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ARTICLES

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A Message from the Editorial Committee

It is a great pleasure for the Editorial Committee to make an official announcement about the publication of the second Issue of *Haramaya Law Review* (HLR). Having launched the HLR in Spring of 2012, the College of Law along with the Editorial Committee has been diligently striving its level best to come up with the current Issue as early as possible. Nevertheless, there has been a delay for a reason imputable to the existence of several hurdles that de-accelerated the pace of the editorial task. We are glad that we fought hard the challenges to ensure the continuity of the Issue without compromising on its quality.

The HLR, though it is too infant to speak fully in itself, is evidently a product of scholarly works that are pooled together from a chorus of leading academics, practitioners, judges and other scholars, both from within and outside Ethiopia.

It is the very purpose of the HLR to make a scholarly contribution in order to enrich the Ethiopian legal system from which the legal community in particular and the whole society in general benefit. In so doing, the HLR is committed to uphold the rule of law and contribute its part in the promotion of legal education and fair justice that are integral to the grand objective of sustainable development. To this end, the HLR warmly welcomes the contributions of all legal scholars in the form of a legal article, notes, essays, book reviews and case comments on landmark decisions of judicial and quasi-judicial tribunals.

Despite its infancy, the HLR aspires to be a reputable legal forum that posits itself among the globally leading legal publications. With this objective in mind, the Editorial Committee would like to emphasize the *high quality* and *relevance* of the contribution as a twin-standard that lies at the heart of its editorial task.

Last but not least, the Editorial Committee wants to seize this opportunity once again to make a call for contributions from the legal community while it owes a gratitude to those who have already played a pivotal role in making our long-conceived dream come to fruition. In particular, the Committee is thankful to the assessors, both internal and external, for their critical and constructive comments and the Advisory Board.

The Editorial Committee

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DISTINGUISHING LIMITATION ON CONSTITUTIONAL RIGHTS FROM THEIR SUSPENSION: A COMMENT ON THE *CUD* CASE

*Abdi Jibril Ali**

Abstract

Suspension of and limitation on fundamental rights and freedoms are justified violations of constitutional rights. Temporary suspension of some fundamental rights and freedoms can be made on the ground of a state of emergency. Since most constitutional rights are not absolute, they can be limited on basis of national security, public safety, public moral, public order, public health, and similar grounds. Although both suspension and limitation should comply with the requirements of necessity and proportionality, they are completely different in their conception and application. However, the Council of Constitutional Inquiry failed to distinguish suspension of constitutional rights from their limitation in CUD v Prime Minister Meles Zenawi Asres. The Council mistakenly held that declaration of the Prime Minister constituted limitation on right of assembly, demonstration and petition. Given its nature and the short period for which it lasted, the declaration should have appropriately held to constitute suspension of those rights.

Keywords: *derogation, fundamental rights and freedoms, limitation, state of emergency*

I. Introduction

As justified violations of human rights, limitation and suspension have common features. Yet, limitation is different from suspension. Limitation can be imposed in normal situation for indefinite period while suspension is justified only in an emergency situation as temporary measures. The Council of Constitutional Inquiry (the Council) dealt with limitation in *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres*

(*CUD* Case).[1] The Case was decided in the aftermath of 2005 Election on constitutionality of a Prime Minister's decree banning right of assembly, demonstration and petition on the morrow of the 2005 National Election. A brief decision of the Council that it does not involve constitutional interpretation did not distinguish between limitation and suspension.

The *CUD* Case has attracted attention of many human rights and constitutional law scholars.[2] The scholarly comments thus far made on the *CUD* Case focus on the decision of the Court in referring the Case to the Council and error of the latter in assuming jurisdiction over the Case. The content of the Council's holding did not succeed in attracting enough criticism. This comment is a modest attempt to contribute to the arguments by examining the content of the Council's decision. It argues that the Council went completely astray and mixed derogation from fundamental rights and freedoms with their limitations. The comment begins with summary of the Case in Part I with emphasis on ruling of the Council. Part II provides discussion to distinguish limitation on fundamental rights from their suspension. Part III analyses the decision of the Council against the

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1. *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres*, Fed. First Instance Ct., Lideta Div., File No. 54024 (Decision of 3 June 2005) (26 *Ginbot* 1997 E.C.)

2. Sisay Alemahu Yeshanew, *The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia*, 8 AFRICAN HUM. RTS. L.J. 273, 279-281 (2008); Sisay Alemahu, *The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia*, J. ETH. L. 135, 144 (2008); Takele Soboka Bulto, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory*, 19 AFRICAN J. OF INT. AND COM. L. 99, 100 (2011) and Getachew Assefa, *All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation*, J. ETH. L. 139, 155(2008). According to Sisay the Court erred in failing to refer the case to the Council of Constitutional Inquiry (the Council) without considering the provisions of Proclamation No. 3/1991 and without first deciding on whether there was lack of clarity of the Constitution; and the Council failed to decide on "whether there was 'constitutional dispute' giving rise to its jurisdiction." According to Takele, the Court not only failed to specify a provision that needed interpretation but also failed to frame question of law while the Council went beyond its power to apply the Constitution to factual situation. Getachew upheld the Court's referral to the Council as "it was acceptably prudent for the court to make this case a case for constitutional interpretation and get out of the flames." He is of the opinion that courts should avoid political confrontation with the executive. He also indicates that the case involved issues of constitutional interpretation.

discussion in the second part. Finally, this comment closes with concluding remarks.

II. Summary of the Case

At the end of 2005 national election, the Prime Minister of the Federal Democratic Republic of Ethiopia, Mr. Meles Zenawi Asres, issued a decree[3] that freedom of assembly including public demonstration was banned in Addis Ababa and its vicinity. Following the ban on demonstration and assembly, the Coalition for Unity and Democracy (CUD), a political party, sued the Prime Minister in the Federal First Instance Court, Lideta Division.

In its claim, the CUD stated that the decree was null and void as per Article 9(1) of the Constitution since banning freedom of assembly and demonstration violated the rights of its members guaranteed under Article 30 of the Constitution.[4] It quoted the first sentence of Article 30(1) which provides that "[e]veryone has the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition." It also based

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3. The Prime Minister's declarations were published in *Addis Zemen*, a government owned newspaper published in Amharic. *See* ADDIS ZEMEN, 64th year No. 248, May 2005 (8 *Ginbot* 1997 E.C.), at 1 & 6. The plaintiff presented *Addis Zemen* as its evidence to prove the issuance of the Prime Minister's declarations. The Newspaper did not use a literal Amharic translation of the term "decree." The plaintiff and the Council of Constitutional Inquiry used *memmerya* (which means "directive" in Amharic). Since the term "directive" signifies a subsidiary legislation, which provides more detailed rules for the implementation of a regulation and its parent Proclamation, it is not used in this piece to avoid confusion. Besides, the declarations of the Prime Minister were closer to an emergency decree than a subsidiary legislation.

4. FDRE CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GASETTE, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 9(1) provides that: The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.

Art. 30 provides that:

> 1. Everyone has the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition. Appropriate regulations may be made in the interest of public convenience relating to the location of open-air meetings and the route of movement of demonstrators or, for the protection of democratic rights, public morality and peace during such a meeting or demonstration.
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> 2. This right does not exempt from liability under laws enacted to protect the well-being of the youth or the honour and reputation of individuals, and laws prohibiting any propaganda for war and any public expression of opinions intended to injure human dignity.

its claim on Article 3(1) and Article 11 of Proclamation No. 3/1991 (the Proclamation to Provide for Peaceful Demonstration and Public Political Meetings).[5] In its prayers, the plaintiff requested the Court to give an order lifting the ban on demonstration and assembly on two grounds. First, the plaintiff alleged that the Prime Minister had no right and power to make such decree; and secondly, there were no circumstances requiring the issuance of such decree.

The judge, Woldemichael Meshesha, believed that the case involved constitutional interpretation and referred the case to the Council of Constitutional Inquiry. He did not refer to any provisions relied upon by the plaintiff. His referral order did not show how the case involved issues of constitutional interpretation. He did not frame issue requiring constitutional interpretation either.

On 14 June 2005, the Council of Constitutional Inquiry handed down its decision that the case did not involve constitutional interpretation. To reach its decision the Council framed two issues: a) whether the decree issued by the Prime Minister violated the Constitution, and b) whether there were sufficient conditions to issue the decree. In dealing with the first issue, the Council considered the content of Article 30(1) of the Constitution and held that the provision contains limitation on the exercise of the right. It particularly referred to the limitation clause of the provision. It also relied on the preamble of Proclamation No 3/1991 and held that "the concerned executive organ can decide on place, direction, and time of public assembly and demonstration on the basis of the Proclamation."

The Council considered the power of the Prime Minister to issue the said decree. It relied on Articles 49, 72(1) and 74(13) of the Constitution. The Council did not find the Prime Minister's decree prohibiting demonstration in Addis Ababa for one month as a violation of the Constitution for two reasons. The first reason was that the Prime Minister is the highest executive organ vested with wide power. The other reason was that Addis Ababa city is accountable to the federal government under Article 49 of the Constitution and Article 61 of Addis Ababa City Charter.

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5. *The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings*, Proclamation No. 3/1991, FED. NEGARIT GAZZETA 50th Year No. 4, Addis Ababa, 12 August 1991.

Regarding the second issue, the Council held that whether there were sufficient conditions for prohibiting demonstration should be decided by the organ vested with such power in the Constitution. Anyone alleging absence of such condition had a burden of proving it. The Council did not decide on whether the plaintiff had provided sufficient evidence to prove the absence of conditions necessitating prohibition of demonstration in Addis Ababa since such issue is an issue of fact rather than an issue of constitutional interpretation. Finally, the Council rejected the case holding that it did not require constitutional interpretation.

III. DISTINGUISHING LIMITATION FROM DEROGATION

A. *Limitation*

Most fundamental rights and freedoms are not absolute. They are limited or restricted by the same provisions that guarantee them or by a general provision that applies to all rights in a particular constitution. Limitation refers to justifiable infringement of fundamental rights and freedoms.[6] Limitations or restrictions are exception to the general rule that fundamental rights and freedoms should be protected.[7] Unlike derogation from rights during public emergencies, limitations "may remain in force indefinitely."[8] Limitation, as the term implies, does not mean a total deprivation of rights whether that deprivation is temporary or permanent.

A provision in national constitutions or international human rights instruments that provides for limitation is a limitation clause (or claw-back clause). A general limitation clause is contained in a separate provision (section or article) and applies to all rights in a constitution or in a particular instrument. A provision that guarantees rights may also contain a specific limitation clause that applies to that specific provision only. A

6. *See generally* IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK, at 165 (2005).

7. NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE, at 184 (2002).

8. *Id*. at 182.

constitution may contain specific limitation clauses together with a general limitation clause or it may contain specific limitation clauses alone.[9]

Limitations, whether they are enacted in pursuance of a general or specific limitation clause, should comply with certain requirements. A mere existence of a limitation clause does not justify limitation on human rights. The African Commission on Human and Peoples' Rights (African Commission) laid down some of the requirements when it held that "[t]he reasons for possible limitations must be founded in a *legitimate state interest* and the evils of limitations of rights must be strictly *proportionate* with and absolutely *necessary* for the advantages which are to be obtained."[10]

First, limitations should be "*prescribed by law*." International human rights instruments and national constitutions usually require promulgation of certain law to place limitations on human rights.[11] The limitations must be "provided for by national law of general application."[12] Such laws should not be "arbitrary or unreasonable."[13] They should also be "clear and accessible to everyone."[14]

Second, the purpose of limitations must be the protection of *legitimate state interest*. Protection of national security, public safety, economic well-

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9. *See*, e.g., CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (1996) which contains a general limitation clause under §36 and specific limitation clauses under other provisions; CONSTITUTION OF UGANDA (1995), Art. 43(1). Some international human rights instruments also contain general limitation clauses. *See*, e.g., *Universal Declaration of Human Rights*, Art. 29; *International Covenant on Economic, Social and Cultural Rights*, adopted in New York on 16 December 1966 and entered into force on 3 January 1976 (here after ICESCR). Art. 4; *African Charter on Human and Peoples' Rights*, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982) (here after *African Charter)*, Art. 27(2).

10. *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 69. Italics added.

11. *See*, e.g., *International Covenant on Civil and Political Rights* (ICCPR), adopted on 16 December 1966, N.Y., USA, GA res. 2200A (XXI) 999 UNTS 171 (here after ICCPR), Arts. 12(2), 18(3), 19(3) & Art. 21; FDRE CONSTITUTION, Arts. 26(3), 27(5) & Art. 29(6).

12. UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, para 15, available at: http://www.unhcr.org/refworld/docid/4672bc122.html [accessed 2 July, 2012].

13. *Id*. para 16.

14. *Id*. para 17.

being of a country, public health, public moral, and rights and freedoms of others, and prevention of crime and disorder are some examples of legitimate state interest. International human rights instruments and domestic constitutions contain these factors in their limitation clauses.[15]

Third, the limitation must be *necessary* to protect legitimate state interest. Necessity implies "the existence of a 'pressing social need', or a 'high degree of justification', for the interference in questions."[16] Laws restricting rights are necessary only when there is no other alternative that preserve legitimate state interest without interfering in the enjoyment of fundamental rights and freedoms. Where all available alternatives interfere with the enjoyment of the right in question, a state must choose an alternative that less restricts such rights. "If a compelling governmental objective can be achieved in a number of ways, that which least restricts the right protected must be selected."[17] Limitation clauses in international human rights instrument and domestic clause clearly require that the limitations must be necessary in a democratic society.[18]

Finally, limitations must be *proportionate* with the purpose to be achieved.[19] Proportionality requires "that a balance be struck between the requirements of the interests sought to be protected and the essential elements of the recognized right."[20] Thus, states should balance protection of legitimate state interest with protection of individuals' rights. A limitation that imposes more restriction than necessary to protect legitimate state interest fails to fulfil the requirement of proportionality.

1. *Limitation under the Constitution*

The Constitution does not contain a general limitation clause that applies to all fundamental rights and freedoms guaranteed in Chapter

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15. *See*, e.g., ICCPR, Arts. 12(3), 14(1), 18(3), 19(3)(b), 21 & 22(2); FDRE CONSTITUTION Arts. 20(1), 26(3), 27(5) & 30.

16. JAYAWICKRAMA, *supra* note 7, at 186-187; and *Handyside* v. *United Kingdom*, European Court, (1976) 1 EHRR 737.

17. *Id*, at 187.

18. *See*, e.g., ICCPR, Arts. 12(3), 18(3), 19(3), 21 & 22(2); FDRE CONSTITUTION, Art. 27(5).

19. Syracusa Principles, *supra* note 12, para 10(d).

20. JAYAWICKRAMAY, *supra* note 7, 189.

Three. Depending on their scope of definition and limitation, fundamental rights and freedoms in the Constitution may fall under three categories. The first category contains rights that are not restrictively defined. It also does not contain specific limitation clause. The rights in this category may be regarded as absolute rights. As such, they cannot be limited through any law. Examples include right to be protected against cruel, inhuman or degrading treatment or punishment, and prohibition of slavery.[21]

However, the absence of limitation clause in a provision of the Constitution that defines the content of a particular right or absence of phrases that restrictively defines content of that right does not elevate that right to the rank of absolute rights. For example, Article 32 (freedom of movement) does not restrictively define the right. It does not contain limitation clause either. An interpretation of Article 32 in line with Article 12 of the International Convention on Civil and Political Rights (ICCPR) suggests that freedom of movement can be restricted because the latter provides for restrictions "to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others." Otherwise, some prohibition under the Criminal Code such as prohibition from resorting to certain place, prohibition to settle down or reside in a place, obligation to reside in specified place or area, or withdrawal of official papers such as Identification cards and passports that can be imposed on a convicted person would directly violate Article 32 of the Constitution.[22]

The second category of rights is restrictively defined. For example, Article 17(2) provides that "[n]o person may be subject to arbitrary arrest." The provision does not prohibit an *arrest*. Rather, it prohibits an *arbitrary* arrest. If an arrest is arbitrary, it is "incompatible with the principles of justice or with the dignity of the human person."[23] Thus, lawful arrest (e.g., arresting a person according to an arrest warrant or while committing a crime) is not an arbitrary arrest and it does not violate right to liberty. A

21. FDRE CONSTITUTION, Art. 18(1) & 18(2).

22. THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Proclamation No. 414/2004, FED. NEGARIT GAZZETE, Year No, 9 May 2005 (hereafter CRIMINAL CODE), Arts. 145-149.

23. JAYAWICKRAMA, *supra* note 7, at 376.

law that permits arrest and lays down its procedure in detail would not contravene Article 17.

The third category contains specific limitation clause which empowers the legislature to promulgate laws limiting rights guaranteed in the Constitution. The right to privacy under Article 26 of the Constitution is clear example of rights under this category.[24] Article 26(3), like similar other provisions, requires enactment of a specific law before limiting right to privacy. The purpose of such law must be legitimate state interest such as "safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others."[25]

2. *Limitation on the Right of Assembly, Demonstration and Petition*

The right of assembly, demonstration and petition guaranteed under Article 30 also falls under the third category. It permits making of "appropriate regulations." As discussed above, limitations can only be made through laws,[26] which should be reasonable, clear and accessible. Ethiopian laws may fulfil the requirements of reasonability and clarity, but they are not accessible in general. Proclamations and Regulations are published in the Federal Negarit Gazeta, which is available only in Addis Ababa. Are they made for people in Addis Ababa only? Accessibility of regional laws is the worst. One cannot buy even regional constitutions, let alone other ordinary laws. Therefore, it seems that Ethiopian legislatures make laws for themselves, not for the citizens.

Although the Constitution does not clearly specify an organ concerned with the regulation of the right under Article 30, it is an inherent power of the legislature to regulate certain matters through promulgation of

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24. Compare Arts. 15, 27(5), 29(6), 30 and similar provisions of the FDRE CONSTITUTION.

25. FDRE CONSTITUTION, Art. 26(3).

26. The term "law" has been defined to include proclamations, regulations, directives and international agreements. *See* Art. 2(2) of *Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities* Proclamation No. 251/2001, FED. NEGARIT GAZZETE, 7th Year No 41; *see also* Art. 2(5) of *Council of Constitutional Inquiry* Proclamation No. 250/2001, FED. NEGARIT GAZETA OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 7th Year, No. 40, 6 July 2001(here after *Council of Constitutional Inquiry Proc.*).

proclamations.[27] The legislature may delegate some of its power to the executive which may make subsidiary laws. These subsidiary laws could be regulations issued by the Council of Ministers.[28] It may also be directives issued by individual ministries or other organs to implement regulations.

Article 30 does not allow all kinds of "regulations" to limit its application. It requires the "regulations" to be "appropriate." Obviously, regulations should be issued by organs that have power whether that power is inherent or delegated. Regulations made by organs that do not have such power are not appropriate. As a legislature, the House of Peoples Representatives can regulate constitutional rights through laws. Other state organs should have authorisation from the House to make subsidiary laws for the regulations of constitutional rights. Laws made to take away the right of assembly, demonstration and petition in its totality even for the shortest period is not a limitation imposed through regulations.[29] Rather, it is a suspension or abrogation of the right. It is a suspension if taking away of the right is temporary and abrogation if it is permanent.

Even when the regulations do not extinguish the right of assembly, demonstration and petition, they would not be "appropriate" unless they address one of the aims enumerated under Article 30(1). The first aim of the regulations is ensuring public convenience by providing for "the location of open-air meetings and the route of movement of demonstrators." If, for example, participants assemble on a very busy road, it would be inconvenient for the public to make proper use of the road. Thus, the regulations may prohibit assembly or demonstration on such road. However, the regulations should not impose blanket prohibition on access to "public streets and parks."[30] When regulations are made to

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27. FDRE CONSTITUTION, Art. 55(1).

28. FDRE CONSTITUTION, Art. 77(13). Enacting regulations is not an exclusive power of the Council of Minister. For example, the National Electoral Board is empowered to make regulations and directives under Art. 110 of the *Amended Electoral Law of Ethiopia* Proclamation No. 532/2007, FED. NEGARIT GAZETA, 13th Year No. 54; similarly, the House of Federation is also empowered to make regulations under Art. 58 of *Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities* Proclamation No. 251/2001, FED. NEGARIT GAZETA, 7th Year No. 41.

29. *See* JAYAWICKRAMA, *supra* note 7, at 184-185. "The power to impose restrictions on fundamental rights is essentially a power to 'regulate' the exercise of these rights, not extinguish them."

30. CURRIE & DE WAAL, *supra* note 6, at 414.

prohibit open-air meetings or demonstration in certain places, they should leave alternative places for meeting or demonstration.

The second aim of the regulations should be "the protection of democratic rights." Unlike other provisions of the Constitution, Article 31(1) does not refer to protection of rights and freedoms of others in general.[31] The Constitution guarantees democratic rights under Part Two of Chapter Three (from Articles 29 to 44). If regulations are made to restrict right of assembly, demonstration and petition to protect, for example, freedom of expression (which falls under democratic rights), *a priori*, such regulations should also be made to protect right to life (which does not fall under democratic rights). Thus, understanding Article 30(1) as permitting regulations restricting rights of assembly, demonstration and petition to protect rights and freedoms of others is more logical and in line with international human rights instruments.

The third aim of the regulations should be the protection of public morality which refers to "the ideals or general moral beliefs of a society."[32] The concept of "public morality varies over time and from one culture to another."[33] Public morality can be invoked when it is essential to maintain "respect for fundamental values of the community."[34] As multi-ethnic nation, there are no common moral standards in Ethiopia. What may be considered as appropriate in the Southern Ethiopia may be considered morally shocking in the Northern Ethiopia. Thus, regulations restricting right of assembly, demonstration and petition should take into consideration part of the country to which they apply. For example, nude demonstration may be prohibited on the ground of protecting public morality in part of the country where nudity is immoral.

The fourth and last aim of the regulations should be the protection of public peace.[35] Regulations made for the purpose of avoiding violence and public disturbance may restrict right of assembly, demonstration and petition. Such regulations may prohibit "riotous or disorderly assembly."[36]

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31. *Compare*, FDRE CONSTITUTION, Art. 26(3) & 27(5). *See also* ICCPR, Art. 21.
32. BLACK'S LAW DICTIONARY 1025 (7th ed. 1999).
33. Syracusa Principles, *supra* note 12, para 27.
34. *Id*.
35. ICCPR uses "public order" instead of "public peace."
36. MAHENDRA P. SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA, 123 (2001).

Article 30(2) implies that laws may be enacted to protect well-being of the youth, honour and reputation of individuals, and to prohibit propaganda for war and public expression of opinions intended to injure human dignity. In other words, these laws can limit the right guaranteed under Article 30(1). Exercise of the right of assembly, demonstration and petition is not a defence for civil and criminal liability that could be imposed for violation of those laws. For example, defamation is a crime and entails criminal liability, and at the same time it is a tortuous act resulting in civil liability.[37] Thus, a defendant in a defamation case cannot invoke Article 30(2) as a defence.

B. Derogation

Derogation refers to temporary suspension of human rights during a state of emergency.[38] Emergency, as opposed to normalcy, is a situation "outside an ordinary course of events."[39] It refers to "a sudden, urgent, usually unforeseen event or situation that requires immediate action, often without time for prior reflection and consideration."[40] It may include "armed conflicts, civil wars, insurrections, severe economic shocks, natural disasters, and similar threats."[41] Derogation from fundamental rights and freedoms "enables the government to resort to measures of an exceptional and temporary nature in order to protect the essential fabric of that society."[42]

A state of emergency is classified into *de jure* and *de facto*. A *De jure* state of emergency exists when states comply with legal requirements for

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37. CIVIL CODE OF THE EMPIRE OF ETHIOPIA (1960), Proclamation No 160/1960, FED. NEGARIT GAZZETE, 19th Year No 2, Art. 2044; CRIMINAL CODE, Art. 613.

38. Awol Kassim Allo, *Derogation or Limitation? Rethinking the African Human Rights System of Derogation in Light of the European System*, 2 ETH. J. LEGAL EDUC. 21, 25 (2009).

39. Oren Gross, *"Once more unto the breach": The systemic failure of applying the European Convention on Human Rights to Entrenched Emergencies* 23 YALE J. INT. L. 438, at 439 (1998).

40. *Id*.

41. Emilie M. Hafner-Burton, et al., *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INTERNATIONAL ORGANIZATION 673, at 673 (2011).

42. JAYAWICKRAMA, *supra* note 6, at 202.

its declaration. If states exercise their emergency power without complying with preconditions prescribed in their constitutions and international human rights instrument, they are in a *de facto* state of emergency.[43] A *de jure* state of emergency becomes *de facto* when emergency "measures are extended beyond the formal termination of a declared state of emergency."[44]

1. *A State of Emergency under the Constitution*

Declaring a state of emergency is a concurrent power of the federal and state governments. State governments can declare state-wide states of emergencies on two grounds: an occurrence of natural disaster and a breakout of an epidemic.[45] Decrees of state executives should be approved by a two-third majority vote of state legislatures.[46] Like the Federal Constitutions state Constitutions require establishment of state of emergency inquiry boards.[47]

The Federal Constitution gives the power of declaring and lifting "national state of emergency and states of emergencies limited to certain

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43. Yehenew Tsegaye Walilegne, *State of Emergency and Human Rights under 1995 Ethiopian Constitution*, 21 J. ETH. L. 78, at 87 (2007).

44. *Id*.

45. FDRE CONSTITUTION, Art. 93(1)(b); *See* REVISED CONSTITUTION OF AFAR STATE (2001), Art. 106; THE REVISED CONSTITUTION OF THE AMHARA NATIONAL REGIONAL STATE, Proclamation No. 59/2001, ZIKRE HIG OF THE COUNCIL OF THE AMHARA NATIONAL REGIONAL STATE, 7th year No. 2, 5 November 2001, Bahir Dar, Art. 114; REVISED CONSTITUTION, 2001, OF THE SOUTHERN NATIONS, NATIONALITIES AND PEOPLES REGIONAL STATE CONSTITUTION, Proclamation No. 35/2001, Art. 121; THE REVISED CONSTITUTION OF BENSHANGUL-GUMUZ STATE, 2002, Art. 115; The Revised Constitution of Gambela Peoples' Regional State, Proclamation No. 27/2002, Art. 117; THE REVISED CONSTITUTION OF OROMIA NATIONAL REGIONAL STATE, Proclamation No. 46/2001, Art. 108; THE REVISED CONSTITUTION OF SOMALI NATIONAL REGIONAL STATE, 2002, Art. 105; THE REVISED CONSTITUTION OF HARARI NATIONAL REGIONAL STATE, 2004, Art. 76.

46. *Id*.

47. *See* REVISED CONSTITUTION OF AFAR STATE, Art. 107; THE REVISED CONSTITUTION OF THE AMHARA NATIONAL REGIONAL STATE, Art. 115; REVISED CONSTITUTION OF THE SOUTHERN NATIONS, NATIONALITIES AND PEOPLES REGIONAL STATE, Art. 122; THE REVISED CONSTITUTION OF BENSHANGUL-GUMUZ STATE, Art. 116; THE REVISED CONSTITUTION OF GAMBELA PEOPLES' REGIONAL STATE, Art. 118; THE REVISED CONSTITUTION OF OROMIA NATIONAL REGIONAL STATE, Art. 109; THE REVISED CONSTITUTION OF SOMALI NATIONAL REGIONAL STATE, Art. 106; THE REVISED CONSTITUTION OF HARARI NATIONAL REGIONAL STATE, 2004, Art. 76(5).

parts of the country" to the Federal Government.[48] Both the legislature and the executive can declare a state of emergency.[49] A state of emergency declared by the Federal Executive (Council of Ministers) must be approved by a two-third majority vote of the House of Peoples' Representatives, otherwise it lapses.[50] To obtain the approval of the House, the Council of Ministers must present its decree within 48 hours if the House is in session or within 15 days if the House is in recess.[51] The decree remains in force for six months unless it is extended for an additional four months by two-third majority vote of the House.[52]

The grounds for declaring a state of emergency is limited to four: "an external invasion, a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic."[53] The state of emergency may be declared as soon as external invasion occurs. Since the adoption of the Constitution, Ethiopia faced one external invasion, the Eritrea invasion of June 1998.[54] The invasion did not resulted in declaration of a state of emergency.

Another ground for declaring a state of emergency is a breakdown of law and order which may include violence and public disturbance due to riots or rebellions. If public peace, safety and tranquillity of the society are in danger, the Council of Ministers can declare a state of emergency. Not all kinds of breakdown of law and order are a ground for a state of emergency though. If it does not endanger the constitutional order or if it can be handled by regular law enforcement without involving the defence force, it is not necessary to declare a state of emergency. Since the Constitution requires the occurrence of a breakdown of law and order before declaring a state of emergency, it is not proper to declare a state of emergency for an eminent danger to law and order.

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48. FDRE CONSTITUTION, Art. 51(16).

49. *Id.*, Arts. 55(8) & 77(10).

50. *Id*.

51. *Id.*, Art. 93(2).

52. *Id*.

53. *Id.*, Art. 93(1)(a). State executives have also similar power.

54. *See* KINFE ABRAHAM, ETHIO-ERITREAN HISTORY AND ETHIO-ERITREAN WAR, at xi (Ethiopian Inaternational Institute for Peace and Development) (2004).

Natural disaster and epidemic are other grounds of declaring a state of emergency. Natural disaster may include earth quick, flood, tsunami and other similar occurrence. Although flood in Dire Dawa caused significant loss of life and property and displacement of people in 2006, it was not invoked as grounds for declaring a state of emergency. Epidemic refers to the appearance of a particular disease, such as cholera and flu, in a large number of people at the same time. Epidemic has not been invoked to declare a state of emergency since the adoption of the Constitution.

The House of Peoples' Representatives must establish a State of Emergency Inquiry Board when it declares a state of emergency or when it approves a state of emergency declared by the Council of Ministers.[55] The Board consists of seven members from the House and legal experts. The Board has three functions. First, it makes public the names of individuals arrested and the reason for their arrest within one month. Since it is an emergency situation, arrested persons cannot claim their right to be brought before a court within 48 hours.[56] In normal situations, every person has a right to know reasons for his or her arrest at the time the arrest takes place.[57]

Second, the Board monitors respect for Article 18(1) of the Constitution, prohibition of inhumane treatment. Although there are other provisions of the Constitution that cannot be suspended during a state of emergency, Article 18 is more likely to be abused. Thus, the Constitution creates the Board as an organ to protect every person against cruel, inhuman or degrading treatment during emergencies.[58] If the Board finds incidences of inhumane treatments, it recommends to the Prime Minister or to the Council of Ministers that inhumane treatments must cease.[59] It also ensures that persons who commit such act are prosecuted.[60] Finally, the Board submits its recommendation to the House whether a state of emergency should be continued or lifted.[61]

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55. FDRE CONSTITUTION, Art. 93(5).
56. *Id.*, Art. 19(4).
57. *Id.*, Art. 19(1).
58. *Id.*, Art. 93(5)(a).
59. *Id.*, Art. 93(5)(b).
60. *Id.*, Art. 93(5)(c).
61. *Id.*, Art. 93(5)(d).

2. *Suspension of Rights During a State of Emergency: Is it allowed?*

According to Article 93(4), once a state of emergency is declared, the council of ministers can suspend "political and democratic rights" guaranteed in the Constitution except the prohibition of torture (Article 18(1)), the prohibition of slavery (Article 18(2)), the right to equality (Article 25), and the right to self determination (Article 39(1) and 39(2)) which are non-derogable rights.[62] Reading Article 93(4) alone suggests that the Council of Ministers can suspend most of the rights under chapter three of the Constitution. However, interpreting chapter three in light of Article 13(2) and Article 9(4) of the Constitution suggests otherwise.[63]

According to Article 13(2), interpretation of fundamental rights and freedoms in the Constitution should conform to international human rights law and other instruments adopted by Ethiopia.[64] Since the Constitution uses the terms *instruments adopted* instead of treaties or agreements ratified, reference should be made to declarations, resolutions etc, adopted within the framework of the United Nations, the African Union or others international organization to which Ethiopia is a member.[65] The Constitution also refers to Universal Declaration of Human Rights which is not a treaty.[66]

Meaning, scope and categories of rights under chapter three of the Constitution must not contradict with International Human Rights Law including 'soft' law. Derogation clause in the Constitution affects scope of rights during a state of emergency. It also creates two categories of rights: derogable rights and non-derogable rights. Can the Council of Ministers suspend all provisions of chapter three that are not listed under Article

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62. *See generally*, Adem Kassie Abebe, *Human Rights under the Ethiopian Constitution: A Descriptive Overview*, 5 MIZAN L. REV. 2, 41-71 (2011).

63. FDRE CONSTITUTION, Art. 13(2) provides that "[t]he fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia." Art. 9(4) provides that "[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land."

64. The Amharic version of Art. 13(2) the FDRE CONSTITUTION refers to *alem akef yesebawi mebtoch hegegat* (which means International Human Rights Law).

65. *Compare*, FDRE CONSTITUTION, Art. 13(2) with Art. 9(4).

66. The binding Amharic version does not refer to the Universal Declaration of Human Rights.

93(4)(c)? For example, can it suspend the right to life (Article 15) or freedom of religion (Article 27)? The answer is negative if one reads chapter three in line with Article 13(2) and Article 9(4). Consideration of some international human rights treaties to which Ethiopia is a party makes the point more clear.

Under Article 4 of the ICCPR, states including Ethiopia cannot derogate from prohibition of torture, prohibition of slavery, right to life, prohibition of retrospective criminal law, right to be recognised as a person, and freedom of thought, conscience and religion.[67] The Human Rights Committee, an organ that monitors implementation of the ICCPR, further expanded the category of non-derogable rights by identifying provisions of the ICCPR containing elements that cannot be subject to lawful derogation.[68] According to the Committee, the rights of prisoners to be treated with humanity and freedom of opinion contain elements that cannot be subject to lawful derogation.[69]

The Human Rights Committee requires states to change their constitutions when the latter allow derogation from rights that are listed under Article 4 of the ICCPR as non-derogable. For example, the Constitution of Tanzania expressly allows derogation from the right to life.[70] In its concluding observation on Tanzania's report, the Human Rights Committee observed that "[c]oncern is expressed over the constitutional provisions allowing derogations from the right to life, which are not compatible with Article 4 of the Covenant. In this regard, changes are clearly necessary."[71]

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67. ICCPR, Ethiopia became party to ICCPR on 11 June 1993. See United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (accessed on 13 November 2012).

68. Human Rights Committee, *General Comment 29, States of Emergency (article 4*), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 13; Human Rights Committee, *General comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (2011), para 5.*

69. *Id.*

70. CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA (as amended), passed on 25 April 1977, Art. 31(1).

71. *Concluding Observation ICCPR,* United Republic of Tanzania, A/48/40 vol. I (1993) 35 at para 171.

Ethiopia submitted its first report on the implementation of the ICCPR to the Human Rights Committee in 2009.[72] The report states that a state of emergency had never been declared since entry into force of the Constitution.[73] It also refers to "the right to equality, the right to self-determination, the right to develop and speak one's own language, the right to promote culture and preserve history, as well as the right to be protected from inhumane treatment" as non-derogable rights.[74] Despite the absence of right to life and other rights that are non-derogable under the ICCPR from the Ethiopian list of non-derogable rights, the Committee did not raise any concern. Given the Committee's concern on derogable right to life in Tanzanian Constitution, one may surmise that the Committee would only be worried when constitutions expressly permit derogation from rights that are non-derogable under the ICCPR or when states actually suspend such rights.

Rights that are non-derogable under the ICCPR have corresponding provisions in the Constitution. They are Article 15 (right to life), Article 21 (rights of persons held in custody and convicted prisoners), Article 22 (non-retroactivity of criminal law), Article 24(3) (right to be recognised as a person), Article 27 (freedom of religion, belief and opinion), and Article 29 (right of thought opinion and expression). Since the ICCPR as interpreted by the Human Rights Committee defines these rights as non-derogable rights, an understanding of the Constitution in light of Article 13(2) puts them in the same category. That is to say, the Council of Ministers cannot suspend Articles 15, 21, 22, 24(3), 27 and 29 of the Constitution during a state of emergency. Of course, there is nothing in the Constitution that expressly authorise the Council of Minister to suspend these provisions. The Council of Minister may make reference to the ICCPR which is a domestic law according to Article 9(4). Here, it will find a proscription that rights guaranteed under these provisions cannot be suspended during a state of emergency.

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72. Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant, First periodic report of States parties: Ethiopia*, CCPR/C/ETH/1, 22 October 2009.

73. *Id.*, para 32.

74. *Id.*, para 31.

Interestingly, constitutions of regional states provides for additional non-derogable rights. The executives of regional states cannot suspend right to life, right to security of person, right to be recognised as a person, right of prisoners to be treated with dignity, and freedom of religion during a state of emergency declared by regional states.[75] Almost all constitutions of regional states provides for wider list of non-derogable rights than the Federal Constitution. Thus, regional constitutions are additional domestic law showing that the list of non-derogable rights in Ethiopia is more rights than those listed under Article 93(4)(c) of the Constitution.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), albeit adopted at the same time with the ICCPR, does not contain a derogation clause.[76] That may raise an assumption that it is not necessary to suspend economic, social and cultural rights during a state of emergency. The implication is that states including Ethiopia cannot suspend them by reading a derogation clause into the ICESCR where none exists.

The Constitution provides for economic social and cultural rights framed in terms of state duties instead of individual entitlements. These rights are guaranteed under Article 34 (marital, personal and family rights), Article 41 (economic, social and cultural rights) and Article 42 (labour rights). Compared to its predecessors, the 1987 Constitution, the (1995) Constitution is a normative regression. Framed in individual entitlement, the 1987 Constitution provides for right to work, right to free education, and right to health care of all Ethiopians.[77] The (1995) Constitution only

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75. *See* REVISED CONSTITUTION OF AFAR STATE (2001), Art. 106(4); THE REVISED CONSTITUTION OF THE AMHARA NATIONAL REGIONAL STATE, Proclamation No. 59/2001, ZIKRE HIG OF THE COUNCIL OF THE AMHARA NATIONAL REGIONAL STATE, 7th year No. 2, 5 November 2001, Bahir Dar, Art. 114(4); REVISED CONSTITUTION, 2001, OF THE SOUTHERN NATIONS, NATIONALITIES AND PEOPLES REGIONAL STATE CONSTITUTION, Proclamation No. 35/2001, Art. 121(4); THE REVISED CONSTITUTION OF BENSHANGUL-GUMUZ STATE, 2002, Art. 115(4); THE REVISED CONSTITUTION OF GAMBELA PEOPLES' REGIONAL STATE, Proclamation No. 27/2002, Art. 117(4); THE REVISED CONSTITUTION OF OROMIA NATIONAL REGIONAL STATE, Proclamation No. 46/2001, Art. 108(4), THE REVISED CONSTITUTION OF SOMALI NATIONAL REGIONAL STATE, 2002, Art. 105(4); THE REVISED CONSTITUTION OF HARARI NATIONAL REGIONAL STATE, 2004, Art. 76(4).

76. ICESCR, Ethiopia ratified it on 11 June 1993. *See* United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en accessed on 13 November 2012.

77. FDRE CONSTITUTION, Arts. 38, 40 & 42.

acknowledges obligation of the state "to allocate ever increasing resources to provide [...] health, education and other social services" to the people.[78] Be that as it may, an understanding of the Constitution in light of the ICESCR denotes that the Council of Ministers cannot suspend Articles 34, 41 and 42 of the Constitution during a state of emergency.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[79] like ICESCR does not contain a derogation clause. The Committee that supervise the implementation of CEDAW clearly held that 'obligations of States parties do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters.'[80] Similarly, the rights of women under Article 35 of the Constitution cannot be suspended during a state of emergency.

The Convention on the Rights of the Child (CRC)[81] has no derogation clause, too. That means, the rights of children are non-derogable. An understanding of Article 36 (rights of children) of the Constitution in light of the CRC would mean that these rights cannot be suspended even during a state of emergency. Although the case does not involve derogation issue, the Federal Supreme Court has invoked the CRC as part of the domestic law in *Tsedale Demissie v Kifle Demissie.* [82]

The African Charter on Human and Peoples' Rights (African Charter) is the main human rights instrument of the African Union.[83] The African

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78. *Id*., Art. 41(4).

79. *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature in New York on 18 December 1979 and entered into force on 3 September 1981. Ethiopia signed and ratified CEDAW on 10 July 1980 and 10 September 1981 respectively. *See* United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en accessed on 13 November 2012.

80. Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under Art. 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, para 11.

81. *Convention on the Rights of the Child*, adopted in New York on 20 November 1989 and entered into force on 2 September 1990. Ethiopia ratified the CRC on 14 May 1991. *See* United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed on 13 November 2012).

82. *Tsedale Demissie v Kifle Demissie*, File No. 23632, decided on 26 Tekemt 2000 E.C, Fed. Sup. Ct., Cass. Div. Jud., Vol. 5, at 189.

83. *African Charter*, Ethiopia acceded to the African Charter on 15 June 1998. *See* OAU/AU Treaties, Conventions, Protocols and Charters at http://www.au.int/en/treaties (accessed on 13 November 2012).

Commission on Human and Peoples' Rights (African Commission), a quasi-judicial organ, monitors the implementation of the African Charter.[84] The Charter is silent on a state of emergency and subsequent suspension of human and peoples' rights. In dealing with individual communications, the African Commission exercised its mandate of interpreting the African Charter and held consistently that derogations from Charter rights are prohibited.[85]

In *Commission Nationale des Droits de l'Homme et des Libertés v. Chad,* the African Commission considered a communication in which the defendant state invoked civil war in its territory as a defence.[86] In *Article 19 v. Eritrea*, the African Commission dealt with the Eritrea's argument that it can suspend Charter rights during war where its existence is threatened.[87] The holding of the Commission is the same in both communications. States cannot invoke "existence of war, international or civil, or other emergency situation" within their territory to defend violation of any right guaranteed in the Charter.[88] The African Commission confirmed similar position in other communications.[89] Therefore, the African Commission "elevated all Charter rights to the level of regional *jus cogens*."[90]

In *Jawara v The Gambia*, the African Commission dealt with a communication alleging violation of the African Charter as a result of suspending the whole bill of rights in the Constitution following a *coup d'état*.[91] The Commission examined the implication of suspending

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84. AFRICAN CHARTER, Art. 45.

85. *Id.*, Art. 45(3).

86. *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995), para 19.

87. *Article 19 v Eritrea*, African Commission on Human and Peoples' Rights, Communication No. 275/2003, AHRLR 73 (ACHPR 2007), para 87.

88. *Id.*, para 98-99.

89. *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 84; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 67; *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 41; *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), 42; *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), para 165 & 167; Communication 250/2002, *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, Seventeenth Activity Report 2003–2004, Annex VII, para 60.

90. FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA, at 252 (2007).

91. *Jawara v The Gambia* (2000), AHRLR 107 (ACHPR 2000), para 48-50.

constitutional rights under the African Charter and concluded that suspending bill of rights in the Constitution amounts to violation of Articles 1 and 2 of the African Charter.[92]

Therefore, an organ interpreting chapter three of the Constitution according to the African Charter reaches two conclusions. First, all rights guaranteed under chapter three of the Constitution cannot be suspended during a state of emergency. Besides, the African Charter forms part of the domestic law. Second, suspension of the rights under chapter three implies that Ethiopia violates its international obligation under the African Charter.

IV. CRITIQUE OF THE COUNCIL'S DECISION

As an organ with the power to recommend interpretation of the Constitution to House of Federation, it is reasonable to expect the Council of Constitutional Inquiry (the Council) to provide exposition of constitutional provisions. In *CUD v Prime Minister Meles Zenawi Asres*, the Council did not make a detailed analysis of constitutional provisions invoked in the case. Rather, it erred in a number of instances.

First, the Council followed an incorrect step to reach its conclusion. The Council should have ascertained the meaning, nature and scope of the right that was alleged to have been infringed. It should have defined the content of freedom of assembly, demonstration and petition before it proceeded to its limitation. To do so, the Council should have referred to international human rights law as required by Article 13(2) of the Constitution and Article 20(2) of the Council of Constitutional Inquiry Proclamation.[93] Given that limitation is an infringement of the right, it would be erroneous to reach a conclusion before ascertaining the content of the right in question.

Second, the Council confused limitation on fundamental rights and freedoms with their suspension during a state of emergency. It wrongly assumed a complete suspension of constitutional rights as their limitation. Limitation on fundamental rights as discussed above does not justify

92. *Id.*

93. *Council of Constitutional Inquiry Proc.*

suspension of fundamental rights and freedoms no matter how short the period is. However, the Prime Minister's ban on right of assembly, demonstration and petition completely suspended the right. Besides, limitations are usually a permanent restriction while the Prime Minister's ban was temporary since it was imposed only for one month. Such ban would have been denoted more appropriately as suspension of (derogation from) fundamental rights and freedoms.[94]

The conclusion that the Prime Minister made suspension of rights during a state of emergency presupposes other premises. The decree of the Prime Minister must comply with procedural and substantive requirements laid down in the Constitution. To begin with procedural requirements, a state of emergency must be declared by the Council of Minister and approved by the House of Peoples' Representatives. Then the question is: does the Prime Minister's decree amount to declaration of a state of emergency? Of course, it is the power of the Council of Ministers to declare a state of emergency subject to approval by the House of Peoples' Representatives. The Council of Ministers speaks through its chairperson, the Prime Minister. When it makes regulations, for example, it is the Prime Minister that signs them, not every member of the Council. Thus, the decree of the Prime Minister is presumed to be the declaration of the Council of Ministers in the absence of contrary proof.

Unfortunately, the Court and the Council of Constitutional Inquiry did not call the defendant for defence. Since the Prime Minister issued the decree as head of the government, the Ministry of Justice as the legal representative of the government or legal advisor of the Prime Minister could have been called to defend the suit. It was not necessary to call the Prime Minister to appear before the court in person. Had the Court or the Council called the defendant, it would have been highly probable that the defendant would have raised the suspension power under Article 93. The Court did not seem to have the courage to call the defendant. As Getachew observed the Court was in a hurry to send the case for interpretation and get out of the political flame.[95]

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94. *See* Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)*, 1 MIZAN L. REV. 1, at 17 (2007).

95. Getachew Assefa, *supra* note 2.

The House of Peoples' Representatives was in session when the decree was issued on *Ginbot* 7 because the House recesses "in the month of *Yekatit* as well as from *Hamle* (1) up to the last Sunday of *Meskerem* each year."[96] The decree must have been presented to the House within 48 hours for approval. As the plaintiff did not challenge the constitutionality of the decree on this point, it is not clear from the record whether the decree was sent to the House for approval. Assuming that the case was not sent to the House for approval, would that make a state of emergency non-existent? Legally speaking, the answer is positive. No state of emergency exists for more than two days without the approval of the House when it is in session. But lack of legal life does not erase the facts on the ground. Thus, the situation can be described as a *de facto* state of emergency.

Even if the decree was presented to the House for approval, it would not have passed the substantive constitutional requirements that a state of emergency is declared only on four grounds (assuming that the House is not a rubber stamp).[97] The decree was based on the ground that there was a looming threat to law and order. Its purpose was to make the process of counting and announcing results of election peaceful and avoid post election disorder. Does this amount to "a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel" within the meaning of Article 93(1)(a)? The textual reading of the Constitution clearly requires an *ex post* declaration of a state of emergency. But the decree was an *ex ante* declaration as a breakdown of law and order did not occur at the time of the declaration. Rather, there was a threat of breakdown of law and order and the decree was made to avoid a future danger.

Although not clear from the Constitution, a formal requirement of an emergency decree may call for a passing comment. Can declaration of a state of emergency be made orally? The Constitution does not require the Council of Minister to make its decree in writing and publish it in the Federal Negarit Gazeta. In the absence of such formal requirements the Council of Ministers has the discretion to choose the means of

96. FDRE CONSTITUTION, Art. 58(2); the *House of Peoples' Representatives of The Federal Democratic Republic of Ethiopia Rules of Procedures and Members' Code of Conduct* Regulation No. 3/1998, Art. 24(1).

97. FDRE CONSTITUTION, Art. 93(1)(a).

communicating its decree to the general public. In this case, the Council of Ministers through its chairperson chose an oral decree that was published in *Addis Zemen*, a news paper that has wider circulation than the Federal Negarit Gazeta.

Third, it is conspicuously clear from the Council's holding that it did not consider the matter meticulously. If the Council based its decision on specific limitation clause under Article 30(1), it should have decided two important issues:

a) Whether the Prime Minister's decree falls within the meaning of "appropriate regulation."

b) Whether the decree was made for the aim enumerated under Article 30(1).

Regulation of the right of assembly, demonstration and petition as discussed above should be provided by law which may include proclamations, regulations or directives. However, the Prime Minister's decree was a notice to the general public in the form of a press release than rules made to regulate constitutional rights because it was a declaration orally made through mass media and reported by print media, *Addis Zemen*. Thus, it would have been difficult for the Council to find the Prime Minister's decree as an "appropriate regulation" within the meaning of Article 30(1).

Regulations restricting rights guaranteed under Article 30(1), albeit appropriate, should address aims enumerated thereunder as discussed above. In other words, the Council should have considered whether the Prime Minister's decree was made to ensure public convenience, to protect democratic rights, public morality or peace. It could have made an argument that the decree was issued to protect public peace. But the effect of the decree and its appropriateness militates against this argument.

Fourth, the Council erred in justifying what it called 'limitation' on right of assembly, demonstration and petition. The Council did not find the decree in violation of the Constitution since the Prime Minister is the supreme executive organ vested with wide power. Here, the Council seems to confuse "wide power" with "absolute power." The Prime Minister does not have absolute power. One of the purposes of entrenching fundamental rights and freedoms in the Constitution is to limit power of the government including power of the Prime Minister. Having wide power does not entitle

a state official to encroach on fundamental rights and freedoms unless such official wants to be above the supreme law of the land.

Finally, the Council's decision that there was no need of constitutional interpretation is erroneous. If the Council interpreted fundamental rights and freedoms in conformity with the international human rights law, it would have found the constitutional provision authorising the Council of Minister to suspend "political and democratic rights" inconsistent with international human rights law.[98] In resolving the inconsistency, the Council could have adopted one of the arguments on the hierarchy of international human rights treaties in domestic laws.[99] Obviously, prohibition of suspension advances respect for human rights and the Constitution should conform to international human rights law. Therefore, the Council should have recommended to the House of Federation that derogation from fundamental rights and freedoms is prohibited under the Constitution.

V. CONCLUSION

In the CUD Case, the Council of Constitutional Inquiry considered constitutionality of a decree suspending right of assembly, demonstration and petition for one month. The Council mistakenly assumed as a limitation on right of assembly, demonstration and petition what should have been regarded as derogation therefrom. It did not properly analyse the provision of Article 30 to test the decree against the essential elements of the limitation clause provided in that provisions. Instead, it gave a wrong justification for consistency of the decree with the Constitution.

Moreover, the decision of the Council was very brief and lacked explanation of constitutional provisions and other relevant principles. The decision of the Council was not based on appropriate research. It should have done some research and at least see how similar issues were resolved

98. *Id.*, Art. 93(4)(b).

99. For the arguments on the hierarchy of international human rights treaties. *See* Takele Soboka Bulto, *The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human rights Treaties under the Ethiopian Constitution* 132, 23 (1) J. ETH. L. *(*2009); Ibrahim Idris, *The Place of International Human Rights Convention in the 1994 Federal Democratic Republic of Ethiopia (FDRE)Constitution* 113, 20 J. ETH. L. 2000.

in other jurisdictions. Given the requirement of Article 13(2), the Council should have resorted to international human rights instruments for reference. The jurisprudence of organs monitoring these instruments such as decisions of the United Nations Human Rights Committee and the African Commission on Human and Peoples Rights would have been of great help in understanding a nature of limitation and their difference from suspension. The Council missed the opportunity to lay down tests of limitations for future references.

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THE JUSTICIABILITY AND ENFORCEMENT OF THE RIGHT TO HEALTH UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

Bahar Jibriel [*]

Abstract

The right to health is a fundamental human right which is recognized in international and regional human rights systems. The African Human Rights System is also duly recognized the right to health. Although recognizing the right in the human rights instrument is important, the meaningful protection of the right needs appropriate and consistent interpretation and adequate implementation mechanisms. Thus, this article tries to scrutinize the Justiciability and Enforcement of the right to health in the African Human Rights System. Based on analysis of relevant African Human Rights Instruments, literatures and cases of African Commission, it argued that the Justiciability of the right to health in African Human Rights System is upheld. Regarding its enforcement, the article argued that there are relevant institutional frameworks in African Human Rights System and African Political Architecture. Hence, the enforcement of the right to health falls squarely in most of these institutions' mandate.

Keywords: *Africa, African Commission, Banjul Charter, enforcement, justiciability, Ogoni Case, Right to Health.*

I. INTRODUCTION

The right to health is a fundamental human right which encompasses the right to access healthcare and underlying determinants of health. It is recognized in international and regional human rights systems. There are plethoras of international human rights instruments that have recognized

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the right to health. Just to mention the major ones: Article 25 of the Universal Declaration of Human Rights (UDHR),[1] Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[2] Article 5 of the international Convention on the elimination of all forms of Racial Discrimination (CERD),[3] Article 12 of the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),[4] and Article 24 of the Convention on the Rights of Child (CRC).[5] It is also recognized in the African human rights system. For example, Article 16 of the African Charter on Human and Peoples' Rights (Banjul Charter),[6] Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women Protocol)[7] and Article 14 of the African Charter on the Rights and Welfare of the Child (Children Rights Charter) have enshrined the right to health.[8]

Although recognizing the right in the human rights instruments is important, the meaningful protection of the right needs appropriate and consistent interpretation and adequate implementation mechanisms. This article tries to scrutinize the justiciability and enforcement of the right to health in the African human rights system. It tries to shed light on the extent of justiciability of the right to health in African human rights system,

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1. *The Universal Declaration of Human Rights* (hereafter UDHR) GA Res 217(III) of 10 December 1948, UN Doc A/810.

2. *The International Covenant on Economic, Social and Cultural Rights* (hereafter ICESCR) adopted and opened for signature by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force on 3 January 1976.

3. *The International Convention on the Elimination of all forms of Racial Discrimination* (hereafter CERD) adopted and opened for signature by General Assembly resolution 2106 A (XX) of 21 December 1965 entered into force on 4 January 1969.

4. *The Convention on the Elimination of all forms of Discrimination Against Women* (hereafter CEDAW) adopted and opened for signature by General Assembly resolution 34/180 of 18 December 1979 entered into force on 3 September 1981.

5. *The International Convention on the Rights of Child* (hereafter CRC) adopted in 1989 and opened for signature by General Assembly resolution 44/25 of 20 November 1989 entered into force on 2 September 1990.

6. *The African Charter on Human and Peoples' Rights* (hereafter Banjul Charter) 1 adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

7. *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (hereafter the Women Protocol) adopted in 2003.

8. *The African Charter on the Rights and Welfare of the Child* (hereafter Children Rights Charter) adopted in 1990 OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

the content of this right and the corresponding state obligation by analyzing African Commission on Human and Peoples' Rights (hereafter the Commission) cases. Moreover, it will assess the institutional framework available within the African human rights system and political architecture which in one way or another have mandate to enforce the right to health.

This article has three main sections. Following this short introduction, the right to health in international and African regional human rights system will be discussed. In connection, the nature and content of states obligation under the right to health in African human rights system will be elaborated. The second section deals with the justiciability of the right to health in the African human rights system. A particular focus is given to how the Commission has approached the content of the right to health and the corresponding states' obligation through its cases. The last section deals with the enforcement of the right to health in the African human rights system where the mandate of African human rights bodies and political frameworks is briefly reviewed before some conclusion is drawn from the discussion.

Before I proceed two caveats are in order. First, the article does not purport to give exhaustive discussion of all issues with regard to the justiciability and enforcement of the right to health in African human rights system. For example, the article does not directly deal with issues such as: the obligation of Non-State Actors under the right to health, the link between health and environment, and limitation on the right to health and derogation from the same. It also does not provide discussion regarding enforcement and follow ups of the Commission's decision. Second, while reviewing domestic cases (jurisprudence) of African countries would have contributed a lot in elaborating issue of justiciability and enforcement of the right to health in Africa, regrettably, that is not made in this article.

II. The Right to Health in International and Regional Human Rights Instruments

A. The Right to Health in International Human Rights Instruments

Normatively, the right to health is recognized under numerous international and regional human rights instruments. The UDHR is the first international human rights instrument which has enshrined the right to health. Accordingly, Article 25 of the UDHR provides that "[e]veryone has

the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services."[9] The ICESCR also offers the most comprehensive article on the right to health in international human rights law. Article 12 of the same provides that "[s]tates parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[10] Apart from these, the right to health is also recognized in article 5 of the CERD, in Articles 11.1 (f) and 12 of the CEDAW and in Article 24 of the CRC.

The United Nations (UN) Committee on International Covenant on Economic Social and Cultural Rights (ICESCR) has interpreted the right to health in its General Comment 14, as inclusive fundamental human rights which include not only the right to access health care but also "the right to the underlying determinants of health."[11] The latter includes "access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."[12] It also encompasses "the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference," and finally the entitlements to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.[13]

The right to health is also recognized in several regional human rights instruments, namely the Revised European Social Charter[14] and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.[15] In a similar vein, the right

9. Art. 25 of UDHR.

10. Art. 12(1) of ICESCR.

11. UN Office of the High Commissioner for Human Rights, *ICESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),* adopted by UN Committee on ICESCR in 2000 UN doc. E/C.12/2000/4 (here after General Comment 14), para.11.

12. *Id*.

13. *Id*. at para. 8.

14. Art. 11 of the *Revised European Social Charter* adopted in 1996.

15. Art. 10 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (San Salvador Protocol) adopted in 1988.

to health has been proclaimed in certain soft laws such as WHO Constitution,[16] the Alma-Ata Declaration,[17] Vienna Declaration and Programme of Action of 1993.[18]

The above paragraphs showed that the right to health is duly recognized in international and regional human rights instruments. Having said these, let us look at the right to health in the African human rights system in depth in the following section.

B. The Right to Health in African Regional Human Rights System

The African human rights system is credited for integrating Civil and Political rights with Economic, Social and Cultural (ESC) rights in its normative frameworks unlike its regional and international counterparts.[19] The ESC rights are enshrined alongside the Civil and Political rights in African regional human rights instruments.[20] Further, the preamble of Banjul Charter provides that civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality.[21] The right to health is among those ESC rights mentioned by name in the African regional human rights instruments, like Banjul Charter,[22] the Women Protocol,[23] and the Children Rights.[24]

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16. WHO, *Constitution of the World Health Organization* adopted in 1946 (entered into force 7 April 1948), preamble. The preamble provides the holistic definition of health stating that" health is state of complete physical, mental and social well being and not merely the absence of disease or infirmity."

17. *Declaration of Alma-Ata*, International Conference on Primary Health Care, Alma-Ata, USSR, September 1978.

18. *Vienna Declaration and Programme of Action*, World Conference on Human Rights, U.N. Doc. A/CONF.157/23 (1993), part I &. 5.

19. *See* FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA (Oxford University Press, Oxford, 2007), at 237.

20. Not only in the Banjul Charter, perhaps the founding instrument of African Human Rights System, the ESC rights are recognized alongside Civil and Political in Children's Rights Charter and Women's Protocol as well.

21. *See* preamble of Banjul Charter.

22. Art. 16 (1) of *Banjul Charter.*

23. Art. 14. of *Women Protocol.*

24. Art. 14 of *Children's Rights Charter*.

In accordance with Article 16(1) of Banjul Charter, "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health." This is similar with Article 12 (1) of ICESCR which reads as "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Furthermore, the Banjul Charter provides that "[s]tates parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."[25] It purports to elaborate state obligation with regard to realizing the right to health. Accordingly, states parties are duty bound to take preventive and curative measures to realize the right to health to its people.

The right to health is also recognized under African Children's Rights Charter. Accordingly, Article 14 (1) states that "[e]very child shall have the right to enjoy the best attainable state of physical, mental and spiritual health." The Children's Rights Charter has brought social element of the right to health on board. This is in line with the Constitution of WHO which defines health as "complete physical, mental and social well being."[26] In other words, the spiritual health phrases mentioned under Children's Rights Charter would fit into social well being aspect of health stated under the WHO Constitution. In terms of states obligation, the Children's Rights Charter elaborated obligations more clearly and concretely than the Banjul Charter.[27] It provides specific measures that states have to take to pursue the full implementation of children's right to health such as: reducing infant and child mortality rate; ensuring the provision of primary health care; ensuring the provision of adequate nutrition and safe drinking water; and so forth.[28]

Moreover, the right to health has also been proclaimed under Article 14 of Women's Protocol.[29] The Protocol has provided for women's right to sexual and reproductive health which includes: the right to control their

25. Art. 16(2) of *Banjul Charter*.

26. *WHO Constitution*, *supra* note 16.

27. Art. 14(2) of *Children's Rights Charter*.

28. *Id*. Art. 14.

29. The right to health of women is also implied in Art.15 (right to food security), Art.16 (the right to adequate housing), and Art.18 (the right to a healthy and sustainable environment) of *Women's Protocol*.

fertility, the right to decide on numbers and spacing of children, the right to choose any method of contraception, the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS, and the right to have family planning education.[30] Interestingly, it has allowed medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the health or life of the mother or the fetus.[31] In terms of obligation, it stipulates that state parties shall take measures to provide adequate, affordable and accessible health services, to establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services during pregnancy, authorizing medical abortion in cases mentioned above.[32]

Interestingly, the right to health is also closely related with other human rights such as the right to a healthy environment, the right to food, the right to adequate housing, the right to safe drinking water, the right to education, work and so forth. Needless to say, that is why the indivisibility, interdependence and interrelatedness of human rights have been reaffirmed under Vienna Declaration.[33] As the Committee on the ICESCR correctly noted, the right to health is closely related to and dependent upon the realization of other human rights.[34] Considering the right to health as not only the right to health care services, goods and facilities, but also the right to underlying determinants of health is clear indication of the fact that the right to health is dependent on, and contributes to, the realization of other

30. *See Women's Protocol* Art. 14(1) (a-g).

31. *See* Charles G. Ngwena, *Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa*, 32 HUMAN RIGHTS QUARTERLY, 783-864 (2010).

32. The Women's Protocol also imposes other obligations apart from those laid down under Art. 14. These are the obligation to: prohibit harmful practices which endanger the health and general well being of women (Art. 2(1) (b)); prohibit all medical or scientific experiments on women without their informed consent (Art. 4(2)); eliminate Female Genital Mutilation and other harmful practices (Art. 5(b)); and provide basic health services to the victims of harmful practices (Art. 5(c)) guarantee adequate and paid pre-and post-natal maternity leave for women(Art. 13(i)). Moreover, it calls up on states parties to reduce military expenditure in favor of spending on social development (which includes heath systems) (Art. 10 (3)).

33. *Vienna Declaration*, *supra* not 18.

34. *General Comment 14*, *supra* note 11, para. 3.

human rights.[35] Thus, the right to health should be read with these rights and freedoms instead of narrowly and separately interpreting it textually.

C. State Obligations under the Right to Health

1. Duty to Respect, Protect and Fulfill the right to health

As the case for other rights, the right to health imposes what is now known as the tripartite typology of human rights obligation on states parties, that is, the obligations to respect, protect and fulfill.[36] Accordingly, the obligation to respect, as a negative obligation, requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health.[37] This, among others, entails obligation to refrain from "carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual."[38] On the other hand, the obligation to protect requires States to take measures that prevent third parties from interfering with the enjoyment of the right to health.[39] Finally, the obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.[40] In a similar vein, the Commission has summarized the positive obligations, i.e. obligation to protect and fulfill, expected of states parties to comply with the right to health and a healthy environment in Ogoni case as:

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35. *Id. See also* Office of the United Nations High Commissioner for Human Rights, FACT SHEET 31, THE RIGHT TO HEALTH, available at http://www.ohchr.org (accessed on 1 February 2011).

36. *See also* ASBJØRN EDIE, ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS, IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXT BOOK, at 23 (Asbjørn Eide et al., eds., 2001), and *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 6 (1997). For the discussion of tripartite states obligation on the right to health; *see General Comment 14*, *supra* note 11, para. 33.

37. *Id*.

38. *See Communication 155/96, Social and Economic Rights Action Center and Another v Nigeria (2001) AHRLR* 60 (ACHPR 2001) (15th Activity Report) (Ogoni Case) para. 52.

39. *General Comment 14*, *supra* note 11, para.33.

40. *Id*.

> the obligation to order independent scientific monitoring, requiring and publicizing environmental and social impact studies, undertaking appropriate monitoring and providing information to those affected by environmental hazardous and to provide the opportunity for individuals and communities to participate in development decisions affecting their communities.[41]

Hence, the right to health gives rise to both negative obligation to refrain from directly violating the right to health, and positive obligation to undertake to protect and fulfill the right to health care and the underlying determinants of health.

2. The Nature of States Obligation under African Human Rights System

Regarding the general nature of states legal obligation under African human rights system, the Banjul Charter provides that:

> [t]he Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.[42]

Apparently, the Banjul Charter does not provide for qualification of progressive realization and maximum available resources for the realization of ESC rights.[43] As a result, some authors argued that the ESC rights in the Banjul Charter have to be realized immediately.[44] The question is to what extent such argument is tenable in light of African countries economic reality and the very nature of ESC rights.

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41. *Ogoni Case, supra* note 38, para. 53.

42. *See* Art.1 of *Banjul Charter*. The Children's Rights Charter also provides similar general legal obligation under Art. 1(1).

43. Compare with Art. 2(1) of ICESCR; *See also General Comment 3, The Nature of States Parties Obligations,* (Art. 2, Para. 1 of the Covenant) UN Doc.E/1991/23.

44. Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights,* 23 HUMAN RIGHTS QUARTERLY, 349 (2001); and FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPARATIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA, (2003), at 201.

In response to this assertion, one would point out at least four reasons to belie the former argument. In the first place the economic realities of most of African states do not afford immediate realization of ESC rights. As Mbazira observed, considering the poor economic conditions and under development of most African states, it is difficult to expect that such economies to immediately overcome their structural problems and to marshal the resources necessary to provide for all socio-economic needs immediately.[45] In a similar fashion, Fatsah Ouguergouz notes that great majority of states parties lack the material resources enabling them to enforce ESC rights immediately.[46]

Secondly, maintaining the argument of immediate realization of ESC rights is at odds with the dynamic nature of standards of those rights. That is, to say, the full realizations are dynamic as they are defined by changing socioeconomic circumstances and establish shifting standards.[47] Another reason is that all major human rights instruments contain progressive realization qualification of enforcing ESC rights.[48] So the missing of progressive qualification from Banjul Charter is not justified by "Africannes."[49] It is also worth to mention that some African human rights

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45. Christopher Mbazira, *Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides*, 6 AHRLJ, 340 (2006).

46. OUGUERGOUZ, *supra* note 44, at 200-201. Mathew Craven also argues that ESC rights in African Charter are generally considered to be incapable of immediate implementation owing to the considerable expenses involved in their realization. MATHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT, (1995). M'baye also noted that the desire of minimalist approach "is not to overburden our young states" as quoted in VILJOEN, *supra* note 19, at 240. Thus, the drafters hardly envisaged the immediate realization of ESC rights which overburden the states.

47. Mbazira, *supra* note 45, at 341. During the drafting process of ICESCR, some have commented that the introduction of the word progressively introduced a dynamic element, indicating that no fixed goal had been set, and that the realization of those rights did not stop at a given level. CRAVEN, *supra* note 46, at 129.

48. All major human rights instruments relating to ESC rights provide for implementation in a piecemeal fashion, CRAVEN, *Id.*, at 130.

49. This refers to African conception (values) of human rights, for African values in African Human Rights System; *see* FRANS VILJOEN, THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM IN INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK, 518-519 (C Krause and M Scheinin eds., 2009).

instruments, namely, Women's Protocol and Children's Rights Charter provide for progressive realization of ESC rights.[50]

Finally, the immediate realization of civil and political rights, let alone ESC rights, itself is even debatable. For example some scholars have argued that the full realization of civil and political rights is dependent on availability of resources.[51]

Interestingly, as will shortly be shown below, the African Commission on Human and Peoples' Rights (the Commission) has interpreted that the qualification of available resource and progressive realization is implicit in the implementation of Charter's ESC Rights.[52] Furthermore, the Commission's reporting guidelines give some indication that ESC rights have to be realized progressively.[53] Here, it is suffice to note that the realism and weights of scholarly literatures and even approach of the Commission leans towards subjecting the realization of ESC rights, including the right to health, to progressive realization and available resources qualifications.

III. Justiciability of the Right to Health in African Human Rights System

In African human rights system, ESC rights including the right to health are made unequivocally justiciable as civil and political rights. This follows from the fact that the main human rights instruments have incorporated the ESC rights alongside the civil and political rights in one

50. C. HEYNS AND M. KILLANDER, THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM IN INTERNATIONAL HUMAN RIGHTS LAW IN A GLOBAL CONTEXT 864, (F.G. Isa and K. de Feyter eds., 2009). *See* for example Arts, 11(3) (b) (provides for making secondary education free progressively), 13(2) & (3) (provides for progressive realization of ESC rights of children with disability subject to available resource) of Children Rights Charter.

51. Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS QUARTERLY (1987), as quoted in Craven, supra note 48, at 130.

52. *See Communication 241/2001, Purohit and Moore v. The Gambia*, (2003), AHRLR 96(ACHPR 2003) (16th Activity Report) (Purohit Case), para. 84.

53. VILJOEN, *supra* note 19, at 240-241. He states that "for example states are required, even in respect of education which is framed without qualification, to report about measures for the progressive implementation of the principle of compulsory education free of charge."

document.[54] Further, the Commission confirmed unequivocally the justiciability of ESC rights in Ogoni Case underscoring that "there is no right in the African Charter that cannot be made effective."[55] Thus, as far as African human rights system is concerned, the cloud of suspicion regarding the justiciability of ESC rights has been cleared. It is in light of this understanding that the review of some of Commission's cases, where the right to health or certain aspect of it has been considered, will be made as follows.

So far, the violation of the right to health or some aspects of it has been alleged and the Commission has found violation in several cases, and few of them are discussed below. The selection of cases is, in fact, not exhaustive but rather illustrative of the justiciability of the right to health; and how the Commission has approached the right to health and corresponding states obligation.

A. *Free Legal Assistance Group v Zaire Case*

Communication 100/93 was submitted by the *Union Interafricaine des Droits de l'Homme* against Zaire alongside other communications alleging, among other things, that the mismanagement of public finances, the failure to provide basic services, and the shortage of medicines was a violation of the right to health.[56] In finding the violation of Article 16 of the Banjul Charter, the Commission has linked the failure to provide basic services such as safe drinking water, electricity, and shortage of medicine to the violation of the right to health.[57] In effect, the Commission held that the failure to provide basic health facilities constitutes the violation of state's

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54. *See generally Banjul Charter* and *Children's Rights Charter and Women's Protocol* (all of them provide both civil and political rights and ESC rights on equal footing). The preamble of Banjul Charter in particular provides that "… civil and political rights cannot be dissociated from economic, social and cultural rights in their conception …"; *See also* VILJOEN, *supra* note 19, at 237.

55. *Ogoni Case*, *supra* note 38, para. 68.

56. *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) (9th Activity Report).

57. *Id*., para. 47. One could read the Commission saying that the right to health gives rise to such rights as water and electricity; rights not expressly protected by the Charter. However, the scanty nature of the decision does not give chance for concrete imputation on the Commission of this position. Mbazira, *supra* note 45, at 345.

obligation imposed under the right to health which says that states parties should take the necessary measures to protect the health of their people.

B. *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*

The Communication against Nigeria was brought to the Commission on behalf of the Ogoni environmental activist and writer, Ken Saro-Wiwa.[58] The communication alleged a number of irregularities and human rights violations in Saro-Wiwa's detention and trial. Regarding the right to health, the communication alleged that while in detention, Saro-Wiwa had been severely beaten, and in spite of his high blood pressure, he had been denied access to medicine and a doctor.[59]

The Commission held that the responsibility of the state in respect of the right to health is heightened when a person is in detention as a person's integrity and wellbeing are completely dependent on the state.[60] The Commission has interpreted the denial of access to Saro-Wiwa (prisoner) to a qualified doctor and medicine as violation of the right to health enshrined under Article 16 of Banjul Charter.[61]

C. *The Mauritania Slavery Case*

The communication concerns the marginalization and human rights violations suffered by black Mauritanians following a *coup d'état* that took place in 1984, and which brought Colonel Maaouya Ould Sid Ahmed Taya to power.[62] The communication alleged, *inter alia*, that some detainees had been starved to death, left to die in severe weather without blankets or clothing, and were deprived of medical attention. The Commission decided that the starvation of prisoners, and denying them access to blankets, clothing, and healthcare violated Article 16 of the Banjul Charter and is

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58. *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria* (2000) AHRLR 212 (ACHPR 1998) (12th Activity Report).

59. *Id*., para. 2

60. *Id*., para. 112

61. *Id*.

62. *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) (13th Activity Report).

violations of the right to health.[63] Like in Saro-Wiwa case, the Commission has adopted the medicalized approach (the right to access health care) aspect of the right to health.[64] But later on, as shown in case of Darfur, it has expanded the realm of the right to health as encompassing both the right to access health care and the right to healthy condition.

D. *The Purohit Case*

The communication was brought before the Commission by two mental health advocates, Ms. H. Purohit and Mr. P. Moore, on behalf of existing and future mental patients detained under the Mental Health Acts of the Republic of the Gambia at its psychiatric unit.[65] The complainants alleged that the provisions of the Lunatic Detention Act of the Gambia and the manner in which mental patients were being treated amounted to a violation of various provisions of the Banjul Charter, including the right to health. The Commission, in finding the violation of the right to health, stated that the right to health includes "the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind."[66] The Commission further noted that mental health patients deserve special treatment because of their condition and by virtue of their disability.[67] Hence, the Commission held that the Lunatic Detention Act was deficient in terms of therapeutic objectives and provision of matching resources and programmes for the treatment of persons with mental disabilities.[68]

The Commission, cognizance of implication of resource constraints in interpreting the right to health, stated that:

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63. *Id*., at para. 122. Similar violation has been found in case of *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

64. Benjamin Mason Meier and Ashley M. Fox, *Development as Health: Employing the Collective Right to Development to Achieve the Goals of the Individual Right to Health*, 30 HUMAN RIGHTS QUARTERLY, 299 (2008).

65. *Purohit Case, supra* note 52. For review of Purohit case, see C Mbazira, *The right to health and the nature of socio-economic rights obligations under the African Charter The Purohit Case*, 6 ESR Review 15-18 (2005).

66. *Purohit Case, supra* note 52, para. 80.

67. *Id*., para. 81.

68. *Id*., para. 83.

> [M]illions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with problems of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full realization of this right.[69]

Thus, it is due to this depressing but real state of affairs that the Commission has read into Article 16 of the Banjul Charter and defined obligation of States party to the Banjul Charter "to take concrete and targeted steps, while taking full advantage of its available resources," to ensure that the right to health is fully realized in all its aspects without discrimination.[70]

In this case, the Commission has interpreted the right to health as the right to access health facilities, goods and services. It seems that the Commission has adopted the right to access health care aspect of the broader concept of the right to health in this case.[71] In addition, it has considered special measures that are necessitated for mental health patients due to their condition and disabilities.[72] Thus, states are duty bound to provide special measures to mental health patients in order to realize their right to health.

As argued in the preceding section, the realization of ESC rights in African human rights system are sought to be subject to available resources and progressive realization qualification. The Commission has reaffirmed this position in the present case. In other words, the Commission confirmed that the argument of immediate realization is not tenable at least as regards the right to health. Whether Purohit case can be taken as precedent regarding the nature of states' obligation as to the realization of ESC rights of the Charter: the authorities tend to differ. While some argue in favor of taking it as precedent with the

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69. *Id*., para. 84

70. *Id*.

71. The right to health has the right to health care and the right to underlying determinants of health aspects. *See General Comment 14*, *supra* note 11. The Commission has applied the latter aspect of the right to health in Darfur case.

72. In the words of the Commission the special measures are those "[w]hich would enable mental health patients not only attain but also to sustain their optimum level of independence and performance." *Purohit Case*, *supra* note 52, para. 81.

potential of being invokable in other cases of ESC rights,[73] others hold that this case is specific and as such fall short of setting precedent.[74] At any rate, as far as African reality is concerned, the progressive realization of ESC rights while making use of available resources maximally is inevitable.

E. *The Ogoni Case*

This communication was brought before African Commission by two nongovernmental organizations: the Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) against the government of Nigeria.[75] The complaint alleged, *inter alia*, that the military government of Nigeria had been directly involved in irresponsible oil development practices in the Ogoni region through the Nigerian National Petroleum Company in consortium with Shell Petroleum Development Corporation, and the operations produced contamination causing environmental degradation and health problems. In particular, the complaint alleged that the widespread contamination of soil, water and air; the destruction of homes; the burning of crops and killing of farm animals; and the climate of terror under which the Ogoni communities had been suffering resulted in violation of their rights to health, a healthy environment, housing and food (Articles 16 and 24 of the Banjul Charter).

In this case, the Commission has analyzed both the negative and positive obligations of states with regard to the right to health, and the right to a healthy environment. Accordingly, these rights impose negative obligation "to desist from directly threatening the health and environment of their citizens."[76] It also noted that the state is under an obligation "to refrain from carrying out, sponsoring or tolerating any practice, policy or

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73. *Mbazira, supra* note 65, at 17.

74. *Viljoen, supra* note 19, at 240.

75. *Ogoni Case, supra* note 38. For a review of Ogoni case, see *inter alia*, Dinah Shelton, *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria). Case No. ACHPR/ COMM/A044/1*, 96 THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 937 (2002); and Fons Coomans, *The Ogoni Case before the African Commission on Human and Peoples' Rights*, 52 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 749 (2003).

76. *Ogoni Case, supra* note 38, para. 52.

legal measures violating the integrity of the individuals."[77] The positive obligation under these rights includes:

> [O]rdering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[78]

In examining the conduct of Nigerian government in light of these obligations, the Commission held that the Nigerian government has failed to take necessary care required to comply with the provisions.[79] To make even matters worse, the government engaged in conduct of violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.[80] For these reasons, the Commission found the Nigerian government in violation of articles 16 and 24 of Banjul Charter.

F. *The Darfur Case*

This communication is consolidation of two communications brought by the Sudan Human Rights Organization and Others, and by the Center on Housing Rights and Evictions against the government of Sudan.[81] The communications alleged, *inter alia*, gross, massive and systematic violations of human rights by the Republic of Sudan against the indigenous black African tribes in the Darfur region. It further alleged that the

77. *Id*.

78. *Id*., para. 53.

79. *Id*., para. 54.

80. *Id*.

81. *Communications 279/2003 and 296/2005(joined), Sudan Human Rights Organization and Another v* Sudan (28th Activity Report, annex V) (Darfur Case).

government of Sudan, in addition to attacking rebel targets, has targeted the civilian population, raided and bombed villages, markets, and water wells by helicopter gunships and *antonov* airplanes. The complaints alleged in particular that the government of Sudan has violated the right to health (Article16 of Banjul Charter) by being complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning water wells and denying access to water sources in the Darfur region.

The Commission, in interpreting the right to health, noted that, "[i]n recent years, there have been considerable developments in international law with respect to the normative definition of the right to health, which includes both health care and healthy conditions."[82] The Commission stated that the violation of the right to health can occur through the direct action of states or other entities insufficiently regulated by states.[83] It further held that the failure of the government to provide basic services such as safe drinking water and electricity, and the shortage of medicine constitutes a violation of Article 16 of the Banjul Charter. Thus, it found that the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks, and amounts to a violation of Article 16 of the Banjul Charter.[84]

Here, the Commission has adopted comprehensive aspect of the right to health as including both the right to health care and healthy conditions. It has tried to catch up with the internationally evolving and developing concept of the right to health. In a similar vein, it has confirmed that the violation of the right to health could occur not only through the direct activity of the states but also by private entities insufficiently regulated by the states. More importantly, it has expanded the realm of the violation of the right to health to include cases such as destruction of homes, livestock and poisoning of water sources as well.

82. *Id*., para. 208.
83. *Id*., para. 210.
84. *Id*., para. 212.

IV. The Enforcement of the Right to Health in the African Human Rights System

The institutions in African human rights system and political frameworks have got in one way or the other human rights mandate which indeed encompasses the right to health.[85] To begin, the African Commission on Human and People's Rights (the Commission) has been given a clear mandate to promote and protect human rights including the right to health.[86] Consequently, as discussed in preceding section, so far the Commission has considered numerous communications whereby the right to health has been invoked; and found violations in majority of the cases. It has also recommended remedies states have to take to address alleged violation of rights.[87] Apart from this, the Commission is entrusted with mandate to undertake the review of periodic state reports on the implementation of the Banjul Charter.[88] Hence, it can enhance the enforcement of the right to health by reviewing measures taken in this regard and recommending further improvement needed by considering state reports.

The monitoring organ established to oversee the implementation of African Charter on Rights and Welfare of Child, the African Committee of Experts on Rights and Welfare of Child, is also in a position to monitor the enforcement of children's rights to health through states reporting, on-site visit and considering complaints.[89] In particular, the Committee is mandated to:

> [C]ollect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize

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85. For discussion on the institutions with human rights mandate and their functions in Africa, see, *inter alia*, RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION (2004); OUGUERGOUZ, *supra* note 44; HEYNS AND KILLANDER, supra note 50; VILJOEN, *supra* note 19; U.O. UMOZURIKE, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (1997); B Manby, *The African Union, NEPAD, and Human Rights: The Missing Agenda*, 26 HUMAN RIGHTS QUARTERLY, 983(2004); and A. Lloyd and R. Murray, *Institutions with Responsibility for Human Rights Protection under the African Union*, 48 JOURNAL OF AFRICAN LAW 165 (2004).

86. *See* Arts. 30 and 45 of *Banjul Charter*.

87. *See* for instance *Ogoni Case, supra* note 38 and *Purohit Case, supra* note 52.

88. Art. 62 of *Banjul Charter*.

89. *See* Arts. 32-45 of *Children's Rights Charter*.

> meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to governments.[90]

It is also entrusted to formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa.[91] Further, it is charged with task to "co-operate with other African, international and regional institutions and organizations concerned with the promotion and protection of the rights and welfare of the child" including the right to health of children.[92]

On the other hand, the judicial arm of African human rights system, the African Court on Human and Peoples' Rights, would reinforce the protection of the right to health, *inter alia*, by giving binding decisions and ordering wide array of remedies.[93] The court's establishment protocol specifically provides that when the Court finds violation of a human or peoples' right, it can make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.[94] Moreover, in cases of extreme gravity and urgency, and to avoid irreparable harm to persons, the Court is vested with the power to adopt provisional measures as it deems necessary.[95]

Apart from the proper regional human rights system, the right to health could be enforced by African Union's (AU) political architecture.[96] The most influential and relevant of these are: the Assembly, the Executive

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90. *Id*., Art. 42 (a)(i).

91. *Id*., Art. 42 (a)(ii).

92. *Id*., Art. 42 (a)(iii).

93. *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (adopted in 1998 and entered in to force in 2004). But there is ongoing process to merge the African Court on Human and Peoples' Rights with African Court of Justice. *See Protocol on the Statute of the African Court of Justice and Human Rights* (adopted on July 2008 and not yet in force). Viljoen, on his part, states that "the avoidance of duplication of labour and cost saving are the main reasons for considering merging of these two courts," VILJOEN, *supra* note 49, at 514.

94. Art. 27(1) of the *Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights*.

95. *Id*., Art. 27(2)

96. *See* VILJOEN, *supra* note 49, at 514-517.

Council, a Permanent Representatives Committee on Economic, Social and Cultural Council, and the Pan-African Parliament.[97] For instance, the Executive Council is mandated "to co-ordinate and take decisions on policies in areas of common interest to the member states," such as "environmental protection, humanitarian action and disaster response and relief; education, culture, health and human resources development"; and "social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped" which are relevant to realization of the right to health.[98] Further, among the Pan-African Parliament's objectives are to "promote the principles of human rights and democracy in Africa" and to "encourage good governance, transparency and accountability in Member States."[99] Though, there has been reportedly lack of coordination and integration between these bodies and human rights bodies,[100] the enforcement of the right to health would find itself in the mandate of these political organs as far as the corresponding political will and determination of member states is shown.

Finally, the New Partnership for African Development (NEPAD), the blue print for Africa's economic recovery,[101] through its peer review mechanism, i.e., the African Peer Review Mechanism (APRM), would enhance the realization of the right to health as well. Interestingly, the APRM integrates the political level of the AU/NEPAD in a way that other parts of the African human rights system have not done.[102] Further, it is worth to state that "NEPAD has been praised for attempting to look at development holistically, dealing with both political and economic issues."[103]

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97. Arts. 9, 13, 22 & 17 of the *Constitutive Act of the African Union* (adopted in 2000 and entered into force in 2001).

98. *Id*., Art.13 (1) (e), (h) & (k).

99. *Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament* (adopted in 2001 and entered to force in 2003), Arts.3 (2) and 3 (3).

100. *See* VILJOEN, *supra* note 49, at 514. Further some kin observers of human rights notes that the human rights organs are "… still geographically and otherwise isolated, separated from the other OAU (AU) organs and therefore with limited integration and co-ordination among them." Lloyd and Murray, *supra* note 85, at 183.

101. *See* VILJOEN, *supra* note 49, at 515.

102. HEYNS AND KILLANDER, *supra* note 50, at 892.

103. Lloyd and Murray, *supra* note 85, at 178.

V. Conclusion

The right to health is incorporated in major African human rights catalogues as a justiciable ESC rights. The major African human rights instruments have recognized the right to health and other ESC rights on equal footing with Civil and Political rights. Further, the African Commission on Human and Peoples' Rights has unequivocally proved the justiciability of ESC rights including the right to health in its jurisprudence. It has also emphatically confirmed in Ogoni Case that all rights in the Banjul Charter are justiciable. Thus, the progressive interpretation of the Commission as evidently reflected in groundbreaking Ogoni case, indeed, deserves due appreciation in crystallizing the justiciability of ESC rights including the right to health.

It is gatherable from the cases reviewed in this article that the Commission has expanded the conception of the right to health over time from narrowly defined health care aspect to include the right to underlying determinants of health. Similarly, the obligation of states parties is broadened as to including not only refraining from directly violating the right to health but also to regulate private entities to respect the right to health.

Interestingly, the issue of resource implication (i.e., the availability of resource) and progressive realization of the right to health has been dealt with as well. The Commission, as repeatedly argued in this article, confirmed obligation of progressive realization of the right to health while utilizing the available resources maximally.

Regarding the enforcement of the right to health in African human rights system, it is discussed that there are relevant institutional frameworks in African human rights system and political architecture. The enforcement of the right to health falls squarely in most of these institutions' mandate. Henceforth, the remaining issue is: strengthening coordination among these institutions on the one hand, and trying to generate political will and determination of African states on the other to see improved and sustained implementation of the right to health; and of course other human rights in Africa.

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FAMILY VIOLENCE AGAINST WOMEN: HOW DOES ETHIOPIAN LAW COMPARE WITH INTERNATIONAL DEFINITIONS?

*Mrs. Glory Nirmala K**

The family is often equated with a sanctuary - A place where individuals seek love, safety, security and shelter. But the evidence shows that it is also a place that imperils lives and breeds some of the most drastic forms of violence perpetrated against women and girls.

- UNICEF[1]

Abstract

With the recognition of family violence by the United Nations as a human rights abuse in the 1990s, the issue of family violence has achieved a much greater profile in terms of law and policy development in many countries. However, unfortunately, in Ethiopia so far no serious steps have been taken in this direction. The evidence of growing incidence of family violence against women in the country is a clear indication that the general Criminal Law provisions are failing to combat this social evil. In this background, this paper discusses the enormity of the problem of FVAW in

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1. UNICEF, INNOCENTI DIGEST, No. 6 June 2000, *Domestic Violence Against women and Girls*, at 3, available at http://www.unicef-irc.org/publications/pdf/digest6e.pdf (accessed on November 2, 2011). The INNOCENTI DIGEST is compiled by the UNICEF International Child Development Centre to provide reliable and easily accessed information on a critical children's rights concern. It is designed as a working tool for executive decision-makers, programme managers and other practitioners in child-related fields.

the Ethiopian society, shows the inadequacy of the relevant legal provisions under the Ethiopian laws in the light of the international legal instruments and special laws of prominent countries, and emphasizes on the immediate need for the enactment of special law to prevent family violence in Ethiopia.

Key words: *Family, definitions, inadequacies, special law, violence, women,*

I. INTRODUCTION

Safety and a sense of security is what everyone expects from a home. But for many women across the world, particularly Ethiopian women, home is actually a dangerous place. The harsh realities of today's families everywhere in the world demonstrate women being abused/killed by their husbands, girls being discriminated by their parents, women and girls being abused by other male members of the family, female fetuses being aborted and female infants being killed.

Family Violence Against Women (FVAW) and Intimate Partner Violence (IPV) are a subset of the larger body of Violence Against Women (VAW).[2] FVAW includes "threatened and actual use of physical, mental, psychological,"[3] emotional and economic abuse against women by her family members or other intimate partners.[4] Violence in the family is one social issue that is pervasive across all socioeconomic, racial, ethnic, gender, and age boundaries.[5] Specifically, Ethiopia is not an exception but one of the worst victims of the problem as "Ethiopia has one of the highest

2. *Women & Children Intellectual Enhancement Centre, available at* http://www.wocianigeria.org/resources-publications.htm. (accessed on May 12, 2012).

3. *Id.*

4. The United States Department of Justice, Office on Violence Against Women, *Domestic Violence, available at* http://www.ovw.usdoj.gov/domviolence.htm/ (accessed on Feb. 13, 2013).

5. KARL KURST-SWANGER, JACQUELINE L. PETCOSKY, VIOLENCE IN THE HOME: MULTIDISCIPLINARY PERSPECTIVES, at 3 (Oxford University Press 2003).

prevalence rates of both sexual and physical violence by an intimate partner."[6]

While all types of VAW in and outside a woman's home are serious violations of her dignity and safety, and even threaten her life, violence she encounters in her own home poses a serious question to her very existence in this world. Home is meant to be the place where one gets protection from all sorts of fear. Every home should be a safe place, every home a shelter. But, ironically, when abuse strikes, there is no home.

The recognition of family violence by the United Nations as a human rights abuse in the 1990s has meant that domestic violence has achieved a much greater profile in terms of law and policy development in many countries.[7] However, unfortunately, in Ethiopia so far no serious steps have been taken in this direction. Therefore, this paper intends to look into the enormity of the problem of FVAW in the Ethiopian society, shows the inadequacy of the legal protection for victims of FVAW under the Ethiopian laws, and emphasizes on the immediate need for the enactment of special laws to prevent this social evil. Before discussing the Ethiopian socio-legal scenario on the point, at the outset, the paper brings out the multiple dimensions of the problem of FVAW. A presentation of the nature and consequences of the problem and scope of the concept under the international documents as well as some of the national laws is included in the first part of this paper. This helps an understanding of the seriousness of the problem and how effective are the laws of the country to protect the women victims of family violence. Section II, discusses the meaning and scope of different expressions that are in use to denote violence within the family, the scope of FVAW and the effects of FVAW on women's emotional and physical health. Section III elaborates on the legal

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6. Yemane Berhane, *Ending Domestic Violence against Women in Ethiopia*, Editorial, 18 ETH. J. HEALTH DEV.*3*, at 131 (2004) (citing Gossaye Y, et al., *Butajira Rural Health Program: Women's life events study in rural Ethiopia,* ETH. J. HEALTH DEV. 2003.

7. *CEDAW General Recommendation No. 19: Violence against Women*, adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women, in 1992 (Contained in Document A/47/38), *available at* http://www.unhcr.org/refworld/docid/453882a422.html (accessed on Feb. 3, 2011). The United Nations Fourth World Conference on Women Beijing, China - September 1995, *Action for Equality, Development and Peace, PLATFORM FOR ACTION Human Rights of Women Diagnosis, Strategic objective I.1, available at* http://www.un.org/womenwatch/daw/beijing/platform/human.htm (accessed on Feb. 3, 2011).

definitions of FVAW. Finally, Section IV of the paper discusses the problem of FVAW in Ethiopia, the shortcomings of the existing general legal provisions and the obligation on the part of the State, being a party the Convention on the Elimination of all Forms of Discrimination against Women, to enact a special law to combat the problem.

II. FAMILY VIOLENCE AGAINST WOMEN: DEFINITIONS, SCOPE, AND CONSEQUENCES

Attacking the evil of family violence starts with a full understanding of the problem, the related terms and concepts, its harmful consequences and the efficacy of the legal protection available.

A. Definitions: "Domestic," "Family," and "Intimate"

Several expressions are in use worldwide to denote VAW within marital and other intimate relationships. The term "domestic" is a broad and general term and is used in different contexts; the term need not necessarily refer to the institution of family. And the terms like "spousal violence" and "intimate partner violence" are narrow terms referring to the behaviour between the spouses or live-in partners only. In the instances of incest, female genital mutilation and other harmful traditional practices, the perpetrators can be other than spouses. Therefore, the author considers the term "family violence" to be more appropriate to define the abusive behaviour in the institution of family. "Families are essentially about solidarities and these are created and pursued through blood ties, marriage and intimate relationships such as parent, child, grandparent and grandchild."[8]

The term family violence normally refers "to violence that takes place between immediate family members: husbands, wives, children, and parents."[9] However, the cultural and legal definitions of the institution of family are changing to include unions which cannot be strictly brought

8. LIND MCKIE, FAMILIES, VIOLENCE AND SOCIAL CHANGE, in Tim May (ed.), *Issues in Society Series*, at 14 (Open University Press, New York, 2005) (citation omitted).

9. OLA W. BARNETT ET AL., FAMILY VIOLENCE ACROSS THE LIFE SPAN: AN INTRODUCTION, at 22 (SAGE Publications, Inc., 3rd ed. 2011).

under the concept of traditional family.[10] Therefore, the discussion of family violence such as marital rape and wife beating inevitably includes the violence that happens "between unmarried intimates."[11] The term intimate in today's context refers to "anyone in a very close personal relationship,"[12] usually a sexual relationship including same-sex relationships.

The U.S. Bureau of Justice and the Centers for Disease Control and Prevention currently uses the term 'intimate partner violence' to refer to violence between spouses, ex-spouses, or separated spouses; between cohabiters or ex-cohabiters; between boyfriends or ex-boyfriends and girlfriends or ex-girlfriends; and between same-sex partners or ex-partners.[13] Therefore, though the terms intimate partner violence, wife battering, marital violence, domestic violence and family violence are being used interchangeably to denote a person's violent or abusive behavior with a partner married or unmarried, heterosexual or same sex, the author prefers to use the expression 'family violence' for the reasons explained at the beginning of this section.

B. Scope: Types of Family Violence Against Women

Various kinds of VAW are prevalent within the families all over the world. The type, frequency, and intensity of VAW in the family may differ from time to time, society to society, and family to family but it exists in most of the families. It is manifested in various ways throughout women's lives: right from the womb to the tomb.[14] During her childhood, a girl is

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10. *Id.* at 23.

11. *Id.*

12. *Id.*

13. *See* National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States*, Atlanta (GA): Centers for Disease Control and Prevention, 2003, *available at* http://www.cdc.gov/ncipc/pub-res/ipv_cost/ipvbook-final-feb18.pdf (accessed on Aug. 11, 2012).

14. The practice of sex-selective abortions is common in some Asian countries including China and India. But, it is also being practiced in the United States often by people who trace their ancestry to countries that commonly practice sex-selective abortions. *See Ban On Abortions for Sex Selection And Genetic Abnormalities-Model Legislation & Policy Guide For the 2011 Legislative Year*, Americans United For Life, Changing Law to Protect Human Life, State by State, *available at* http://www.aul.org/wp-content/

subjected to enforced malnutrition and deprivation of basic facilities in comparison with her male siblings and other male members of the family. In many cases, she does not get proper education or even adequate medical care. Like in many other countries, girls in Ethiopia are victimized to early marriage, incest, sexual abuse and even prostitution especially during their adolescence. Women in marriage and intimate relationships suffer wife battering and marital rape.

Family violence is a pattern of assaultive and coercive behaviors.[15] The assaultive and coercive behaviors are not restricted to any particular period of a woman's life. Physical, mental, and emotional violence are three major manifestations of family violence.[16] Acts that are directed against the body of the victim such as beating, rape, and murder, amount to physical violence.[17] Acts like destruction of property belonging to the victim, throwing objects around the victim, harming pets of the victim, and abusing her dependants are classed as indirect physical violence.[18]

It is quite possible to abuse someone without even touching the person physically. All those behaviors which can disturb a woman emotionally and psychologically, such as, insulting, intimidating, name calling, controlling behaviors, etc., fall under this category. The emotions[19] and psychology of a person are so strongly related to each other that most of the time they are

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uploads/2010/12/Sex-Selective-and-Genetic-Abnormality-Ban-2011-LG.pdf (accessed on Sept. 30, 2011).

15. LINDA G. MILLS, THE HEART OF INTIMATE ABUSE: NEW INTERVENTIONS IN CHILD WELFARE, CRIMINAL JUSTICE AND HEALTH SETTINGS, in SPRINGER SERIES ON FAMILY VIOLENCE, at 10 (Albert R. Roberts ed., Springer Publishing Company, Inc., New York, 1998).

16. Pierce county, *Domestic Violence and its effects*, April 21, 2010, *available at* http://www.allbestarticles.com/legal-informations/abuse/domestic-violence-and-its-effects.html (accessed on Sept. 30, 2011).

17. *Id.*

18. *Id.*

19. There are roughly nine so-called negative emotions: anger, fright, anxiety, guilt, shame, sadness, envy, jealousy, and disgust, each a product of a different set of troubled conditions of living, and each involving different harms or threats. And there are roughly four positive emotions: happiness, pride, relief, and love. To this list, we probably could add three more whose valence is equivocal or mixed: hope, compassion, and gratitude. R. S. Lazarus, *From Psychological Stress to the Emotions: A History of Changing Outlooks*, 44 ANNU. REV. PSYCHOL.1-21(1993), *available at* http://www.annualreviews.org/doi/pdf/10.1146/annurev.ps.44.020193.000245 (accessed on Feb. 25, 2012).

used interchangeably.[20] Psychological stress should be considered part of a larger topic, the emotions.[21] When the abuser's behavior triggers the negative emotions like anger, fright, anxiety, guilt, shame and sadness, it is "emotional abuse." Gradually, when such experiences become overwhelming, frightening and beyond the control of the victim, the situation leads to psychological trauma resulting in psychological abuse.[22] In short emotional disturbances lead to psychological consequences.

All abuse contains elements of emotional abuse.[23] Physical, sexual or financial abuses inevitably produce great fear, helpless anger and humiliation leading to mental agony, adversely affecting the victim's psychology. Therefore, no abuse can occur without emotional disturbance and psychological consequences.

"Psychological abuse is the systematic perpetration of malicious and explicit nonphysical acts against an intimate partner, child, or dependent adult."[24] Threat to the victim's physical health, her loved ones, and controlling her freedom can have the effect of isolating her and destabilizing her in her own home leading to psychological trauma.[25] Many researchers in the field of family violence argue that "psychological

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20. People have been attempting to understand this phenomenon for thousands of years, and will most likely debate for a thousand more. The mainstream definition of emotion refers to a feeling state involving thoughts, physiological changes, and an outward expression or behavior. For example, before you experience the emotion of 'fear', you hear footsteps behind you and you begin to tremble, your heart beats faster, and your breathing deepens. You notice these physiological changes and interpret them as your body's preparation for a fearful situation. You then experience fear. *See* Christopher L. Heffner, *Psychology 101, Chapter 7: Motivation and Emotions, Emotions*, (April 1, 2001), *available at* http://allpsych.com/psychology101/emotion.html (accessed on Feb. 25, 2012).

21. R. S. Lazarus, *supra note* 19.

22. Sometimes, the situation leads into complex psychological disorders like Post Traumatic Stress Disorder (PTSD), Royal College of Psychiatrists (RC PSYCH), UK, *available at* http://www.rcpsych.ac.uk/mentalhealthinfo/problems/ptsd/posttraumaticstress disorder.aspx (accessed on Feb. 13, 2013).

23. *Source: National Clearinghouse on Family Violence Information*, provided by the Women's Center Southern Connecticut State University, http://www.southernct.edu/ womenscenter/emotionalabuse/

24. National Coalition Against Domestic Violence, *Psychological Abuse*, (citations omitted) (hereinafter, NCADV), *available at* http://www.ncadv.org/files/PsychologicalAbuse.pdf.

25. *Id*.

violence may be the underpinning of all forms of domestic violence."[26] Often times, the physical or sexual abuse is preceded or accompanied by psychological abuse.[27] Psychological abuse increases the trauma of physical and sexual abuse.[28] In addition a number of studies have shown that psychological abuse by itself can cause long-term adverse affects to the victims' mental health.[29] National Coalition Against Domestic Violence study found that "95% of men who physically abuse their intimate partners also psychologically abuse them."[30]

In addition, harm caused as a result of practices condoned by the culture, religion or tradition of the victim/perpetrator can be referred to as cultural violence.[31] These practices include, broadly, female circumcision, rape-marriage, sexual slavery and honor crimes.[32] In addition to these, in the context of Ethiopia cultural violence includes endangering the lives of pregnant women and children through harmful traditional practices.[33] Interestingly, the Revised Criminal Code of Ethiopia, 2005 lists violence against a marriage partner or a person cohabiting in an irregular union under the Chapter entitled "Crimes Committed against Life, Person, and

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26. Daniel Jay Sonkin, *Defining Psychological Maltreatment in Domestic Violence Perpetrator Treatment Programs: Multiple Perspectives*, 2012, J. EMOTIONAL ABUSE, 2012 (forthcoming), *available at* http://www.danielsonkin.com/articles/PsychAb.html.

27. NCADV, *supra* note 24.

28. *Id.*

29. *Id*.

30. *Id.*

31. Violence Prevention Initiative, *Types of Violence and Abuse*, New Found Land and Labrador, CANADA, May 22, 2012. http://www.gov.nl.ca/VPI/types/index.html; Tina de Benedictis et al., *Domestic Violence and Abuse: Types, Signs, Symptoms, Causes, and Effects*, The American Academy of Experts in Traumatic Stress**,** *available at* http://www.aaets.org/article144.htm.

32. *Id*. "Honor" crimes and "honor" killings are a form of violence against women and girls. It is, according to Oxford Dictionary, the killing of a relative, especially a girl or woman, who is perceived to have brought dishonor on the family. A definition of "honor"-based violence should reflect three basic elements: 1) control over a woman's behavior; 2) a male's feeling of shame over his loss of control of the behavior, and; 3) community or familial involvement in augmenting and addressing this shame. *See* Baker et al., *Family Killing Fields: Honor Rationales in the Murder of Women in* VIOLENCE AGAINST WOMEN, ed., at 5, 1999 (as quoted in "Defining "honor" crimes and "honor" killings", by 'endvawnow.org'), *available at* http://www.endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html (accessed on Feb. 13, 2013).

33 THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Proclamation No. 414/2004, FED. NEGARIT GAZZETE, Year No, May 9, 2005 (hereafter CRIMINAL CODE OF ETHIOPIA), Arts. 561-570.

Health through Harmful Traditional Practices"[34] which leads to the understanding that wife beating is considered as cultural behavior..

Family violence is often not recognized by people who are not victims particularly if the violence is the more subtle psychological and emotional abuse. The victim woman herself may not recognize that what is happening is violence. Since, most women experiencing denial of financial freedom and emotional violence do not realize that they are being abused. It is sometimes difficult to identify that abuse is occurring,[35] because an abusive person may not always behave that way; sometimes he may be loving and kind. But if the victim often feels afraid of upsetting her partner, and needs to change what she does to avoid being abused, this can be taken as sign that there is abuse.[36]

C. Consequences: Effects of FVAW on Woman's Emotional and Physical Health

There are varied consequences of family violence depending on the victims' age group, the intensity of the violence, and frequency of the torment they are subjected to.[37] Living under a constant fear, threat and humiliation are some of the feelings developed in the minds of the victims as a consequence of an atrocious violence.[38] Family violence impacts on many people in all kinds of ways. It is not only the victim, but the other family members like children and even the whole community experiences the effects of family violence. Chronic health problems such as headaches and back pains can be the results of injuries, fear, and stress caused by intimate partner violence.[39] Fainting and seizures are some of the recurring

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34. CRIMINAL CODE OF ETHIOPIA, Book V, Chapter III, Art. 564.

35. The National Council of Single Mothers and their Children Incorporated (NCSMC), *Definition of Domestic* Violence, *available at* http://www.ncsmc.org.au/wsas/violence_and_abuse/definition_of_domestic_violence.htm.

36. *Id.*

37. Ankur Kumar, *Domestic Violence in India: Causes, Consequences and Remedies*, 2010, *available at* http://www.youthkiawaaz.com/2010/02/domestic-violence-in-india-causes-consequences-and-remedies-2.

38. *Id.*

39. *See generally* The National Institute of Mental Health, *What Parents Can Do*, *available at* http://www.nimh.nih.gov/health/publications/helping-children-and-adolescents-

symptoms of its impact on the central nervous system.[40] Interpersonal events like physical or sexual assault can lead to what is known as "Post-Traumatic Stress Disorder (PTSD)."[41] It is an anxiety disorder characterized by repeated nightmares of the event, emotional "numbing," (feeling as though you don't care about anything), tension, stress, dizziness, headaches, fainting etc.[42] "Some abused women try using drugs, alcohol, smoking, or overeating to cope, and all these can lead to greater physical and emotional problems."[43] According to a research study conducted in 2009, the physical violence by an intimate partner including emotional violence and spousal control of women are associated with depressive episode among women in rural Ethiopia.[44]

"Abused women experience conflicting emotions such as fear, anger, shame, resentment, sadness and powerlessness."[45] They live in constant fear that they may be attacked again. They also suffer from self-blaming.[46] They try to ignore their bitter experiences, hoping that it will not happen again.[47]

Family violence has huge financial costs too not only on the victims, their families as well as their organizations, if they are working women.[48]

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cope-with-violence-and-disasters-parents/helping-children-and-adolescents-cope-with-violence-and-disasters-what-parents-can-do.pdf.

40. Jacquelyn C. Campbell, *Health consequences of intimate partner violence,* Violence Against Women II, *available at* http://www.nnvawi.org/pdfs/alo/Campbell_1.pdf (accessed on Feb. 28, 2012) (citations omitted).

41. A.D.A.M. Medical Encyclopedia, *Post-traumatic stress disorder,* U.S. National Library of Medicine, Feb. 13, 2012, *available at* http://www.ncbi.nlm.nih.gov/pubmed health/PMH0001923/.

42. *Id.*

43. Violence Against Women, *Mental health effects of violence***,** *available at* http://www.womenshealth.gov/violence-against-women/mental-health-effects-of-violence/.

44 Negussie Deyessa et al., *Intimate partner violence and depression among women in rural Ethiopia: a cross-sectional study,* **5** CLINICAL PRAC.& EPIDEMIOLOGY IN MENTAL HEALTH**,** 2009, *available at* http://www.cpementalhealth.com/content/5/1/8 (accessed on March 11, 2012).

45. *Effects of domestic violence on women*, *available at* http://refuge.org.uk/get-help-now/what-is-domestic-violence/effects-of-domestic-violence-on-women/.

46. *Id.*

47. *Id.*

48. The National Network to End Domestic Violence, *Domestic Violence and Sexual Assault Fact Sheet-Incidence, Prevalence and Severity*, Washington DC, 2009, *available at* http://www.nnedv.org/docs/Policy/DVSAFactSheet.pdf.

Many women have lost their jobs due to family violence.[49] A victim woman may lose her job, firstly, because her abuser may restrict her freedom to work in order to make her financially dependent on him which gives him an opportunity to show his authority and keep her well under his control. Secondly, being under great fear, stress and mental agony, her performance, naturally, suffers resulting in the possibility of loss of job.

Children, who may be direct witnesses to abuse, stand high risk of suffering harm incidental to the family abuse.[50] Their lives get disrupted in many ways such as by moving or being separated from parents, by being used by the batterer to manipulate or gain control over the victim, or sometimes they themselves maybe abused.[51]

III. LEGAL DEFINITIONS OF FVAW: IMPLICATIONS

In order to develop practicable and effective strategies to combat violence in the family, accurate information on the prevalence and magnitude of FVAW is needed at both community and national levels.[52] However, measuring the true prevalence of violence is not an easy task because, oftentimes, crime statistics are not reliable.[53] First, crimes are under-reported by the victims.[54] Second, the sources of crime statistics, such as police, women centers and other formal institutions,[55] do not give an actual picture of the problem.[56] Accordingly, data from population-based research could give more accurate information provided that the research methodology uses consistent definitions and methods.

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49. *Id*.

50. The Stop Violence Against Women, *Effects of Domestic Violence on Children, April 2010, available at* http://www.stopvaw.org/effects_of_domestic_violence_on_children.html.

51. *Id.*

52. World Health Organization (WHO), *Violence against Women Definition and Scope of the Problem*, July 1997, *available at* http://www.who.int/gender/violence/v4.pdf.

53. Eamonn Carrabine et al., CRIMINOLOGY: A SOCIOLOGICAL INTRODUCTION, at 39 (Routledge, 2nd ed. 2009); *see also* Suman Rai, LAW RELATING TO PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE, at 235 (Orient Publishing Company, New Delhi, 2008.)

54. *Id.*

55. These include Government Ministries, National Statistical offices, International Agencies, NGOs, and Women Rights Organizations.

56. Suman Rai, *supra* note 53.

Since definitions of what amount to family violence are subjective, the survey questions often ask whether women experience specific acts of violence, during a fixed period of time.[57] As a result, the scope and content varies widely between studies. Some studies investigate only physical abuse; others may focus on physical, sexual and psychological abuse.[58] Some may include only women currently in a relationship, while others report on women who have been married at some point in their lives.[59] Variations are also present between studies in terms of severity of violence. For instance, a study may record all acts of violence irrespective of the nature of injuries caused (i.e., whether physical or psychological), while others may record only the instances of violence that resulted in actual physical injuries.[60]

The nature of relationship between the abuser and the abused is another factor that has a considerable impact on the data collected in the studies on the topic.[61] The traditional definition of family violence included violence in the institution of marriage and more specifically between the spouses and former spouses. However, the sociological definition of family has been changed to include unmarried persons living together.[62] In line with this change, some countries brought persons in all types[63] of intimate relationships under the purview of their domestic violence laws. Children, relatives and former live in partners also have been covered under several such laws further expanding their scope. Nevertheless, there are still some countries which stick to the traditional definitions of family relationships.[64]

Therefore, definitions of FVAW have to be meticulously drafted clearly describing the nature of violence, consequences of violence and relationship between the perpetrators and the victims they purport to cover. Carefully drafted definitions are also important for proper identification of

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57. *Id.*

58. *See generally* Suman Rai, *supra* note 53.

59. *Id.*

60. *Id.*

61. *National Center for Victims of Crime*, *Domestic Violence and the Law*, available at http://www.victimsofcrime.org/ (accessed on Dec. 15, 2011).

62. *Id.*

63. Types of intimate relationships include unmarried live in partners, homosexual partners, and lesbian partners.

64. NCVC, *supra* note 24.

the acts amounting to violence. This can, hopefully, facilitate considerable accuracy in the measurement of FVAW which in turn helps the designing, revising and strengthening intervention policies from time to time. A careful consideration of definitions of FVAW incorporated by the legal instruments both at international and national level by different countries would be helpful to understand the multi-dimensional nature of the problem and come up with a comprehensive definition for Ethiopia.

A. National and International Examples

Worldwide states have made—and continue to make—efforts to assure adequate legal protection to the victims of family violence by enacting special laws,[65] in addition to the general criminal laws. This endeavor includes defining whether or not particular behaviors are abusive. The central concerns of the legal debates for this purpose are the inconsistencies in the definitions of terms relating to family violence.[66] Such inconsistencies occur because of the variations in defining causes, effects, motivations, frequency, and intensity of the abusive behavior.[67] "Such definitions, which vary in their inclusiveness and differ within and across fields, influence the likelihood that individuals subjected to unwanted behaviors within domestic settings will receive interventions from the legal, medical, and/or social service communities."[68]

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65. General Law: Law that is neither local nor confined in application to particular persons. Even if there is only one person or entity to which a given law applies when enacted, it is general law if it purports to apply to all persons or places of a specified class throughout the jurisdiction. It is also termed as general statute, e.g., CRIMINAL CODE OF ETHIOPIA. Special Law: A law that pertains to and affects a particular case, person, place or thing, as opposed to the general public, e.g., Law Prohibiting Domestic/Family Violence. BLACK'S LAW DICTIONARY 890 (7th ed. 1999).

66. DENISE A. HINES, KATHLEEN MALLEY-MORRISON, FAMILY VIOLENCE IN THE UNITED STATES: DEFINING, UNDERSTANDING, AND COMBATING ABUSE, at 4 (Sage Publication, USA, 2005).

67. *Id*., at 4-5. Examples of such variables include causes (e.g., people who hurt the ones they love are "sick"); effects (e.g., abusive behaviors are those that cause harm); motivations (e.g., abusive behaviors are intended to hurt rather than discipline); frequency (e.g., slapping is abusive only if it is chronic); and intensity (e.g., hitting is abusive if it is hard enough to cause injury) of the abusive behavior.

68. *Id.*

There is no single nationally or internationally agreed upon definition of FVAW. It is useful to first consider the United Nations' definition of "domestic violence"[69] because it provides a good standard from which to analyze whether or not the national definitions are up to the desired standards. Following UN definition, some National examples from South Africa, United States, United Kingdom and India also have been discussed for their broader nature that can provide remedy against a wide range of behaviours that amount to FVAW.

1. United Nations

According to the INNOCENTI DIGEST[70] on Domestic Violence against Women and Girls, published by the UNICEF Research Centre,[71] domestic violence includes violence perpetrated by intimate partners and other family members, and manifested through:

> "***Physical abuse*** includes slapping, beating, arm twisting, stabbing, strangling, burning, choking, kicking, threats with an object or weapon, and murder. It also includes traditional practices harmful to women such as female genital mutilation and wife inheritance (the practice of passing a widow, and her property, to her dead husband's brother).
>
> ***Sexual abuse*** includes coerced sex through threats, intimidation or physical violence, forcing unwanted sexual acts or forcing sex with others.
>
> ***Psychological abuse*** which includes behavior that is intended to intimidate and persecute, and takes the form of

69. The United Nations prefers to use the term "domestic violence" for "family violence."

70. UNICEF, *supra* note 1, at 2.

71. The UNICEF Innocenti Research Centre is the organization's dedicated research cluster. Established in 1988, the centre has over the past two decades produced studies that have explored neglected areas of child rights and well-being, informing policy and practice in numerous countries around the world. The centre's research aims to advise decision-makers in government, the private sector and civil society, to influence policies and spending priorities for children, and to provide a solid evidence-base to inform UNICEF program interventions in countries across the globe.

> threats of abandonment or abuse, confinement to the home, surveillance, threats to take away the custody of children, destruction of objects, isolation, verbal aggression, and constant humiliation.
>
> ***Economic abuse*** includes acts such as denial of funds, refusal to contribute financially, denial of food and basic needs, and controlling access to health care, and employment, etc."

According to the DIGEST, acts of omission, such as discriminating girls and women by denying proper nutrition, education and access to health care, come within this definition as they violate their rights.[72] The different forms of abuse included in the definition are not mutually exclusive. Any one or two or all of them may exist at the same time.

According to the UN definition, domestic violence includes VAW and girls by an intimate partner including a cohabiting partner, and by other family members. Such violence whether it occurs within or beyond the confines of the home amounts to domestic violence. The definition does not include the violence against domestic workers as this is perpetrated by individuals who are not related.[73] Therefore, it follows that the term "domestic" here refers to the types of relationships involved rather than the place where the violent act occurs.

2. South Africa

South Africa ratified Convention on Elimination of all forms Discrimination Against Women (CEDAW)[74] in 1995[75] and took steps to fulfill its obligation by enacting the Domestic Violence Act of 1998, which

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72. UNICEF, *supra* note 1, at 3-4.

73. *Id.*

74. *The Convention on the Elimination of All Forms of Discrimination Against Women (*UN Doc A/RES/34/180) (1980). The Convention was adopted for signature and ratification and accession by the UN General Assembly on Dec. 18, 1979. and entered into force on Sept. 3, 1981.

75 SOUTH AFRICAN LAW COMMISSION, RESEARCH PAPER ON DOMESTIC VIOLENCE, April 1999, at 11, *available at* http://www.justice.gov.za/salrc/rpapers/violence.pdf.

provided the country with its first legal definition of domestic violence.[76] This definition is broad in its coverage which includes even the new forms of violence like stalking.[77] Among other things, the definition includes: physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; harassment; damage to property; entry into the victim's home without consent, where the parties do not share the same home; and any other controlling or abusive behavior where such behavior harms, or may cause imminent harm to the safety, health or well-being of the victim.[78]

The merits of the South African Domestic Violence Act are the following:[79]

a. It gives a broad definition of domestic violence.
b. It does not restrict the coverage only to married couples but extends to all types of live in partners such as unmarried, same sex and also to relatives by consanguinity, affinity or adoption.
c. It provides for the police to help the abused woman, including explaining her rights, finding her a safe place to stay and helping her get medical attention if necessary. Failure to comply will lead to disciplinary action.
d. It gives more powers to arrest the abuser.
e. It includes provision for the abuser to continue to support the women and children financially.

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76. REPUBLIC OF SOUTH AFRICA, GOVERNMENT GAZETTE, DOMESTIC VIOLENCE ACT 116 OF 1998, 1998. Section 1 of the Act defines many concepts including domestic relation-ship'(vii), domestic violence(viii), economic abuse (ix), economic abuse (ix), emotional, verbal and psychological abuse (xi), harassment (xii), intimidation (xiii), physical abuse (xvi), and stalking (xxiii), *available at* http://www.info.gov.za/view/DownloadFile Action?id=70651.

77. Stalking will be discussed in Part IV of this article. According to the Act, "stalking" is defined as "repeatedly following, pursuing, or accosting the complainant."

78. SOUL CITY INSTITUTE FOR HEALTH AND DEVELOPMENT COMMUNICATION, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: A RESOURCE FOR JOURNALISTS, 1999, at 11-12. This booklet was produced by the Soul City Institute for Health and Development Communi-cation in partnership with the National Network on Violence Against Women, the Institute for the Advancement of Journalism, the Commission on Gender Equality and Women's Media Watch, *available at* http://www.soulcity.org.za/advocacy/campaigns/wawsaarfj.pdf (accessed on Feb. 28, 2012).

79. *Id.* at 11.

f. Failure to comply with a Protection Order issued under this Act can lead to a sentence of up to five years in prison.

3. United States

The United States definition of domestic violence is put in terms of power and control and applies to opposite-sex and same-sex relationships.[80] The definition covers intimate partners who are married or living together.[81] The U.S. Office on Violence against Women (OVW)[82] defines domestic violence as:

> [A] pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.[83]

The expression "any relationship" applies to the violent behavior by "any family member, household member, or intimate partner against

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80. U.S. Department of Justice, *supra note* 4. Power control theory is based on the concept that many family conflicts result from an individual's need to obtain and maintain power control within relationships. The motivation behind the abuser's behaviour is the power and control that she or he is able to exert over other members of the family. Fathers and husbands being the more powerful members of the family often use the threat or use of force or the threat or use of violence to obtain compliance from less powerful family members like children and wives. *See* Bostock, D.J., et al., *Family Violence*, American Academy of Family Physicians Home Study Self-Assessment Program (Serial No. 274) 2002; Goode, W.J., *Force and Violence in the Family*, J MARRIAGE & FAM. 33, at 624-636, 1971.

81. *Id.*

82. The Office on Violence Against Women (OVW), a component of the U.S. Department of Justice, is to provide federal leadership in developing the nation's capacity to reduce violence against women and administer justice for and strengthen services to victims of domestic violence, dating violence, sexual assault, and stalking.

83. *Id.* The U.S. definition further adds explanation for Physical Abuse, Sexual Abuse, Emotional Abuse, Economic Abuse and Psychological Abuse.

another."[84] Most of the State laws in U.S. dealing with family violence require the relationship of a spouse or former spouse.[85] In addition, as of 2007, majority of States[86] provide some level of statutory protection for victims of dating violence.[87]

According to the OVW's definition, all violence in the family relationships is for the purpose of establishing and maintaining authority over the victim.[88] This implies that the abusers in the family are neither sick nor deranged. On the other hand, it emphasizes that violent behavior is learnt behavior. Such behavior uses manipulative techniques and behaviors to dominate and control others in the family and get things done by their victims.[89]

4. United Kingdom

In UK different definitions of domestic violence were in use by both the government and the public sector.[90] The UK government introduced a single definition of domestic violence in 2004 by replacing the previous ones.[91] It is not a statutory definition.[92] The police, the Crown Prosecution

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84. *Domestic Violence*, The National Center for Victims of Crime. The National Center for Victims of Crime is a nonprofit organization that advocates for victims' rights, trains professionals who work with victims, and serves as a trusted source of information on victims' issues through collaboration with local, state, and federal partners, http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32347.

85. The laws apply to persons currently residing together or those that have lived together within the previous year, or persons who share a common child.

86. Arizona, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and Washington. National Conferences of State Legislatures, *available at* http://www.ncsl.org/issues-research/health/teen-dating-violence.aspx.

87. U.S. Department of Justice, *supra note* 4.

88. PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, U.S. Department of Justice Office of Justice Programs (2000), available at www.ncjrs.gov/pdffiles1/nij/181867.pd.

89. *Id.*

90. These include the Home Office Definition, Crime Prosecution Service Definition (CPS) and Metropolitan Police Service (MPS) Definition.

91. HOME OFFICE, CROSS-GOVERNMENTAL DEFINITION OF DOMESTIC VIOLENCE: A CONSULTATION, UK December 2011, at 6, *available at* http://www.homeoffice.gov.uk/

Service (CPS), and UK Boarder Agency use the definition to identify domestic violence cases to be referred to the CPS under the Director's Guidance on Charging.[93] According to the definition, domestic violence means:

> [A]ny incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.[94]

The so called 'honor-crimes', female genital mutilation (FGM) and forced marriage also are recognized by this definition.[95] It also recognizes that domestic violence may be committed by members of the family including grandparents, members directly related, in-laws or step family.[96] Further description of domestic violence is provided by the UK government in "Domestic Violence Policy" used in The Children and Family Court Advisory and Support Services. This goes beyond the basic definition and refers to a range of violent and abusive behaviors, as follows:

> Any patterns of behavior characterized by the misuse of power and control by one person over another who are or have been in an intimate relationship. It can occur in mixed gender relationships and same gender relationships and has profound consequences for the lives of children, individuals, families and communities. It may be physical, sexual, emotional and/or psychological. The latter may include intimidation, harassment, damage to property, threats and financial abuse.[97]

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publications/about-us/consultations/definition-domestic-violence/dv-definition-consultation?view=Binary.

92. In the UK some government agencies and parts of the voluntary sector use slightly different definitions to fit their particular needs.

93. *Id.*

94. The Crown Prosecution Service, Section 2 of CPS GUIDANCE ON PROSECUTING CASES OF DOMESTIC VIOLENCE CASES, *available at* http://www.cps.gov.uk/publications/prosecution/domestic/domv_guidance.html.

95. NCVC, *supra* note 24.

96. *Id.*

97. CAFCASS, PUTTING CHILDREN AND YOUNG PEOPLE FIRST: DOMESTIC VIOLENCE ASSESSMENT POLICY, at 2, *available at* http://web.archive.org/web/20071130235416/

Interestingly, the definition promulgated by the government expands the description of the relationship to include other "family members" in addition to "intimate partners."[98] There are consultations going on in England and Wales to further broaden the definition of domestic violence to include "coercive control" within the definition.[99]

5. India

The Indian definition of domestic violence is given by the Protection of Women from Domestic Violence Act (PWDVA) of 2005.[100] It is a civil law that recognizes a woman's right to reside in a violence free home and provides emergency remedies in case this right is violated. The law extends its provisions to "live-in relationships," and to equalize relationships within the home.[101] PWDVA can be used in addition to other laws such as criminal provisions on cruelty.[102] Section 3 of the PWDVA provides that any act/conduct/omission/commission that harms or injures or has the potential to harm or injure will be considered domestic violence.[103]

Under this provision, the law prohibits physical, sexual, emotional, verbal, psychological, and economic abuse or threats of such abuse. Even a single act of commission or omission may constitute domestic violence. In other words, women do not have to suffer a prolonged period of abuse before taking recourse to the law.

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http://www.cafcass.gov.uk/English/Publications/consultation/04DecDV%20Policy.pdf (accessed on Feb. 13, 2013).

98. HOME OFFICE, *supra note 91*.The consultation also seeks views on whether the current definition is being applied consistently across government, and if it is understood by practitioners, victims and perpetrators.

99. *Id.*

100. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT (PWDVA) Act No. 43 of 2005 (13th September, 2005 with effect from October 26, 2006).

101. THE INDIAN PENAL CODE, Section 498 A: Cruelty by husband or relatives of husband.

102. *Id.*

103. In addition, Section 3 of PWDVA further defines terms of physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse.

The law says any definition of domestic violence must detail the fact that it is a human rights violation.[104] Further, the law describes in detail the different forms of violence faced by women, and ensures that such interpretations are not left solely to the discretion of the judges.[105]

A husband, under this provision, cannot dispose of household effects, cannot alienate her from her assets or any other property of which she has an interest or entitlement by virtue of the domestic relationship.[106] A husband may not sell or use *stridhan* (dowry) and/or any other property jointly or separately held by the wife. Such activities shall amount to economic abuse of the wife.[107]

B. Analysis of Definitions of Family Violence

Experience of the international community has shown that it is a near impossibility to find a generally accepted definition for *domestic violence.*[108] Some definitions are basic and general: a pattern of regularly occurring abuse and violence, or the threat of violence, in an intimate (though not necessarily cohabitating) relationship. Other definitions are comprehensive and specific.[109]

The broad nature of the UN definition of FVAW has many advantages. First, it benefits the victim women by its broad coverage as it includes the physical, sexual, psychological and economic dimensions of

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104. In its "statement of object and reasons," the PWDVA 2005 recognizes domestic violence as human rights issue and a serious deterrent to development.

105. PWDVA, Section 3.

106. *Id.*, Section 3 Explanation I (iv).

107. *Id.*

108. Laurence and Spalter-Roth, *Contemporary Women's Issues Database*, May-July, 1996.

109. John H Manor, *Helping Abusers Out of the Domestic Violence Equation*, MICHIGAN CHRONICLE, Jan. 30, 1996; Brenda Neufield, *SAFE questions: overcoming barriers to the detection of domestic violence*, AMERICAN FAMILY PHYSICIAN, June 1, 1996; ASIAN PAGES, *What is domestic violence?* Nov. 14, 1998; Ivy Josiah, *Education through radio*, CONTEMPORARY WOMEN'S ISSUES DATABASE, Jan. 2, 1998; *Domestic violence: Give us statistics we can work with*, SEATTLE POST-INTELLIGENCER, July 16, 1999; Danis, Fran S., *The criminalization of domestic violence: What social workers need to know*, *SOCIAL WORK*, April 1, 2003; Robert Verkaik, *One man in six "a victim of domestic violence",* THE INDEPENDENT, Sept. 24, 2003.

the abuse. Second, as a resolution of the General Assembly, it is part of internationally recognized moral standards and imposes a moral obligation of adherence to its standards on the States adopting it. Finally, it forms a foundation to the making of international law on FVAW.[110]

Among the national examples, the more comprehensive definitions, although phrased differently, typically possess the following common elements:

- a pattern of abusive behavior (as contrasted to a single event);
- the abusive behavior involves control, coercion, and/or power;
- the abusive behavior may be physical, sexual, emotional, psychological, and/or financial; and
- the victim of the abusive behavior is a cohabitating or non-cohabitating intimate partner or spouse.[111]

The South African definition is quite broad in its coverage including even the new form of violence such as "stalking." The explanation to US definition is inclusive and incorporates a wide range of conducts that amount to domestic violence. The British government has adopted one of the more expansive descriptions of domestic violence covering all of the above listed elements.[112] Yet it cannot be said to be an absolutely comprehensive definition so as to include every act of violence against women in the family. Section 3 of the PWDVA, 2005 of India provides a comprehensive definition of domestic violence in all its forms and describes in detail the wide range of acts that amount to economic violence, which is an invisible dimension of family violence. However, this definition too does not include stalking as an act of family violence.

Unfortunately, there are always new types of violence coming to light which cannot be ignored. Legislations cannot claim any efficacy unless they include broad definitions that can thoroughly cover all possible acts of violence against the women in the family.

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110. Eleonora Chikuhwa, INVISIBLE WOUNDS*: A Namibian Case Study of Psychological Abuse*, at 5, Center for Gender Studies (Uppsala University, Master's Thesis, VT 2011), *available at* http://www.gender.uu.se/digitalAssets/44/44672_EllenChikuwa.pdf (accessed on Dec. 14, 2012).

111. *Id.*

112. Suman Rai, *supra* note 53, at 37.

C. New Dimensions of FVAW

Spiritual violence and stalking are the new forms of family violence.[113] Stalking, which can be a severe threat to the victim, also has only recently been recognized as a form of family violence.[114]

1. Spiritual Violence

Spiritual violence can be defined as 'using the religious or spiritual beliefs to manipulate, dominate, or control victim.'[115] Examples of such violence include, preventing the partner from practicing their religious or spiritual beliefs, ridiculing the other person's religious or spiritual beliefs, forcing the children to be reared in a faith that the partner has not agreed to.[116]

Spiritual violence may encompass tactics such as, criticizing partner's beliefs, forcing beliefs on partner, and spreading rumors within church or spiritual community (breakdown of a support system), using religion or religious texts as justification for abuse, coercing someone into doing things against their religion, etc. Spiritual violence and emotional violence often go hand in hand. Partners are demeaned and condemned for their behavior.

2. Stalking

Stalking is a type of harassing or threatening behavior such as following a person, appearing at a person's home or place of work, making

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113. Aboriginal and Torres (Strait Islander Social Justice Commissioner), *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander communities Key issues*, June 2006. http://www.humanrights.gov.au/social_justice/familyviolence/family_violence2006.html

114. Forms of Domestic Violence, *Stop Violence Against Women*, available at http://www.stopvaw.org/forms_of_domestic_violence.html.

115. *Types of Violence and Abuse*, Violence Prevention Initiative, available at http://www.gov.nl.ca/VPI/types/index.html; *see also* Tina de Benedictis *et al*, *Domestic Violence and Abuse: Types, Signs, Symptoms, Causes, and Effects*, The American Academy of Experts in Traumatic Stress, available at http://www.aaets.org/article144.htm.

116. *Id.*

harassing phone calls, leaving written messages or objects, or vandalizing a person's property.[117] When stalkers use the electronic media and internet activity to track their victims through threatening e-mails, it is called "cyber stalking."[118]

It is not necessary that such acts mean an imminent threat of serious harm. The actions may or may not be followed by an assault or attack on the life of the victim.[119] Simply following a person everywhere by itself can scare the person and be harassment "that haunts the person physically or emotionally in a repetitive and devious manner."[120] "Stalking creates a psychological prison that deprives its victims of basic liberty of movement and security in their homes."[121] The victims of stalking feel out of control, anxious, and depressed and may lose their ability to sleep, eat, and work.[122]

Stalking of an intimate partner can take place during existence of the relationship or it can take place after a partner or spouse has left the relationship. The stalker may be trying to get his/her partner back, or may wish to harm the partner as punishment for his/her departure.

Unfortunately, the Ethiopian Law does not recognize *the multi-dimensional nature of the evil* of family violence. A brief look at the seriousness of the problem of family violence in Ethiopia and the negligible legal protection the Ethiopian women have against this menace is enough to understand the necessity for immediate action.

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117. U.S. Department of Justice, *Stalking and Domestic Violence*, at 5 (The Third Annual Report to Congress under the Violence Against Women Act, Office of Justice Programs, July 1998) (citation omitted).

118. *Id.*, at 1.

119. *Id.*

120. Rosalie Ambrosino *et al*., *Social Work and Social Welfare: An Introduction*, at 283 (Cengage Learning 2011).

121. U.S. Department of Justice**,** *Stalking and Domestic Violence*, Report to Congress, at vii, May 2001, National Criminal Justice Reference Service, Violence Against Women Office, *available at* https://www.ncjrs.gov/pdffiles1/ojp/186157.pdf (accessed on Feb. 13, 2013).

122 Violence against Women, *Stalking*, available at http://www.womenshealth.gov/violence-against-women/types-of-violence/stalking.cfm (accessed on Feb. 13, 2013).

IV. FVAW IN ETHIOPIA

A. Magnitude and Prevalence

Abuse of women in the society continues to be a problem in Ethiopia. Not many studies are conducted on the issue of abuse of women in the country. Although some studies have provided insight into the magnitude of the problem of VAW, these studies lack thoroughness and depth.[123] *Cultural violence* is the most widespread manifestation of violence against women in Ethiopia.[124] Besides marital rape and battery, harmful traditional practices, including female genital mutilation and cutting, child marriage, abduction as a method of forcefully contracting marriage and wife inheritance,[125] are rampant in Ethiopia.[126]

In 2005, a study by WHO reported that Ethiopian women experienced the highest levels of sexual violence by a partner at 59 percent. Furthermore, 46 percent of women have been reported to be physically forced into having intercourse, and 35 percent of women who have partners experienced some form of severe physical abuse.[127]

A large scale study in Ethiopia, which covered 95 percent of the country and included eleven major ethnic groups in Ethiopia, reveals that wife beating is prevalent among the families of all ethnic and language groups of the country.[128] The study included both rural and urban Ethiopia

123. Yemane Berhane, *supra* note 4.

124. United Nations Population Fund (UNPF), *Shelter from the Storm: Escaping from Gender Violence in Ethiopia*, Dec. 7, 2009, *available at* http://www.unfpa.org/public/cache/offonce/News/pid/4522;jsessionid=06AAEC60C40542878F4232027B3EF74 (accessed on Dec. 10, 2009).

125. In some places, a woman is considered the property of the family into which she marries, and if her partner dies, she is expected to wed a male relative.

126. *See* UNPF, *supra* note 129.

127. Being hit with a fist or something else, kicked, dragged, beaten up, choked, burnt on purpose, threatened with a weapon or had a weapon used against them. *See* World Health Organization (WHO), *WHO Multi-country Study on Women's Health and Domestic Violence Against Women*, Ethiopia, 2005, available at www.who.int/gender/violence/who_multicountry_study/fact_sheets/eth/en/index.html (accessed on Nov. 17, 2009).

128. CERTWID (2004), *Gender and Cross-Cultural Dynamics in Ethiopia*, Research Output of 1997 (as quoted by *Report on the Nationwide Survey on Domestic Violence* 20, Ethiopian Women Lawyers Association in Partnership with Oxfam GB, Oxfam Addis Ababa, 2008) (hereinafter Nationwide Survey on Domestic Violence).

with regard to national, regional, and gender issues. The study found that the use of violence in conjugal relations—one of the common elements of domestic violence—existed among all ethnic groups included within the study.[129] The study further indicated that on an average, every husband beats his wife eight times in the indicated period of six months.[130]

United Nations Fund for Population Activities (UNFPA) 2005 reported that family violence is so rampant in Ethiopia that nine out of ten women think that their husbands are justified in beating them. The report further indicated that the women believed that it is justified to be punished, especially if a wife went out without telling her spouse, neglected the children, or prepared food badly.[131] A national study conducted by Hirut, Habtamu and Yusuf that involved 11 most populous ethnic groups revealed, among other things, wife and child beating are prevalent among these groups.[132]

"Violence against women has long been shrouded in culture of silence."[133] The prevalence of marital rape in Ethiopia is not documented due to legal, cultural, and religious barriers that are inhibiting the victims from reporting to the police.[134] Ethiopian women strongly believe that forced sex is normal and do not constitute rape if they are married to or cohabiting with the perpetrator.[135] This mindset results from the dictates of culture, traditions and religions that operate across most communities in Ethiopia and instills in women the belief that they are subordinate to their

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129. *Id.*, at 20.

130. *Id.*

131. UN Office for the Coordination of Humanitarian Affairs (IRIN), *ETHIOPIA: Domestic violence rampant, says UNFPA*, Addis Ababa, 12 October 2005 (IRIN) *available at* http://www.irinnews.org/printreport.aspx?reportid=56682 accessed on 13-02-2013. IRIN is a service of the UN Office for the Coordination of Humanitarian Affairs providing humanitarian news and analysis.

132. Habtamu Wondimu, *The Contradictions between the Proclaimed and the Practiced Inhuman Rights in Ethiopia: Blaming Cultures and the Victims for the Violations*, AFRICAN STUDY CENTERS 11 (1997), *available at* http://www.ascleiden.nl/pdf/paper260902.pdf.

133. *Information Report, ETHIOPIA 112*, Jan. 18, 2008, Border and Immigration Agency, Country of Origin Information Service (citation omitted).

134. Sinidu Fekadu, *An Assessment of Causes of Rape And Its Socio-Health Effects: The Case of Female Victims In Kirkos Sub-City, Addis Ababa*, Master's Thesis in Gender Studies, 2008, at 1-2, *available at* http://etd.aau.edu.et/dspace/bitstream/123456789/2386/1/GENDER_32.pdf (unpublished).

135. OUR VOICE (*DIMITSACHEN*), Ethiopian Women Lawyers Association, 2006.

husbands in the marital relationships.[136] Lack of legal remedies and the fear of retaliation by the abuser are the other reasons for the reluctance to report marital rape cases.[137] Therefore, there is a lack of research conducted on this subject in Ethiopia. However, there are some recent studies undertaken by the younger generation that reveal the extent of the abuse of marital rape. The Ethiopian Women Lawyers Association (EWLA) Survey,[138] in which both illiterate and highly educated women (a total of 208 women) were interviewed, showed that 14.9 percent of women were victims of rape, 10.8 percent were insulted by the husbands for refusing to have sex, 5.4 percent were raped when they refused sex, and 1.4 percent were beaten when they refused sex.

B. Protection from FVAW Under Ethiopian Law

Unfortunately, Ethiopian law offers little legal protection to women who suffer from family violence. Except the constitutional guarantees proscribed within the fundamental rights of Ethiopian Constitution,[139] and the general criminal law provisions,[140] there are no special legal instruments in Ethiopia that address the problem of FVAW. The great variety of FVAW listed above is perpetrated in different subtle and deliberate forms of violence such as verbal abuse, intimidation, emotional abuse, economic abuse, social abuse, cultural abuse, spiritual abuse, sexual abuse, physical abuse extending up to causing the death of the victim women. Therefore, obviously, the nature, scope and definitions of FVAW under the existing laws, as will be seen from the following section, are inadequate to address the more sensitive and invisible dimensions of this problem.

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136. *Id.*

137. *Id.*

138. *The EWLA Survey*, BERCHI, Research Output 11, 2004 (as quoted by Report on the Study, *Nationwide Survey on Domestic Violence*, *supra* note 128, at 55).

139. FDRE CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETTE, 1st Year No.1, 1995, Arts. 16, 18, 25 & 35(4).

140. CRIMINAL CODE OF ETHIOPIA, Arts. 564, 555-560 and 568.

1. The Definition of Family/Domestic Violence under Ethiopian Laws

The Ethiopian government first addressed the problem of *family violence* was with the adoption of the Ethiopian Criminal Code of 2005[141] in an article named "Violence against Marriage Partner or a Person Cohabiting in an Irregular Union."[142] Article 564 of the Criminal Code states:

> The relevant provisions of this Code (Arts.555-560)[143] shall apply to a person who, by doing violence to a marriage partner or a person cohabiting in an irregular union, causes grave or common injury to his/her physical or mental health.

Primarily, the fact that the Article has been inserted under 'Harmful Traditional Practices'[144] and not under the violence section minimized the response of the criminal justice in that harmful practices entail very light sentences and the response relied more on educating the public rather than punishment.[145] Ms. Tayechalem G. Moges, author of the book *The Legal Response to Domestic Violence in Ethiopia a Comparative Analysis*,[146] while acknowledging that family violence against women, specifically physical violence, has been part of the culture of the Ethiopian society, rightly argues that it is primarily a violation of many interrelated human rights and should be treated accordingly.

Article 564 of the Criminal Code does not mention *domestic violence* by name, yet has recognized partner violence as causing grave or common injury to physical or mental health. Specifically, "violence to a marriage partner" is not defined. The Article makes violence against marriage

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141. *Id.*

142. *Nationwide Survey on Domestic Violence*, *supra* note *128*, at 55.

143. *See* CRIMINAL CODE OF ETHIOPIA, Art. 555 Grave Wilful Injury, Art. 556 Common Willful Injury, Art. 557 Extenuating circumstances (of these crimes), Art. 558 Consequences not intended by the Criminal, Art. 559 Injuries caused by Negligence, and Art. 560 Assaults.

144. *See Id.*, Book V, Title I, Chapter II, Articles 561-570 "Crimes Committed Against Life, Person and Health through Harmful Traditional Practices."

145. TAYECHALEM G. MOGES, THE LEGAL RESPONSE TO DOMESTIC VIOLENCE IN ETHIOPIA: A COMPARATIVE ANALYSIS, (VDM Verlag Dr. Müller Publisher, Jan. 31, 2010), at 68.

146. *Id.*, at 66.

partner and irregular union partner punishable by a general statement that *"grave or common injury to the physical or mental health"* should be the consequence of the violence without giving any further explanation of the key terms. The acts of violence which amount to FVAW need to be specifically defined in order to give proper protection to women against such violence. The example definitions from the international and national laws of different countries discussed above emphasize the need for carefully drafted definitions.

2. Inadequacies in the Ethiopian Criminal Code in Combating FVAW

The way in which Article 564 of the Ethiopian Criminal Code deals with the violence to a marriage partner is too general. The provisions of Article 564 and Articles 555-560 are applied cumulatively to punish physical or mental injuries caused by the marriage partner or a cohabiting partner. These articles do not specifically deal with the psychological, emotional and economic violence that usually happen within the families but often times go unnoticed. Psychological violence could be worse than physical or sexual violence which is rather invisible and needs to be defined in clear terms. Economic violence is one form of family violence. Article 564 has failed to address *economic violence* against marriage partner or irregular union partner. Most of the women in Ethiopia being economically dependent on their husbands they need to have effective legal protection when they are victimized to economic abuse.

Article 564 has also ignored violence occurring between those who are in intimate relationship but do not necessarily live together. By writing a special provision for punishing violence between the marriage partners and cohabiting couples in Article 564, then taking the details and the punishment to the general provisions of the Code (Arts. 555-560) the special and intimate nature of the partner violence is ignored by the law. In addition, Article 564 fails to cover the repeated acts of violence, the special nature of the relationship, and the economic dependency of the partners.

Women in Ethiopia, like their counterparts in other countries, are in need of protection against all forms/types of FVAW. The types of family violence identified in the surveys conducted so far in Ethiopia, confirm the fact that it is manifested through the following forms of abuses:

a) Physical;

b) Sexual;

c) Psychological; and

d) Economic.[147]

Further, the prevalence of wife battering, rape, intimidation, insult and instances of disrespect, denial of food and rest, and forced displacement from home (FDH) proves that family violence is manifested in Ethiopia in all its known global forms. Obviously, the lack of proper definitions of the relevant expressions in Ethiopian laws would certainly limit the scope of effective application of the laws. To say the least Article 564 is certainly inadequate especially in the light of the international instruments Ethiopia has ratified.[148] The evil of family violence deserves a much more complex analysis and a deeper look than a mere mention in one of the provisions of the Criminal Code.

In Ethiopia, the law enforcement agencies are reluctant to start investigations where wives want to prosecute battering partly because "it is husband and wife" issue.[149] As Article 564 has addressed violence against marriage or irregular union partner specifically, this may help in principle to eliminate the reluctance of the law enforcement agencies to handle such cases. However, it will not make much difference for a police force that classifies rape victims as virgins or non-virgins despite mandate of the law to the contrary.[150] Irrespective of high prevalence of marital rape in Ethiopia, police officers tend to think that the issue of marital rape is domestic matter because of the absence of specific provision in the Criminal Code.[151]

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147. *Id.* at 57.

148. The Ethiopian government is a signatory to most international instruments, conventions and declarations, and adopted international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women /CEDAW (1979), the Declaration on the Elimination of Violence Against Women/DEVAW (1993), the Beijing Platform for Action/BPA (1995) including the domestication of the international instruments. Ethiopia ratified and adopted the UN charter on Human Rights and other conventions, in 1981. *See also EWLA Report on Nationwide Survey*, *supra* note 128, at 56

149. *Id.*

150. *Id.*

151. G. MOGES, *supra* note 145, at 68 (quoting from NGOs Complimentary Report on the Second Combined Report of the Country on the Implementation of the CEDAW, 37 (2003).

Moreover, the Criminal Law of Ethiopia falls short of outlawing marital rape maintaining the institution of marriage as a defense for rape. Hence, the only option women victims of marital rape have in the Criminal Code is if the incident results in sexually transmitted diseases including HIV/AIDS under the Article 568 of the Criminal Code.[152] Ironically, while rape by a man under Article620[153] of the Criminal Code requires the act to be outside the wedlock to be punishable, Article 621[154] subjects a woman to punishment for forcing a man into sexual intercourse irrespective of whether or not the act happened during wedlock. Obviously, having regard to the biological realities, the protection against such kind of violence between the spouses should be given to women primarily.

Another drawback is, the Code on Article 564 refers to the general assault articles for the purposes of punishment for violence within the family. This does not give much room for the appreciation of the unique nature of family violence; that it is intertwined with the gender power relations in the family (society). Such definition is not considered as effective since it fails to incorporate 'power relationship' and is not ready to capture the unique nature of domestic violence-looking at the whole context. Looking just at the nature of the injury on the body of the woman is not the whole issue in FVAW cases. On the whole, the Criminal Law of Ethiopia failed to come up with comprehensive definition and protection against domestic violence.[155]

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152. *Id. See* CRIMINAL CODE OF ETHIOPIA, Article 568 stating : "Where the victim has contracted a communicable disease as a result of one of the harmful traditional practices specified in the above provisions, the penalties prescribed in this Code concerning the spread of communicable diseases shall apply concurrently."

153. *Id.*, Article 620(1) providing: "Whoever compels a woman to submit to sexual intercourse *outside wedlock*, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance, is punishable with rigorous imprisonment from five years to fifteen years."

154. *Id*, under Art. 621 states: "A woman who compels a man to sexual intercourse with herself, is punishable with rigorous imprisonment not exceeding five years."

155. G. MOGES, *supra* note 145, at 68.

3. Broader Definitions and Detailed Descriptions are More Helpful

Limiting the definition of "family violence" means that the number of victims that can get assistance of the law also gets limited. Broad and open ended definitions can be helpful to deal with the unforeseen acts of violence, as and when they happen. Additionally, such comprehensive definitions are helpful to avoid the lengthy procedures of amendments in future.[156] Ethiopia needs to adopt broad open-ended definitions if the country wants to make significant steps in addressing the problem of FVAW.

Any legislation must include detailed definitions that address all the potential forms of violence experienced by Ethiopian women. With the adoption of detailed definitions, the potential for judicial discretion is reduced, thereby protecting women against the influence of patriarchal biases in judicial decision making. Ethiopia should follow the lead of most large countries by including all forms of violence—i.e., psychological, sexual, and economic abuse—within its legal protection. In particular, the inclusion of sexual violence is particularly significant as it rules out any tolerance of rape within marriage. In this connection, it is worth considering the Report prepared for the Committee on African Affairs of the New York City Bar[157] which makes general recommendations for drafting laws preventing family violence. The following general considerations, among other things, that should underlie all drafting initiatives for gender-based violence legislation are helpful:[158]

- Legal definitions should be broad to reflect the realities of gender-based violence in Africa. For example, marital rape and intimate partner violence are two categories of gender-based violence that should be incorporated into definitions of rape and domestic violence, respectively. By expanding the definitions and creating

156. Chikuhwa, *supra* note 110.

157. *See* Elizabeth Barad et al., *Gender-Based Violence Laws in Sub-Saharan Africa*, 2007 (a report prepared for the Committee on African Affairs of the New York City Bar as part of a pro bono project coordinated by The Cyrus R. Vance Center for International Justice), *available at* http://www.nycbar.org/pdf/report/GBVReportFinal2.pdf (accessed on Feb. 27, 2012).

158. *Id.*, at 3.

inclusive legislation, sub-Saharan African States can better protect their citizens.

- Legislation should clearly define key elements of gender-based violent crimes to reduce the potential for abuse of judicial discretion. Clear explanations of key concepts, like "consent" and "penetration", are essential to the uniform application of laws against gender-based violence.

Another important suggestion from the women's organization called 'Stop Violence Against Women' is the inclusion of stalking within the meaning of family violence and protection of women from this dangerous and very frightening crime.

> Legislation should define stalking as a pattern of harassing or threatening behaviors. Naming these behaviors "stalking" is useful in a number of ways. First, the stalking itself, and not just the assault which often results, is a form of violence. The batterer is taking specific actions, such as calling or appearing at a place of work, that are designed to intimidate and coerce his former partner. Second, the term "stalking" identifies a pattern of behaviors that often leads to serious or fatal attacks. Identifying the pattern of behaviors can therefore be useful in taking steps to prevent an assault. Third, naming this pattern of behaviors helps to convey the seriousness of these behaviors. Individually, the acts that constitute stalking, such as telephone calls or texting, may appear to be relatively innocent. Taken together, however, they indicate the presence of a severe threat to the victim.[159]

"Stalking must be understood as part of the domestic violence continuum and must be addressed forcefully."[160] Otherwise, this can lead to serious economic and social problems including physical and psychological sickness and loss of employment.[161] The level of impact of

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159. Stalking, Stop Violence Against Women, available at http://www1.umn.edu/humanrts/svaw/domestic/link/stalking.htm.

160. Report to Congress, *supra* note 121.

161. Heather Douglas, *Personal Protection and the Law: Stalking, Domestic Violence and Peace and Good Behavior*, at 2 (citations omitted) *available at* http://www.qlrc.qld.gov.au/events/personalProtection.pdf.

stalking has been well researched and the results emphasize the need for legal protection.[162]

It is also a good practice to domesticate the definitions by outlawing specific cultural manifestations of violence. The Ethiopian law punishes early marriage[163] as a harmful traditional practice, but not a forced marriage, which is a blatant violation of a woman's constitutional rights.

Further, Ethiopian law should include all forms of family relationships. Specifically, the provisions on individuals covered under the law should be supplemented with a definition of a "shared residence" to include all family members within it.

The broader the definitions of family relationships, the higher are the estimates of family violence. The narrowest definitions, generally, restrict family violence to that between people currently living together as couples, and often only as heterosexual couples. Estimates of FVAW can vary on whether the studies classify incidents as "family violence" that occur between people in the early stages of a relationship who do not know each other well, and those where there is no longer an intimate relationship, but there has been at sometime in the past. The term "family violence" can encompass a wide range of experiences. The measures used in research vary considerably as to the type of relationship they count as "family" and the types of experience that are deemed "violence."

4. Lack of Special Laws is Violation of Human Rights and Fundamental Freedoms

The lack of specific legislation to combat domestic violence and sexual harassment constitutes a violation of human rights and fundamental

162. *Id.*

163. *See* CRIMINAL CODE OF ETHIOPIA, Article 648-Early Marriage: Whoever concludes marriage with a minor apart from circumstances permitted by relevant Family Code is punishable with: a) rigorous imprisonment not exceeding three years, where the age of the victim is thirteen years or above; or b) rigorous imprisonment not exceeding seven years, where the age of the victim is below thirteen years.

freedoms, particularly the right to security of person.[164] The Committee on the Elimination of Discrimination against Women has addressed the obligation of States parties to enact, implement and monitor legislation to address VAW in its work under the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women.[165] Further, strengthening implementation and monitoring of the laws for the protection against violence within the family and related criminal law, by acting with due diligence to prevent and respond to such VAW and adequately providing for sanctions for the failure to do so, is the responsibility of the State party to CEDAW.[166]

Many countries of the world, including African countries like South Africa, Kenya, Uganda, Rwanda etc., realizing the emergency of the problem, have enacted special legislations to combat FVAW and are training personnel to effectively apply the laws. There are arguments and studies to show that there is a correlation between development and the treatment of women in a society.[167] The recommendation of the UN Women[168] is that domestic violence laws should include in the statement of objectives reference to international treaties and laws, which recognize explicitly that domestic violence constitutes a breach of human rights, particularly the right to equality and the right to life. Further, a

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164. The Committee on the Elimination of Discrimination against Women, *A.T. v. Hungary communication No*. 2/2003, views adopted on Jan. 26, 2005, *available at* http://www2.ohchr.org/english/law/docs/Case2_2003.pdf; *see also* Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, at 6, *available at* http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf (accessed on Jan. 15, 2013).

165. *See Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women***,** entered into Force on Dec. 22, 2000, *available at* http://www.un.org/womenwatch/daw/cedaw/protocol/ (accessed on Feb. 13, 2013).

166. *CEDAW Recommendations to the State Parties, Sahide Goekce (deceased) v. Austria, Communication No.*5/2005, views adopted 6 August 2007, *available at* http://www.daccessdds.un.org/doc/UNDOC/GEN/N07/495/43/PDF/N0749543.pdf?OpenElement; *See also Fatma Yildirim (deceased) v. Austria, communication No. 6/2005*, views adopted on 6 August, 2007, *available at* http://www.daccessdds.un.org/doc/UNDOC/GEN/N07/495/37/PDF/N0749537.pdf?OpenElement.

167. *See generally*, GAIL WARSHOFSKY LAPIDUS, WOMEN IN SOVIET SOCIETY: EQUALITY, DEVELOPMENT AND SOCIAL CHANGE, (University of California Press, 1978).

168. *See generally*, UN Women, *Domestic Violence Legislation and its Implementation: An analysis for ASEAN countries based on international standards and good practices*, XIII, 2011.

comprehensive definition of "domestic violence" will provide a strong basis for the law. This will determine broader prevention and education programs aimed at changing societal attitudes and behavior of individuals, including state and non-state actors.

V. CONCLUSION AND RECOMMENDATIONS

For many Ethiopian women and girls, 'home' is where they face a regime of terror and violence at the hands of somebody close to them – somebody they should be able to trust. However, lack of proper legal protection against FVAW makes the situation especially tragic in Ethiopia.

It is therefore imperative that in addition to the substantial financing plans, Ethiopia must reform the law to protect women who are subjected to family violence. Violence in the family incapacitates the victims and is a human rights issue. Enacting laws is not enough to combat FVAW, but having adequate legal provisions is much better than having none or insufficient ones. Obviously, the laws and policies on the ground do not properly address the problem of family violence. Therefore, while working for the application of existing laws, there is a need to have comprehensive legislation to combat family violence, which is hampering the progress of women and girls in every sphere.[169]

The lack of sensitivity to women subjected to violence undermines women's rights to protection under the law. The ineffectiveness of the law has created a dangerous situation for women living in the society and has reduced public faith in law enforcement institutions. Major reforms in law are needed to institute a change in attitudes, promoting equality of opportunity as well as allowing people to rise above their circumstances and become socially participating. To this end, the following specific recommendations are made:

1. To uphold the constitutional intent of ensuring substantive equality and providing a life with dignity to women, special legislation to prevent FVAW needs to be enacted as soon as possible. The special law, among other things, should include the following:

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169. *Id.*

- A comprehensive definition of 'family/domestic violence against women';
- Definition of 'domestic/family relationships,' which include relationships through marriage, consanguinity and adoption, and the women in the relationship 'in the nature of marriage';
- Provision for shelter homes to protect the women facing violence in the family, her children and other persons connected to her, who could be used by the perpetrator to coerce her;
- Mandate a coordinated response among protection officers, service providers, shelter homes, counselors, medical officers, the police, and, most importantly courts;
- Provision to hold the perpetrator accountable for abusive behavior, and to ensure that such violent behavior is put to an immediate end; and,
- Provision for speedy and effective access to justice to women.

2. The Criminal Code, 2005 must be amended to include specific provisions to define and punish family/domestic violence.
3. Art. 620 of the Criminal Code, 2005 must be amended to include marital rape as a punishable crime.

Each woman decides for herself the remedy that is in her best interests, given her particular situation. Irrespective of whether she exercises her options, it is undeniable that violence shatters a woman's life, her economic situation, her relationships, her sense of security, self esteem, and everything she holds dear. She needs time and space to reach her own decision, without her vulnerability being used as a tool for blackmail by the perpetrator.

The purpose of family violence law is, therefore, to prevent a situation where a woman is rendered destitute, and to restore her to a position of equality. The absolute precondition for that is to stop violence immediately. If the law does not serve this function, it serves no function at all.

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PROTECTION OF WELL-KNOWN TRADEMARKS IN ETHIOPIA: A COMPARATIVE TREATISE UNDER THE TRADEMARK PROCLAMATION

Tilahun Esmael Kassahun[*]

Abstract

The purpose of this Article is to undertake a comparative survey of key issues that need to be addressed under the Trademark Proclamation with regard to protection of well-known trade marks in Ethiopia. In doing so, the Article attempts to evaluate the current system against relevant international instruments and best practices in an effort to bring the current standards of protection in the country close to that of the international community. In so doing this article finds that the Proclamation goes further to protect well-known marks than what would be required of it under relevant international instruments, a situation which should be reviewed in light of the need to balance Ethiopia's domestic interests with its international commitments.

Keywords: *Ethiopia, trademark, TRIPS Agreement, well-known trademark*

I. Introduction

The theories and practices underlying modern trademark systems are as old as commerce itself.[1] Today, although trademark protection regimes

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are present virtually in every country of the world, "national regimes often differ markedly regarding the scope of protection, the requirements for names and symbols that can be protected, and guidelines for avoiding confusing marks, registration costs, the legal means available for fighting infringement, and other important details."[2] One of the thorny issues in this area is the case of global protection of well-known trademarks where in the course of the globalization of economic activities and diversification of business lines in recent years, there is an increasing risk that the property interests of trademarks, particularly "famous trademarks," could be damaged.

At the moment, a comprehensive level of global consensus seems to have been reached in terms of protecting this line of trademarks. The *famous marks doctrine*, which should more accurately be called the *famous foreign marks doctrine*, proposes that trademarks that have achieved a certain degree of fame or recognition in a foreign country ought to be accorded domestic protection without a showing of domestic registration or use in commerce.[3] In the more developed jurisdictions of the United States and major European countries, if a registered trademark is widely known or if its reputation is damaged, that trademark is protected, while the particular set of infringements are deemed to constitute a trademark infringement, beyond the scope of the registered goods or services.[4] It has been said that

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1. David Johnson, "*Trademarks: A history of a billion-dollar business",* http://www.infoplease.com/spot/trademarks1.html (last accessed Dec. 2012), at 1. Read more: Trademarks: A History, http://www.infoplease.com/spot/trademarks1.html#ixzz2EZxlWYsF

2. Carsten Fink & Beata K. Smarzynska, *Trademarks, Geographical Indications, and* lity principle has also been eroded both by domestic case law and international developments that have made the well *Developing Countries, in* Bernard Hoekman et al., (eds.), DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 403, at 403(2002).

3. Accordingly, with respect to the scope of trademark rights, "the strength of the territorial -known mark doctrine more readily available as an alternative means for a foreign user to obtain rights in the United States." *See* Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 886, 918 (2004).

4. *See generally* Momoko Nishimura, *Expanding the Protection of Famous Trademarks*, INST. INTELL. PROP. BULL. 58 (2008).

"the notion of a well-known trademark is one of the most polemic concepts within intellectual property, but also the most noble."[5]

Following the line of developments emerging on the global plane, Ethiopia's 2006 Trademark Registration and Protection Proclamation has made a wise effort to keep the country in line with the most sophisticated intellectual property systems.[6] Yet, regulation of the issue both under international intellectual property instruments and the Trademark Proclamation is not free of challenges. For instance, the definition and protection granted to well-known trademarks are still grey areas, both internationally and under the Trademark Proclamation. Thus, despite general recognition that protection should be given to well-known marks, the Trademark Proclamation is still short of fully addressing vital questions that could arise in this context.

The purpose of this Article is to undertake a comparative survey of key issues that need to be addressed under the Trademark Proclamation with regard to protection of well-known marks in Ethiopia. In doing so, the Article attempts to evaluate the current system against relevant international instruments and best practices in an effort to bring the current standards of protection in the country close to that of the international community. In so doing, this article finds that the Proclamation goes further to protect well-known marks than what would be required of it under relevant international instruments, a situation which should be reviewed in light of the need to balance Ethiopia's domestic interests with international commitments.

Accordingly this work is structured in to seven sections. In the subsequent section, an attempt will be made to highlight some basic economic foundations of trademark law. Section 3 tries to sketch a brief account of contemporary trademark law systems of the world. Sections 4, 5 and 6 will briefly highlight the Ethiopian trademark law system and

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5. *See* Orlando Viera-Blanco, *The Extension and Nobility of a Well-Known Trademark*, *available at* www.ilflaw.com/publications.

. 6 *Trademark Registration and Protection Proclamation* No. 501/2006, FED. NEGARIT GAZETA, 12th Year No. 37 (hereinafter *Trademark Proc*.). For further understanding of the Ethiopian trademark law regime, see also the recently introduced *Trademark Registration and Protection Council of Ministers Regulation No.273/2012*, Federal Negarit Gazette, 19th Year No 10, Addis Ababa, 24 Dec 2012 (hereinafter Trademark Regulation).

introduce the issue of well-known trademarks. Under section 7, a modest attempt is made to analyze the current state of protection of well-known trademarks in Ethiopia followed by a brief conclusion.

II. Economics of Modern Trademark Protection and Law

Historically,

> [t]rademarks originated as craftsmen's marks that artisans and others put on their goods to distinguish them from those of other artisans. Such marks have been found in antiquity, in many societies and civilizations, including Persia, Egypt and China, as well as Greece and Rome.[7]
>
> Dating back to those barbarian times where majority of people could not read or write is when symbols became a logical method of letting people know, what belonged to whom? The earliest marks were that of marking of animals, so a farmer, rancher or lord could distinguish what animals belonged to whom.[8]

Today, the economic analysis of trademarks shows that what a trademark indicates is not that the article in question comes from a definite or particular source,[9] the characteristics of which are specifically known to the consumer, but merely that the goods emanate from the same—possibly anonymous—source or have reached the consumer through the same channels as certain other goods that have already given the consumer satisfaction, and that bore the same trademark.[10]

In standard law and economics literature, trademark law is presented as an instrumental tool of incentive creation for business enterprises to

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7. *See International Trademark Law Harmonization*, Ladas & Parry LLP, *available at* http://www.ladas.com/Trademarks/IntTMProtection/IntlTM03.html (last accessed on Dec. 04, 2012).

8. Manisha Shirolikar, *History and Evolution of Trademark System*, *available at* http://www.sinapseblog.com/2011/01/history-and-evolution-of-trademark.html

9. *See generally* NICHOLAS ECONOMIDES, TRADEMARKS IN THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, (Peter Newman ed., 1997).

10. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 814 (1927).

invest in the quality of the goods and services with which the marks are used and as a remedy to specific market failures.[11] As the argument goes, if it were impossible for consumers and for the public-at-large to identify the source of goods, then every business would have an incentive to supply goods at a quality lower than the average prevailing in the market, because the profits generated by the individual transaction would, in fact, be garnered by the individual business entering into it, while the reputational costs derived from the public's disappointment with the quality of goods would be externalized to the entire industry.[12] Thus, "the adoption of a sign or symbol that consistently links the goods to a source over time is seen as a device to overcome this difficulty."[13] The case is often made that while "other intellectual property rights—for example, patents and copyrights—provide a mix of welfare costs and long-term economic benefits, in principle, very few costs and no welfare losses whatsoever are associated with trademark protection."[14]

Trademarks are also renowned for the economic efficiency that they generate in favor of consumers.[15] In particular, trademarks are welcomed because of their value in saving search and experiment costs of consumers.[16] "The value of a trademark is the saving in search costs made

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11. *See* William M. Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987). Also for a normative account of Trademarks, see Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007).

12. Giovanni B. Ramello, *What's in a Sign? – Trademark Law and Economic Theory*, (Dep't of Pub. Pol'y and Pub. Choice – POLIS, Working Paper No. 73, 2006); *see also* Andrea Mangàni, Paper Presented at the 4th Oxford University Conference on Business and Economics: Trademarking Global Brands in the European Union (June 26-28, 2005) http://dse.ec.unipi.it/~mangani/Trademarking%20Global%20Brands1.pdf.

.13 Nicola Bottero, Andrea Mangani & Marco Ricolfi, *The Extended Protection of "Strong" Trademarks*, 11 MARQ. INTELL. PROP. L. REV. 225, 267 (2007).

14. *See* David W. Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH. & INTELL. PROP. 22 (2006).

15. *See* Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N. C. L. REV. 427 (2010).

16. For exemplary US Jurisprudence see The Senate Committee on Patents, S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946), U.S.C.C.A.N. 1274; stating that "[t]he purpose underlying any trademark statute is twofold. One is to protect the public so that it may be confident that, in purchasing a product bearing a particular trademark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner

possible by the information or reputation that the trademark conveys or embodies about the brand (or the firm that produces the brand)."[17]

It should be apparent, however, that the benefits of trademarks presuppose legal protection.[18] For instance, for a business to create a reputation in the relevant market, it requires business expenditures on product quality, service, advertising, and so on. Once the reputation is created, the business will obtain greater profits because consequential and stable purchases will generate higher sales in addition to "fame*"* profits generated because consumers will be willing to pay higher prices for lower search costs and greater assurance of consistent quality.[19] However, if the market is disturbed by "copycats*"* because "the cost of duplicating someone else's trademark" is insignificant, the incentive to incur this cost will disappear.[20]

> [I]n the absence of legal regulation . . . [t]he free riding competitor will, at little cost, capture some of the profits associated with a strong trademark since the large portion of the consumers will assume (at least in the short run) that the free rider's and the original trademark holder's brands are identical.[21]

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of a trademark has spent energy, time and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trademark owner."

17. Landes & Posner, *supra* note 11, at 270.

18. *Id.*

19. Such people are often called "snobs" because of the economic "irrationally" of paying more for the same physical product they could have purchased for less. *See generally* Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting "Irrational Beliefs,"* 14 GEO. MASON. L. REV. 605 (2007).

20. Landes & Posner, *supra* note 11, at 270.

21. *Id.*

III. Contemporary Trademark Law Systems

A. Trademarks under Common Law and Civil Law

In conventional trademark systems, trademarks are "acquired either through use or through" registration or some combination of these.[22] The use model is based on the objective facts of trademark use, and decides the ownership of a trademark according to the time that the trademark was first used,[23] "'[w]hile the 'registration' model grants trademark rights according to registration and the first applicant will obtain the trademark right."[24] "In modern society, the United States is the representative state that still insists on the 'use' principle."[25] The legislative basis that the U.S. Congress used to enact the Trademark Law is the trade provision in the U.S. Constitution: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes". Thus, U.S. trademark law adopted a system where the use of a trademark in the course of trade between states is a prerequisite for the trademark right.[26] The common law doctrine of use has been deeply rooted in the U.S. trademark law. So far, the trademark grant systems in the world have been divided into the French-represented civil law registration model and the U.S.-represented common law use model.[27]

The protection of trademarks originated as an effort to prevent harm against the greater population by "the sale of defective goods, and to safeguard the collective goodwill."[28] "The repression of trademark infringement came into the common law through an action of deceit and, although it is the public rather than the owner of the trademark who is

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22 Trademark law, http://www.markenverband.de/english_/trade%20mark%20law. (last accessed on Dec. 2012).

23. Landes & Posner, *supra* note 11.

24. The Acquisition of Trademark Right, www.ipr2.org/storage/Acquisition_of_TM_ rights-EN928.doc (last accessed on Dec. 2011).

25. *Id*.

26. For a detailed treatise on U.S. trademark law and policy, *see generally* HUGH HANSEN, U.S. INTELLECTUAL PROPERTY LAW AND POLICY (2006).

27. The Acquisition of Trademark Right, *supra* note 24.

28. Schechter, *supra* note 10, at 819.

actually deceived, the common law trademark action still" protects the interest of the trademark owner.[29] Thus, in countries which have a legal system based on pure common law, prior use is generally sufficient for claiming rights over a given trademark in case of dispute.[30] That is why, for instance, in countries like the U.S., trademark rights are recognized primarily based on the "first-to-use" principle.[31] In civil law countries, however, this is usually not the case. Only trademark registration will provide legal certainty on exclusive rights to the use of the trademark, regardless of how many years an enterprise has been using the name.[32] Today, the vast majority of the world aligns itself as a civil law legal tradition, wherein legal norms are basically either compiled or codified.[33]

A typical feature of civil law trademark regime is that jurisdictions grant trademark rights upon registration.[34] This way "registration allows the registrant to enforce trademark rights against others."[35] In practice however, "many civil law countries allow the assertion of some trademark rights arising as a result of notoriety or distinctiveness acquired through use."[36]

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29. *Id*.

30. *See* World Intellectual Property Organization (WIPO), Trademarks in General, http://www.wipo.int/madrid/en/faq/trademarks.html (last accessed Dec 2011).

31. Thomas F. Zuber, Registering and Enforcing a Foreign Trademark in the U.S., IP International, 3-4/2009 China IP, 2009, at 101-104.

32. WIPO, *supra* note 30.

33. *"The Common Law and Civil Law Tradition*s", The Robbins Collection, 2010, at 5 http://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf. *See also* James G. Apple and Robert P. Deyling, *A Primer on the Civil-Law System, Federal Judicial Center publication*; *see also* Joseph Dainow, *"The Civil Law and the Common Law: Some Points of Comparison",* 15 AM. J. COMP. LAW 419, (1966-1967).

34. *See* Gregory H. Guillot, "*All about Trademarks",* http://www.ggmark.com/protect.html (last accessed Dec 2012).

35. Samantha D. Slotkin, Note, *Trademark Piracy in Latin America: A Case Study on Reebok International Ltd*., 18 LOY. L.A. INT'L & COMP. L.J., 672–73(1996).

36. Ladas & Parry, *supra* note 6.

B. International Law

Traditionally, trademark law grew all over the world with the internal market in mind, with little or no thought given to foreign owners of trademarks or their rights.[37] However, the driving by accelerating globalization and international trade has given a powerful boost to the argument in favor of protection of trademarks and business reputation, central to which trademark law must be consistency in operation and application.[38]

Thus, globalization has led to a degree of harmonization of trademark laws.[39] Harmonizing national legal systems to be similar, employing basic minimum standards, or at least enacting more consistent laws, all have the obvious effect of simplifying trademark protection. Major example includes the 1983 Paris Convention for the Protection of Industrial Property (Paris Convention).[40] Another key force in the harmonization of international trademark laws has been the 1994 World Trade Organization's (WTO) TRIPs Agreement, [41]which generally requires both statutory harmonization and enforcement harmonization.[42] The Paris

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37. *See generally* Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law - The British Experience, 1760-1911*, Cambridge Studies in Intellectual Property Rights, Chapter Seven, Explanations for the shape of intellectual property law, (1999).

38. LANNING G. BRYER, SCOTT J. LEBSON AND MATTHEW D. ASBELL, INTELLECTUAL PROPERTY OPERATIONS AND IMPLEMENTATION IN THE 21ST CENTURY CORPORATION, by John Wiley & Sons, Inc., at 226 (2010).

39. *See generally* J. Weberndörfer, *The Integration of the Office for Harmonization in the Internal Market into the Madrid System*: A First Field Report, in E.I.P.R. (2008).

40. *Paris Convention for the Protection of Industrial Property* of March 20, 1883, as revised at Brussels on Dec.14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on Oct. 31, 1958, and at Stockholm on July 14, 1967, and as amended on Sept. 28, 1979.

41. *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh Agreement Establishing the World Trade Organization*, signed at Marrakesh (Morocco), April 15, 1994; Annex IC, *Agreement on Trade-Related Aspects of Intellectual Property Rights* [hereinafter TRIPS Agreement or TRIPS], *reprinted in The Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts*, 1–19, 365–403, GATT Secretariat, Geneva (1994).

42. *See generally* DUNCAN MATTHEWS, *GLOBALIZING INTELLECTUAL PROPERTY RIGHTS*, (ROUTLEDGE/WARWICK STUDIES IN GLOBALIZATION) (2002).

Convention has also been an instrument of harmonization of the trademark laws.[43]

Accordingly, since the national trademark systems are a design of national legislators, they can act, both in theory and practice, as a barrier for international movement of trade and investment.[44] The laws in fact were originally intended to protect local merchants. This stands in contrast to today's theory and growing practice of the global market. Therefore, "the use of a national trademark as a way to seal off various markets from one another as a form of trade protectionism has come under increasing international criticism."[45] In the mean time, the inherent limitations of the territorial application of trademark laws have been mitigated by various intellectual property treaties, foremost amongst which are the Paris Convention, the Madrid System, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the Trademark Law Treaty. Below is a brief reflection on the basic framework of these.

- *Paris Convention:* Paris Convention for the protection of Industrial Property is the oldest and multilateral industrial property treaty. It was signed in Paris on March 20, 1883, entered into force as from July 7,1884, and has been revised six times, the latest revision being made in Stockholm in 1967. It has the widest membership consisting of more than 140 member countries. The Paris Convention includes provisions relating to the all-industrial property rights, and establishes a set of uniform rules that must be observed by the member country of Union to provide minimum protection in the domestic legislation of the industrial property rights.[46] In addition, the cornerstone of the Convention is the National Treatment

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43. Karol A. Kepchar, *Protecting Trademarks: Common Law, Statutes and Treaties*, ALI-ABA Course of Study, Fundamentals of Trademarks, Copyrights, and Unfair Competition: Protection and Enforcement in the Digital Age, Chicago, Illinois October 11-12, 2007, at 103.

44. Zenobia Ismail, Tashil Fakir, *Trademarks or trade barriers?: Indigenous knowledge and the flaws in the global IPR system*', 31 INT'L J. SOC. ECON. 1/2 (2004), at 173.

45. See, Substantive Trademark Law Harmonization, http://www.gaileevans. com/Ch7_Evans_Final.doc (last accessed Dec. 2011).

46. XIA Qing, *Protection of Well-Known Trademarks, The Comparison of Trademark Examination Standards and Trademark Law Systems Between Japan and China*, Trademark Office State Administration for Industry and Commerce, at www.jpo.go.jp/torikumi_ e/kokusai_e/asia_ip.../2002_china.pdf (last accessed Dec 2011).

principle, expressed in Article 11(1), which provides that "[n]ationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant to nationals."

- *Madrid System:* The Madrid System primarily constituting the Madrid Agreement Concerning the International Registration of Marks[47] (Madrid Agreement) is the oldest multilateral regime to simplify and harmonize the standards and procedures for trademark registration and protection.[48] Two treaties make up the *Madrid System*: the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to the Madrid Agreement.[49] The system establishes a core application and registration framework in its member countries by immediately extending the protection obtained through the World Intellectual Property Organization.[50] This international registration is in turn based upon an application or registration obtained by a trademark applicant in its home jurisdiction.[51] The main input of the *Madrid system* is its innovative approach which allowed an owner of a trademark to secure a simultaneous trademark protection in more than one jurisdiction by filing only one application in a single jurisdiction.[52]

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47. *Madrid Agreement Concerning the International Registration of Marks* of April 14, 1891, as revised at Brussels on Dec. 14, 1900, at Washington on June 2, 1911, at The Hague on Nov. 6, 1925, at London on June 2, 1934, at Nice on June 15, 1957, and at Stockholm on July 14, 1967, and as amended on Sept. 28, 1979 (here in after *Madrid Agreement*).

48. Robert H. Hu, *International Legal Protection of Trademarks in China*, 13 INTELL. PROP. L. REV. 69, 86 (2009).

49. *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, adopted at Madrid on June 27, 1989, as amended on October 3, 2006, and on November 12, 2007 (here in after *Madrid Protocol*).

50. The World Intellectual Property Organization is a specialized agency of the United Nations dedicated to the promotion and protection of Intellectual Property in all its forms.

51. *See Madrid Protocol*, Article 4: Effects of International Registration; Article 4bis: Replacement of a National or Regional Registration by an International Registration.

52. *Id.*, Article 6: Period of Validity of International Registration; Dependence and Independence of International Registration; Article 7: Renewal of International Registration For a comprehensive discussion of the Madrid Agreement and the Madrid Protocol; *see also* PETER J. GROVES, SOURCE BOOK ON INTELLECTUAL PROPERTY LAW, Chapter 6, Trademarks, at 627-632 (1997).

- *The TRIPs Agreement:* The conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994 opened the advent of effective global protection of trademark rights.[53] In addition, the Agreement also provides detailed rules regulating the protection of trademarks, and rules, which would impose legal obligations on WTO Members towards building effective enforcement procedures within their jurisdiction.[54] Among others, the Agreement requires WTO Members to ensure that enforcement procedures and remedies are available to permit effective action against any act of infringement of the intellectual property rights referred to above, including civil and administrative procedures and remedies, provisional measures and criminal procedures.[55] Pursuant to Articles 3 and 4 of the TRIPS Agreement, each WTO Member must accord other WTO Members national treatment and most-favoured-nation treatment, subject to a number of exceptions.[56]

- *Trademark Law Treaty***:** The Trademark Law Treaty is a system that aims to establish international rules on areas whereby countries commit to standardize their procedural rules with respect to their domestic trademark registration procedure.[57] Apparently, what has become today's Trademark Law Treaty is only a reminder of broad aspirations originally envisioned by the contracting parties. The original aim of the negotiations for this treaty, was to harmonize the trademarks laws of the eventual signatory states in numerous areas, both administrative and substantive, including harmonization of the definition of registrable marks, provision for registration of sound marks, provision of opposition procedures,

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53. *See generally* Gail. E. Evans, *Substantive Trade Mark Law Harmonization by Means of the WTO Appellate Body and the European Court of Justice: The Case of Trade Name Protection*, 41 J. WORLD TRADE L. 6, 1127–1162 (2007).

54. *See generally* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION TEXT, CASES AND MATERIALS, Cambridge University Press 2005.

55. TRIPs Agreement, Articles 41–61.

56. Other than Trademarks, the TRIPS Agreement in general covers six types of intellectual property: copyright and related rights (Articles 9-14), geographical indications (Articles 22-24); industrial designs (Articles 25-26); patents (Articles 27-34); layout-designs (topographies) of integrated circuits (Articles 35-38); and undisclosed information, including trade secrets (Article 39).

57. WIPO, TRADEMARK LAW TREATY, Done at Geneva on Oct. 27, 1994, WIPO Publication No 225(E).

harmonization of the definition of objectionable marks, etc.[58] However, due to serious line of stalemates in the negotiations, almost all the substantive goals of the Treaty were eliminated, thereby leaving the treaty with the purely administrative harmonization treaty as we have it today.[59] In the mean time, the principal features of trademark practice, which the Treaty seeks to harmonize include, *inter alia*, the initial registration term and renewal terms of trademark registrations will be ten years,[60] service marks are given the same protection as trademarks under the Paris Convention,[61] one power of attorney may be submitted for each applicant and member states may not require that signatures on powers be authenticated or legalized,[62] cumbersome documentation procedures, such as the submission of multiple powers of attorney, certificates of incorporation or corporate status, etc will be alleviated, and importantly single application may be filed to cover multiple international classes.

IV. Ethiopia's Trademark Law

As discussed above, the key function of trademarks is distinguishing products and services from others in commerce. In fact, only marks that perform such a function are protected by the Law. Accordingly Ethiopia's newly introduced and working Trademark Registration and Protection

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58. Ian J. Kaufman, Trademark Law Treaty, 2001, available at http://www.ladas.com/Trademarks/MadridAgreement/Madrid05.html (last accessed Dec. 2011).

59 *See* WIPO, Summary of the Trademark Law Treaty (TLT) (1994), http://www.wipo.int/treaties/en/ip/tlt/summary_tlt.html (last accessed Dec. 2011).

60. TRADE LAW TREATY, Article 13 of the Treaty provides for duration and renewal of registration. (7) [Duration] The duration of the initial period of the registration, and the duration of each renewal period shall be 10 years.

61. *Id.*, Article 16, Service Marks: Any Contracting Party shall register service marks and apply to such marks the provisions of the Paris Convention which concern trademarks.

62. *Id.*, Article 22, (2) [Single Power of Attorney for More Than One Application and/or Registration] Any State or intergovernmental organization may declare that, notwithstanding Article 4(3)(b), a power of attorney may only relate to one application or one registration. (3) [Prohibition of Requirement of Certification of Signature of Power of Attorney and of Signature of Application] Any State or intergovernmental organization may declare that, notwithstanding Article 8(4), the signature of a power of attorney or the signature by the applicant of an application may be required to be the subject of an attestation, notarization, authentication, legalization or other certification.

Proclamation,[63] (Trademark Proclamation), protects trademarks that have distinguishing ability within a market.[64] The Proclamation was promulgated in 2006 to replace the existing, non-statutory trade mark system administered by the Ethiopian Intellectual Property Office (EIPO).[65] The existing system has been developed since 1987 from a simple cautionary notice procedure, so as to comprise registration for the stated term of 6 years.[66] Similar to economic assertions mentioned in the previous heads of this work, the Proclamation under its preamble provides that "… trade mark … play an important role in guiding customers` choice and protecting their interests."[67] In here, the Proclamation does not explicitly mention the function of trademark registration as an incentive for the production of quality products. However, by emphasizing on the source identifying role of trademark registration, it can be contended that our Trademark Proclamation as well encourages the production of quality products.

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63. *See, Trademark Proc*.

64. *Id*., Article 2 (12) states that a "trademark" means any visible sign capable of distinguishing goods or services of one person from those of other persons; it includes words, designs, letters, numerals, colors or the shape of goods or their packaging or the combinations thereof.

65. *See* Ethiopia, *Trademark Law & Practice Developments*, (2010), http://www.spoor.com/home/index.php?ipkArticleID=317 (last accessed Dec. 2011).

66. *Id.*

67. *Trademark Proc*.; in general, the preamble of the of the Proclamation state the objective of the Proclamation by stating that;

> WHEREAS, it is necessary to protect the reputation and goodwill of business persons engaged in
>
> manufacturing and distribution of goods as well as rendering services by protecting trademarks to avoid confusion between similar goods and services;
>
> WHEREAS, trademarks, in the course of free trade. play an important role in guiding customers' 'choice and protecting their interests;
>
> WHEREAS, it is believed that protection of could have positive impact on the national economic advancement and especially on the trade and industrial development of the country.

A. Eligibility for Protection

Although the role of trademark is ever expanding beyond our imagination, it primarily serves to indicate the origin of goods and/or services. Thus, the standard for the eligibility of trademarks for registration is basically determined whether the mark is distinctive.[68] Accordingly, under the Trademark Proclamation, a trademark shall be eligible for registration if it fulfills the following conditions: be a sign as defined under Article 2 (12) which includes words, designs, letters, numbers, colors or the shape of goods or their packaging or the combination thereof, be capable of being represented graphically as envisaged under Article 8(3)(a), be capable of distinguishing goods or services of one person from those of others, be used or proposed to be used in relation to goods and services, the use must be for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be.

B. Application and Registration: Formality and Procedure

As discussed earlier, many countries require registration of trademarks as a validity requirement. Some authorities resist the registration system as complicated, expensive and unnecessary. However, it is thought that the advantages of the registration system outweigh its potential disadvantage. In particular, it is argued that the registration of trademark would enable third parties to discover whether other traders had claimed the right to use a particular sign and, where necessary, to locate the proprietor of the sign.

Ethiopia seems to have been influenced by this Civil Law tradition in this regard. Under the Proclamation and the newly introduced Trademark Regulation, trademarks and their subsequent rights are conferred upon the trader upon the registration of the trademark and its certification which is initiated when a trader approaches the office for such registration and

68. *See Search Results Why a trade mark needs to be distinctive - Trade Mark Articles, available at* http://www.trademarkroom.com/.../why-a-trade-mark-needs-to-be-distinctive (last accessed Doc 2011).

certification.[69] The approval and certification of a trademark, in general, involves four steps: application for registration to be put in by the trader,[70] examination of application,[71] publication of notice of invitation for opposition,[72] registration of trademarks and issuance of certification, and notification of registration.[73]

In particular, a written application for the registration of a trademark is made by the trader and is filed in the intellectual property office. The office will, upon receipt of the application examine it for form and content. If the application is found insufficient, it will give the applicant notice and provide with sufficient time to remedy the defect. But if the defect is fundamental or if, in the period of time granted to him, the applicant does not take the appropriate steps, the office will reject his application and inform the applicant the decision in writing. Where the application proves sufficient under examination, the office will publish and broadcast, through the press and media, a notice inviting opposition to the grant of the trademark at the cost of the applicant. An opposing party will have to, within the prescribed time limit and in writing, present his issues to the office which shall relay such to the applicant. A counter report shall be expected of the applicant, the absence of which means that he has abandoned his application. The office shall furnish copies of the counter opposition to the party making the opposition and arrive at a decision within a prescribed period of time. Where the request for the registration of a trademark is found to have fulfilled its conditions as to substance and form and where it has not been opposed to or an opposition filed has been rejected, the office will register the trademark and, upon the requisite payment, issue the applicant a certificate of registration conferring him rights over such trademark.

From the time an application is made known to the public until the grant of a trademark, the applicant enjoys the legal protection that he would

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69. As per Art.4, a right in trademark is acquired and is binding on third parties upon the grant of a trademark registration.

70. *Trademark Proc*., Article 8. *See also Trademark Regulation,* Arts.9, 10 & 12

71. *Id*., Art. 11; *see also Trademark Regulation,* Arts.14-16.

72. *Id.,* Art. 12; *Trademark Regulation,* Art. 25(2) & 26.

73. *Id.*, Art. 15; *Trademark Regulation,* Art. 31-33.

get, if he had been granted a trademark. The only exception to this rule is legal infringement. A trader may not initiate proceedings for legal infringement unless his trademark has been registered and certified. After a trademark has been appropriated appeal to such may be filed to the relevant court within 60 days from the issue.[74]

C. Duration and Renewal of registration of trade marks

It should be noted that there is a key difference between protection of trademarks and protection of IPRs that seek to stimulate creative and inventive activity - patents, copyright, designs, and so on. In particular, unlike copyrights and patents, trademark rights can last indefinitely as long as the owner continues to use the mark to identify its goods or services. Thus, while term of protection in a trademark law can range between 5 to 10 years, this only means that protection is to be given indefinitely with 5 to 10 year renewal terms.[75] This fundamental difference is reflected in the fact that patents and copyright receive protection for only a limited time period, whereas trademarks can endure forever, provided they remain in use.[76]

Accordingly, in accordance with Article 24 of the Proclamation, the registration of a trade mark remains valid in Ethiopia for a period of seven years from the date of submission of the application for registration. However, this does not mean that the trademark would be a public domain right after the seven years period. Unlike the patent system, the jurisprudence of the trademark law always allows for indefinite renewal of trademark registration. In this regard, Article 25 provides that "registration of trademark may, upon request of the owner, be renewed for consecutive periods of seven years." No provision under the Proclamation envisages a

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74. *Id.*, Art. 15(1); *Trademark Regulation*, Art. 30.

75. How long does trademark protection last? http://www.registeringatrademark.com/length-trademark.shtml

76 CARSTEN FINK AND BEATA K. SMARZYNSKA, TRADEMARKS, GEOGRAPHICAL INDICATIONS, AND DEVELOPING COUNTRIES (IN) BERNARD HOEKMAN, AADITYA MATTOO, AND PHILIP ENGLISH, DEVELOPMENT, TRADE, AND THE WTO*;* A HANDBOOK, THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT / THE WORLD BANK, (2002), at 404.

time limit for renewal of trademark registration. Thus, the trademark owner can in no way be discouraged by the initial shorter duration of his trademark right.

V. The Doctrine of "Famous" and "Well-known" Trademarks

As discussed above, although there are systems which facilitate the filing, registration or enforcement of trademark rights on global basis, such as the Madrid System, it should be noted that, currently it is not possible to file and obtain a single trademark registration which will automatically apply around the world. Thus, like any other legal regime under national law, trademark laws apply only in their applicable country or jurisdiction, a character which is often known as 'territoriality'.

Accordingly, trademark rights are territorial and ownership of a mark in one country in principle provides no advantage when enforcing the mark in another country.[77] Hence, trademark rights under national legislation are in principle, established through state legislature and national court decisions[78]supplemented by the practices of the IP offices.[79] According to World Intellectual Property Office (WIPO), these rights, "such as patents, trademarks and industrial designs are 'territorial rights' that are protected through a registration or grant procedure.[80] This means that they can only be enforced in countries or regions (e.g. Member States of the EU or African Intellectual Property Organization-OAPI) where protection has been established and is in force."[81]

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77. *See generally* Christopher Dolan, IP: *Territoriality and Well-Known Trademarks,* Inside-Counsel, A Summit Business Media Publication, 2011.

78. Mavreen A. O'Rourke, *Evaluating Mistakes in Intellectual Property Law: Configuring the system to account for imperfection,* 4 THE J. SMALL & EMERGING BUS. L., at 168 (2000).

79. It is thus expected that these institutions pay attention to the sorts of trademarks are being protected and why; thus, fulfilling their democratic mandate directly or indirectly.

80. *Convention Establishing the World Intellectual Property Organization*, signed at Stockholm on July 14, 1967 and as amended on Sept. 28, 1979.

81. *See* WIPO, http://www.wipo.int/sme/en/documents/ip_pharma.html (last accessed Dec. 2011).

But it is understandable that a considerable number of companies have successfully established, via their trademarks, including service-marks, worldwide fame and reputation. Consequently, consumers can, without effort, recognize and identify their goods or services, their qualities and their features without referring to the location of the company in question. These trademarks are called *well-known trademarks*.[82] Following this, the geographical expansion in the operations of many businesses has given rise to a form of opportunism, against which international action, through the instrumentality of international agreements such as the Paris Convention and the WTO Agreement on Trade Related Intellectual Property Rights (TRIPs) Agreement, has taken place. More specifically, the Paris Convention has been revised to prevent the preemptive adoption of such marks by copyists in countries where the proprietor has not yet commenced marketing.

A. Well-known trademarks under Paris Convention

According to the Paris Convention, a mark that creates confusion with a well-known trademark may not be registered in the territories of the contracting states.[83] Consequently, members states of the Convention are expected to acknowledge the protection of well-known trademarks within their domestic trademark law regime. In the meantime, to apply this provision, the infringing mark which creates confusion must belong to the same class of goods or be used for identical or similar goods in addition to the fact that the protection accorded for well-known marks under the Paris Convention is only limited to trademarks over goods and not services.[84]

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82. *See generally* Lile Deinard and Amy Stasik, *The Famous Marks Doctrine Under the Paris Convention*, N. Y. L. J. (2006).

83. Paris Convention for the Protection of Industrial Property, 21 UST 1583, 828 UNTS 305, Article 6bis: Marks: Well–Known Marks.

84. *Id.*, The relevant part of the Convention reads:

> Article 6 bis.
>
> (1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use of a trademark which constitute a reproduction, an imitation, or a translation, liable to create confusion, of a mark

Article 6bis first incorporated the concept of a well-known trademark in 1925, and has been applying universally. It specifies the principles of protection of well-known trademarks in the countries of the Convention. The unauthorized registration and use of trademarks that constitute the reproduction, an imitation or a translation of well-known trademarks, which are the clear standards, the competent authority of the country where the protection of well-known trademark is sought has to refuse, cancel or prohibit such trademarks, while well-known trademarks should be well-known and used in the country where the protection is sought.[85] As such, Article 6bis of the Paris Convention imposes an obligation to recognize and protect well-known marks even where they have not been registered. Consequently, well-known trade mark status is commonly granted to famous international trade marks both in better developed and less-developed jurisdictions.

In the meantime, the Paris Convention has not defined what "well-known trademark" is. It also neither provided a criterion of which trademarks can be recognized as well known. While, the existence of actual confusion or a risk of confusion is necessary for the protection of well-known trademarks as a result of infringement, the limitation of the boundaries of a well-known mark is left under the respective jurisdiction of each Member State. In the meantime, while the provision of Article 6bis played a very important role for protection of well-known trademark in the past decades, it was unable adapt to the needs of protection in line with modern developments of global commerce. It is within this context that the limitation of the Convention has become apparent where the infringing or

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considered by the competent authority of the country of registration or use to be well-known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well- known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

85. XIA Qing, *supra note* 46.

counterfeiting acts to well-known trademarks has become very severe were it deeply damages the benefits of proper proprietor. Therefore it became necessary to reframe the Convention towards a stronger provision to protect well-known trademarks in the global scale.[86] This was later achieved by the work of the TRIPs Agreement.

B. Well-known trademarks under TRIPs

Speaking of the TRIPs Agreement, one can safely say that its outstanding achievement in realm of international intellectual property protection is its ability to build from earlier foundations of intellectual property regimes established under historical instruments such as the Paris Convention.[87] Particularly it has been provided under the TRIPS Agreement that every Member country of the WTO is obliged to implement at the domestic level Articles 1-12 and 19 of the Paris Convention, whether or not that member is signatory of the Paris Convention in the first place.[88] Based on the above understanding, the TRIPs agreement provides under Article 16 that the owner of a registered trademark [will] have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion." [89] Article 16(2) of the Agreement incorporates

86. *Id.*

87. Generally, the TRIPS Agreement frequently refers to other intellectual property agreements, such as the *Paris Convention for the Protection of Industrial Property (1967), the Bern Convention for the Protection of Literary and Artistic Works (1971), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)* and *the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (1989*), making provisions of these agreements applicable to all WTO Members.

88. Tshimanga Kongolo, *The International Intellectual Property System and Developing Countries before and after the TRIPs Agreement: A Critical Approach*, 3 INT'L PUB. POL'Y STUD. 1, at 99-116 (1998).

89. TRIPS, Art.16: Rights Conferred.

Article 6 bis of the Paris Convention and further extends the scope of its protection to 'services' as well.[90]

Thus, in conformity with the prescription of Article 16(1), an unauthorized label on goods using signs already registered as a trademark shall be considered as infringement and the labeled goods as counterfeit goods. In the case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed.[91] From this perspective then we can say that TRIPs has strengthened the protection of well-known marks in the sense that it applies expressly to services and is extended to "dissimilar goods or services when use of a registered mark would likely indicate a harmful connection between those dissimilar goods or services and the owner of the registered mark."[92]

VI. The Case of Well-known Trademarks in Ethiopia

While the Territoriality Rule is rooted in the commonsense idea that if a mark is not registered in Ethiopia commerce, then Ethiopian/foreign consumers will not encounter it, globalization has rendered the rule anachronistic. Indeed, economic integration, increased travel and the Internet have changed the playing field. It is now very possible that Ethiopian consumers will recognize well-known brands used exclusively overseas and erroneously assume that a copycat in Ethiopia, is associated with the overseas brand owner. Simply speaking, the primary question remains determination of whether it is actually possible for a foreign well-

90. In addition Art 16(2) provides that in determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark. Article 16(3) further provides; Article 6*bis* of the Paris Convention (1967) shall apply, mutatis mutandis, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

91. *Id.*

92. TRIPS, Art. 16 (3); *see also* J.H. Reichman, *Universal Minimum Standards of intellectual Property Protection under the TRIPs Component of the WTO Agreement*, 29 INT'L LAW. 2 (1995), at 363.

known mark, that is not used in Ethiopia as a trademark, to reach the required level of recognition by consumers? The answer at first seems to be in the negative. However, after considering the great number of Ethiopian diaspora abroad, internet, the growth of international satellite TV, the ease of global communications, and the convenience of international travel, a different answer emerges. Thus one can safely say that, foreign marks can and do easily become well-known to Ethiopian consumers even without actual use in the country.

Thus it is within this understanding that the Trademark Proclamation provided for rules which protects property interests of owners of foreign well-known trademarks.[93]

However, at the outset it should be noted that the Proclamation in effect does not commence to protect well-known marks at the date of its adoption. Rather the applications of the above rules are subject to any international agreement that Ethiopia will enter in the future. Considering the fact that the most important international agreements in this regard are the Paris Convention and the TRIPs Agreement, one can safely assume that the pertinent provision of the Proclamation protecting well-known trademarks will be put in to effect only when Ethiopia joins these instruments. And there is a high likelihood that this would happen as there are informal talks which tip that Ethiopia will sign the Paris Convention soon, while importantly Ethiopia is already in the process of acceding to the WTO and thus signing the TRIPs agreement will be certain up on accession in due time.[94] When this is done, an owner of a well-known

93. *Trademark Proc*. The following are the pertinent provisions: Article 23: 3, Well-known Trademarks 1. A trademark which is entitled to protection under an international convention to which Ethiopia is a party, as a well-known trademark shall be protected under this Proclamation if it is well-known in Ethiopia and is a trademark of a person who is: a) the national of a state party to the convention; or b) domiciled in or has a real and effective industrial or commercial establishment in a state party to the convention, Whether or not such person carries on business or has any good will in Ethiopia. Article 26 (2); Registration of a trade mark shall confer upon its owner the right to preclude others from the following: a) Any use of a trademark or a sign resembling it in such a way as to be likely to mislead the public for goods or services in respect of which the trademark is registered, or for other goods or services in connection with which the use of the mark or sign is likely to mislead the public, b) Any use of a trademark, or a sign resembling it, without just cause and in conditions likely to be prejudicial to his interests and; c) Other similar acts.

94. *See generally* Melaku Geboye Desta, *Accession for What? An Examination of Ethiopia's Decision to Join the WTO, 43* J. WORLD TRADE. 2 (339), at 348 (2009).

trademark in Ethiopia will be able to protect and exploit his interests by the work of the above mentioned provisions of the Proclamation. Thus even though the trademark is not registered as per the rules of the proclamation, protection will be granted to an owner of a well-known trademark to the extent that he is a national or resident of a state party to a convention which Ethiopia has signed.[95]

To illustrate, consider a well-known trademark owned by some foreigner. When the above provisions are fully effective up on ratification of either the Paris Convention or the TRIPs agreement, another person who copies that mark cannot legally use it under the Rules of the Proclamation if it is confusingly similar to the well-known mark, because TRIPS presumes that Ethiopian consumers are likely to believe that the goods of the copier are connected with the owner of the well-known trademark. Consumers who ordinarily would not have purchased the copying mark owner's products will do so because they believe the copier's products are associated with the products bearing the well-known mark that they have read about in magazines or travel guidebooks, or seen in advertisements, on their favorite websites, or television programs. Ethiopian consumers might well enjoy the copier's product because they thought they were dealing with a branch of the well-known mark's owner, the case of services.

Other than the above, while this work does not attempt to provide a comprehensive commentary on the application of the Proclamation, it seems vital if one or two words are added to explain some important innovations incorporated under the Proclamation based on international standards. The first is the case of Article 23 sub-article 2 – which provides determination of well-known status based on knowledge of the trademark to be established *with in a relevant sector of the public*. This means, depending on the nature of the goods and services, the channels of distribution may differ considerably. Certain goods may be sold in supermarkets and are easily obtainable for consumers. Other goods are distributed through accredited dealers or through sales agents direct to a consumer's business or home. This would, for example, indicate that a survey among consumers who exclusively shop in supermarkets may not be a good indication for establishing the relevant sector of the public in

95. *Trademark Proc.*, Art. (1) a & b.

relation to a mark which is used exclusively on goods sold by mail order.[96] Thus, according to Article 23 Sub-Article 2, in order for a mark to be considered to be a well-known mark, it is sufficient that the mark is well known in at least one relevant sector of the public. It accordingly would not be necessary to apply a more stringent test such as, for example, that the mark be well known by the public at large. The reason for this is that marks are often used in relation to goods or services which are directed to certain sectors of the public such as, for example, customers belonging to a certain group of income, age or sex. An extensive definition of the sector of the public which should have knowledge of the mark would not further the purpose of international protection of well-known marks, i.e., to prohibit use or registration of such marks by unauthorized parties with the intention of either passing off their goods or services as those of the real owner of the mark, or selling the right to the owner of the well-known mark.[97]

It also seems that, in accordance with Article 6bis of the Paris Convention, the Proclamation, under Article 23(1) has provided protection for marks that are only well-known in Ethiopia; in the words of the Convention this is *the country in which protection is sought*. Thus, for a well-known trademark to be granted protection under the Proclamation, it is not sufficient that the mark be well known only in the country of origin or elsewhere, rather it must, in fact, also be well known in Ethiopia. Article 23 sub 2 of the Proclamation also seem to have taken Article 16 of the TRIPs Agreement in to consideration by adding another important element of the TRIPs agreement which protects well-known trademarks created *as a result of the promotion of the trademark and the knowledge gained as a result of promotions*.[98]

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96. WIPO, *Draft Provisions on the Protection of Well-Known Marks, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications*, Second Session, First Part, Geneva, March 15 to 17, 1999.

97. *Id.*

98. According to Héctor A. Manoff, "This element is very important for those cases where advertising created good reputation, yet the product is not available. This kind of case is also very useful in analyzing trademarks that promote themselves sponsoring shows that are watched worldwide, or that have web pages on the Internet." *See* Héctor A. Manoff, *Famous Trademarks in the Argentine Law, The McDonald case in South Africa and the*

In addition to this, it should be recognized that trademark protection traditionally was only possible where goods were of the same description. Where a mark was applied to different category of goods, there was frequently no remedy. New developments of trademark law regimes now contain significant changes. Similarly, in Ethiopia an owner of a well-known trademark can protect his mark against prejudices to come from non identical use of his well-known trademark. Under Article 7(2) the Registrar may consider whether an application for registration will have a detrimental effect on the reputation or distinctive character of a well-known mark, even if the application registration is for dissimilar goods. And obviously, under Article 26(4), a registered proprietor is now able to prevent the unauthorized use of his trade mark in relation to goods or services which are not similar to the proprietor's goods or services, provided the trade mark has a reputation in Ethiopia and that the unauthorized mark would take unfair advantage of or would be detrimental to the distinct character of the repute of the registered trademark. The extension in Article 26(4) would prevent, for instance, an imitation of a mark used for a soft drink being used on weed-killer and could protect trademarks from being extended or expanded into widely different products by deterring other traders from poaching existing goodwill.

Generally, contrary to the Territoriality Rule, which would argue that proof of registration should be unnecessary to underpin an infringement action involving a well-known mark, it is the reputation of a demonstrably well-known mark that is given protection under the Trademark Proclamation and thus reputation should be considered sufficient to create enforceable rights in a well-known foreign mark. Otherwise, foreign companies' successful marks are at risk of infringement in Ethiopia.[99] Accordingly, it is also worth noting that under the terms of Art. 6bis of the Paris Convention, marks that are well-known in a member country may be

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necessity to define "well-known trademarks", Vitale Manoff & Feilbogen, THE NAT'L L.J. (1996), at 5.

99. That is, under the working Trademark Proclamation, enforceable trademark rights arise from actual registration of the mark in Ethiopia under what is referred to as the Territoriality Rule. Thus, if a foreign company has yet to register its mark in Ethiopia, the Territoriality Rule can have the surprising and inequitable effect of precluding it from enforcing its mark against copycats in the Ethiopia, even when the foreign company's mark is well-known abroad and in Ethiopia. *See Trademark Proc.*

protected there even without use within its borders. Thus, under Ethiopia's obligations upon accession to the WTO or to the Paris Convention, Ethiopia would have to protect a mark that has been well-known in a member state of the Paris Convention, without requiring use in Ethiopia. Rights given to the well-known trademark owners by the Paris Convention, accordingly, will at least pre-empt Ethiopia's Trademark law. Therefore, we can see that the well-known mark doctrine, as indicated under Article 23 of the Trademark Proclamation, will provide protection to owners of well-known foreign marks from infringement in Ethiopia, despite the territoriality Rule. Under this doctrine, marks that are used and well-known abroad may be enforced in Ethiopia, even when they are not used in Ethiopia.

VII. Analysis of the Current State of the Law

With a historical perspective on the protection of well-known marks in the greater context of the past development of the Trademark Proclamation, this section sketches the contours of what well-known mark protection in Ethiopia could be in the future. As Ethiopia continues its own search for the *rule of law* and as it strives to build a *market economy*, polishing the current Proclamation and the entire trademark protection system is unavoidable.

Under the current Trademark proclamation, certain well-known trademarks will receive protection in Ethiopia where some likelihood of confusion is found, even if the well-known mark and the copying mark are registered in different classes of goods/services. Art 26(2, a) in particular, in line with TRIPS Article 16(3) declares that the protection of well-known marks extends to goods or services that are different from those for which the trademarks are registered, as long as the use of the mark on those goods or services would indicate a connection with the owner of the registered trademark, and as long as the owner of the registered trademark would be damaged by use of the mark on those goods or services.

A. Defining "Well-Known" Trademarks

As it has become apparent from the above discussions, ascertainment of the meaning of "well-known" trademarks is needed for legal certainty as

to when a trademark owner in Ethiopia can rely up on international agreements such as Article 6bis of the Paris Convention.

Yet ever since the time of the Paris Convention, this issue has been problematic. For starters Art 6bis does not provide a definition. TRIPS 16(2) however has given some basic guidance: "Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark." This has also been adopted by Ethiopia's working Trademark Proclamation. Under the terms of the Proclamation, a well-known mark is a mark with "knowledge in the mark of the relevant sector of the public." This definition requires more than simple name recognition. The test is whether Ethiopian consumers would associate the trademark with the goods and services for which the trademark is used outside Ethiopia.

However, the Trademark Proclamation does not provide any criterion or illustrative factors which will be helpful to define whether a mark is "well-known." There is no clear definition of well-known trademarks under the Proclamation. Perhaps, a precise ascertainment of what protection is available for well-known marks will probably require a great deal of litigation in the coming years. Knowing the meaning of the term "well-known" in the context of trademark law is important to determine whether a foreign well-known mark that has not been used as a trademark in Ethiopia will be protected here.

In this context the most important question that should be raised is whether a trademark that is well known in a Ethiopia in the sense of Article 23(1) of Trademark Proclamation only relates to the *degree* that a trademark is well known in a Ethiopia or an important part thereof, or whether this concept also relates to a trademark that is (only) in-brief well known in a certain region and its surrounding area.[100] That is, the issues is whether the Proclamation to a workable extent has elaborated what the executive or adjudicators need to ascertain in terms of the 'well known' status of a certain trademark. So, the question is whether the word well known relates to the degree of deepness in knowledge of the well-known

100. For similar line of investigation, *see* Kennedy Van der Laan, *Where a Well-Known Trademark Should be Known*, A discussion of the "Nieto Nuno" judgment of the European Court of Justice (November 2007).

mark in the relevant sector or does it refer to the spatial (e.g., territorial or population wise) scope of the knowledge of the relevant trademark.

In addition to the above – while, TRIPs determines the grant of protection to well-known marks premises 'knowledge of the trademark in the relevant sector of the public,' and the reference to the relevant sector of the public requires States to accord protection even when the trademark is known only to a certain group of consumers, how the relevant sector of the public is to be defined, is a matter of national legislation.

In light of the possibility that the knowledge be obtained through the trademark's promotion, we have discussed above that it is not necessary that the trademark is well-known to the consumers constituting the specific market for the product, but knowledge of an interested circle of experts could suffice. However, this proposition holds the risk of an uncalculated increase of well-known marks. Thus, implementing a relatively high standard regarding the criterion of knowledge of the trademark among the relevant sector therefore have been recommended for developing states like Ethiopia.[101] That is, as there is a risk that defining 'well known' in terms of the relevant sector of the public will lead to a proliferation of well-known marks, this risk should be addressed by imposing a relatively high standard regarding the degree of knowledge of the mark among the relevant sector, which possibly is in line with the scope of the relevant obligation under international law, in particular the TRIPs Agreement.[102]

Thus, generally the primarily challenge is a question of what criterions to consider when ascertaining the well-known status of a certain trademark? Under the international framework, some attempts have been made to further support the extended protection of well-known marks but without defining the concept. While, this work provides below a brief sketch of this development, it should be noted that most of the national laws dealing with the subject, rather opt to provide only some guideline factors which can be used as a test case in establishing the case for a 'well-

101. For more on this, *see* RÜDIGER WOLFRUM AND PETER-TOBIAS STOLL, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, at 324 (Martinus Nijhoff Publishers, Leiden-Boston 2009).

102. UNCTAD/ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT, at 240 (Cambridge University Press/The Edinburgh Building, Cambridge cb2 2ru, UK, 2005) (hereinafter RESOURCE BOOK ON TRIP).

known' status or its infringement.[103] At the outset, defining well-known trademarks and issues of protection related with this will be addressed within the international framework via examination of the Pars Convention for the Protection of Industrial Property, the Agreement on Trade-Related Intellectual Property Rights (TRIPS), and the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks of the World Intellectual Property Organization (WIPO).

In particular this work explores workable line of tests and references that should be adopted in the future with the aim of reform and implementation objectives. Primarily this work proposes an assessment of both quantitative and qualitative elements of knowledge of the relevant trademark in determining well-known status. In particular this work argues that assessment in this regard is well situated to internalize the above developmental challenges of setting the right balance between protecting a well-known trademark of foreign interest with that of domestic business.

1. Quantitative Vs qualitative determination

As disused above, while determining whether a trademark is well-known in Ethiopia, regard will be given to the knowledge of the trademark in the relevant sector of the public, this rule does not determine whether reference is to be made to the quantitative geographical reach of this relevant sector or to the qualitative degree of information within the same category of population. Obviously, a mark cannot be considered well-known if it is not known to a certain extent in a specific territory. But the question is what degree of coverage should be established to conclude in positive of well-known status. Well, though jurisdictions and various adjudicative bodies within these (such as the European Court of Justice) have in general been reluctant in establishing any strict limits on percentages for well-known marks (and have strived towards a more qualitative approach), a growing academic and practical opinion in the legal doctrine is that well-known marks as referred to in Article 6bis

103. Tshimanga Kongolo, *Are Well-Known Marks Well Known in African Countries*?, 5 THE J. WORLD INTELL. PROP. 2, at 274 (2005).

require an establishment of a minimum 50% of the target group.[104] Advocates in this line have argued that:

> "a strict limit on percentages is to be preferred to increase predictability for all market actors. With a strict limit, trademark owners may be assured that they enjoy an extended scope of protection for their mark, which will facilitate their strategic business decisions. According to Grundén, it is of importance that the protection for well-known marks is clearly limited and that the extended scope of protection is not given on an arbitrary basis. By using traditional market surveys, determining the level of establishment of a mark in a specific territory, resource-demanding processes before Court may also be avoided."[105]

It also appears that this proposition had traditionally gained prominent acceptance in various jurisdictions. For instance, in Sweden, the Swedish Trademark Act requires a finding of 80-90% of the target group and about 20% finding among the general, which resulted in very few marks with the status of being well known.[106] In similar line, while examining whether it is sufficient that a mark is well known only in a part of a Member State, i.e. a city or a region, or if it is required that the mark is well known in the entire member state, in the *Chevy-case*, the European Court of Justice addressed also this question by declaring "…a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."[107] Meanwhile, what constitutes a substantial part of a Member State was not clarified by the ECJ in this case. But, it was underlined that cultural and language

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104. Peter Ottosson, *Brand-napping:-Goodwill Protection for Well-known Trademarks*, University of Gutenberg, Graduate School Master of Science in Intellectual Capital Management, at 8 (Master Degree Project No.2010:12, 2010).

105. Tatham, *WIPO Resolution on Well-Known Marks: A Small Step or a Giant Leap?* http://www.faqs.org/abstracts/Law/WIPO-resolution-on-well-known-marks-a-small-step-or-a-giant-leap.html *(*last accessed Dec 2011).

106. Peter Ottosson, *supra* note 104, at 11.

107. ECJ, *General Motors Corp v Yplon Sa* [1999], Case C-375/97CMLR, 427, para. 28.

differences in a Member State must be taken into consideration. [108] In a similar matter, the ECJ issued a preliminary ruling in the *Spanish Fincas Tarragona* case, which further clarified the meaning of a mark being considered well known in a substantial part of a Member State. Here, the Court explained that the customary meaning of the expression "in a Member State", as stated in the Directive, does not include a situation where "…the fact of being well known is limited to a city and to its surrounding area, which together do not constitute a substantial part of the Member State."[109] In another case, In Nuño v Franquet (C-328/06), the ECJ addressed the issue of well-known trademarks in the context of Article 4(2)(d) of the Directive,[110] holding that the requirement is for the mark to be well known in a substantial part of the territory. Mere local reputation is not enough, but the mark does not need to be well known throughout the territory.[111]

On the other side of this proposition, advocates, which favor qualitative assessment over quantitative determination, argue that, "it is the image, goodwill and power of attraction of the used trademark that are in need of protection and it is therefore these qualitative factors that primarily must be considered in the assessment of a mark." [112] These advocates thus have proclaimed that "the examination should be done from a qualitative rather than a quantitative perspective and it is not the percentage, but the actual damage in the specific case that should determine whether or not a trademark should enjoy an extended scope of protection."[113]

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108. Peter Ottosson, *supra* note 104.

109. *Id.*

110. *Nieto Nuno v Monlleo Franquet* (Case C-328/06), available at http://lexisweb.co.uk/cases/2007/november/nieto-nuno-v-monlleo-franquet-case-c-32806 (last accessed Dec. 2011).

111. Clifford Chance, *Famous and Well-known Trademarks in EU law, Well-known and Famous Trademarks, Country correspondents*, WORLD TRAD. REV., January/February (2008), at 66.

112. Peter Ottosson, *supra* note 104, at 10.

113. *Id.*

2. The case for Ethiopia

Today, both quantitative and qualitative approaches seem to have earned credit on their own merit while new developments have shown that both methods of evaluation need to be adopted in determining well-known status of a certain trademark. For instance, in later dates it has been established that both quantitative and qualitative elements are to be considered in determining if a trademark qualifies for goodwill protection in the EU.[114] We can also find the interesting jurisprudences from trademark practice in South Africa, where in the highly talked-about case of *McDonalds Corporation v. Joburger*, the South African Supreme Court of Appeal held that the term "*well known"* should be tested by reference to whether "*sufficient persons* know it *well enough* to entitle it protection against deception or confusion."[115] Thus, today, the growing understanding is that neither of the two approaches should be exclusively pursued.

It is within this context that the WIPO in its Resolution of 1999, which was adopted as a supplement for the interpretation of the Paris Convention and the TRIPs Agreement, has to some extent clarified the issue of how to define a well-known mark. In doing so, the WIPO Committee of Experts concluded that neither the quantitative approach based on percentages of the relative sector of the public, nor the qualitative approach, based on evaluating the value of the mark, was acceptable as the basis for the definition of a well-known mark.[116]

Thus, experience of the above systems explored in this work show that the complex process of determining whether or not a mark is well-known in Ethiopia under the words of the Proclamation should include assessment of both quantitative and qualitative elements. Primarily, the predominant opinion in the legal doctrine is that less quantitative knowledge about a mark could be compensated by other relevant conditions, such as if a mark is perceived as a highly qualitative mark or represents a high amount of goodwill for consumers in a specific territory.

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114. *Id*. at 8.

115. McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd. and Another; McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd. and Another (547/95) [1996] ZASCA 82; 1997 (1) SA 1 (SCA); [1996] 4 All SA 1 (A); (27 August 1996), at 38, para. 1.

116. Peter Ottosson, *supra* note 104, at 7.

Consequently, as the relevant obligations under the Paris Convention and the TRIPs Agreement are not detailed enough to cover every ground, it is possible that "well-known marks in one jurisdiction will not be found to be well-known in another";[117] and thereby various jurisdictions have established guidelines in their legislation, which would assist their relevant state departments and adjudicators to reach at consistent determination. In particular, trademark legislations in U.S., under the Lanham Act,[118] Brazil, under the Industrial Property Code of Brazil,[119] and Canada, under the Canadian Trade-marks Act,[120]have established a workable line of guidelines in this regard. In addition, foreign trademark offices, including the Chinese and Japanese trademark offices, have also created criteria for determining well-known status.[121] Trademarks laws of countries such as Vietnam provide indicative definitions of the meaning of well-known trademarks. Apparently, all the above systems seem to have been influenced by the set of guidelines drawn up by the Standing Committee on the Law of Trade Marks of the World Intellectual Property Organization (WIPO).[122]

This work also proposes that further implementation instruments could easily adopt approaches of this instrument. In doing so, the instruments could easily incorporate the set of guidelines included under Article 2 of the WIPO guideline, which provides 'factors for consideration' to allow national authorities to draw up their own rules, and a somewhat convoluted 'factors which shall not be required'. Although 'any circumstances' at all can be taken into account in determining whether or not a mark is well

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117. Vasheharan Kanesarajah, *Protecting and Managing Well-known Trademarks,* Knowledge LINKSM NEWSLETTER from Thomson Scientific scientific.thomson. com/newsletter, 2007, at 3.

118. *See generally* The Lanham Trademark Act, 15 USC 22.

119. Intellectual Property 9.1 Industrial Property 9.1.1, http://www.brazilian-consulate. org/secom/incs/TrademarksinBrazil.pdf.

120. *See* Canadian Trademarks Act, R.S.C., ch. T-13, 1995; Amir H. Khoury, *Well-Known and Famous Trademarks in Israel: TRIPS from Manhattan to the Dawn of a New Millennium!,* 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 4, Article 2, Volume XII Book 4, at 1004 (2002).

121. *Id.*

122. This was adopted in the form of a Joint Recommendation by the Assembly of the Paris Union and the Assembly of WIPO at their meeting in September 1999.

known in any jurisdiction, six headings are listed for special consideration, viz.:

Article 2: Determination of Whether a Mark is a Well-Known Mark in a Member State

> (1) [Factors for Consideration] (a) In determining whether a mark is a well-known mark, the competent authority shall take into account any circumstances from which it may be inferred that the mark is well known.
>
> (b) In particular, the competent authority shall consider information submitted to it with respect to factors from which it may be inferred that the mark is, or is not, well known, including, but not limited to, information concerning the following:
>
> 1. the degree of knowledge or recognition of the mark in the relevant sector of the public;
>
> 2. the duration, extent and geographical area of any use of the mark;
>
> 3. the duration, extent and geographical area of any promotion of the mark, including advertising or publicity and the presentation, at fairs or exhibitions, of the goods and/or services to which the mark applies;
>
> 4. the duration and geographical area of any registrations, and/or any applications for registration, of the mark, to the extent that they reflect use or recognition of the mark;
>
> 5. the record of successful enforcement of rights in the mark, in particular, the extent to which the mark was recognized as well known by competent authorities;
>
> 6. the value associated with the mark.

Meanwhile, it should be noted that none of the above are preconditions for the determination, and there is a bewildering array of possible combinations that are given approval. Article 2 Sub-article (c) of the recommendation states that;

> The above factors, which are guidelines to assist the competent authority to determine whether the mark is a well-known mark, are not pre-conditions for reaching that determination. Rather, the determination in each case will depend upon the particular circumstances of that case. In

> some cases, all of the factors may be relevant. In other cases, some of the factors may be relevant. In still other cases, none of the factors may be relevant, and the decision may be based on additional factors that are not listed in subparagraph (b), above. Such additional factors may be relevant, alone, or in combination with one or more of the factors listed in subparagraph (b), above.

Thus this work argues that this WIPO jurisprudence can easily be adopted in Ethiopia forming a set of alternative reference point while determining the well-known status of a certain trademark. Interestingly, this seems to have been done in other jurisdictions of Europe, US and Asia. For instance, even though the WIPO Recommendation for the Protection of Well- Known Marks is a 'soft-law', i.e., a non-binding instrument, a number of states in Europe[123], (such as Estonia, Bulgaria and Romania) – Asia, China[124] and US have provided in their national legislation particular criteria for recognizing a trademark as well-known similar to those established in the WIPO Recommendation.[125]

In way of conclusion, this work emphasizes two points. One, the recommendations will enable proper ascertainment of balance between quantitative and qualitative evaluations. As the Explanatory Notes to the Joint Recommendation state, "The duration, extent and geographical area of any use of the mark are highly relevant indicators as to the determination whether or not a mark is well known by the relevant sector of the public. Attention is drawn to Article 2 (3) (a) (i), providing that actual use of a mark in the State in which it is to be protected as a well-known mark cannot be required. However, use of the mark in neighboring territories, in territories in which the same language or languages are spoken, in territories which are covered by the same media (television or printed

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123. Danguolė Klimkevičiūtė, *The Legal Protection of Well-Known Trademarks and Trademarks With a Reputation: The Trends of the Legal Regulation in the EU Member States'*, Mykolo Romerio Universitetas, SOCIAL SCIENCES STUD. 3 (7) at 229-256 (2010).

124 China well-known Trademarks Regulation, http://www.wipo.int/wipolex/en/text.jsp?file_id=198928#LinkTarget_44, ... (last accessed Dec. 2011) Also see Edward Eugene Lehman, Camilla Ojansivuy and Stan Abramsz, *Well-Known Trademark Protection in The People's Republic of China—Evolution of the System*, 26 FORDHAM INT'L L.J. 2 (2002), Article 3.

125. Danguolė Klimkevičiūtė, *supra* note 123.

press) or in territories which have close trade relations may be relevant for establishing the knowledge of that mark in a given state."

Second, while it is understandable that assessing the qualitative parameters of a mark in practice is a complicated process that includes determining a marks capability to create associations, this guideline gives the right message to the relevant evaluator that traditional market surveys simply examining the level of quantitative reach cannot be used as indicators of a marks quality and value. According to Ottosson, "market surveys must be adjusted to better fit the criterion 'well-known' before being used as an instrument in this process. By integrating a qualitative dimension into the market surveys they could constitute the basis for a more nuanced assessment. In practice market surveys should for example include questions on the kind of associations that a certain mark creates."[126] A wisely harmonized incorporation of the above recommendation in Ethiopia would achieve the above expectations.

B. Scope of Protection

It is to be noted that protection of well-known marks is a notorious issue for developing countries. The special protection of unregistered well-known marks does not favor local enterprises which carry on business in the same/other sectors. Although TRIPs prescribes that the knowledge of the trademark in the relevant sector of the public shall be taken into consideration, the issue is far from finding an adequate solution.[127]

One of the notoriety brought by trademark laws which guarantee protection for well-known trademarks has to do with protection given for trademark owners against dilution of their trademarks by unjustified interference of other parties.[128] For instance, the TRIPs Agreement provides under Article 16(3) that an owner of a well-known trademark can stop any

126. Peter Ottosson, *supra* note 104, at 11.

127. Tshimanga kogolo, *Trademark protection under Congo's Industrial property Act and TRIPs Agreement*, 1998, available at www.library.osaka-u.ac.jp/metadb/up/LIBOSIPPK/2-7_n.pdf (last accessed Dec, 2011).

128. Elson Kasake, *Trade Mark Dilution: A comparative Analysis*, at 1 (Dissertation for Doctor of Laws, University of South Africa, March 2006).

third party from any interference provided that the interests of the owner of the registered trademark are likely to be damaged by such use. Interestingly, this is a recent development of international trademark law influenced by Common law thinking. This is easily noticeable because, Articles 16.2 of TRIPS and 6*bis* of the Paris Convention do not contain such reference to the interests of the right holder, but focus was traditionally given to the likelihood of confusion of the public. In Ethiopia, the Trademark Proclamation, providing protection for well-known trademarks under Article 26(2) (a) & (b), follows similar line of thinking by establishing a regime, which protects the interest of the trademark owner by stating that the trademark owner may forbid any one from any use of a trademark or a sign resembling it, without just cause and in conditions likely to be prejudicial to his interests and; other similar acts. In other jurisdictions, this aspect of protecting the 'interest' of the trademark owner is called dilution law.[129]

Generally speaking, dilution may appear in two forms: *blurring* and *tarnishment*.[130] Blurring is the whittling away of a trademark's uniqueness.[131] It occurs when other sellers, not necessarily of identical goods, use or modify the plaintiff's trademark to identify their own goods.[132] For instance, the use of the famous marks "Toyota" for computers or 'Marlboro' for shoes can be simple examples. In these cases, there is no concern that the public will be confused. Primarily, there is no threat that, for instance, in the case of the use of *Toyota*, the mark used by the computer manufacturer would divert trade away from Toyota's sales. Rather, such a use will lessen the power of the mark to identify a unique seller. The word "Toyota" would trigger an association of a car and a computer, depreciating the unique distinctiveness value of the mark and of its ability to kindle its primarily designated product.[133] The second form of dilution, that is tarnishment, occurs when the trademark is linked to

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129. *See* US Trademark Dilution Revision Act of 2006.

130. For a an extensive global overview on these see the International Trademark Association, Dilution Debate, *The Global Analysis of Dilution*, WORLDextra: INTA Supplement, (May 2008).

131. Elson Kaseke, *supra* note 128, at 44.

132. *Id.* at 45

133. Shahar J. Dilbary, *supra* note 19, at 15.

products of inferior quality that is likely to cause disparaging thoughts about the trademark and its product.[134] Thus, the pirated use of the trademark replaces a positive association by a negative one.[135]

Thus, it seems that Ethiopia's Trademark Proclamation, under Article 26 (2b&c) and by the work of Article 26 sub article 4 and 23(2, b), protect the owner of well-known trademark against any activity which would affect or interfere with his trademark in manners "prejudicial to his interest." Accordingly, owners of a well-known trademark in Ethiopia will be granted protection from dilution under the Proclamation in accordance with the relevant international agreement which Ethiopia becomes party to.

Apparently, however, there is no international obligation which mandates states to grant dilution protection to the owners of *unregistered* well-known marks,[136] and understanding of this is very important under the Proclamation since, as it stands now, the Proclamation protects well-known trademarks only to the extent that protection is given under international agreements which Ethiopia has signed. Since Ethiopia has not signed any such agreement yet, for now we can only evaluate potential obligations under existing international agreements which Ethiopia has showed a readiness of becoming a member. Among these the typical case is that of the TRIPs agreement.[137] Accordingly, under Article 16.3, the TRIPS Agreement makes clear that its legal basis available for the protection of well-known marks on non-competing goods.[138] Although this is an

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134. ILANAH SIMON FHIMA, TRADE MARK DILUTION IN EUROPE AND THE UNITED STATES, at 159 (Oxford University Press 2011).

135. Shahar J. Dilbary, *supra* note 19, at 15.

136. Ilanah Simon, *"Dilution in the US, Europe, and beyond: international obligations and basic definitions"*, 1 J. INTELL. PROP. L. & PRAC. 6, at 407(2006). Instead, the obligation is limited to the provision of protection from confusion caused by later use both similar and dissimilar goods.

137. Ethiopia has shown this readiness already back in 1997. *See WTO, Request for Observer Status: Communication from Ethiopia* (WT/L/229, 10 Oct. 1997) and WTO, Request for Extension of Observer Status: Communication from Ethiopia (WT/L/445, 11 Jan. 2002).

138. The article states that: -16(3) 3. Article 6*bis* of the Paris Convention (1967) shall apply, mutatis mutandis, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the

improvement compared to Article 6bis of the Paris Convention, which only protected 'identical' or 'similar' goods, an obvious limitation in the former is that TRIPS requires registration of the well-known mark to be given protection against unauthorized use of non-competing goods.[139]

This means, while the Paris Convention and the TRIPs agreement clearly stipulates to the effect that well-known trademarks shall be protected without requiring registration or use in that country, this obligations only relates to protection that should be accorded under the heads of identical or similar goods that are likely to create confusion between consumers on the true identity of the use of a well-known trademark. This means the above obligation does not protect well-known trademarks against dilution to be created by the use of the well-known mark on dissimilar line of products and/or services, the effect of which is not to confuse consumers but only reduces future integrity and thus value of the trademark itself. Protection in the latter context is accorded under the TRIPs agreement if and only if the well-known trademark is registered in the territory of the member state.[140] Thus, it is within this line that has been stated that:

> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an important advance, as it provides a legal basis for the protection of well-known marks on non-competing goods. Art 16(3) of TRIPS provides that Article 6bis of the Paris Convention will apply to goods and services that are not similar to those for which a well-known trademark is registered, provided that there is

owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use."

139. Héctor A. Manoff, *supra* note 98, at 5.

140. The Executive Committee of Barcelona, Sept 30 – Oct. 5, 1990 for instance has stated that "[t]he owner of such a mark should be able to prevent third parties from taking undue advantage of or causing detriment to the distinctive character or reputation of the mark. The scope of such protection may be dependent upon the nature of the mark and the degree of its reputation. Such protection may be made dependent on registration in the jurisdiction concerned." https://www.aippi.org/download/commitees/100/RS100English.pdf (last accessed Dec. 2011), at 2.

> a connection between the respective goods and the interests of the well-known mark's owner are likely to be damaged.[141]

Thus, one can safely say that the Proclamation anticipates protecting well-known trademarks more than that is required under any of the international agreements which Ethiopia can potentially accede to. This is because the TRIPS Agreement protects well-known trademarks against dilution only to the extent that have already registered. It does not also set out the criteria to determine what trademark can be recognized as well-known trademark equally, and therefore, the members have to make national legislation about it respectively.[142]

It is also very interesting to notice whether the determination of well-known status under the above provision of the Proclamation is sufficient enough to warrant protection under the latter provision, which establish protection under the concept of dilution. In United States, which protects dilution under a separate set of legislation different from the trademark law, US Congress has declared, under the Federal Trademark Dilution Revision Act, the level of fame required is a much higher burden for a trademark holder to prove.[143] The holder must establish that its trademark is widely recognized by the general consuming public of the United States. "Trademarks with a level of fame recognized by the public only in a specialized segment or geographic place or region in the United States are not protected."[144] Accordingly, the law requires that the consuming public come from all different markets, sectors, and regions of the United States.[145] In European Union, some of the EU trademark law provisions refer to "well-known trademarks" in the sense that the term is used in Article 6*bis*, whereas others refer to "marks with a reputation". The

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141. Ron Lehrman and Carlos Cucurella, *International Protection of Well-Known Marks*, THE INTERNATIONAL WHO'S WHO OF BUSINESS LAWYERS, at 806.

142. XIA Qing, *supra note 46.* at 9.

143. According to Paul Alan Levy "Because dilution law bars truthful speech, the cause of action *should* be hard to prove." *See* Paul Alan Levy, *The Trademark Dilution Revision Act—A Consumer Perspective*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1189, 1196 (2006).

144. Xuan-Thao Nguyen, *Fame Law: Requiring Proof of National Fame in Trademark Law*, 33 CARDOZO L. REV. 1 at 99(2011).

145. *Id.* at 104.

legislation does not elaborate on the latter term, which is used in the provisions equivalent to Article 16(3) of the TRIPs Agreement. While it remains unclear whether there is a difference between the two terminologies, in at least one reported case (C-375/97, General Motors Corporation v Yplon SA), it was argued that for a mark to have a reputation under Article 5(2) of the directive, it did not need to be well known in the sense of Article 6bis of the Paris Convention,[146] but the European Court of Justice did not comment on this relationship. It did, however, provide guidance on what amounts to a 'mark with a reputation'. To satisfy the requirement, the trademark must be known by a significant part of the public concerned in a substantial part of the relevant territory.

In the mean time, we can see that Article 26 (2, b&c) generally protect well-known trademarks more than that would be required of Ethiopia under the Paris Convention or the TRIPs Agreement. As this work has tried to show in the above paragraphs, Article 16.3 of the TRIPs Agreement "addresses a situation only in which a third party uses a well-known mark in connection with goods or services for which the mark holder is not well known."[147] Hence, this work argues that, while Article 26 (2,b&c) of the Trademark Proclamation seems to have rightly adopted the obligation under Article 16(3) of TRIPs, it goes more to protect well-known marks than what would be required of it under the Agreement. Thus, the Proclamation seems to have forfeited great scope of local interest than what would be required of it to comply with upcoming international negotiations under the TRIPs Agreement. In doing so it apparently fails to set the right balance between protecting local interest and that of its obligations under international law by giving more than what is asked for. This work thus calls up on the legislature to either amend the relevant provision of the Proclamation or clarify this issue in an implementing Regulation.

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146 ECJ, *General Motors Corp v Yplon Sa* [1999], Case C-375/97CMLR, 427, Judgment of the Court, 14 September 1999. *General Motors Corporation v Yplon SA*, Reference for a preliminary ruling by *Tribunal de commerce de Tournai* – Belgium on Directive 89/104/EEC -Trademarks-Protection-Non-similar products or services-Trademark having a reputation, in the Case, C-375/97, available at http://www.ippt.eu/files/1999/IPPT19990914_ECJ_Chevy.pdf - last accessed Dec 2012), at 2.

147 RESOURCE BOOK ON TRIPS, *supra note* 102, at 240-1241.

C. Determination of Well-Known Status: Effect on Latter Disputes

In principle, a determination is made for each well-known trademark, and the effect thereof is defined on a case-by-case basis. Within this understanding various countries have clarified their intention under various instruments of their trademark legislation. For instance, in Japan, both when the patent office makes determinations of well-known trademarks in the course of the trademark examination procedure, objection procedure and invalidation proceedings, and when courts make determination of well-known trademarks in trademark disputes, the only focus is on the dispute settlement in question. In the majority of EU Member States also, protection of a well-known trademark is based on a case-by-case principle.[148] In this instance it is interesting to point out that the Trademark Regulation of some EU member states explicitly provides that "the recognition of a trade mark as being well-known shall not have any legal effect in later disputes."[149]

In contrast, however, in France, court decisions where a trademark is recognized as well-known can be important evidence in other cases related to the same trademark.[150] Such decisions are binding on the French courts without any need for the mark owner to provide the evidence presented in the earlier decisions.[151] Of course, such earlier decisions must be recent enough to dispel any doubt as to the current well-known character of the mark.[152]

Between these lines we can also find jurisprudences which took perspectives from both approaches mentioned above. For instance, under China's Trademark Law - the new regulations allow trademark owners to seek recognition of prior well-known status for each new dispute that arises in the future. However, the new regulations also suggest that recognition of well-known status in an earlier dispute will raise a strong but rebuttable

148. Danguolė Klimkevičiūtė, *supra* note 123, at 244.

149. *Id.*, for instance, this is the case in Estonia.

150. *Id.*

151. *Id.*

152. *Id.*

presumption of well-known status in a subsequent dispute.[153] Within this line, a determination of a well-known trademark is not only related to the solution of a particular case but also is significant to the extent to go beyond the case in at least two aspects. Firstly, it is significant in terms of business advertising; once a trademark is determined to be a well-known trademark in the administrative or judicial proceedings, the owner of the trademark can advocate in advertising that his/her trademark is a well-known trademark, thereby acquiring an advantage in the market. On the other hand, owners of trademarks without such determination cannot advertise their trademarks as well-known ones, regardless of how well-known in fact they are.[154]

Understandably, it should come with no surprise to note that Ethiopia's working Trademark proclamation is silent about this issue. Perhaps rules in this regard would only be introduced if need arises. Therefore, while this work does not propose any determination in line with any of the perspectives explored above, it does provide for an argument towards legislative ascertainment against any misconception that would arise in the future. In doing so, the legislature should choose the best alternative, between the various experiences explored above, which would take Ethiopia's pragmatic context into account.

D. The Procedure for Determining if a Trademark is a Well-Known or with a Reputation

Similar to the above evaluation, a simple evaluation of the relevant rules of Ethiopia's Trademark Proclamation makes clear that the procedure for determining a trademark's well-known status is not clear. For instance, it is unclear under the Proclamation, whether it is possible to determine a trademark as a well-known *a priori*, or only in connection with disputes and oppositions to come later under the heads of an infringing trademark.

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153 Regulations on Well-Known Trademarks, *The American Chamber of Commerce People's Republic of China,* http://www.amcham-china.org.cn/amcham/show/content.php?Id=128&PHPSE (last accessed Dec. 2012).

154. *See generally* Mingde Li, *Well-Known Trademark Protection: A Comparative Study between Japan and China*, IIP BULL. (2007).

At the outset, it seems that it possible only in connection with the latter case. That is which involved infringing trademark, determination to be made both by the Intellectual Property Office and the Court.

However, other states have provided well-reasoned and detailed provisions in their national trademark laws regarding the procedure for determining if a trademark is well-known. Under the EU, Estonia Bulgaria, and to some extent Lithuania has clarified their intention within their trademark legislation.[155] The Bulgarian legislation addresses both the procedure for determination a mark as a well-known and a mark with a reputation. The law provides that a mark shall be determined as a well-known mark or mark with a reputation by Sofia City Court under the ordinary claim procedure and also by the Patent Office.[156]

Within this context, this work proposes that further implementing instruments to come under the Trademark Proclamation could learn from the above interesting experiences of few European states. In particular this work argues that *a priori* determination of well-known status will have its own efficiency advantages. For instance, if certain owner of a well-known trademark succeeds in getting a declaration of the well-known status of his trademark, this can assist him in preventing identical and confusingly similar trademarks from being registered for any goods or services which would grant him an ability to highlight well-known status and hence acts as a potential deterrent against infringers and counterfeiters. In addition, this determination will also allow him to shift the cumbersome and expensive burden of proving a well-known status of this trademark every time he brings an action against infringers.[157] Practically, this will also have an effect of increasing the value attributed to the trademark from a marketing perspective in addition to the direct effect on the owner which allows him

155. Danguolė Klimkevičiūtė, *supra* note 123.

156. *Id*.

157. Experience in other countries show, that under usual practice, an owner of a well-known trademark has to conduct a consumer survey to clearly establishing well-known status. Such surveys are complex and expensive to implement.

to use its trademark with greater legal and commercial certainty as the owner knows it has a valuable asset that can be enhanced and protected.[158]

Of course, the proposal in this heading could and should be accompanied by opposition procedures for third parties acting in good faith to oppose the determination of a mark on as a well-known mark.[159] A declaration of well-known status of a mark which has not been contested by third parties can also be made subject to challenge at any time by any interested party. In addition, the applicable scope of the well-known mark determination provisions could be limited to administrative agency actions so that they cannot be binding on courts. Thus, by giving them only an administrative power/nature, they could only serve as persuasive authority.[160]

Thus the attempt in this work is to show that regardless of their merits, these concrete alternatives bring forth a certain degree of certainty and predictability to potential well-known-mark applicants thus decreasing cost of litigation. As it has been stated at the outset, there is growing number of experiences in this regard proliferating everywhere. It this recommendation is also adopted in Ethiopia, the legislation in this line could take various experiences of other countries and tailor them to fit Ethiopia's practical economic context.

VIII. Conclusion

Intellectual property protection, in particular the trademark regime, is now recognized for its key contribution towards developing a modern legal framework which facilitates international movement of businesses. For developing and least developed countries like Ethiopia the contribution of

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158 *Thailand's Well-Known Trademark Registration Process, available at* http://www.athertonlegal.com/publications/20-intellectual-property/41-thailand-well-known-trademark-registration-process.html (last accessed Dec. 2011).

159. For perspectives in this regard, *see Model Law Guidelines: A Report on Consensus Points for Trademark Laws, International Trademark Association,* revised November, 2007.

160. Within this line, *see generally* Jing "Brad" Luo & Shubha Ghosh, "*Protection and Enforcement of Well-Known Mark Rights in China: History, Theory and Future",* NW. J. TECH. & INTELL. PROP., 2009.

this comes in terms of foreign direct investment. The purpose of this work is thus to investigate whether Ethiopia's newly overhauled trademark protection regime is mature enough up to the needs and expectations of current business developments. Generally, this work in the preceding sections has tried to show that the relevant section of the Trademark Proclamation protecting and governing well-known trademarks need to a certain extent be clarified, consolidated and supplemented by an implementing regulation based on existing international standards of protection for well-known marks under the Paris Convention and the Agreement on Trade-related Aspects of Intellectual Property Rights and soft law developed by WIPO. The evaluation in this work has shown that to attain the goals of uniformity, consistency and certainty, it is essential for the relevant authorities to introduce further implementation instruments which among others endorses urgent recommendations made in this work such as the relevant sectors of the public as proclaimed under Article 23(4) of the Proclamation shall include, but shall not necessarily be limited to: actual and/or potential consumers of the type of goods and/or services to which the mark applies, persons involved in channels of distribution of the type of goods and/or services to which the mark applies, business circles dealing with the type of goods and/or services to which the mark applies.

In addition, this work has exposed the need, under future reform efforts, for a set of guidelines with a list of factors clarifying a criterion for establishing the status of a well-known trademark. In doing so this work has made proposals for adopting the relevant experiences from the WIPO draft provisions which were adopted by the WIPO on September, 1999 as an attempt to provide a worldwide standard on how to implement the requirements under Article 6bis of the Paris Convention and Article 16 of TRIPs. More importantly, this work has tried to put in to question whether the right balance between protecting local interest and that of its obligations under international law has been set under the Trademark Proclamation. Accordingly, this work argues that, while Article 26 (2,b&c) of the Trademark Proclamation seems to have rightly adopted the obligation under Article 16(3) of TRIPs, it goes more to protect well-known marks than what would be required of it under the Agreement thus apparently giving more than what is asked for. Hence the Proclamation seems to have forfeited great scope of local interest than what would be required of it to comply with upcoming international negotiations under the TRIPs

Agreement. Therefore, future review effort on the Proclamation should give its heads up to this concern.

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ፋሲል ወንድወሰኝ

Abstract

One of the controversies in the interpretation of labour law is the determination of the duration in contract of employment. The Ethiopian labour law seemingly adopts the presumption of 'indefinite period' of engagement for all labour contracts. The burden is then on the employer to prove otherwise i.e. recruitments for definite period or piece work. This case comment drills on the effect of phaseout of project works on labour contract attached to it. The Federal Supreme Court Cassation Division passed precedence ruling that labour contracts would terminate resulting dismissal of employees where a project work phases out on its File No. 57337 rendered on June 15/2003 (Ethiopian Calendar) and File No. 35621 October 11/2001 (Ethiopian Calendar). The comment is made on these files claiming that the employer must be compelled to prove its endeavors exhausting all possibilities and failure to transfer the employee to another post or projects even if the specific project the employee recruited for ends. The author argues that the very purpose of the 'presumption of indefinite period engagement', i.e. job security, should be given effect. More importantly, employers shall not be given discretion to abuse their right to recruit for 'definite period' under the guise of project work refuting the protective purpose of the labour law.

ሀ. መግቢያ

ይህን ምልከታ ያቀረበው ፀሐፊ በቅርብ ቀን በአንድ የክልል የመጀመሪያ ደረጃ ፍ/ቤት ተገኝቶ ችሎት ሲከታተል በአንድ የስራ ክርክር ከሳሽ የነበረው ሰራተኛ የስራ ውሉ በአሰሪው አላግባብ ተቋርጦብኛል፣ የተቀጠርኩት ለተወሰነ ጊዜ ቢሆንም ስራው በባህርዩ ቀጣይነት ስላለው እልተጠናቀቀም፣ እንዲያውም አሰሪው የእኔን የስራ ውል የቅጥር ቆይታው ተጠናቋል በማለት ካቋረጠ በኃላ በእኔ የስራ መደብ ሌላ አዲስ ሰው ቀጥሮ እያሰራበት ነው ሲል ይከራከራል። ስለሆነም ይህ ድርጊት በአሰሪና ሰራተኛ አዋጅ ቁጥር 377/96 አንቀፅ 9 የተቀመጠውን ‹‹የስራ ውል ላልተወሰነ ጊዜ እንደተደረገ ይቆጠራል›› የሚለውን የህግ ግምት ተላልፎ የተፈፀመ ስንብት ስለሆነ ህገ ወጥ ስንብት ተብሎ እንዲወሰንለትና ወደ ስራው እንዲመለስ፤ ይህ ካልሆነም በአማራጭ ዳኝነት በህግ የተጠበቁ ክፍያዎች እንዲፈፀሙለት ጠይቋል። አሰሪው በበኩሉ ሰራተኛው የተቀጠረው ለተወሰነ ጊዜ ለሚቆይ የፕሮጀክት ስራ መሆኑን፣ ፕሮጀክቱም መጠናቀቁን እና የፕሮጀክቱ ለጋሽ የገንዘብ ድጋፉን ማቋረጡን ገልጿል። በአንፃሩ አሁን በአዲስ ፕሮጀክት አዲስ የገንዘብ ድጋፍ እድራጊ አካል በመገኘቱ የፕሮጀክቱ ስራ መጀመሩንና የሰራተኛው (ከሳሽ) የስራ ውል በህግ አግባብ ቀድሞ የተቋረጠ በመሆኑ ለአዲሱ ፕሮጀክት መልሶ የመቅጠር በህግ የተጣለ ግዴታ የሌለበት መሆኑን እጥብቆ ተከራክሯል። ክርክሩን በማጠናከርም ለአዲሱ ፕሮጀክት ከሳሽ ቀድሞ ሲሰራበት በነበረው የስራ መደብ አዲስ ሰው መተካቱ ብቻውን የስራ ውሉን መቋረጥ ህገወጥ እንደማያሰኘው ለዚህም የፌደራል ጠቅላይ ፍ/ቤት ሰበር

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* ረዳት መምህር፣ ሐረማያ ዩኒቨርስቲ ሕግ ኮሌጁ፣ ኤል ኤል ቢ (አዲስ አበባ ዩኒቨርስቲ)።

ሰሚ ችሎት በመ/ቁ 57337 በቀን ሰኔ 15/2003[1] የሰጠውን አስገዳጅ የህግ ትርጉም ጠቅሶ ክርክሩን አቅርቧል።

ሰራተኛው በድጋሜ ባቀረበው የማጠናከሪያ ክርክር ላይ በድርጅቱ ሲሰሩ የነበሩት ሰራተኞች በሙሉ የስራ ውላቸው የፕሮጀክት በሚል የተገለፀ እንደሆነ፣ ነገር ግን አሰሪው የእርሱን የስራ ውል ብቻ ማቋረጡንና ሌሎቹ የመ/ቤቱ ሰራተኞች በሙሉ በአዲሱ ፕሮጀክት ቀጥለው እየሰሩ መሆኑን ለችሎቱ አስረድቷል። በተጨማሪም በቀድሞው ፕሮጀክት መጠናቀቅና በአዲሱ ፕሮጀክት መጀመር መካከል ያለው የአንድ ወር ጊዜ ልዩነት ብቻ መሆኑን እና እርሱ ሲሰራበት የነበረው የሹፌርነት የስራ መደብ አሁንም ቀጣይነት ያለው ሆኖ አዲስ በተቀጠረ ሰራተኛ እየተሸፈነ እንደሆነ አስረድቷል። በአሰሪው የተነሳውን የፈንድ አልቋል ክርክር በተመለከተም ፈንዱ ያለቀው በእርሱ የስራ መደብ ላይ ብቻ ያለመሆኑን፤ ሌላ ፈንድም በአጭር ጊዜ በመገኘቱ የድርጅቱ ስራና የሌሎች ሰራተኞች የስራ ውል ታድሶና አዲስ ውል ፈርመው ስራ የቀጠሉ መሆናቸውን፤ በስራው እንዲቀጥል ያልተደረገው እርሱ ብቻ መሆኑን፤ የተቀጠረው በድርጅቱ እንጂ በፈንድ ሰጪው ተቋም ያለመሆኑንና ይህም በእርሱና በፈንድ ሰጪው ለጋሽ መካከል የስራ ውል ያለመመስረቱን ፍ/ቤቱ እንዲገነዘብለት በመጥቀስ ተከራክሯል። የግራ ቀኙ ክርክር ገና በቀጠሮ ላይ ቢሆንም ፀሐፊው በተከሳሹ ድርጅት ክርክር የተጠቀሰው የሰበር መዝገብ አትኩሮቱን ስለሳበው በመዝገቡና በፕሮጀክት ስራ ባህሪይ ላይ ተከታዩን ምልከታ አድርጓል።

ለ. የስራ ውል ጊዜ ገደብ ክርክር መነሻና ፋይዳው

በአንድ አሰሪና ሰራተኛ መካከል የሚፈፀም የስራ/የቅጥር ውል ስምምነት መሰረቱ በዋናነት ውል ነው፣ የሚገዛውም በአመዛኙ በውል ህግ መርሆዎች ነው። ከውል ህግ መሰረታዊ መርሆዎች ደግሞ አንዱና ዋነኛው ስለተዋዋይ ወገኖች የውል ነጻነት (freedom and sanctity of contracts) የሚናገረው ነው።[2] ይህም ተዋዋዮች በሚፈጥሩት ውል ለግንኙነታቸው መሰረት የሚሆን ህግ እየፈጠሩ እንደሆነና በውል የተፈጠረው ህግም አስገዳጅ እንደሚሆንባቸው በህጉ ተደንግጓል።[3] ይህ ማለት በህጉ አግባብ የተቀመጡ ገደቦች እንደተጠበቁ ሆነው ተዋዋይ ወገኖች የውሉንም ይዘት የመወሰን ፍጹም ነጻነት አላቸው።[4] ነገር ግን የስራ ውል ከሌሎች የውል ዓይነቶች በተለየ ከተዋዋዮች የመዋዋልና የመደራደር አቅም በመነሳት፣ የውሉ ዓላማና የቆይታ ጊዜ በመመልከት በተለይም ውሉ የሚፈፀመው ለረዥም ጊዜ በመሆኑና ደካማ የመደራደር አቅም ያለው ሰራተኛ ሊገጥመው ከሚችለው የማህበራዊ ዋስትና ተግዳሮቶች አንፃር በተለየ ህግና የህግ አተረጓጎም የሚገዛ ነው። ይህ ማለት ግን ጠቅላላ የውል ህግ (ስለ ግዴታ የተደነገጉት ድንጋጌዎች) ተፈፃሚ አይሆኑበትም ማለት አይደለም። ነገር ግን ገዢው ህግ ልዩው ህግ ማለትም የአሰሪና ሰራተኛ ህጎቹ ሆነው በነዚህ ህግ ለሚኖር ክፍተት ግን የፍ/ብ/ህ/ቁ 1677 በሚያዘው መሰረት ስለ ግዴታ የተመለከቱት የፍትህብሔር ህጉ አንቀፆችና በፍትሐብሔር ህጉ የተቀመጡት *'ስለ ስራ ውል'* የተደነገጉት ክፍሎች በግልፅ የተሻሩበት ሁኔታ ስለሌለ ተፈፃሚ እንደሚሆኑ ግልፅ ነው።[5]

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1. *አድሺንቲስት የልማትና የተራድኦ ድርጅት እና አቶ ገበየሁ ወ/ሚካኤል፣* የፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት መዝገብ ቁጥር 57337፣ ሰኔ 15 ቀን 2003 ዓ.ም. የተወሰነ።

2. ጥላሁን ተሾመ፣ *የኢትዮጵያ የውል ህግ መሰረታዊ ሃሳቦች፣* አዲስ አበባ ዪኒቨርሲቲ ማተሚያ ማዕከል፣ 4ኛ ዕትም፣ ሰኔ 1999 ዓ.ም.።

3. አንቀፅ 1731፤ *የፍትሀብሔር ሕግ፣* ነጋሪት ጋዜጣ በተለየ የወጣ፤ አዋጅ ቁጥር 165/1952 ዓ.ም.።

4. ሙሉጌታ መንግስት አያሌው፣ *ኢትዮጵያ፤ የአለም አቀፍ የህግ ኢንሳይክሎፔዲያ፡* ውል አርታኢ ጄ. ሔርቦቶስ. ክቡወር ሎው ኢንተርናሽናል፣ 2010።

5. የፍትሐብሔር ሕግ፣ አንቀጽ 2512-2671።

በዋናው የአሰሪና ሠራተኛ ህግ (አዋጅ ቁጥር 377/96) አንቀፅ 4 መሰረት አንድ የስራ ውል ሲመሰረት ከውሉ ቆይታ አንፃር ለተወሰነ ስራ (piece work)፣ ለተወሰነ ጊዜ (definite period) ወይም ላልተወሰነ ጊዜ (indefinite period) ሊሆን እንደሚችል ያስቀምጣል።[6] ታዲያ በመቀጠል የሚነሳው ጥያቄ ይህን የውል ቆይታ የሚወስነው ማነው የሚለው ሲሆን ህጉ የሚሰጠውን መልስ መፈተሽ ተገቢነት አለው። ከዚያ በፊት ግን ሶስቱን የስራ ውል ቆይታ ልዩነቶች አስቀምጠን እንለፍ።

ለተወሰነ ስራ (piece work) የተደረገ የስራ ውል ቆይታ የሚወሰነው ሰራተኛው የተቀጠረበትን የስራ ዓይነት በመመልከት ነው። ስለሆነም ስራውን ለማጠናቀቅ የፈጀውን ጊዜ ያህል ወይም ስራው ተሰርቶ የሚያልቅበት ጊዜ የስራ ውሉ ማብቂያ ይሆናል ማለት ነው። የተወሰነ ጊዜ (definite period) ቅጥር የውል ቆይታ ግን አሰሪውና ሠራተኛው በውላቸው ባሰፈሩት ጊዜ ገደብ የሚወሰን ሲሆን፤ እንደነገሩ ሁኔታ አስቀድሞ የስራውን ማብቂያ በመመልከት የውሉ ማብቂያ በጊዜ ገደብ ሊቀመጥ አልያም ስራው ቢያልቅም ባያልቅም ሰራተኛው የተቀጠረበትን ሁኔታና ምክንያት ከግምት በማስገባት የውሉ ቆይታ ሊቀመጥ ይችላል። ይህም ባይሆን አሰሪው በፈለገው ምክንያት ወይም በዘፈቀደ የስራ ውሉን በተወሰነ የጊዜ ገደብ የሚያስቀምጠው የውል ዓይነት ነው። የመጨረሻውና ሶስተኛው ላልተወሰነ ጊዜ (indefinite period) ቅጥር የምንለው ደግሞ ውሉ ቀድሞ በጊዜ ገደብ ያልታጠረና የስራ ውሉን ለማቋረጥ በህግ ወይም የህግ መሰረት ባላቸው ስምምነቶች በሰፈሩ ሁኔታዎች የስራ ውሉ እስካልተቋረጠ ድረስ የውሉ ማብቂያ ጊዜ አስቀድሞ ያልተቀመጠለት ነው።

እንግዲህ ሶስቱም የቅጥር ቆይታዎች በአሰሪና ሰራተኛ ህጋችን የተካተቱ ሲሆን፣ ክርክር የሚጋብዘው ጥያቄ የቅጥሩን ቆይታ የመወሰን ስልጣን የማነው የሚለው ነው። ከዚህ ጥያቄ መልስ ጋር በተያያዘ ሁለት አይነት ክርክሮች ይነሳሉ።[7] የመጀመሪያው የስራ/የቅጥር ውል ራሱ ውል እንደመሆኑ መጠንና ተዋዋዮች ደግሞ የውል ነፃነት ስላላቸው በመካከላቸው የሚመሰርቱት የስራ ውል ቆይታ የመወሰን መብቱ የተዋዋዮቹ (የአሰሪውና የሰራተኛው) ነው የሚል ነው። የዚህ ክርክር ማጠናከሪያው የስራ ውል ቆይታ (duration of contract) እንደ ሌሎች የሰራተኛ መብቶች ዝቅተኛ የስራ ሁኔታዎች (minimum labor conditions) ተብለው በዓለም አቀፍ ደረጃ አለመቀመጣቸው ነው። በተጨማሪም በዓለማችን ባመዛኙ ነፃ ገበያ የምጣኔ ኃብት መርህ እያጋደለ በመሆኑ መንግስት በተቋማቱ ጉዳይ ጣልቃ በመግባት ለተዋዋዮች ውል ሊመሰርትላቸው አይገባም የሚል ነው።[8]

ከዚህ ተቃራኒውና ሁለተኛው ክርክር ግን ስለ ውል ነፃነት ለመነጋገር የተዋዋይ ወገኖች የመደራደር አቅም እኩልነት ከግምት ውስጥ ሊገባ ይገባዋል የሚል ነው።[9] የስራ ውል የሚፈፀመው ብዙውን ጊዜ የምጣኔ ኃብታዊ አቅሙ ሻል ባለው አሰሪና እንጀራ ፍለጋ በሚባዝነው ሰራተኛ መካከል ነው። አሰሪው ወደ ስራ ውሉ የሚገባው ባመዛኙ የሰራተኛውን እውቀትና ጉልበት በመጠቀም ኃብቱን/ትርፉን ለማሳደግ ወይም እንደስራው ባህርይ ማህበራዊ ግልጋሎቱን ለመስጠት ሲሆን ሰራተኛው በበኩሉ ራሱንና እንደነገሩ ሁኔታ የቤተሰቡን የዕለት ጉርስ ለማሸነፍ እንደሆነ ይታመናል።

በመሆኑም ሁለቱ ወገኖች ወደ ውሉ የሚገቡበት ዓላማ የተለያየ፣ የመደራደር አቅማቸውም የማይመጣጠን በመሆኑ አሰሪው የሚያቀርባቸውን የስራ ውል ሁኔታዎች (የውል ቆይታን ጨምሮ) ሰራተኛው ያለማቅማማት እንደሚቀበላቸው ግልፅ ነው። በተለይም በአሁኑ ወቅት በዓለማችን የምንሰማው የምጣኔ ኃብት ቀውስ ያስከተለው የስራ አጥነት መንሰራፋትና በአገራችንም ያለው አነስተኛ የኢንቨስትመንት መሰረተልማት የስራ ዕድልን የበለጠ እያጠበበው መሄዱን እንገነዘባለን።

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6. የአሰሪና ሠራተኛ አዋጅ ቁጥር 377/1996፣ *የፌደራል ነጋሪት ጋዜጣ፣ 10ኛ ዓመት ቁጥር 12፤ የካቲት 18፣1996።*

7. በላቸው መኩሪያ፣ *የኢትዬጵያ አሰሪና ሰራተኛ ህግ መሰረታዊ ነጥቦች፣* ፋር ኢስት ኃ.የተ.የግል ማህበር ማተሚያ ቤት፤ ገፅ 57-58፤ (ጎንደር 2004)።

8. *ዝኒ ከማሁ።*

9. *ዝኒ ከማሁ።*

በዚህ ሁኔታ ውስጥ ሰራተኛው ለመደራደር ቢሞክር እንኳን፣ ከአንዳንድ የባለሙያ እጥረት ከሚታይባቸው የስራ ዘርፎች በቀር፣ አሰሪው በገበያው ላይ ያለው የሰራተኛ አማራጭ ሰፊ በመሆኑን ውጤታማ አይሆንም። ሰለዚህ የሰራተኛው መደራደር አቅም ደካማ በሆነበት ሁኔታ ስለስራ ውል ነፃነት በሰፊው መነጋገር የማይቻል ይሆናል።

ስለዚህ የዚህ ክርክር አቀንቃኞች የስራ ውል ቆይታ እንደሌሎች ዝቅተኛ የስራ ሁኔታዎች በህግ ግምት ሊወሰድበት የሚገባ እንጂ በአሰሪው መወሰን ያለበት ጉዳይ አይደለም ይላሉ። ነገር ግን የስራ ውሉ ቆይታ ለተወሰነ ስራ/ጊዜ ቅጥር ከሆነ በጠባብ ሁኔታ የሚተረጎም፤ አሰሪውም የማስረዳት ሸክም ወድቆበት ማስተባበል ይኖረበታል። አሰሪው በዘፈቀደ የጊዜ ገደብ በማስቀመጥ ወይም ህጋዊ ምክንያት ሳይኖረው የስራ ውሉ ጊዜው አልቋል ብቻ በማለት የሰራተኞችን የስራ ውል በማቋረጥ የስራ ዋስትና መብት አደጋ ላይ ይጥላል። ይህም የስራ አጥነትን በማባባስ ማህበራዊ ቀውሱን ከድጡ ወደ ማጡ ይወስደዋል። ለአሰሪውም ቢሆን ተረጋግቶና መንፈሱን ሰብስቦ በእኔነት ስሜት የሚሰራ ሰራተኛ ስለማይኖር ምርታማነቱ እንዲቀንስና የኢንዱስትሪው ሰላም እንዲረበሽ የደርጋል የሚሉ መከራከሪያዎች ይነሳሉ።

ወደ አገራችን የአሰሪና ሠራተኛ ህግ አቋም ስንመጣ ሁለተኛውን አቋም እንደወሰደ እንረዳለን። በአሰሪና ሠራተኛ አዋጅ ቁጥር 377/96 አንቀፅ 9 *'ማንኛውም የስራ ውል ላልተወሰነ ጊዜ እንደተደረገ ይቆጠራል'* የሚል ግምት ይወስዳል። ይህ ግምት ተዋዋይ ወገኖች በውላቸው ያስቀመጡት ግልፅ የውል ቆይታ ጊዜ ቢኖርም እንኳ ሰራተኛው የተቀጠረበት የሥራ ዓይነት ፈፅሞ እስካላለቀ ድረስ ወይም በአንቀፅ 10 በህጉ ተለይተው ለተወሰኑ የስራ ዓይነቶችና ሁኔታዎች ካልሆነ በቀር አሰሪው የቆይታ ጊዜ ተጠናቋል በማለት የስራ ውል ማቋረጥ እንደማይችል ያመለክታል። እንዲሁም ውሉ ፀንቶ ባለበት ጊዜ ላልተወሰነ ጊዜ ለተቀጠሩት (ለቋሚ) ሰራተኞች የሚሰጣቸውን መብትና ጥቅም ልዩነት በማድረግ ለተወሰነ ጊዜ ለተቀጠሩት ሰራተኞች መከልከል እንደማይችል አስምሮበታል።[10] በርግጥ የፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በመ/ቁ 44218 በግንቦት 13/2002 በሰጠው አስገዳጅ የህግ ትርጉም ላይ አሰሪ ለሰራተኞች የሚሰጠውን ጥቅማጥቅም የቅጥር ሁኔታን መሰረት በማድረግ (በቋሚና በፕሮጀክት ሰራተኞች መካከል) ልዩነት እንዳይፈጥር ህጉ ክልከላ አላደረገበትም ብሎ አስቀምጧል። ነገር ግን የዚህ ፅሁፍ የምልከታ ወሰን ባለመሆኑ በስፋት አልተዳሰሰም።

ለማጠቃለል የስራ ውል ቆይታ አይነቶችን ለያይቶ የመነጋገር ፋይዳው ከስራ ዋስትና ጋር የተቆራኘ ሲሆን ውጤቱም ወደ አዋጁ አንቀጽ 24(1) የሚመራ ነው።[11] የስራ ውሉ ላልተወሰነ ጊዜ የተፈፀመ ከሆነ ሌሎች የስራ ውል ለማቋረጥ በህግ በተደገፉ ምክንያቶች እንዳሉ ቢሆንም አንቀፅ 24(1) ግን በፍፁም ተፈፃሚ አይሆንም። በአንፃሩ ለተወሰነ ስራ ወይም ጊዜ የተቀጠሩ ሰራተኞች ግን ይህ ስራ ወይም ጊዜ ሲያልቅ በቀጥታ ያለሌላ ምንም ዓይነት ተጨማሪ ምክንያት የስራውን ወይም የጊዜ ገደቡን ማለቅ በመጥቀስ በአንቀጽ 24(1) ማሰናበት ይቻላል ማለት ነው። ታዲያ አሰሪ ለተወሰነ ጊዜ መቅጠር የሚችልባቸው ምክንያቶች በህግ የተቀመጡት ብቻ ናቸው ወይ የሚለውን ነጥብ በጥቂቱ እንመለከታለን።

በአሰሪና ሰራተኛ አዋጅ አንቀጽ 10 የተወሰነ ጊዜ ወይም ስራ መቀጠር የሚቻልባቸውን ዘጠኝ ሁኔታዎች በመዘርዘር ያስቀመጠ ሲሆን እነዚህ ዘጠኙ ብቻ ናቸው ወይስ ሌሎችም መነሾች ካሉ ማካተት ይቻላል የሚል ለውይይት የሚጋብዝ ነጥብ ሊነሳ ይችላል። የአንቀጹን መነሻ (በአንቀጽ 10(1)) ስንመለከት ‹‹ከዚህ በታች በተዘረዘሩት ሁኔታዎች›› የሚል ሀረግ ስለምናገኝ አንቀጹ

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10. መሐሪ ረዳኢ፤ *ስለ ኢትዮጵያ አሰሪና ሰራተኛ ጉዳይ አዋጅ ጥቂት ነጥቦች (ቀለል ባለ አማርኛ የተዘጋጀ)*፣ ገፅ 23 (ታህሳስ 2000)።

11. የአሰሪና ሰራተኛ አዋጅ ቁጥር 377/96፣ አንቀፅ 24(1)፤ በህግ በተደነገገው መሰረት የስራ ውልን ስለማቋረጥ ሲይስቀምጥ ለተወሰነ ጊዜ ወይም ስራ የተደረገ የስራ ውል በውሉ የተወሰነውን ጊዜ ወይም ስራ ሲያልቅ የስራ ውሉ እንደሚቋረጥ ይደነግጋል።

ሁኔታዎችን በሙሉ ዘርዝሮ ያጠቃለለ ነው ብሎ መደምደም ያስችላል። ስለሆነም ተመሳሳይ ሁኔታዎችን በማመሳሰል መጨመር ህጉ የሚፈቅድ አይመስልም። በርግጥ ህጉ በግልፅ ከነዚህ ሁኔታዎች በቀር ሌሎች ሁኔታዎች አልተፈቀዱም ወይም አይስተናገዱም ብሎ በግልፅ አልከለከለም። ቢሆንም በህጉ አንቀፅ 9 የተወሰደውን *ገልተወሰነ ጊዜ ቅጥር* የህግ ግምት ለማስተባበል ልንጠቀምበት ከሚገባው የተለዩ ሁኔታዎች ጋር እኩል ተለጥጠው መተርጎም እንደሌለባቸው መገመት ይቻላል። በተጨማሪም የአሰሪና ሠራተኛ ህግ ዋነኛ ዓላማ ደካማ የሆነውን ሰራተኛ ከብዝበዛና ሌሎች የመብት ጥሰቶች መጠበቅ በመሆኑ[12] ህጉን አስፍተን የምንተረጉም ከሆነ የአዋጁን ዓላማ የሚቃረንብን ይሆናል። ነገር ግን ከጉዳይ ጉዳይ ከሚያጋጥም ፍሬ ነገር በመነሳት በአንቀፅ 10 ውስጥ ከተዘረዘሩት ምክንያቶች በአንዱ የሚወድቅ መሆኑን በማስረዳት የስራ ውሉ ለተወሰነ ስራ ወይም ጊዜ ነው ብሎ ማስረዳት ይቻላል።

ወደ መነሻ ጉዳያችን ስንመለስ ግራ ቀኙ ሲከራከሩበት በነበረው መዝገብ የስራ ውሉ የተወሰነ የጊዜ ገደብ እንደተቀመጠለት፣ ስራው ለጋሾች በሚሰጡት ፈንድ ላይ የተመሰረተ መሆኑን፣ ለጋሾች ፈንዱን የሚሰጡት በተለጋሹ በሚቀርበው ፕሮጀክት ግምገማ መሰረት መሆኑን፣የመጀመሪያው ፈንድ መቋረጡንና አዲስ ፈንድ በአንድ ወር ጊዜ ልዩነት መገኘቱን፣ ድርጅቱ ቀድሞ ይሰራው በነበረው የፕሮጀክት ስራና በአዲሱ የፕሮጀክት ስራ መካከል ምንም ልዩነት ያለመኖሩን፣ በተሰናበተው ሰራተኛ ምትክ አዲስ ሰራተኛ መቀጠሩን አልተካካዱም። አከራካሪው ነጥብ የፕሮጀክት ስራ ማለት ምንድን ነው? በአዋጅ አንቀጽ 10(1) መሰረት ለተወሰነ ጊዜ ቅጥር የሚሸፈን ነው ወይስ አይደለም የሚለው ነው።

ሐ. የፕሮጀክት ስራ መገለጫዎች

የፕሮጀክት ስራ የሚባለው አንድ የተለየ ውጤት በመተለም፣ በተወሰነ የጊዜ ገደብ፣ በተወሰነ የበጀት ቀመር፣ የተወሰኑ አጋር ባለድርሻ አካላትንና ተጠቃሚዎችን በመለየት የሚሰራ የስራ ዓይነት ነው።[13] ፕሮጀክት ሲቀረጽ የሚያስፈልገው የሰው ኃይል፣ አስተዳደራዊና የሰራተኛ ወጪዎችን አብሮ በትልሙ ይሰፍራል። በተለይም በመንግስትም ሆነ በበጎ አድራጊዎች የሚሰሩት የመሰረተ ልማት፣ አቅም ግንባታ እንዲሁም ማህበራዊ ስራዎች ከለጋሾች በሚገኝ የገንዘብና የቁሳቁስ ድጋፍ ነው። ለጋሾች ደግሞ ገንዘባቸውን የሚሰጡት ድጋፉን እየጠየቀ ያለው ፕሮጀክት ችግር ፈቺነቱና አዋጭነቱ ተገምግሞና ለአፈፃፀሙም የቁጥጥርና ክትትል ስርዓት ተዘርግቶለት ነው። ስለዚህ ብዙውን ጊዜ የፕሮጀክት ስራ በጊዜ ሰሌዳ ተከፋፍሎ መጀመሪያውና ማጠናቀቂያው የሚታወቀ፣ በደረጃ የተከፋፈለ (phase by phase)፣ ለአፈፃፀሙ የራሱ ስትራቴጂክ ዕቅድና የድርጊት መርሃ ግብር የሚዘጋጅለት እና የመለዋወጥ እድሉም የጠበበ ነው።

በፕሮጀክት ስራ አሰሪው ፕሮጀክቱን የወሰደው አካል እንጂ ፈንድ ሰጪው አካል አይደለም። አንዳንዴም አሰሪው በስሩ ብዙ የተለያዩ ፕሮጀክቶች ከአንድ ወይም ከብዙ ፈንድ ሰጭ ተቋማት ሊወስድ ይችላል። ለነዚህ ፕሮጀክቶችም እንደነገሩ ሁኔታ የተለያዩ ሰራተኖን ሊቀጥር ይችላል። አሰሪው ፈንድ ካለቀና ፕሮጀክቱ አንድ ብቻ ከሆነ የሰራተኞቹን የስራ ውል አብሮ የሚያቋርጥበት አጋጣሚ ይፈጠራል። አንዳንዴም ቀደም ብሎ አሰሪው ሌላ ተተኪ/ተለዋጭ ፕሮጀክት በመቅረጽ የመጀመሪያው ፕሮጀክት ሲያልቅ በአዲሱ ፕሮጀክት ያለምንም የቀናት ክፍተት ሲቀጥል፤ አንዳንዶቹ ደግሞ ከተወሰነ የጊዜ ክፍተት በኋላ የቀድሞ ወይም አዲስ ገንዘብ ለጋሽ በማግኘት ስራቸውን

12. በላቸው መኩሪያ፣ *ከላይ 7 ላይ* የተገለጸ፤ ገፅ 12።

13. ስቴፈን ማርቲን፣ *ፕሮጀክት ስማርት*፣ ጥር 7/2010 እኤአ።

በድጋሜ ሲቀጥሉ ይታያል። በሌላም አጋጣሚ ሙሉ በሙሉ በሌላ ዘርፍ አዲስ ፕሮጀክት በመቅረፅና ገንዘብ በመፈለግ ሊቀጥሉ ይችላሉ።

የሆነው ሆኖ ፕሮጀክቶች ቢጠናቀቁም ብዙውን ጊዜ የድርጅቶቹ ሀልውና እንዳለ የሚቆይበት አጋጣሚ አለ ወይም የመክሰም ሁኔታ ቢያጋጥምም ከጊዜ በኋላ በአዲስ ፕሮጀክት በድጋሚ ብቅ የሚሉበት ሁኔታም አይጠፋም። በዚህ ጊዜ አንዳንዶቹ የቀደሙ ሰራተኞቻቸውን አዲስ ውል በማስፈረም ወይም ውል እንዲያድሱ በማድረግ ወይም በድጋሜ በመቅጠር ሲያሰሩ ይታያል። ከዚህ በተለየ የተወሰኑት አሰሪዎች በየፕሮጀክቱ ሙሉ ለሙሉ በአዲስ ሰራተኛ በመተካት ወይም በከፊል ከቀደሙት በከፊል ደግሞ አዲስ ሰራተኞችን በመቅጠር ያሰራሉ። ከአንድ በላይ ፕሮጀክት በስራቸው ያለ አንዳንድ አሰሪዎች ደግሞ ባለቀው ፕሮጀክት የሚሰሩትን ሰራተኞች ወደ አዲሱ ወይም ወዳላላቀው በማዟዟር የሚያሰሩበት ሁኔታም አለ። ነገር ግን አንድ የፕሮጀክት ስራ አለቀ የሚባለው መቼ ነው? የፕሮጀክት ስራ ማለቅ ብቻውን የስራ ውል ለማቋረጥ (ድርጅቱ እያለና ምናልባትም ሌሎች ፕሮጀክቶች እያሉት) በቂ ምክንያት ነውን? ድርጅቱ በድጋሚ ሌላ ፕሮጀክት ቢጀምር (ወዲያውኑ ወይም ከተወሰነ ጊዜ ልዩነት በኋላም ቢሆን) የቀደሙት ሰራተኞች የመቀጠል መብት አላቸውን? የሚሉትን ነጥቦች መዳሰስ ተገቢ ነው።

መ. የፕሮጀክት ስራ መጠናቀቅ በፕሮጀክቱ ስር በሚሰሩ ሰራተኞች የስራ ውል ላይ ያለው ውጤትና የሰበር ችሎት አቋም

ከላይ ለመጥቀስ እንደተሞከረው የፕሮጀክት ስራ በባህርይ ለተወሰነ ስራ በተወሰነ ጊዜ የተገደበ ነው። ይህም የስራ ውሉ በአንቀጽ 10(1)(ሀ) የተገደበና ፕሮጀክቱ የተወጠነበት ስራ ወይም የተቀመጠለት ጊዜ ሲጠናቀቅ በፕሮጀክቱ ስር የተቀጠሩ ሰራተኞች የስራ ውል በአንቀፅ 24(1) መሰረት ይቋረጣል ማለት ነው። ነገር ግን ፕሮጀክቱ ቢጠናቀቅም ቀጣሪው ድርጅት ሌላ ፕሮጀክት ወይም ስራ ካለውና ባለቀው ፕሮጀክት ስር ሲሰሩ የነበሩ ሰራተኞችን በአዋጁ አንቀጽ 28(1)(መ)[14] መሰረት ወደ ሌላኛው ፕሮጀክት አዛውሮ ማሰራት ያልቻለበትን ምክንያት ማስረዳት ካልቻለ ፕሮጀክቱ አልቋል ብቻ ብሎ ማሰናበት በአንቀጽ 9 *'የስራ ውል ሁለ ላልተወሰነ ጊዜ እንደተደረገ እንዲገመት'* የተቀመጠውን ግምት የሚያፈርስና የሰራተኞችን የስራ ዋስትና የሚያሳጣ በመሆኑ ህጉን ይቃረናል። በአንቀጽ 10(1)(ሀ)[15] የተመለከተውን ድንጋጌ አንቀጽ 9 የተደነገገበትን ዓላማ ሳይሸራርፍ ከአንቀጽ 28(1)(መ) አንፃር በጠባብ ሁኔታ ሊተረጎም ይገባዋል የሚል እምነት አለኝ። ይህ ካልሆነ ግን አሰሪዎች ስራዎችን በሙሉ ፕሮጀክት በሚል ሽፋንና ከለላ የሰራተኞችን የስራ ዋስትና አደጋ ላይ እንዳይጥሉት ያሰጋል።

1. የሰበር መዝገብ ቁጥር 57337 (ሰኔ 15/2003) ምልከታ

14. በዚህ አንቀፅ ሰራተኛው የያዘው የስራ መደብ በበቂ ምክንያት ሲሰረዝና ሰራተኛውን ወደ ሌላ ስራ ማዛወር የማይቻል ሆኖ ሲገኝ አሰሪ ማስጠንቀቂያ በመስጠት የሰራተኛውን የስራ ውል ማቋረጥ እንደሚችል ተደንግጓል። የዚህ አንቀፅ ዋነኛ ሐሳብ ሰራተኛው ይዞት የነበረው የስራ ውል የህግ ድጋፍ ባለው በቂ ምክንያት ቢሰረዝም አሰሪው የስራ ውሉን ከማቋረጡ በፊት ሰራተኛው ሊሰራው ወደሚችለው ሌላ ስራ ማዛወር መቻል አለመቻሉን የማስረዳት ግዴታ ይጥልበታል። በአንድ ህግ ውስጥ ሁለት ዓይነት አሰራር ሊኖር ስለማይገባና ስለማይችል በዚህ ጉዳይ ሰራተኛው ይዞት የነበረው ፕሮጀክት ቢጠናቀቅም በሰራተኛው ሊሰራ የሚቻል ሌላ ስራ አለመኖሩን፤ አሰሪው ከማሰናበቱ በፊት ማዛወር አለመቻሉን ሊያስረዳ ይገባል እላለሁ።

15. ሰራተኛው የተቀጠረበት የተወሰነ ስራ እስከሚያልቅበት ጊዜ ድረስ የስራ ውል ለተወሰነ ጊዜ ወይም ለተወሰነ ስራ ሊደረግ እንደሚችል ያስቀምጣል።

ይህ የሰበር መዝገብ የክርክር አመጣጥ ሰራተኛው የስራ ውሉ አላግባብ ተቋረጠ የሚል ሲሆን አሰሪ ደግሞ የሰራተኛው ስራ የዕርዳታ እህል ከማከፋፈል ጋር የተገናኘ የፕሮጀከት ስራ በመሆኑና ፕሮጀክቱም በመጠናቀቁ በህግ አግባብ የተፈፀመ ስንብት ነው የሚል ነው። በዚህ መዝገብ በአሰሪውና በሰራተኛው መካከል የሰበር ፍ/ቤቱ የሰጠው አስገዳጅ የህግ ትርጉም ሲፈተሽ የስራ ውል ለተወሰነ ጊዜ የተደረገ ቢሆንና ጊዜው ደርሶ የስራ ውሉ ቢቋረጥ የስራ ውሉ በተቋረጠበት ሰራተኛ ምትክ አዲስ ሰው ተቀጥሮም ቢሆንም እንኳን የስራ ውሉ መቋረጥ ህገወጥ አይደለም የሚል ነው።

በመሰረቱ ሰራተኛውን የቀጠረው አሰሪ ድርጅት ከፕሮጀክቱም መጠናቀቅ በኋላ ሀልውናው እንዳለና ሌላ ስራ/ፕሮጀክት እየሰራ እንደሆነ ከመዝገቡ ግምት መውሰድ ይቻላል። እንዲያውም የከሳሹን/የአሁን ተጠሪን የስራ ውል ካቋረጠ በኋላ በምትኩ ሌላ ሰራተኛ መቀጠሩም በመዝገቡ ሰፍሯል። የሰበር ፍ/ቤቱ ያለፈውና ሊፈትሻቸው ይገባ የነበሩት ነጥቦች ሰራተኛው የተቀጠረበት ፕሮጀክት ካለቀ በኋላ ድርጅቱ የቀጠለው ስራ ምንድን ነው? ለምንስ ሰራተኛውን ወደ ሌላ ስራ የማዛወር ግዴታ አልነበረበትም ወይም አላዛወረውም? ወደ ሌላ ስራ ማዛወር ያልቻለበትን ምክንያትስ ለምን አላስረዳም? የሚሉትን ነው።

ድርጅቱ ፕሮጀክቱ አልቆ አፈፃፀሙ ተገምግሞ ይቀጥል እስኪባል ለሰራተኛው የሚከፈለው ደመወዝ በፈንድ ማለቅ የተነሳ የለም ከተባለም በአዋጁ አንቀጽ 18(6)[16] እና 21(1)[17] መሰረት ሰራተኛውን ከአሰሪው ባልመነጨ ምክንያት ባጋጠመው የገንዘብ/ፈንድ ችግር አግዶ በማቆየት ፕሮጀክቱ ሲጀምር/ሲቀጥል ማስጀመር ይችላል። ካልሆነና ፕሮጀክቱ ለዘለቄታው የማይቀጥል ከሆነም በአዋጅ አንቀጽ 21(1)[18]፣ 24(4)[19] እንዲሁም 28(1)(መ)[20] መሰረት የስራ ውሉን ለማቋረጥ ይችላል። በመሆኑም እነዚህ አማራጮች ስለመሟጠጣቸው ባልተመለከተበት ሁኔታ ድርጅቱ ስራውን ቀጥሎና የቀደመውን ሰራተኛ ስራው/ፕሮጀክቱ አልቋል ብሎ ሸኝቶ በምትኩ አዲስ ሰራተኛ ቀጥሮ ማሰራቱ ስንብቱን ህገወጥ ነው ወደሚል መደምደሚያ ያደርሰዋል። በመሆኑም በዚህ መዝገብ የተሰጠው አስገዳጅ የህግ ትርጉም የአዋጁን አንቀፅ 9 ዓላማ የተላለፈ ነው የሚል እምነት አለኝ።

2. ሰበር መዝገብ ቁጥር 35621(ጥቅምት 11/2001)[21]

በተመሳሳይ ሁኔታ በዚህ መዝገብ አሰሪው የኮንስትራክሽን ድርጅት ሲሆን ሰራተኞቹ አናፂዎች ናቸው፣ የተቀጠሩትም ‹‹ፈንጫ ለምለም›› በተባለ ፕሮጀክት መሆኑ አላከራከረም። ያከራከረው ነጥብ ሰራተኞቹ ድርጅቱ ሌላ ቦታ ፕሮጀክት/ሳይት እያለው የተቀጠራችሁበት ስራ/ፕሮጀክት አልቋል ተብለው መሰናበታቸው ነው። የተቀጠሩበት ስራ አናፂነት እንደመሆኑና ስራው የተወሰነ ወቅት እየጠበቀ የሚሰራ በመሆኑ ‹‹በፊንጫ ለምለም›› ፕሮጀክት ስራው አልቋል። ነገር ግን በዚሁ አሰሪ በሌላ ቦታ የሚሰሩ ፕሮጀክቶች እያሉ በሌሎቹም ፕሮጀክቶች በሰራተኞቹ የሚሰራ የአናፂነት ስራ ስላለመኖሩ ወይም ለየሳይቱ በቂና የተሟላ ሰራተኛ እንዳለው አሰሪው አላስረዳም። በዚህ ሁኔታ የሰበር ችሎቱ የአዋጁን አንቀጽ 28(1)(መ) ሰራተኞችን ይዞ እንዲዞር የሚያስገድደው ድንጋጌ እጅግ

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16. የአሰሪው ጥፋት ባልሆነ ምክንያት ከ 10 ተከታታይ ቀናት ላላነሰ ጊዜ የድርጅቱን ስራ የሚያቋርጥ ያልታሰበ የገንዘብ ችግር የስራ ውልን ለማገድ በቂ ምክንያት ነው።

17. ሚኒስቴሩ የእገዳ ምክንያት መኖሩን ሲያረጋግጥ ወይም ሲያፀድቅ የእገዳውን ጊዜ ይወስናል:: ሆኖም የተባለው የእገዳ ጊዜ ክ 90 ቀናት መብለጥ የለበትም።

18. ዝኒ ከማሁ።

19. በመክሰር ወይም በሌላ ምክንያት ድርጅት ለዘለቄታው ሲዘጋ የስራውል ይቄረጫል።

20. የግርጌ ማስታወሻ ቁጥር 13ን ይመልከቱ።

21. *ሰንሻይን ኮንስትራክሽን እና እነ አቶ ፍቃዱ ገቢሳ*፣ የፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት መዝገብ ቁጥር 35621፣ ጥቅምት 11 ቀን 2001 ዓ.ም. የተወሰነ።

አጥቦ በመመልከት እና አይኖርም በማለት የህጉን ያልተወሰነ ጊዜ የስራ ቅጥር ግምት ያፋለሰ ውሳኔ ሰጥቷል። በነዚህ ውሳኔ አስገዳጅነት የተነሳም በተግባር የስራ ዋስትና ላይ አሉታዊ ተዕፅኖ እያሳደሩ መኖናቸው በግልጽ እየተንጸባረቀ ይገኛል።

ሠ. ማጠቃለያ

የሰራተኞች የስራ ዋስትና ከሰራተኞች መብት ዋንኛውና መሰረታዊው ነው። በመሆኑም አሰሪው የሰራተኞችን የስራ ውል ስራው/ጊዜው ወይም ፈንዱ አልቋል ብቻ በማለት በህጉ በግልጽ የተመለከቱ ሁኔታዎች መሟላታቸውን ሳያስረዳ የስራ ውል ማቋረጥ ህገ ወጥ ሊባል የሚገባው ድርጊት ነው።

በመሆኑም የሰበር ሰሚ ችሎት ከሚሰጣቸው ውሳኔ አስገዳጅነት የተነሳ የሚደርስባቸው የህግ ትርጓሜዎች የህጉን አላማና ግብ ከማሳካት አንፃር ከፍተኛ ጥንቃቄ ሊደረግባቸው ይገባል። በዚህ ጹሑፍ የታዩት ሁለት ውሳኔዎች አሰሪ ስራዎችን በሙሉ በፕሮጀክት ከለላ/ሽፋን እየቀረፀ፣ በኃልም ስራው/ፕሮጀክቱ አልቋል እያለና በምትኩ ሌላ ሰው እየቀጠረ የሰራተኞችን የስራ ዋስትናና መብት እንዲያደበዝዝ የሚፈቅድ በመሆኑ ወደፊት በተመሳሳይ የህግ ጉዳይ በሚነሱ በሌሎች መዝገቦች ይህን አስገዳጅ የህግ ትርጉም ሰበር ሰሚው ችሎት ሊቀለብስ ይገባል እላለሁ።

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HARAMAYA UNIVERSITY COLLEGE OF LAW PROFILE*

I. Brief Background

The Haramaya University College of Law was established in 2002 as Faculty of Law, in one of the oldest universities in Ethiopia in existence since 1952. The undergraduate law program began with 100 degree (LLB) program students and was soon followed by 140 advanced diploma level students. Subsequently, launched was a Continuing Education Program (CEP) with diploma level training in Harar and Dire Dawa. The Faculty began with just five staff members.

Aspiring to be a center of quality higher learning and research with a community of scholars devoted to producing well-trained, competent and responsible legal professionals, it has produced more than 1087 graduates with LLB degrees and 120 in advanced diploma in regular programs, more than 250 graduates with LLB degree and about 130 graduates with diploma in CEP, more than 175 graduates with LLB degree and 90 graduates in summer-in-service program.

A total of 440 Regular, 60 CEP, 550 Distance and 90 Summer-in-service students are currently enrolled in the LLB Program. These students take core courses for three and half years and they spend the remaining year by studying elective courses depending on their choice of area of concentration: international law, business law and public &administrative law. The national Externship Program (three months intensive field work) and Law Schools' Exit Exam constitute the final 10th semester. The College with the cooperation of College of Continuing and Distance Education of the University also prepares teaching materials and gives tutorials at six centers located in Ambo, Adama, Addis Ababa, Asela, Fiche and Shashemene.

II. Academic Staff Profile and Resources

The College has young, very energetic and ambitious staff, some of whom have rich experience in legal practice before joining the College. The College has a total of 30 full time instructors, eight of whom are female. In terms of academic rank, the College has two Assistant Professors who are expatriate staff, 13 lecturers and 15 assistant lecturers. Nine staff members are currently on study leave. In addition, it is a home for 14 support staffs including legal counselors working on Free Legal Aid Centers.

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* Prepared by Bezawit Bekele (LL.B. and Assistant Lecturer, Haramaya University College of Law) and Mulugeta Getu (LL.B. & LL.M. & Lecturer, Haramaya University College of Law)

Housed in a separate building at Haramaya University main campus, the College has just finalized the construction of its own library and moot court room and is in the process of acquiring the necessary resources and supplies.

III. Research and Publication

In addition to teaching, the staff members of the College have been taking part in different research projects and have published more than 16 articles in major journals such as**,** *University of California- Hastings West-Northwest Journal of Environmental Law & Policy, University of San Francisco Law Review, Mississippi Law Journal, Haramaya Law Review, Ethiopian Journal of Legal Education, Mizan Law Review and Journal of Ethiopian Church Studies*. Five more publications are expected to come out in 2013.

Ongoing research is being conducted in collaboration with foreign donors such as USAID and grant from the government in various areas including environment, rural land and violence against women. One of the high profiled outputs of the College on Oromia land law and administration will be published very soon.

An important step in the research and publication activity of the School is the launching of the Haramaya Law Review in the spring of 2012, which aims at publishing original scholarship that is interesting, informative and relevant to the Ethiopian legal community. The first issue hosted scholarly contribution from both College staff and international researchers.

IV. Academic, Research and Community Service Centers

The College has established different centers, which advance its research activities and enhance community service in 2009. These are: the Environmental Law and Policy Center, the Social Justice Center, and Advocacy Skills Center.

A. The Environmental Law and Policy Center (ELPC)

The Environmental Law and Policy Center (ELPC) is created to fill the under-serviced area of environmental and natural resource laws by creating, among other things, more scholarship on the scope of environmental problems existing in Ethiopia, promotion of local projects aimed at fulfilling both economic and environmental objectives, raising awareness of Ethiopian environmental laws and regulations among the general public, increasing the availability of courses specializing in Ethiopian environmental law at Haramaya University Law School, and bringing together academics, practitioners, and policy makers to debate, discuss and propose solutions on major environmental issues that exist both in Ethiopia and the outside world.

The Land Tenure Institute of the College, which is currently functioning under the umbrella of this ELPC, is designed to specifically address the most sensitive and demand issues of land. The institute which is established in partnership with The University of Washington School of Law and Landesa (former Rural Development Institute, RDI) has the objectives of developing and improving regional land policy, law and dispute resolution mechanisms, clarifying existing land law and land rights, improving equality between women and men pertaining to land right, improving scholarship, education and research on land law and promoting community awareness of equitable land tenure policy as well as enhancing the capacity of local stakeholders and government officials to create sustainable models for this development.

Currently, the ELPC and LTI are coordinating and conducting different researches in the areas of land laws and land administration, environmental protection and sustainable development, land dispute resolution, etc. Notable local and national researches in this regard are: A Review and Assessment of the Implementation of Rural Land Laws in the Oromia Regional State *(Ongoing; funded by Tetra-Tech ARD and the USAID)*; Rural Land Disputes Prevention and Resolution: Assessing the Approach, Practices, and Problems in East and West Hararghe Zones *(Ongoing; funded by Haramaya University)*; and Towards Sustainable Cement Production: Environmental Challenges and Regulation of Ethiopian Cement Industry *(Ongoing; funded by Haramaya University)*. Moreover, the LTI is currently working in collaboration with the ELPC and faculty of the College of Law to organize an annual conference on Ethiopian Land Tenure and Security. More importantly, the ELPC and LTI are working in collaboration with the faculty of the College of Law and College of Agriculture to implement a two-year project in Borana Zone under the title *"Peace Centers for Climate and Social Resilience"* funded by the USAID-Ethiopia. The two institutions are also leading Haramaya University's team that partner with Mecy Corp to conduct researches under USAID funded *Pastoralist Resilient Improvement through Market Expansion (PRIME)* project.

B. The Social Justice Center (SJC)

The Social Justice Center (SJC) provides programs in a number of areas that concern Ethiopia's disadvantaged communities. It sponsors conferences and independent research by Haramaya faculty as well as outside experts, provides training to local officials and stakeholders to increase awareness on the issues of human rights and issues affecting marginalized groups and provides legal representation to traditionally disadvantaged groups such as the economically disadvantaged, women, juveniles and people with disabilities. The center runs three programs: the free legal service program, research and publication program and finally, the training and community awareness program.

Currently the center actively participates in community service in the Eastern and West Hararge Zones of Oromia Regional State and Harari Regional State. Under its free legal service program the SJC currently has 11 fully operational le-

gal service centers located in court compounds and prison administrations of East and West Hararghe Zones and Harari Regional State. These centers are operated by full time lawyers employed by the University and the participation of College of Law instructors on some cases. The services delivered include legal advice, preparation of pleadings and court representation including appeals to the highest courts. In the first half of 2012/2013 fiscal year, the 11 centers have provided service for a total of 13,680 needy individuals where two third of which were females and children. The numbers of clients were more than 14,000 in 2011/12 fiscal year.

In its training and community awareness program, the SJC is currently running 2 hours weekly radio legal education program aimed at raising the community on various legal issues in Afaan Oromo and Amharic languages in collaboration with Haramaya University FM Community Radio. The center has also provided trainings for 70 judges and prosecutors of Eastern Hararghe Zone on sentencing guidelines and the anti-terrorism proclamation.

With the assistance it obtains from the USAID, the SJC is expanding its services by opening additional 12 centers in East and West Hararghe Woreda courts and Prison Administrations. With this expansion it is expected that the SJC will have a total of 23 centers covering 18 Woredas and 5 prison administrations. It is also planning to open 2 specialized legal clinics in collaboration with the justice bureaus focusing on women and children exposed to violence in Harar and Haramaya towns. The clinics, in addition to the legal service centers, would create opportunities for the College of law students to conduct their clinical legal education. Moreover, the center has a plan of expanding its radio services by airing additional 2 hours radio program through Haramaya Fana FM. SCJ is also beginning to fund research activities in thematic areas of Land Law, Family law, Criminal Law and Human Rights.

C. Advocacy Skills Center

The Advocacy Skills Center (ASC) is established with the objectives of fostering legal research, trial advocacy and legal clinics so as to enable students with the skills of being an advocate. The center would organize moot court and mock trial competitions for students, forums and workshops for students, lawyers, judges and layperson on advocacy skills and alternate dispute resolution. ASC works in two primary areas. On the one hand, it will provide a focal person for organizing students of the College as they pursue moot court opportunities both domestically and abroad. It would also organize Haramaya's own moot court competition.

The College of Law has recorded remarkable achievements in international and national moot court competitions. Students of the College of Law were the first African team to pass the international written round and compete in the Oral Round Competition of the European Law Students Association (ELSA) WTO Moot Court Competition held in Geneva, Switzerland in 2006. They have also been constant participants of the African Human Rights Moot Court Competition since 2007, often becoming among the best 10 teams of the competition. Since 2008, the College's team participated in all the national rounds of the Philip

C. *Jessup* International Law *Moot Court* Competition and represented Ethiopia twice in the Oral Round held in Washington DC. The College is also participating in Copenhagen Negotiation Moot Competition and Frankfurt Arbitration Moot.

In national events, the College has won many trophies in the National Arbitration Moot Court (Best Oralist in 2009 and 2010, and Best Memorial in 2012) and the 5th National Moot Court organized by Action Professionals' Association for the People (APAP) and Haramaya University (all the three trophies 2010) in addition to numerous participations.

V. Future Endeavors: A new Masters of Law Program

Since its establishment, the College has been offering only LLB program. The College plans to upgrade offering an LLM program beginning in 2013. To this end, the College has already started reviewing the curriculum for the LLM in International Business and Economic Law. Programs in Environmental and Land Laws, Developmental Law and Criminal Justice are also soon to follow.

It also plans to expand its community service and research engagement with the support of the University management and USAID. Currently, the College is finalizing different projects funded by USAID on climate resilience, peace building, and land tenure issues on pastoral and agro-pastoral communities. The College is also leading a team of experts of the University that partners with Mercy Corp and other which have won five year Pastoralist Areas Resilience Improvement and Market Expansion (PRIME) project from USAID.

In partnership with Landesa and other partners, the College is also working to bring Land Tenure Institute (LTI) as a full-fledged research institute.

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HARAMAYA LAW REVIEW SUBMISSION GUIDELINES

1. The *Haramaya Law Review* (HLR) is seeking original submissions in English or Amharic for upcoming issues. Submissions may be on any topic relevant to the Ethiopian legal community, including analysis of domestic or international laws and cases, the African Union and other international organizations, challenges and lessons from domestic practice, and original field research.

2. Notes and case reviews can also be submitted to HLR. This includes contributions which are descriptive of new laws and policies as long as they have wider relevance.

3. Texts of English submission are typed in Times New Roman 12 fonts 1.5 spaced while the footnotes will be with font size of 10 and single spaced. Amharic texts should be written in Power Ge'ez Unicode. HLR will acknowledge the receipt of all submissions and make publication decisions within one month of receiving a submission. The HLR will publish two issues per year.

4. All factual assertions, direct quotations, statutes, and case references must be cited using footnotes. In general, three consecutive words or more copied from a source should be treated as a direct quotation (given quotation marks and a citation). All citations should be in the style of *The Bluebook: A Uniform System of Citation*. A recommended guide to legal citation is *Introduction to Basic Legal Citation* (online ed. 2010) by Peter W. Martin, which can be found online at http://www.law.cornell.edu/citation.

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9. Sample Citations

Books (edition and publisher are only required where there are multiple editions/publishers):

Deborah L. Rhode, Justice and Gender 56-59 (1989).

Charles Dickens, Bleak House 49-55 (Norman Page ed., Penguin Books 1971) (1853).

Newspapers:

Ari L. Goldman, *Price of Oranges Rising*, N.Y. Times, June 15, 2009, at A2.

Law Review Articles (should include volume number, journal title, page on which article begins, specific page(s) cited):

Charles A. Reich, *The New Property*, 73 Yale L.J. 733, 737-38 (1964).

Magazines:

Robert J. Samuelson, *A Slow Fix for the Banks*, NEWSWEEK, Feb. 18, 1991, at 55.

Damages for a Deadly Cloud: The Bhopal Tragedy, TIME, Feb. 27, 1989, at 53.

Works in a Collection:

Kay Deaux, *A Social Model of Gender*, *in* Theoretical Sexual Difference 89, 95-96 (Deborah Rhode ed., 1990).

Online Publications:

Heidi Goldberg, Center on Budget & Policy Priorities, State Supported Health Care 15 (2007), *available at* http://www.cbpp.org/11-8-01wel.pdf. (accessed on 23rd of January 2013)

International Treaties (include date of signing):

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

African Charter on Human and Peoples' Rights, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982) (here after *African Charter)*, Art. 27(2).

International Law Cases:

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
Kampanis v. Greece, 318 Eur. Ct. H. R. 29, 35 (1995).

Ethiopian Cases

Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres, Fed. First Instance Ct., Lideta Div., File No. 54024 (Decision of 3 June 2005) (26 *Ginbot* 1997 E.C.)

Ethiopian Laws:

FDRE CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GASETTE, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 9(1) [when it appears for the first time], and then FDRE Constitution, Art. 40(3) subsequently.

The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings, Proclamation No. 3/1991, FED. NEGARIT GAZZETA 50th Year No. 4, Addis Ababa, 12 August 1991.

Short citations:

(same as immediately previous citation) → *Id.*
(same as immediately previous source, but different page) → *Id.* at 53.
(same as citation earlier in article) → (Author's last name), *supra* note 12.
(same as citation earlier in article, but different page) → (Author's last name), *supra* note 12, at 23-26.

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