persons, as well as how to avoid the risk of human trafficking and labor exploitation.¹⁶⁰ It has been reported that between July and December 2009, MoLSA provided three-hour pre-departure orientation to 5,355 migrating workers using two full-time counselors.¹⁶¹

Article 36 of Employment Exchange Proclamation obligates MoLSA to assign, in consultation with the MoFA, labour attachés in Ethiopian embassies to ensure the protection of the rights, safety and dignity of workers deployed abroad. However, no labour attaché has been assigned in Ethiopian embassies to date. The state minister of MoLSA noted that the request for appointment of labor attaché has been turned down by MoFA arguing that the staff of the embassies can handle the task of labor attaché.¹⁶²

Further, labor agreements have been concluded with some countries such as Jordan, Qatar, Saudi Arabia, Kuwait and Sudan.¹⁶³ There are some bilateral labor agreements in the pipeline. For instance, MOLSA anticipates the

¹⁵⁹ ILO study, *supra* note 73, p.ix.

¹⁶⁰ Observation at MoLSA predeparture orientation hall, on September 21, 2011.

¹⁶¹ US TIP Report 2010, p.146.

¹⁶² Reporter, (Amharic), February 13, 2003 E.C.

¹⁶³ US TIP Report 2013, p.167; Interview with Zaleke Hirpa, *supra* note 153.

conclusion of bilateral labor migration agreement with UAE government in the near future.¹⁶⁴ However, it appears that that the government of Ethiopia is not going far enough in engaging destination countries governments in an effort to improve protections for Ethiopian workers and obtain protective services for victims.¹⁶⁵

4.2.3.1.4. Addressing Gender Based Discrimination

The FDRE Constitution recognizes equality of all persons before the law and their entitlement to equal protection of the law.¹⁶⁶ The Constitution also states unequivocally the right to equality of women with men in enjoying the rights and protection provided under the Constitution.¹⁶⁷ It further imposes the duty on the government to ensure equal opportunity of citizens to improve their economic conditions and to promote equitable distribution of wealth among them. On top of this, the Constitution provides for affirmative action,¹⁶⁸ as a means of enabling women to compete equally with men in their economic, political and social life. Affirmative action is guaranteed for women in order to offset the injustice of the old order. Hence, it is aimed at providing special attention to women so as to enable them compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.¹⁶⁹ Further, the women are guaranteed equal right to acquire, administer, control, use and transfer property.¹⁷⁰ In particular, they

¹⁶⁴ Ibid, p.167.

¹⁶⁵ US TIP Report 2011, p.159.

¹⁶⁶ FDRE Constitution, Art. 25.

¹⁶⁷ FDRE Constitution, Art.35 (1).

¹⁶⁸ FDRE Constitution, Art. 35(3)

¹⁶⁹ FDRE Constitution, Art 35(3).

¹⁷⁰ FDRE Constitution, Art.35 (7).

have equal rights with men with respect to use, transfer, administration and control of land.¹⁷¹ They shall also enjoy equal treatment in the inheritance of property.¹⁷² Women's right to equality in access to employment is also entrenched under the Constitution. The relevant provision states that: "[w]omen shall have a right to equality in employment, promotion, pay, and the transfer of pension entitlements."¹⁷³ Similarly, it states that women workers have the right to equal pay for equal work.¹⁷⁴ Moreover, the Labour Proclamation No.377/2003 prohibits employment discrimination on grounds of sex. Article 87 provides that 'women shall not be discriminated against as regards employment and payment, on the basis of their sex'.

Apart from this, the Constitution proscribes laws, customs and practices that discriminate against women.¹⁷⁵ Consequently, any form of harmful practice which in one way or another contribute to women trafficking such as early marriage and forced marriage is outlawed by the highest law of the land. Similarly, the Criminal Code penalizes harmful practices such as early marriage¹⁷⁶ and marriage by abduction.¹⁷⁷

However, the practice of gender based discrimination still continues to drive Ethiopian women and girls to trafficking in persons. The ILO study notes that practices of gender discrimination have created 'a climate where migration of

¹⁷¹ FDRE Constitution, Art. 35(7).

¹⁷² FDRE Constitution, Art. 35(7)

¹⁷³ FDRE Constitution, Art.35 (8).

¹⁷⁴ FDRE Constitution, Art.42(1)(d)).

¹⁷⁵ FDRE Constitution, Art.35 (4).

¹⁷⁶ FDRE Criminal Code, Art. 648.

¹⁷⁷ FDRE Criminal Code, Art. 587.

women is encouraged and the practice of trafficking in women is perceived as morally acceptable.¹⁷⁸ Similarly, the CEDAW Committee points out that the discrimination against women is still perpetuated in the country and are reflected in women's disadvantageous and unequal status in many areas, including in public life and decision making, economic life, sexual and reproductive health, and in marriage and family relations.¹⁷⁹

4.2.3.2. Public Awareness Raising Campaigns

Public awareness raising campaigns have been conducted by governmental, intergovernmental and non-governmental organizations regarding the causes and consequences of trafficking in persons for several years. While MoLSA, MoWCYA and MoJ engage in public awareness raising campaign,¹⁸⁰ it is the IOM that is doing the lion's share in this respect. Accordingly, starting from 2001 onwards, IOM conducted several public awareness raising campaigns on legal migration and the risks of trafficking for a number of years using tools such as radio programs, drama, and posters.¹⁸¹ Nonetheless, most of the projects save for the weekly 20 minute radio program on Ethiopian Radio aired on Fridays, have phased out owing to constraints in financial resources.¹⁸² From 2012 and mid-2013 onwards, the state owned media outlets have engaged in sustained awareness activities. Several programs (including documentary film) and talk shows have been aired out in the stated period.

¹⁷⁸ ILO study, supra note 73.

¹⁷⁹ CEDAW Committee, supra note 150, para.18.

¹⁸⁰ Interview Tsegabirhan Solomon; supra note 124; Abiy Epherem, supra note 153 and Nabit Girma, supra note 107.

¹⁸¹ ILO study, supra note 73, p.65.

¹⁸² Ibid.

Although the recent media campaign is commendable, it is relevant, at this juncture, to reiterate that the CSO law seriously hampers the capacity of NGOs to raise awareness regarding women trafficking and promotion and protection of women's rights.¹⁸³ This suggests that a lot of work is required to increase the awareness raising campaigns to alert the potential victims of trafficking in persons as the problem is on the rise in the country.

4.2.3.3. Research and Data Collection

There is a significant dearth of research and data on trafficking in persons in Ethiopia. According to the finding of recent ILO study there is lack of detailed and regular research and surveys that document the prevalence of trafficking, the routes and patterns of trafficking, methods used by traffickers, services available, measures taken by the Government and non-governmental organizations, and the impacts of the responses.¹⁸⁴ Similarly, the CEDAW Committee noted that it is concerned about the lack of data in relation to trafficking of women and children for forced labour and sexual exploitation.¹⁸⁵

5. CONCLUSION AND RECOMMENDATIONS

This article has analyzed anti-trafficking measures adopted in Ethiopia to counteract trafficking in women in light of a human rights based anti-trafficking response. It showed that while trafficking in women is widespread and causing multiple human rights violations, the anti-trafficking measures are

¹⁸³ Interview with Genet Shume, supra note 125.

¹⁸⁴ ILO study, supra note 73, p.65

¹⁸⁵ CEDAW Committee, supra note 147. Similar concern has been raised by Human Rights Committee, para.11, CCPR/C/ETH/1, Concluding Observation on Ethiopia, (July 2011).

not adequately devised to address the problem effectively. While there is no comprehensive legislative framework enacted to deal with the trafficking in persons, the crime is proscribed by the existing scattered various provisions of the laws, including the Constitution, Criminal Code and Employment Exchange Proclamation. But the lack of comprehensive legal definition of trafficking in persons and the narrow scope of criminalization of trafficking particularly in criminal law can be cited as draw backs in legislative frameworks in the prosecution of trafficking cases.

Regarding the investigation and prosecution of trafficking cases, it is shown that, while there is no specialized institution established to deal with trafficking in all its aspects, there are specialized investigation and prosecution (adjudication) units in Federal Judiciary and Federal Police Commission. Contrary to this, it is shown that there is low rate of prosecuting those involved in the trafficking of persons. Moreover, while the punishments set by law are more or less sufficiently stringent, in practice, often, the lesser penalties are handed down. Further, law enforcement officials are given capacity building training in a piecemeal and limited manner. In general, measures for the effective prosecution of trafficking cases that seek to end impunity and deliver justice to the victims are not yet established.

It is also discussed that limited and infrequent protection services are provided to VoT. In particular, although identification of VoT is considered as a starting point to provide protection services, it is argued that in Ethiopia there exists no proactive and coordinated identification mechanism. Besides, there is low level coordination between criminal justice agencies and victim support

agencies in the process of identification of VoT. Consequently, the referral mechanism between criminal justice and victim support agencies (mainly NGOs) is of negligible significance.

In terms of actual protection services a limited psychological, medical, material and legal assistance is provided to VoT. The MoFA provides temporary shelter for VoT in Kuwait and Lebanon via its embassies. But it has been noted that the resources of running the shelters is very scarce. Besides, the Ethiopian government provides limited legal assistance to VoT in destination countries unlike some labor sending countries. But the situation is relatively better at home as far as providing legal information to VoT is concerned. Although on limited level some government institution and NGOs provide legal aid to VoT to vindicate their cases in court of law.

Further, it is noted that the MoFA in collaboration with IOM and UN Refugee agencies undertakes to facilitate the repatriation of VoT from destination countries including mainly Middle East countries. But it is mentioned that there are complaints raised from PEAs and victims that the assistance provided by Ethiopian missions is minimal and staff members are not necessarily caring and understanding. Regarding reintegration of VoT, while some NGOs offer rehabilitation and reintegration protective services, the CSO proclamation negatively impacts their operation. On top of this, the lack of repatriation fund and protection center for VoT leave several trafficked persons to the risk of re-trafficking.

Moreover, this article has discussed that the prevention is perhaps at the lowest level of all the three Ps anti-trafficking measures implemented in Ethiopia.

The lack of comprehensive policy or national action plan on trafficking in persons and the absence of institution specifically mandated to deal with trafficking in persons is cited as an indication of less attention given to prevention aspects of anti-trafficking measures. In addition, even the existing policy frameworks do not entertain the prevention of trafficking in persons as policy objectives. It is also argued that while the Constitution stipulates certain obligations and policy guidelines that are relevant to address the root causes of trafficking, there remains a lot to be done to realize constitutional aspirations and entitlements.

Further, it is shown that there are some commendable measures taken to promote the right to movement for employment and protect the rights and dignity of Ethiopian prospective migrant workers. For example, the Employment Exchange Proclamation is passed to enhance the protection of the rights, safety and dignity of Ethiopian workers going abroad for employment, and to strengthen the mechanism for monitoring and regulating the employment exchange services. The MoLSA is mandated to implement the duties enshrined under the proclamation. Although boring and one way traffic, predeparture orientation is given for prospective migrant workers regarding causes, process and consequences of trafficking in persons. Further, labor agreements have been concluded some Middle East countries. There are some bilateral labor agreements in the pipeline.

However, there exists still significant draw backs in monitoring the operation of PEAs and ensuring the protection of migrants workers rights in destination countries. The irregularities and loopholes in operation of PEAs, reluctance of

engaging with destination countries to protect the rights and dignity of Ethiopian migrant workers, and the failure of appointing labor attaché in overseas embassies are discussed as the main factors behind perpetuation of trafficking and exploitation of many Ethiopian women and girls.

Finally, the lack of data and research on the scale of the problem and anti-trafficking measures available, as well as the low level of awareness raising campaign to alert potential victims of trafficking call for reinvigorating anti-trafficking measures in this respect. In sum, it is fair to say that, while there are some positive initiatives and efforts, anti-trafficking measures adopted in Ethiopia as discussed in this article fall short of Human Rights Based anti-trafficking standards. The lack of legislative, policy and institutional frameworks coupled with deficiencies in prosecution, protection and prevention strategies prove this assertion. Therefore, it is a high time to adopt A Human Rights Based Approach to anti-trafficking response in the country to see the effective and meaningful eradication of trafficking in women.

In order to comply with a human rights based anti-trafficking response, the author specifically recommends the following measures:

- a. Adopting comprehensive anti-trafficking law and national policy that is based on a human rights approach providing for the primacy of human rights in prosecution, protection and prevention of trafficking is necessary and guide the overall effort to combat trafficking in women in a coordinated and holistic manner is called for. Further, it vital to establish institution mandated exclusively to deal with the combating of trafficking in persons.

- b. Undertaking comprehensive effort to promote the rights of vulnerable groups, inter alia, access to education, information, employment and other social services, the right to equality and to be protected against gender based discrimination. Facilitating alternative employment opportunities available at home to women and girls so that they are not forced to fall prey of traffickers.
- c. Improving the quality of investigation, and prosecution of trafficking cases. Strengthening coordination between criminal justice agencies and victim support agencies to enhance the prosecution of traffickers and protection of victims of trafficking. And Strengthening the monitoring and inspection of PEAs.
- d. Improving the cooperation with destination countries in combating of Trafficking in Persons and protection of the rights of migrant workers. Appointing labor attaché in Ethiopian embassies. Establishing protection center that facilitate the effective physical, psychological, social and economic recovery of victims and allocating fund for rehabilitation and reintegration of VoT to avoid re trafficking.
- e. Undertaking data collection and nationwide research on the scale, causes, and consequence of trafficking, and measures to combat trafficking in women.
- f. Creating favorable environment for NGOs to enhance their participation in prevention and protection of trafficking in women including amending charity and civil society proclamation particularly to enhance awareness raising to the potential victims of trafficking regarding the risk of trafficking.

SAME SEX MARRIAGE: NIGERIA AT THE MIDDLE OF WESTERN POLITICS

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ABSTRACT

Criminalising homosexuality dates back to 1553 by the British, though the act was considered a purely moral issue and done within the preserve of the privacy of the practitioners. However, the act later became legal in Britain with no form of punishment attached. Over time, the practitioners gradually fought for recognition first attaining the status of civil partnership, until the wake of the 21st century when it attained the status of marriage which saw the passage of the gender neutrality in marriage and marriage laws which gave birth to same sex or gender marriage. This has become a policy which is being championed by the United Nations Human Rights Council. The developed nations of the world are daily embracing this phenomenon called same sex marriage. This paper examines the concept of same sex marriage in the light of the various available national, regional and international instruments with a view to determining its place in the legal regime of human rights and fundamental freedom. The paper further examines the purports of the external influence by the international community on other nations of the world, with particular reference to Nigeria to legalise same sex marriage into their legal system.

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INTRODUCTION

Homosexual practice is not a new phenomenon.¹ Homosexual activities either between male or female adults were considered as acts or activities carried out between two consenting adults as purely private affairs in society.² Different legal systems of the world at one time or the other frowned at it and by legislations criminalized³ it, thereby making it a punishable offence with terms of imprisonment.⁴ The concept of same sex marriage was unknown to legal jurisprudence till about the end of the 20th century. It was towards the tail end of the 20th century and the dawn of the 21st century that countries from the different continents of the world predominantly western societies commenced the process of reviewing their legal systems to legalise same-sex union or

¹ Genesis 19 vs 4 & 5 and Romans 1 vs. 24, 26 and 27 King James Version.

² The Wolfenden Committee (of the British Parliament) Report on Homosexuality and Prostitution in 1957.

³The Buggery Act 1533 was adopted in England in 1533 during the reign of Henry VIII, and was the first legislation against homosexuals in the country. It was one of the first anti-sodomy laws passed by any Germanic country. All Germanic codes up to this time ignored all sexual activities except adultery. The Buggery Act was piloted through Parliament by Thomas Cromwell. The Act made buggery with man or beast punishable by hanging, a penalty not finally lifted until 1861. www.turdorplace.com.ar/Documents/the_buggery_act.htm, accessed on Feb. 23, 2014); Male homosexuality had been illegal in England since the Buggery Act of 1553 (female homosexuality was never specified). That law became a lot stricter in 1885 with the Criminal Law Amendment Act which made all homosexual acts illegal and even those carried in private. Perhaps the most famous prosecution was that of the writer Oscar Wilde in 1895. The Wolfenden Report on Male Homosexuality 1957. <http://www.bl.uk/learning/timeline/item107413.html>, accessed on Jan. 20, 2014); Criminal Code Act C38/2010, section 214.

⁴ Criminal Code Act C38/2010, section 216. See also Criminal Law Amendment Act 1885, section 1885 which provides “any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years. Available at www.swarb.co.uk/acts/1885/Criminal_Law_AmendmentActs.html, accessed on Feb. 22, 2014).

association.⁵ These reviews brought about the introduction, acceptance and legal recognition of same-sex union in the form of civil partnership and later marriage between same sex partners.

THE CONCEPT OF MARRIAGE

Marriage is the world's oldest institution. In Christendom, it is believed that it was instituted by God himself,⁶ and it is as old as man's creation.⁷ Marriage therefore, is believed to be a sacred union that exists between a man and a woman. The term marriage has been described elsewhere as "a socially sanctioned union, typically of one man and one woman, in this connection called husband and wife. Typically they form a family, socially, through forming a household, which is often subsequently extended biologically, through children. It is found in all societies, but in widely varying forms."⁸ In Islam, marriage has been defined as "a contract that results in the man and woman living with each other and supporting each other within the limits of what has been laid down for them in terms of rights and obligations."⁹ Furthermore, "it is a mutual contract between a man and a woman whose goal is for each to enjoy the other, become a pious family and sound society."¹⁰

⁵ The Netherlands Same Sex Law 2001, Belgium Same Sex Marriage Law 2003

⁶ Genesis 2:18 King James Version.

⁷ "The institution of marriage dates from the time of man's original creation". Available at www.bible.dictionaries.org/marriage, accessed on Aug. 3, 2013).

⁸ Ibrahim B. Syed Same Sex Marriage and Marriage in Islam. http://www.irfi.org/articles/articles_151_200/same_sex_marriage_and_marriage_i.htm, accessed on February 22, 2014.

⁹ Id.

¹⁰ Id.

The common law definition of marriage is credited to Lord Bughley wherein he refers to it as, “the voluntary union for life of one man and one woman to the exclusion of all others.”¹¹ The existing marriage law in Nigeria, the Marriage Act, made no attempt to define marriage. However, recourse can be had to the Interpretation Act, which again did not define marriage. According to the Act, “monogamous marriage to mean a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.”¹² Marriage has been further defined as “a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic and Customary Laws.”¹³ In Islam, the function of marriage has been stated thus:

*Marriage acts as an outlet for sexual needs and regulates it so one does not become a slave to his/her desires. It is a social necessity because through marriage, families are established and the family is the fundamental unit of every society...Marriage is the only legitimate way to indulge in intimacy between a man and a woman.*¹⁴

¹¹ These were the wise words of William Cecil, also known as Lord Bughley, for decades the Minister of Finance to Queen Elizabeth I and later, King James. He wrote these words to his son in approximately 1600 and one should replace the word ‘wife’ with spouse to give it contemporary spice. Marriage Definition: Available at www.duhaime.org/legaldictionary/M.Marriage.aspx, accessed on Aug. 3, 2013).

¹² Interpretation Act M6/2010, section 18.

¹³ Same Sex Marriage (Prohibition) Act, 2013, section 7. This is a recent legislation, at the time of the writing of this paper, it has not come to our knowledge that it has been published.

¹⁴ Concept of Marriage in Islam. Available at www.islamawareness.net/Marriage/marriage_article001.html, accessed on Aug. 10, 2013).

It has further been canvassed that:

*Marriage exists to bring a man and a woman together as husband and wife to be father and mother to any children their union produces. It is based on the anthropological truth that men and women are different and complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that children need both a mother and a father.*¹⁵

Marriage is purely a private affair, a practice within the private realm of the individuals or parties who come into it. Marriage exists by agreement of the parties who have decided to come into the union to live as husband and wife. The question is if marriage is a private affair between the parties thereto, that is man and woman, what then is the role of the state or government in the marriage institution? In all facets of human endeavors, government formulates the legal framework to govern and regulate such activities; and marriage is not an exception to such arrangement. This position has been maintained elsewhere in the following words:

Government recognizes marriage because it is an institution that benefits society in a way that no other relationship does. Marriage is society's least restrictive means of ensuring the well-being of children. State recognition of marriage protects children by encouraging men and women to commit to each

¹⁵ Ryan T. Anderson (2013) *Marriage: What it is, why it Matters, and the Consequences of Redefining it*: <http://www.heritage.org/research/reports> < accessed on Sept. 18, 2013).

other and take responsibility for their children. While respecting everyone's liberty, government rightly recognizes, protects marriage as the ideal institution for childbearing and childrearing.¹⁶

The relevance of marriage to the society has necessitated the need for its regulation by State apparatus through legislation or regulation. This view has been expressed elsewhere thus:

Marriage is more than a personal relation between a man and woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the state. Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for dissolution.¹⁷

¹⁶ *Ibid.*

¹⁷ Fearon cited in Definition of Marriage. Available at www.duhaime.org/LegalDictionary/M/Marriage.aspx < accessed on July 12,2013>.

In stressing the importance of marriage and family life it has been stated elsewhere that:

Marriage is a uniquely comprehensive union. It involves a union of hearts and minds, but also and distinctively a bodily union made possible by sexual complementarity. As the act by which a husband and wife make marital love also makes new life, so marriage itself is inherently extended and enriched by family life and calls for all-encompassing commitment that is permanent and exclusive. In short, marriage unites a man and a woman holistically emotionally and bodily, in acts of conjugal love and in the children such love brings forth for the role of life.¹⁸

As a result of the place of marriage and family, government will from time to time make regulations and policies that will impact on marriage and family. This is with a view to ensure that the society will not be crippled in anyway. This position has been maintained by Spalding thus:

With good reason, states continue to recognize marriage as the union of a man and a woman. In the context of democratic government, citizens and their elected representatives must be able to deliberate and make policy decisions to uphold the institution that forms the basis for civil society.¹⁹

¹⁸ *supra* note 15.

¹⁹ Matthew Spalding, "A Defining Moment for Marriage and Self-Government". Available at www.heritage.org/research/reports/2013/03/redefining- < accessed on Dec.20, 2013>.

AN EVOLVING TREND IN MARRIAGE AND FAMILY

The traditional concept of marriage now appears to attain a new ideology. At the dawn of the 21st century a radical change to marriage emerged, essentially based on the fundamental rights agitation and the need for gender neutrality in marriage and marriage laws. The discriminatory marriage laws against same-sex couples were seen as anti-human rights. Homosexuals (gays and lesbians) feeling that their basic rights were being trampled upon pushed for legal recognition and acceptance of the activities through legislation in the society.

The traditional definition of marriage laws which only recognize the union of different-sex as marriage seems to be gender discriminatory in nature.²⁰ It has been stated that “homosexual behavior between males has been illegal in most countries for several centuries. It was only in recent decades that a number of nations began to implement legislative reforms which allow for certain consensual homosexual acts.”²¹

The view that marriage is a union between a man and woman may have changed today with the passage of gender neutrality in marriage and marriage laws in various countries of the world which have made it possible for people

²⁰ James W. Skillen, Same-Sex ‘Marriage’ Is Not a Civil Right, 2004, [www.cpjustice.org/stories/StoryReader\\$1178](http://www.cpjustice.org/stories/StoryReader$1178), accessed on Feb. 24, 2014. “Those who want homosexual relationships to be redefined as marriages say that many aspects of their relationships are like marriage—having sexual play, living together, loving one another, etc.—and therefore they should be allowed to call their relationships marriages and should be recognized in the law as marriage partners... The answer they want is for law making and adjudicating authorities to change the law based on the principle that reality is defined by the will and declarations of individuals, all of whom should be treated without discrimination”

²¹ Melissa Bull *et al*, *Homosexual Law Reform in Australia*: Australian Institute of Criminology, 1991. <http://www.aic.gov.au> < accessed on Feb. 22, 2014 >.

of the same sex to go through the form of marriage in the same way couples of heterosexual marriage can. It may be said that couples of same sex marriage are simply exploiting their fundamental rights and freedoms guaranteed them by the various human rights instruments to which countries of their origins have obligated to honour. It is therefore, pertinent to examine a number of those instruments.

We shall begin with the provisions of the foremost human rights instrument²² which in Article 2 provides thus:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction or any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.

Further is the provision of Article 23 (2) of the International Covenant on Civil and Political Rights,²³ which provides for “the right of men and women of marriage age to marry and to found a family shall be recognised.” Further is Article 16 which provides “men and women of full age, without any limitation

²² Universal Declaration of Human Rights, United Nations General Assembly, the Palaise de Chaillot, Paris, 10th September 1948, Resolution 217A (III)

²³ International Covenant on Civil and Political Rights, United Nations General Assembly, adopted 16th December, 1966, effective 23rd March, 1976.

due to age, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.” Article 20 (1) provides that “everyone has the right to freedom of peaceful assembly and association.” Also relevant is the European Convention of Human Rights,²⁴ Article 11 thereof provides:

Everyone has the right to freedom of assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of the national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Another relevant provision is that contained in Article 14 of the Convention which provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political

²⁴ European Convention of Human Rights, Council of Europe, Rome, adopted on 19th November 1950, effective on 1953, Resolution 2200A (XXI).

*or other opinion, national or social origin, association with a national minority, property, birth or other status.*²⁵

The African Charter on Human and Peoples' Rights²⁶ in its Article 2 provides that "every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, birth or any status."

Furthermore, Article 14 of the Charter provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property or other status."

The plausible argument here is that the words "any status" appearing in the African Charter and "other status" in the European Convention as well as the Universal Declaration of Human Rights contemplate sexual orientation so as to accommodate the rights of same sex couples or persons who are engaged in homosexual activity thus affording them the opportunity to claim such rights.

²⁵ This provision is *in pari material* to Article 1(1), while paragraph 2 states that "no one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1, of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.2000.

²⁶ The African Charter on Human and Peoples' Right, Organisation for African Unity (now African Union), Banjul, adopted on 1981, came into force on 1986, Resolution 115(XVI). Article 2 provides "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, birth or any status."

Even the right to marry and found a family may be a right available to couples of same sex union as the provision is not discriminatory and did not specify which class of persons can invoke such rights in their favour.

The above accounts for the argument canvassed elsewhere while hinging the justification of same-sex marriage on fundamental rights thus:

*The Universal Declaration on Human Rights...contains the fundamental human rights principle that all human beings are born free and equal in dignity and rights. This fundamental principle of equality comprises also lesbian woman and gay men. Other human rights instruments have since been built on this principle of non-discrimination. The 1966 Covenant on Civil and Political Rights, according to the interpretation of the Human Rights Committee forbids discrimination based on sexual orientation.*²⁷

Homosexuality was seen as a private act between consenting adults and more so as a moral issue. The big question again is whether laws should be invoked to enforce moral rules in the society. There are however two divides to this. John Stuart Mill,²⁸ one of the proponents of the liberal view states:

²⁷ Toone v Austria (UN Committee for Human Rights). Cited in Katharina Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe*, (Antwerp, Intersentia, 2003) p 184 referred to in I. O. Omoruyi, *An Introduction to Private International Law: Nigeria Perspectives* (Benin: Ambik, Press Limited, 2005) p 257.

²⁸ John S. Mill *Essay on Liberty* cited in Funso Adaramola, *Basic Jurisprudence*, 2nd ed. (Lagos, Nayee Publishing Co Ltd, 2003) p 91.

*That rules of private morality concern the individual and his conscience alone. Private immorality is presumed to harm no one else, such as in cases of drug abuse, private drunkenness, private greed, lesbianism, etc., and in England, homosexuality between two consenting adults.*²⁹

He, however, based this on individual liberty wherein he gave the following reasons for his position:

- (a) The value of the personal freedom of the individuals;
- (b) The moral value of not being coerced to choose to do right; i.e., the value of individual's conscience and personality;
- (c) The misery that will result from criminal punishment of such immoralities; and
- (d) The likely impotence of the law leading to its ridicule, particularly regarding the difficulty of detection and the chances of successful prosecution.³⁰

This position was adopted and approved by the Wolfenden Committee (of the British Parliament) Report on Homosexuality and Prostitution of 1957,³¹

²⁹ *Ibid.*

³⁰ *Id.* p 92.

³¹ After WWII, arrests and prosecutions for homosexuals increased. For example Alan Turing, the cryptographer who helped to break the German Enigma Code, was victimized for his homosexuality. Charged with 'gross indecency' he was forced to choose between prison or hormone treatment. He also lost his job. His death in June 1954 was treated as suicide. This and other cases led the government to set up a Departmental Committee under Sir John Wolfenden, to consider both homosexual offences and prostitution. Wolfenden's influential report put forward the argument that 'homosexual behavior between consenting adults in private be no longer criminal offence.' Despite the recommendations of the report, it was not until July 1967 that homosexuality finally became legal in England and Wales. The

wherein it stated that “...unless a deliberate attempt is to be made by society to equate crime with sin, there must remain a realm of private morality and immorality which is not the law’s business.”³²

However, Lord Devlin of the moderate view stated that:

*...But before a society can put a practice beyond the limits of tolerance there must be a deliberate judgment that the practice is injurious to society. There is, for example, a general abhorrence of homosexuality. We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it. Our feeling may not be so intense as that. We may feel about it that, if confined, it is tolerable, but that if it spread it might be gravely injurious; it is in this way that most societies look upon fornication, seeing it as a natural weakness which must be kept within bounds but which cannot be rooted out. It becomes then a question of balance, the danger to society in one scale and the extent of the restriction in the other. On this sort of point the value of an investigation by such a body as the Wolfenden Committee and of its conclusion is manifest.*³³

Wolfenden Report on Male Homosexuality 1957. <http://www.bl.uk/learning/timeline/item/107413.html> < accessed Jan. 10, 2014).

³² *Supra* note 28, p 92.

³³ Patrick Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press), 1965, p 17-18.

A growing number of governments around the world are considering whether to grant legal recognition to same-sex marriage. More than a dozen countries have national laws allowing gays and lesbians to marry, mostly in Europe and the Americas.³⁴ Sixteen countries now give the freedom to marry to same-sex couples nationwide. Netherlands,³⁵ Belgium,³⁶ Spain,³⁷ Canada,³⁸ South Africa,³⁹ Norway,⁴⁰ Sweden,⁴¹ Portugal,⁴² Iceland,⁴³ Argentina.⁴⁴ Brazil,⁴⁵

³⁴ Pew Research Religion and Public Life Project, (2013) *Gay Marriage around the World*: <http://www.pewforum.org> < accessed on Sept. 19, 2013).

³⁵ The Netherlands was the first country to end the exclusion of same-sex couples from marriage in 2001, when their Parliament voted 107-33 to eliminate discrimination from their marriage laws. The law requires that at least one member of the couple be a Dutch national or live in the Netherlands, and it took effect on April 1, 2001. Anne-Marie Thus, a Dutch lesbian who married in 2001, explains, “it’s really become less of something that you need to explain. We are totally ordinary. We take our children to preschool every day. People know they don’t have to be afraid of us. In December 2012, the Dutch Caribbean Island of Saba also established the freedom to marry. *The Freedom to Marry Internationally*: (2013) www.freedomtomarry.org, <accessed on September 09, 2013>.

³⁶ Belgium became the second country to legalise equal marriage on February 13, 2003, when King Albert II approved the bill, which had previously been passed by the Senate and Chamber of Representatives (*Ibid*).

³⁷ After the unexpected victory of the Spanish Socialist Party in 2004, the newly elected Prime Minister Jose Luis Rodriguez Zapatero, moved to end the exclusion of same-sex couples from marriage in the country (*Ibid*).

³⁸ On June 28, 2005, the House of Commons in Canada passed the Civil Marriage Act, which was then passed by the Senate on July 19. The Civil Marriage Act, which received Royal Assent on July 20, provided a gender-neutral definition of marriage. The national legislation passed after more than three quarters of Canadian provinces and territories legalized same-sex unions (*Supra note 35*).

³⁹ In December 2005, the Constitutional Court of South Africa ruled that denying marriage to same-sex couples violates the country’s constitution and gave the Parliament one year to adjust laws to comply with the ruling. The court also made it clear enacting only a civil unions law would not work. On November 14, 2006, Parliament voted 230 to 41, to end the exclusion of same-sex couples from marriage in South Africa, making the nation the first in Africa to do so (*Ibid*).

⁴⁰ On June 11, 2008, members of Parliament in Norway approved a gender-neutral bill that ended the exclusion of same-sex couples from marriage by a vote of 84-41 (*Ibid*).

⁴¹ On April 1, 2009, a broad majority of the Swedish Parliament voted in support of a bill to end the exclusion of same-sex couples from marriage. The proposal was approved by a 261 to 22 vote, with 16 abstentions. The new legislation took effect as of May 1, 2009, replacing the

France,⁴⁶ Uruguay,⁴⁷ and New Zealand,⁴⁸ plus Britain,⁴⁹ which has passed a law that has not yet taken effect), while two others have regional or court-

legislation approved in 1995 that allowed gay couples to form a union in Sweden via registered partnership. Couples who have registered partnership can keep that status or amend it to a marriage by an application to the authorities. On October 22, 2009, the Church of Sweden's board voted to allow priests to wed same-sex couples using the term "marriage" (*Ibid*).

⁴² On May 18, 2010, Portugal's President ratified a law that was passed in January 2010 by Portugal's parliament to end the exclusion of same-sex couples from marriage. The law was upheld as constitutional by the Portuguese Constitutional Court in April and was officially published in the official gazette of Portugal on May 31 and took effect a few days later (*Ibid*).

⁴³ On June 11, 2010, Iceland's Parliament unanimously voted, 49 to 0, to end the exclusion of same-sex couples from marriage. The Althingi parliament voted to add the words "man and man, woman and woman" to the country's existing marriage legislation in 2009, the country became the first in the world to elect an openly gay head of state, when Johanna Sigurdardottir became the prime minister. Iceland is the seventh country in Europe to uphold the freedom to marry, and ninth in the world (*Ibid*).

⁴⁴ On June 7, 2010 Argentina became the first country in Latin America to uphold the freedom to marry for gay and lesbian couples. The legislation was approved by a 33 to 27 vote, with 3 abstentions by the Argentine National Congress. It gives same-sex couples the same rights and protection as different-sex couples, including the ability to adopt. The law was backed by the government of President Cristina Fernandez de Kirchner, who signed the measure into law on July 21, 2010. Marriages are only allowed only for citizens or permanent residents of Argentina (*Ibid*).

⁴⁵ On May 14, 2013, the National Council of Justice in Brazil ruled that government offices that issue marriage licenses have no standing to reject same-sex couples from marriage. Since 2011, federal marriage laws in Brazil have been somewhat confusing: On May 5, 2011, the Supreme Federal Court voted to allow same-sex couples nationwide many of the legal rights as married couples (through a mechanism called "stable union"), and since June 2011, same-sex couples joined together in "stable union" may petition judges to convert their union into a marriage. The two-step process to being married can be performed across Brazil, and in recent months, many jurisdictions have ordered a final end to the exclusion of same-sex couples from marriage. Before the May 2013 ruling, 14 of Brazil's 27 jurisdictions had passed the freedom to marry (*Ibid*).

⁴⁶ On April 23, 2013, the National Assembly in France took a final vote to approve the freedom to marry. The following month, on May 18, French President Francois Hollande signed the bill into law. The bill passed with overwhelming support in both houses- by a 331-225 final vote in the Assembly and 179-157 final vote in the Senate the first wedding occurred in Montpellier, between Vincent Autin and Bruno Boileau (*Ibid*).

⁴⁷ On April 10, 2013, the lower House of the Uruguayan legislature approved a bill to extend the freedom to marry to same-sex couples, marking the final vote in the process of ending the exclusion of same-se couples from marriage across the country. President Jose Mujica signed

directed provisions enabling same-sex couples to share in the freedom to marry (Mexico,⁵⁰ and the United States).⁵¹ Many other countries provide some protections for such couples.⁵²

the bill on May 3, and Uruguay became the third country in Latin America to end the exclusion of same-sex couples from marriage nationwide when the law took effect on August 5 (*Ibid*).

⁴⁸ On April 17, 2013, the Parliament in New Zealand took a final vote to approve a bill to extend the freedom to marry to same-sex couples. The Parliament previously cleared the bill on August 29, 2012 and March 12, 2013. Prime Minister John Key vocally supported the freedom to marry throughout the national conversation on why marriage matters. The first weddings between same-sex couples took place on August 19 (*Ibid*).

⁴⁹ On July 17, 2013, the Queen of England granted royal assent to a bill extending the freedom to marry to same-sex couples in England. The final approval came after the British House of Commons and House of Lords voted overwhelmingly in favour of the legislation multiple times. Same-sex couples in England and Wales will be able to marry in Spring 2014. The introduction, acceptance and legal recognition of same-sex marriage shows a shift in cultural values in different societies. The United Kingdom made homosexual activities legal both in England and Wales, in 1967. It progressed to the Civil Partnership Act of 2004 which gave same sex couples the same legal rights as marriage straight couples, until the recent legislation by the Houses of Commons and of Lords giving legal approval to same sex marriage. All of these are hinged on respecting the basic rights of the people (*Supra* note 35).

⁵⁰ On March 4, 2010 Mexico City's Legislative Assembly voted 39-20 to uphold the freedom to marry for same-sex couples on December 21, 2009. The law defines marriage as "the free uniting of two people." The bill also legalizes adoption by gay couples. In August 2010, the Mexican Supreme Court ruled that the law honoring the freedom to marry in Mexico City is constitutional and all states must honor same-sex marriages from other jurisdictions. In May, 2012, after dealing with a civil case that did not specifically state gender requirements for marriage, the state of Quintana Roo declared that all marriages between same-sex couples would be legal. In December 2012, the Mexican Supreme Court declared that the Oaxaca civil code restricting marriage to different-sex couples is unconstitutional. Because of Mexican law, the ruling currently only applies to the three couples who filed the suit. If the court rules the same way in two additional cases, binding national precedent is set in Mexico, and all other jurisdictions in the country will have the freedom to marry (*Ibid*).

⁵¹ Individual states in the United States have been left to decide their own marriage laws. On May 17, 2004, Massachusetts became the first state to provide the freedom to marry same-sex couples. Since then, CA, CT, DE, IA, ME, MD, MN, NH, NY, RI, VT, WA, and Washington, D.C. have also passed their own freedom to marry laws. In June 2013, the U.S Supreme Court overturned the so-called Defense of Marriage Act, a law passed by President Bill Clinton in 1996 to prohibit the federal government from respecting legal marriages between same-sex couples (*Ibid*).

However, there are a number of countries where it is illegal for same sex marriage to be practised. Recently, Uganda Parliament passed an anti-homosexuality law.⁵³ Section 2 of the Act criminalises homosexuality with a life imprisonment for any person convicted of the offence. While section 12 of the said Act treats any person who purports to contract same sex marriage as committing the offence of homosexuality punishable with a life imprisonment upon conviction. This has been signed into law by the Ugandan President Yoweri Museveni.⁵⁴ Besides, there are over 83 countries in the world today which cut across Africa, Asia including the Middle East, Americas, the Oceania and Europe where homosexuality is a crime.⁵⁵

Notwithstanding the recognition granted same-sex couples to marry, however, there are dissenting opinions or views on same sex marriage. To such people

⁵² In Australia, when couples – including same-sex couples – have lived together for more than two years, they achieve “*De Facto*” status, which extends many of the protections and responsibilities that marriage provides. Several states in Australia – Tasmania, New South Wales, Victoria, Queensland, and ACT – have created lesser mechanisms of family status, called either “relationship register” or “civil partnership” Australian Marriage Equality is currently leading the charge to win the freedom to marry in Australia. Also in late July 2011, the National Columbian Court ruled that the Colombian Congress must pass marriage or an equal alternative for same-sex couples before June 20, 2013, or else the Court would automatically allow any judge or notary to formalize a marriage between same-sex couples. In December 2012, a committee in the Colombian Senate approved a measure by a 10-5 vote to extend the freedom to marry, but in April 2013, the freedom to marry was not approved. As such, soon, same-sex couples in the state will be able to register their unions in court. *Ibid.*

⁵³The Anti-Homosexuality Act, 2014. <http://wp.patheos.com.s3.amazonaws.com/blogs/warranthrockmorton/files/2014/02/Anti-Homosexuality-Act-2014.pdf> < accessed on April 3rd, 2014>.

⁵⁴ Faith Karimi and Nick Thompson (200), *Ugandan's President Museveni Signs Controversial Anti-Gay Bill into Law*, CNN: <http://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill/index.html> < accessed Feb. 25, 2014>.

⁵⁵ 83 countries where Homosexuality is illegal. <http://76crimes.com/76-countries-where-homosexuality-is-illegal/> < accessed on Feb. 22, 2014>.

the actions of the state is an encroachment on the societal values.⁵⁶ At the time Canada moved to join the league of nations that have legalized same-sex marriage by the passage of the Civil Marriage Act that redefines marriage to include same-sex marriage. A Parliamentarian while speaking against it, referred to a statement credited to former Justice Gerard La Forest of the Supreme Court of Canada:

*...marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of longstanding philosophical and religious traditions. But its ultimate raison d'etre transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.*⁵⁷

In continuation, he further stated that:

Whether we came from Britain, France, Europe, China, India, Asia or Africa, all of us came here to build a future that would respect

⁵⁶ What was once an important debate over the legal status of marriage has emerged as a critical national issue, the resolution of which will shape the future of our society and the course of constitutional government in the United States? Family is and will always remain the building block of civil society, and marriage is at the heart of the family. Redefining marriage down to a mere form of contract fundamentally alters its nature and purpose and will usher in new threats to the liberty of individuals and organizations that uphold marriage and have moral or religious objections to its redefinition.

⁵⁷ Stephen Harper, Protecting the Traditional Definition of Marriage in Canada: <http://www.catholiceducation.org/articles/marrage/mf0041.html> < accessed on Dec. 20, 2013 >.

*the values and traditions of our ancestors and build a future for our children and families. One of those was our traditional institution of marriage. For anyone irrespective of their belief to equate the traditional definition of marriage with segregation and apartheid is sad and disappointing. Our society has, over the decades come, to respect and recognize the choices of consenting adults. It is time that traditional institutions like marriage be equally recognized and respected without modifications.*⁵⁸

It is further our view that the State need not tinker with traditional marriage with the pretense that marriage laws which only accord recognition to the union of different sex amounts to trampling on the basic rights of couples of same-sex marriage or union.

The point societies which have through legislation legalized same-sex marriage may need to consider is what are the essential characteristics of marriage or the purpose of marriage in the society? It has been canvassed that the purpose of marriage among others are for “partnership, pleasure and procreation.”⁵⁹ It is our view that the foregoing stated purposes of marriage can effectively be realized through the traditional marriage which recognized the union of heterosexual sex. It is trite that couples of same-sex marriage cannot fulfill the procreation purpose of marriage, though it may be conceded without yielding that the same sex marriage or union can realize partnership

⁵⁸ *Ibid.*

⁵⁹ (2008) *Marriage as a Concept and its Purpose*: dksuresh: http://www.scribd.com/doc/2505629/marriage_as_a_concept_&_purpose < accessed Feb. 25, 2014>.

and pleasure. The existence of society will be threatened without procreation, to which couples of same sex marriage can hardly achieve.

However, in Nigeria, this practice is yet to find expression in the nation's legal system. The legal regime of marriage is still being maintained and as such, the concept of same-sex union under various legislations⁶⁰ is still regarded as a crime punishable by a term of imprisonment.⁶¹

It is the view of some that granting marriage right to same sex couples is in a way allowing the people to enjoy the basic fundamental rights of choice and association. The British Culture Secretary Maria Miller after the Royal assent to the Same Sex Law passed by both Houses of Commons and Lords stated that "marriage is the bedrock of our society and now irrespective of sexuality everyone in British society can make that commitment."⁶² The Culture Secretary stated further that:

It is a wonderful achievement and whilst this legislation may be about marriage, its impact is so much wider. Making marriage available to all couples demonstrates our society's respect for all individuals regardless of their sexuality. It demonstrates the importance we attach to being able to live freely. It says so much about the society that we

⁶⁰ Criminal Code Act C38/2010, section 214; The Armed Forces Act and the Same Gender Marriage (Prohibition) Act C20/2010, section 81 and Same Sex Marriage (Prohibition) Act, 2013, section 1.

⁶¹ Same Sex Marriage (Prohibition) Act 2013, section 5(1) spells a term of 14 years imprisonment for offenders.

⁶² Ned Simons, Gay Marriage is Now Legal in England and Wales after 'Historic' Bill Gets Royal Assent, 2013, The Huffington Post UK: <http://www.huffingtonpost.co.uk> < accessed on Sept. 20, 2013>.

*are and the society that we want to live in. this is a historic moment that will resonate in many people's lives. I am proud that we made it happen, and I look forward to the first same sex wedding by next summer.*⁶³

SAME SEX MARRIAGE: THE NIGERIAN PERSPECTIVE

The Same Sex Marriage (Prohibition) Act 2013⁶⁴ which is the extant law in Nigeria prohibits and criminalises marriage contract or civil union between persons of same sex.⁶⁵ In the Act same sex marriage means “the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship.”⁶⁶

Nigeria is a sovereign State with federating units which is governed by a federal Constitution which is the nation's grundnorm.⁶⁷ Same-sex associations and or unions have been criminalized in Nigeria during the colonial era.⁶⁸ The issue of marriage has long since been settled through legislation in Nigeria. So any association or union between or among same-sex in Nigeria is a crime.⁶⁹

⁶³ *Ibid.*

⁶⁴ Recently assented to by the President of the Federal Republic of Nigeria.

⁶⁵ Same Sex Marriage (Prohibition) Act 2013, Section 1.

⁶⁶ Same Sex Marriage (Prohibition) Act 2013, Section 7.

⁶⁷ Constitution of the Federal Republic of Nigeria 1999 (as amended), section 1

⁶⁸ Criminal Code Act C38/2010, section 214 which provides that: any person who has carnal knowledge of any person against the order of nature; or permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for fourteen years.

⁶⁹ Criminal Code Act C38/2010, section 214 and Armed Forces Act A20/2010, section 81(1) which provides “A person subject to service law under this Act who (a) has carnal knowledge of a person against the order of nature (c) permits a person to have carnal knowledge of him against the order of nature is guilty of an offence under this Act. While subsection (2) of the section makes it an offence where a person subject to the military law commits an act of gross indecency with any person or procures another person to commit the act with him or attempts

So the issue of gender neutrality in marriage and marriage law does not arise in Nigeria, as the country affirms marriage to be an association or union between heterosexual couples.⁷⁰

It may seem that the criminalisation of same sex marriage by the Nigerian government is capable of eroding the fundamental rights of persons who are inclined to such practise. The various human rights instruments make elaborate provisions for the rights of persons such as rights to marry and found a family as well as the right of freedom of association. Nigeria as a country has assented to these instruments by signing and ratifying same at various times. Would the act of the government of Nigeria in passing the same sex marriage prohibition law, which prohibits a marriage contract or civil union between persons of same sex as well as criminalises the act by making person who goes into same sex marriage contract or civil union committing an offence punishable with a term of imprisonment not amount to a breach of such international obligations? Will the enactment of the law not be said to be an infringement of the fundamental rights and fundamental freedoms of the Nigerian people more particularly the minority who considered same sex marriage as a way of life?

In international law a country is obligated to honour treaty provisions, besides the various human rights instruments, there is another human rights instrument which calls for close examination which provides:

to procure the commission of the act by any person with himself or with another person whether in public or private. And any person upon conviction of the act shall be punished for an imprisonment not exceeding seven years or any less punishment provided by this Act.

⁷⁰ Same Sex Marriage (Prohibition) Act 2013, section 3

Persons belong to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belong to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and in without interference or any form of discrimination. Persons belong to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties. States shall take measures to create favourable conditions to enable persons belonging to the minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.⁷¹

The point here is whether these persons who practise same sex activities do not come within the ambit of minority in the light of the above Declaration, whose rights should be protected? If the answer is in the affirmative, the issue therefore would be whether Nigeria is not in violation of the above Declaration.

If it is conceded here that same sex practitioners fall within the ambit of minority whose rights should be protected, it is however, important to observe

⁷¹ Declaration on the Rights of Persons Belong to National or Ethnic, Religious and Linguistic Minorities, United Nations General Assembly, New York, adopted on 18th December, 1992, Resolution A/RES/47/135. Article 2(1), (5) and Article 4(2).

that a provision in the above stated Articles provided an exemption clause. In that if the government of Nigeria views very strongly that to allow homosexual activities to operate in the society will violate the national laws, it could refuse to grant them such rights, which she has done by the introduction of the Same Sex Marriage (Prohibition) Act, 2013. What the government of Nigeria in our opinion has done was to draw a balance between the rights of the persons who are inclined to same sex activities and the need to uphold the moral fabrics of the society. The custom and cultural beliefs of the various ethnic nationalities that make up Nigeria still see marriage as a union between a man and a woman.⁷² No doubt, prohibiting and criminalising same sex marriage or union may have infringed on the rights of some persons, nevertheless, the greater good of the society have dictated the decision of the government to do so.⁷³ The enactment of Same Sex Marriage (Prohibition) Act, 2013 by the Nigerian government besides prohibiting same sex marriage practice in the country⁷⁴, it went further to criminalise the act with a term of

⁷² Talatu Usman, Nigeria to Defend Ban on Same-Sex Marriage in letter to UN – Maku, 2013 : <http://www.premiumtimes.ng.com/news> < accessed Sept. 19, 2013). “He said in relation to same-sex marriage, there were fundamental differences “within our country and so we are trying to look into it and see what position Nigeria will take. But definitely, the problem with same-sex marriage as at now is that both sections of Nigerian society, traditional society, Muslim community, Christian community that virtually make up nearly 100 per cent of the Nigerian population are still opposed to the idea of same-sex marriage. And in nations, it is not easy for you to enforce a value that is strange to your own society.”

⁷³ The African Charter on Human and People Rights, Article 18(1) and (2) which provides, “The family shall be the natural unit of society. It shall be protected by the State which shall take care of its physical health and moral. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.”

⁷⁴ Section 1 of the Act.

fourteen (14) years imprisonment upon conviction⁷⁵ without an option of fine. However, the Act did not expressly criminalise homosexuality in the country.

However, Nigeria has been under tremendous pressure from the international community to reverse the law recently passed which prohibits same sex marriage in the country. The Minister of Information Labaran Maku after, one of the nation's Federal Executive Council's meetings where the President presented a memorandum seeking the Federal Executive Council's approval of Nigeria's Second Quota Universal Periodic Review Report (2008-2012) to the United Nations Human Rights Council stated that "the country has made substantial progress in 30 out of the 32 issues raised in the last report in 2009...That Nigeria had continued to differ in the other two areas which include abolition of death penalty and the clamour for same-sex marriage."⁷⁶ He further stated that "while Nigeria has made substantial progress in terms of death penalty, but with relation to same-sex marriage, it still has fundamental differences within the country and as they are trying to look into it and see what position Nigeria will take."⁷⁷

The British Prime Minister Mr. David Cameron, reacting to the passage of the Same Gender Marriage (Prohibition) Act, told Nigeria that:

Britain would not give any assistance or aid to countries that were opposed to same sex marriage. The British High Commissioner in Nigeria, Mr. Andrew Lyod, in a closed door meeting with the Jigawa

⁷⁵ Section 5 of the Act.

⁷⁶ Olalekan Adetayo, "Nigeria, UN Disagree Over Same-Sex Marriage, Death Penalty" The Punch.

⁷⁷ *Ibid.*

*State Governor, Alhaji Sule Lamido, asked the Nigerian government to rescind its decision on punishing individuals involved in same sex marriage, adding that such a law infringes on the fundamental rights of choice and association.*⁷⁸

In the same vein, the Canadian government also condemned the passage of a bill criminalizing same-sex marriage and gay activities in Nigeria by the Senate, saying that

*The bill, if assented to by President Goodluck Jonathan, would trample upon the fundamental human rights of homosexuals and gay people. The Canadian government, in a statement by its Foreign Affairs Minister, John Baird, called on Nigeria to reverse the bill so as to allow all its citizens to enjoy basic rights. He further maintained that, a bill passed by Nigeria's Senate, if ratified disregard basic human rights and fundamental freedoms.*⁷⁹

If a sovereign state is free to govern its state and its citizenry in accordance with the laws of its land. Is it appropriate therefore for such State to be coerced into accepting a practice which it finds not compatible with its cultural values and customs as they offend natural justice equity and good conscience as well as public policy and morality?

The British and Canadian governments have hinged their point on the fundamental rights doctrine. It was even stressed further by the Canadian

⁷⁸ Britain Tells Nigeria to Rescind on Gay Marriage Law or Else...” www.gistnigeria.com < accessed on Sept. 19, 2013.

⁷⁹ Ibid.

government which referred to it as ‘basic human rights.’ What then are fundamental rights and basic human rights? The Nigeria state pursuant to the Universal Declaration of Human Rights introduced into her Constitution in Chapter Four the fundamental provisions for the Nigerian people. The British High Commissioner has stated that such law is capable of trampling on the right of choice and association of the people.

Although section 37 of the Constitution of the Federal Republic of Nigeria provides that “every person shall be entitled to... associate with other persons.” It is our strong opinion that literally, the above section did not contemplate gender-neutrality in marriage to accord the right or freedom of marriage to same-sex couples in Nigeria. And to do so, would amount to overstretching the human rights provisions to a dangerous extreme.

Nigeria as a sovereign state has the authority to make laws for the good governance of the people without any form of interference or external influence of any kind. Nigeria is a member of the United Nations, the UN Charter provided for non interference of the domestic affairs of a sovereign state.⁸⁰ So laws made by the country which include laws that exclude same-sex couples from marriage and other policies should be viewed as a purely domestic matter for the State not attracting foreign or external interference or influence.

In the light of the foregoing therefore, there is likely to be problem with couples of same-sex marriage coming into the country. The Same Gender

⁸⁰ United Nations Charter, United Nations International Conference, San Francisco, 26th June 1945, entered into force on 20th October, 1945, Article 1(7).

Marriage (Prohibition) Act, 2013 in section 1(2) provides that “Marriage contract or civil union entered between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing there-from by virtue of the certificate shall not be enforced by any court of law.” By this, nationals of countries that have recognized same-sex marriage are likely to have problem with obtaining entry and residence permit in the Nigeria. Even Nigerians in Diaspora who have taking advantage of the freedom to marry to perform same-sex marriage under the laws of the countries they are resident will equally be faced with similar legal disability.

There is an interesting angle to this same-sex marriage phenomenon. It is our opinion that a sovereign state has the exclusive preserve to make laws for the good and order of the society. To this realization Nigeria has through legislation expressed clearly of her refusal to accord recognition to same-sex marriage in her legal system. We argue here that with respect to the issue of same-sex marriage in countries where the same-sex marriage is legal, to allow Nigeria citizens who are resident in those countries to go through the form of marriage, recourse should be had to the law of the country of their nationality. Except the individual applying for same sex marriage ceremony would first and foremost have abandoned her/his Nigerian nationality. A classic example is the Belgium same-sex marriage law which stipulates “that only couples from countries with the freedom to marry can be married under Belgian law.”⁸¹ It is our view that it may not be appropriate for citizens of a country whose law has not recognized same-sex marriage under its legal system to be

⁸¹ Pew Research Religion and Public Life Project, *Supra* note 35.

allowed to go through same-sex marriage in those countries, as they lack the capacity to go through that kind of marriage under a different legal system.

An interesting angle to this will be whether Nigerian government will accredit diplomats of same-sex marriage sent to the country by a foreign country that has legalised same sex marriage. If the provision of section 1(2) of the Same Sex Marriage (Prohibition) Act, 2013 is anything to go by, such people cannot be accredited by the Nigeria government. The question whether the implementation of the law to foreign diplomats who are same-sex couples having gone through that form of marriage under the laws of the sending state, assigned to Nigeria to be refused accreditation is capable of sparking diplomatic row between the sending government and the Nigerian government, is awaited.

In a situation like as we have today, where a growing number of countries are through legislation not only decriminalising homosexual activities but according the status of traditional marriage which hitherto was exclusive to heterosexual couples would have significant impact on the society. This view was taken by Adaramola when he stated that “Mill’s credo and the views of the Wolfenden Committee on the issue of private morality are obviously objectionable in traditional African societies. Devlin’s position on the matter seems to be relatively in conformity with the tenets of African customary law.”⁸²

⁸² John S.Mill, *Supra* note 28, P. 97.

CONCLUSION

Different countries of the world over time resisted the pressure and agitation by different groups to recognize same gender marriage by passing gender neutrality laws that allows same-sex couples to be married like the heterosexual couples. But at the wake of the 21st century most of those countries gave in to such pressure and then amended their laws to accommodate same-sex marriage into their legal system.

The whole idea of same-sex marriage couples is about adult pleasure desires and nothing more. This, in our opinion, could be achieved without seeking the instrumentality of the law to gain recognition and legitimacy without tinkering with the traditional conception of marriage. Same-sex couples could as well go about their activities without seeking any license from the state or government for any form of legitimacy so long as the law of the land permits them.

Our worries here are how long Nigeria would continue to resist such pressure particularly those from the international community championed by the United Nations Human Rights Council, which say the present law against same-sex marriage is anti-human rights. We are afraid that the day will come when Nigeria will decriminalize same-sex association or union and enact a marriage law that is gender neutral, to accommodate same-sex association.

Ergama, Mul'ata, Toorawwan Xiyyeeffannoo fi Duudhaalee Inistiitiyuutii Leenjii Ogeessota Qaamolee Haqaa fi Qo'annoo Seeraa Oromiyaa

Ergama

Leenjii ogeessota qaamolee haqaa itti fufiinsaan kennuun gahumsaa fi qulqullina olaanaa gonfatanii sirna heeraa fi seeraa kabajanii fi kabachiisan horachuu, gahumsa ogeessota seeraa mirkaneessuu fi rakkoowwan sirna haqaa irratti qorannoo fi qo'annoo gaggeessuun yaada haaraa burqisiisuun fooyya'iinsi sirna haqaa itti fufiinsaan akka jiraatu dandeessisuu dha.

Mul'ata

Bara 2012 tti gahumsa hojii leenjii fi qo'annoo seeraa fi haqaa tiin Inistiitiyuuticha sadarkaa biyyaatti filatamaa, akka Afirikaatti beekamaa gochuu dha.

Toorawwan Xiyyeeffannoo

1. Gahumsa Ogeessota Qaamolee Haqaa
2. Qo'annoo fi Qorannoo

Duudhaalee Ijoo

- Gahumsa
- Iftoomina
- Maamila Giddugaleessaa Godhachuu
- Kalaqummaa fi
- Dursaanii Yaaduu

Submission Guidelines

Oromia Law Journal (OLJ) is a Journal published at least once annually. It accepts and publishes submissions fulfilling the following criteria upon revisions by the editors and approval by the Preparatory Board.

1. Submissions should be articles (not published elsewhere) related to legal, economic, political and social issues arising in relation to Oromian, Ethiopian, and other related International Laws. Contributions could also be other works such as essays, comments on legislations, book reviews, and court cases (with or without comments).
2. Contributions may be submitted in Afan Oromo, English or Amharic
3. Submissions shall be computer typed, 1.5 space, in 12 font, Times New Roman; footnotes in 10 font, 1.0 space, Times New Roman (for Afan Oromo & English). These considerations also work for Amharic submissions except that the font size for footnote is 9.
4. The length of a contribution shall not exceed 30 pages for articles and essays. Other contributions like book reviews, case comments, etc shall range from five to ten pages.
5. The contribution should be organized into title page, introduction, body and conclusion.
6. Footnotes should be numbered consecutively with superscript Arabic numerals in the text.

N.B. A contribution may at any time be submitted to the Preparatory Board (etafadereje@yahoo.com) OR Editorial Committee (bekele.teferi@yahoo.com) in soft copy or hard copy. Submissions in hard copy should not reveal the identity of the author in anyway.

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