ISSN: 0022-0914

የኢትዮጵያ ሕግ መጽሔት
JOURNAL OF ETHIOPIAN LAW

25ኛ ቮልዩም ቁ 1	በዓመት ሁለት ጊዜ የሚታተም	Vol. XXV No. 1
መስከረም 2004 ዓ.ም	Published biannually	September, 2011

In This Issue:

IN LOVING MEMORY OF

Professor James C.N.Paul

and

Ato Yohannes Heroui

የኢትዮጵያ ሕግ መጽሔት
JOURNAL OF ETHIOPIAN LAW

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JOURNAL OF ETHIOPIAN LAW

Published biannually by the School of Law,
Addis Ababa University
Founded in 1965
(To be cited as 25 J. Eth.L.No.1)

አዲስ አበባ ዩኒቨርሲቲ የሕግ ት/ቤት

በ1956 ዓ.ም የተቋቋመው የአዲስ አበባ ዩኒቨርሲቲ የሕግ ፋኩልቲ የኤል.ኤል.ኤም እና የኤል.ኤል.ቢ. ዲግሪዎችን ይሰጣል። ለማንኛውም ጉዳይ መረዳት ቢያስፈልግዎ፣ ለሕግ ት/ቤት፣ አዲስ አበባ ዩኒቨርሲቲ፣ የመልዕክት ሣጥን ቁጥር 1176 ብለው ይጻፉ።

የትምህርት ቤቱ ቋሚ የሕግ መምህራን
2004 ዓ.ም

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ኤልያስ ኑር - ኤል.ኤል.ቢ፤ ሌክቸረር

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ሰለሞን እምሩ - ኤል.ኤል.ቢ፤ ኤል.ኤል.ኤም፤ ሌክቸረር

አስቻለው አሻግሬ	-	ኤል.ኤል.ቢ፤ ኤል.ኤል.ኤም፤ ሌክቸረር
አበበ አበባየሁ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
አባስ መሀመድ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
አብዱላጥፍ መሀመድ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ባህካል አባተ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
በርሀ ተወልደብርሃን	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ቢኒያም አህመድ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
መንበረጸሀይ ታደሰ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ፒ.ኤች.ዲ፤ ረዳት ፕሮፌሰር
ታደሰ ካሳ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ፒ.ኤች.ዲ፤ ረዳት ፕሮፌሰር
ሰለሞን ባርናባስ	-	ፒ.ኤች.ዲ፤ ረዳት ፕሮፌሰር
ቢኒያም ዳዊት	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ኤል.ኤል ዲ፣ ረዳት ፕሮፌሰር
ዮናታን ፍሰሀ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ኤል.ኤል ዲ፣ ረዳት ፕሮፌሰር
ያዕቆብ ኃ/ማሪያም	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ፒ.ኤች.ዲ፤ ረዳት ፕሮፌሰር
ሙሉጌታ መንግስት	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ፒ.ኤች.ዲ፤ ረዳት ፕሮፌሰር
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ሰለሞን አየለ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ፒ.ኤች.ዲ፤ ረዳት ፕሮፌሰር
ሪመንበር ሚያሚንጊ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ብስራት ሙልጌታ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ዳኛቸዉ ተስፋዬ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ደጀኒ ግርማ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ጌታሁን ካሳ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ቃልኪዳን ነጋሽ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
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ሞላልኝ አበበ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
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ጥላሁን ኢስማኤል	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ዮሴፍ አእምሮ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ዘሪሁን ይመር	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ሚስተር ሻርማ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ልዩ ታምሩ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ታሪካ ጌታቸዉ	-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ADDIS ABABA UNIVERSITY
SCHOOL OF LAW
Full time Faculty
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Fikremarkos Merso	-	LL.B, LL.M, Ph.D; Assistant Professor
Aman Assefa	-	LL.B, LL.M; Lecturer

Tilahun Teshome - LL.B; Professor
Mekete Bekele - LL.B, LL.M Assistant Professor
Aberra Degefa - LL.B, LL.M; Assistant Professor
Tsehay Wada - LL.B, LL.M; Associate Professor
Mehari Redae - LL.B, LL.M; Assistant Professor
Molla mengistu - LL.B, M.A, LL.M; Assistant Professor
Seyoum Yohannes - LL.B, LL.M; Assistant Professor
Getachew Assefa - LL.B, LL.M; Assistant Professor
Mandefro Eshete - LL.B, LL.M, Dr. Iur., Assistant Professor
Martha Belete - LL.B, LL.M; Lecturer
Muradu Abdo - LL.B, LL.M; Assistant Professor
Tadesse Lencho - LL.B, LL.M; Lecturer
Wondwossen Demissie- LL.B, LL.M; Assistant Professor
Yazachew Belew - LL.B, LL.M; Lecturer
Yonas Birmeta - LL.B, LL.M; Lecturer
Girmachew Alemu - LL.B, M.A; Ph.D; Assistant Professor
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Binyam Tafesse - LL.B, LL.M; Lecturer
Mesenbet Assefa - LL.B, LL.M; Lecturer
Fekadu Petros - LL.B, LL.M; Lecturer
Gedion Timotiwos - LL.B, LL.M; Lecturer (on study leave)

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Yonatan Fisseha - LLB, LLM, LLD; Assistant Professor
Remember Miamingi - LL.B, LL.M; Lecturer
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Mulugeta Mengist - LLB, LLM, PHD; Assistant Professor
Pietro Toggia - PHD, Professor
Solomon Barnabas - PHD, Assistant Professor
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Abdulatif Mohammed - LL.B, LL.M; Lecturer
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Biniam Ahmed - LL.B, LL.M; Lecturer
Bisrat Mulugeta - LL.B, LL.M; Lecturer
Dagnachew Tesfaye - LL.B, LL.M; Lecturer
Dejene Girma - LL.B, LL.M; Lecturer
Getahun Kassa - LL.B, LL.M; Lecturer
Kumelachew Dagne - LL.B, LL.M; Lecturer

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Emiru Tamrat	-	LL.B, LL.M; Assistant Professor
Mizane Abate	-	LL.B, LL.M; Lecturer
Molalign Abebe	-	LL.B, LL.M; Lecturer
Mulugeta Aregawi	-	LL.B, LL.M; Lecturer
Nuru Seid	-	LL.B, LL.M; Lecturer
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Ameha Tesfaaye	-	LL.B, LL.M; Lecturer
Elias Nour	-	LL.B, LL.M; Lecturer
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Yosef Aymero	-	LL.B; Lecturer
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Tilahun Wolde (LL.M)

የኢትዮጵያ ሕግ መጽሔት

ከኢትዮጵያ ሕግና ተዛማጅነት ካላቸው ዓለም አቀፍ ሕጎች ጋር ተያይዘው የሚነሱ የሕግ ነክ፣ ፖለቲካዊና ማሕበራዊ ጉዳዮችን የሚመለከቱ የምርምር ሥራዎች የሚታተሙባት መጽሔት ነች።

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የኃላፊነት አለመኖር

የኢትዮጵያ ሕግ መጽሔት በተለያዩ ጸሀፍት የተደረሱ ወይም የቀረቡ ጽሁፎችንና ሰነዶችን የሚያሳትም ሲሆን የጽሁፎቹን ወይም በጽሁፎቹ ዉስጥ ያለዉን መረጃ ትክክለኛነት ማረጋገጥ ግን የጽሁፎቹ አቅራቢዎች ኃላፊነት ነዉ:: በመሆኑም በደራሲያኑ ተደርሰዉም ይሁን ተተረጉመዉ አልያም በማንኛዉም መልክ የሚቀርቡ ጽሁፎች ዉስጥ ባሉ መረጃዎች ትክክል ያለመሆን ወይም በመረጃዎቹ በመጠቀም ለሚደርስ ማንኛዉም ኃላፊነት የሕግ ትምህርት ቤት ወይም ሰራተኞቹ ተጠያቂ አይሆኑም::

JOURNAL OF ETHIOPIAN LAW

Is a scholarly publication devoted to the legal, political and social issues arising in relation to Ethiopian Law and related international Law.

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Our Address is: The Editor - in - Chief
Journal of Ethiopian Law
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P.O.Box 1176
Addis Ababa, Ethiopia
Tel., 0111-240010

The Journal is distributed by the Book Centre of Addis Ababa University. If you wish to subscribe, please address correspondence to:
The Book Centre, Addis Ababa University,
P.O.Box 1176, Addis Ababa, Ethiopia.

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Annual Report of the Dean (2010/11)

By Dean Zekarias Keneaa

I. Overview

During the last academic year, there were four programs that were run by the School of Law. The Regular undergraduate LL.B Program, the Evening undergraduate LL.B Program, the graduate LL.M Program, and the Summer In-Service Program for Prosecutors from the Oromia Regional State.

The 2010/11 academic year was a challenging academic year for the School of Law at AAU. The usual budgetary constraints were there and the School wouldn't have been able to meet crucial ends had it not been for the income it generated by training Prosecutors for the Oromia Regional State.

The School of Law is not staffed with qualified instructors in adequate number. For many undergraduate courses the school depends on part-time instructors many of whom are quite busy with their own businesses and commitments. The problem of not having qualified fulltime instructors is even more glaring in the currently running LL.M Program of the School. The offering of quite a number of courses are postponed due to not being able to find instructors. The pervasive problem of finance has been a hindrance to the School's LL.M Program and because of this problem; the School has not been able to even employ foreign professors willing to come and teach provided their expenses are fully covered.

Preparing our students for Exit Exams that were offered for the first time is another mentionable challenge of the year as was deploying our prospective LL.B graduates on externship which was also the first of its kind. The School has gained some experience with respect to both and it is hoped that the handling of both programs in the current academic year will improve.

II. Some Highlights for the Year

Statistics

There were about 620 students in the 5 different batches in the Law school. 100 out of this total have graduated last July and now the School of expects to have about 80 new students joining the school for the 2011/12 academic year.

Public Lecture

In March 2010 a public Lecture was organized by the School of Law in cooperation with the Ethiopian Arbitration and Conciliation Center (EACC). Ms Gina Barbieri, a lawyer form South Africa with rich experience in settling international disputes, delivered a lecture on the topic "Best Practice Lessons in Implementing ADR in Africa' which was followed by a very fruitful

discussion with lots of questions and comments both from faculty and students.

Hosting of the Final Round of the National Arbitration Moot Competition
The final round of the National Moot Court Competition for 2010 organized and sponsored by the Ethiopian Arbitration and Conciliation Center (EACC) was hosted by AAU School of Law on Hidar 22, 2003. Ato Zekarias Keneaa, then Acting Dean of the School of Law, served as one of the judges for the final round. The final round competition was conducted in the Auditorium in the Nelson Mandela Building and was a very colorful event.

Participation in the National Moot Court Competition on Human Rights
Three third year students of the School headed by an instructor coach participated in the National Human Rights Moot Court Competition organized and sponsored by The Ethiopian Human Rights Commission held in Bahr Dar. The Competition was held between 29th Megabit and Miazia 04, 2003. Students Bantayehu Demlie, Sousena Kebede and Alemayehu Begna represented the school and achieved a good result.

Participation in Jessup International Law Moot Court Competition
The Jessup International Moot Court Competition is held every year in Washington D. C. The School of Law at AAU is one of the schools that regularly and annually take part in the competition. With the guidance and coaching of the Assistant Dean of the School of Law W/zt Blen Asemrie, four students of the School Students Bthel Genene, Chaan Koang, Ermias Kassaye and Mintesinot Kebede took part in the competition held between Megabit 12-17, 2003 in Washington D.C. after winning the National Round competitions against law schools in the country. Several staff members have participated as judges in the screening rounds to select team members for the competition and also in the public rehearsal sessions organized to help prepare the team.

Ato Wondwossen Demissie a faculty member of the School of Law also took part by serving as a judge in the various rounds of the competition.

The participation in the competition of students of the School materialized only through the assistance extended to the participants by the University's central administration.

Participation in the Jean-Pictet International Humanitarian Law Moot Court Competition
Three students of the School Feben Regassa, Ermias Dejene and Tamrat Lapiso participated in the Jean-Pictet International Humanitarian Moot Court Competition held in France in March 2011.

Participation in the Regional Training on Arbitration - in preparation for an upcoming Arbitration Moot Competition

Two students of the School, members of a future International Arbitration Moot Team led by Ato Fekadu Petros, a faculty member of the School, participated in the Regional Training Program on Moot Arbitration held in Ghana Accra from Megabit 19-25 2003.

Exit Exams

Exit Exams (National exams for students graduating from Ethiopian Law Schools with L.L.B Degrees) were administered for the first time through out Ethiopia. They were administered in April 2010. 101 graduating students in the regular program in the undergrad program in law of AAU took part in the exams and all of them managed to clear the exams.

Externship

Prospective graduates of the regular program in the undergrad in law at AAU also were involved in a pioneer program of externship which was introduced for the first time and in which all prospective graduates in the undergrad law programs of all Ethiopian Law Schools participated. AAU's prospective graduates did their externship for 12 weeks From Miazia 03, 2003 to Hamle 01 2003 in 19 various institutions. The institutions that cooperated with our School of Law in accommodating our prospective graduates included among others, Federal Courts, Oromia Supreme Court, Ministry of Justice, various other ministries, state-owned commercial banks private banks and private insurance companies. Stipends were paid to the prospective graduates who went on externship by the University.

Research and Publications

In the course of the last academic year, two issues of the Journal of Ethiopian Law were out viz, Vol 24 No. 1 and Vol 24 No. 2. Moreover, Volume IV of the Ethiopian Constitutional Law Series as well as Vol IV of the Ethiopian Business Law Series were out. The coming out of Volume IV of the Ethiopian Human Rights Law Series is delayed.

III. Financial and Equipment Support

Financial Support

Grant Fund to support the publication of the Journal of Ethiopian Law

The DLA Piper Foundation donated $25, 967.00 to the School of Law which is earmarked to support the publication of the Journal of Ethiopian Law. The money was credited to AAU's Account No. 0170417333300

Grant Fund to Support Individual Faculty Research

The DLA Piper Foundation donated $8,310.00 to three faculty of the School of Law viz, Ato Muradu Abdo, Ato Seyoum Yohannes and Ato Tadesse Lencho to support their individual research projects.

Equipment Support

2.3.2.1 The DLA Piper Foundation also purchased equipment for the School and the following ICT items were purchased and delivered to the School.

1. HP Laptops	2pcs
2. HP PCs	20pcs
3. HP Monitors(20 inch LCD)	20pcs
4. HP Printers (P2055)	10pcs
5. Canon Copiers (IR2318L)	2pcs
6. Sony LCD Projectors	2pcs

The Starting of a Computer Lab

Mikre Michael Ayele Memorial Foundation has established a Computer Center for the benefit of the School's faculty and graduate students. The Center is located in room 327 on the 3rd floor of the Nelson Mandela Building. The Center was inaugurated on May 27,2011 and has been functional since. Mikre Michael Ayele Memorial Foundation also employed an attendant for the whole of the current academic year

IV. Obituary

1. Professor James C.N. Paul (1923- 2011) The first Dean of the first ever law school in Ethiopia, the man that started Ethiopian legal education from scratch, one of the pioneer academic Vice Presidents of the then Haile Selassie I University, a great scholar and a memorable Ethiopianist, passed away mid September 2011.

Long before his death, Addis Ababa University has placed a plaque of Professor James C.N. Paul right at the entrance of the building where he came and founded the first School of Law and where he himself started conducting formal legal education classes in Ethiopia back in early sixties. More than the plaque to his name, the man that left behind a legacy that will never be erased, James C.N. Paul, will be remembered by pages of Ethiopian Legal History and through good memories of Ethiopian Legal Education.

2. Yohannes Hirouy Tibebu (1941-2011)

Fifteen days before Professor James C.N. Paul passed away; the Ethiopian legal community lost a remarkable Ethiopian legal professional and scholar to the brutal enemy of the human race -death. Yohannes Hirouy, one of the first Ethiopians taught law by Professor C.N. Paul, and one of the first Ethiopians that were recruited to teach law at the then Haile Selassie I University School of Law, passed away on the 31 of August 2011.

Gash Yohannes, as many of us referred to him when he was alive, tirelessly supported the School of Law. He not only served as a part-time law teacher, but oft served as an editor of the Journal of Ethiopian Law as well as a chair or member of the Editorial Board of the Journal.

Gash Yohannes has left behind his imprint on the Ethiopian legal scholarship. His many contributions will remain living witnesses of his works and will continue to inspire young and prospective legal professionals and scholars. The trade mark and meticulous editing services of Ato Yohannes is going to be missed by the community of Ethiopian legal professionals in general and the School of Law in particular,

This issue of the Journal of Ethiopian Law (Vol 25 No 1) a journal started by James C.N.Paul and in the publication of which **Yohannes Hirouy Tibebu** was involved from day one, is dedicated to **Professor James C.N. Paul** and Ato **Yohannes Hirouy Tibebu.**

James C.N. Paul: In MEMORIAM

James C.N Paul: A Man with Transcending Impact on Ethiopian Legal Education

Andreas Eshete*

James Paul's contributions to Ethiopian higher education, legal education, legal profession, legal system and legal practice are extensive, deep and enduring. As a founder of the law school of the then Haile Sellassie I University (HSIU), he forged strong bonds with Yale Law School. For instance, a number of the early graduates and, later, faculty members went to Yale for graduate education. The original Ethiopian law curriculum, texts and commentaries were either authored by James Paul or under his direction and support. A pioneer of Ethiopian education, it is fair to say that James Paul shaped the institution, its faculty, library and program of study in the formative years.

By Serving as academic vice president of HSIU, James Paul's formative influence extended to the university as a whole at the crossroads from University College of Addis Ababa to Haile Sellassie University. James Paul deserves credit for the establishment of the chief faculties, foundational university legislation and institutional arrangements. He was also mentor to the first Ethiopian senior officers of HSIU, thereby advancing the university's driving mission of Ethiopianization.

James Paul continued to support the Law School and the University after his return to the United States. To cite only the most recent of his many contributions: He extended a generous donation, which became the core of a fund to support the law school library and the library at the Kifle Wodajo Center for Human Rights, Peace and Democracy at Addis Ababa University (AAU).

Beyond the education of the first generation of trained lawyers, James Paul labored to make sure that the Ethiopian legal profession lived up to the highest standards of law and morality. In this connection, it is noteworthy that he made frequent visits to Ethiopia during the Transitional Government to assist his friend, Kifle Wodajo, Chair of the Commission to Draft the Constitution of the Federal Democratic Republic of Ethiopia.

Among his many valuable constitutional ideas, perhaps most notable were his seminal views on a constitutional order, the rule of law, and the independence of the judiciary.

Just before his sadly failing health James Paul served as Ethiopia's advocate in

* Former President of AAU; Professor of Law and Philosophy; UNESCO Chair for Human Rights, Peace and Democracy; Presently Adviser to the Prime Minster

the compensation dispute with Eritrea, a dispute occasioned by the Ethio-Eritrean war. James Paul's able advocacy resulted in a triumphant decision in favor of Ethiopia. James Paul's lawyerly virtues to one side, this international case demonstrated outstanding traits of his personal character. First, his loyalty and devotion to Ethiopia, Second, at the time, AAU had put forward an offer to confer an honorary degree in recognition of his academic services. James Paul declined the honor on grounds that it may appear as a conflict of interest with his duty as Ethiopia's legal representative. Third, he donated his legal fees as a gift to AAU's libraries, once again showing that James Paul was always prepared to serve Ethiopia and her people far beyond the call of any legal or ethical duty.

I am certain that Ethiopia's citizens and her government will always cherish the memory of James Paul, one to whom we all owe a deep debt of gratitude that unhappily we cannot discharge.

James C.N. Paul: Personal Reminiscences

Fasil Nahom*

Prof. Jim Paul was a passionate teacher. Law particularly constitutional law, was his first love. As a student, I remember sitting in his classes mesmerized, when he would expound, Socratic style, profound principles and rhetorically ask, 'Who speaks for the law? Who speaks for justice?'

It was one day in early July 1963 that by chance I happened to meet Jim Paul at the entrance of the Law School at Sidest Kilo Campus of the then H.S.I. University. It was on the stairs of the Law School that I had my first encounter with Prof. Paul. He invited me to his office and there initiated me into law studies. His sincere concern for solving fundamental problems of society convinced me to study law.

In 1968 Prof. Paul had gone from being Dean of the Law School to become Academic Vice President of the University. As administrative duties of a fledgling university weighed heavily upon him he had to curtail his beloved teaching. I was asked to take over his classes and I still remember the dread of stepping into the shoes of such a great teacher. Thirty years later, when I had the opportunity to write a book on the new Ethiopian Constitution, it was a pleasure to pay back in a very little was by acknowledging his tremendous contribution.

As he fashioned the Law School together with a crack team of young professionals, so he put his stamp on the then only university in Ethiopia. He was keen to see the University become not only a transmitter of knowledge but also a center of relevant research and creativity.

His love for Ethiopia was a life-long affair and showed itself in action again and again. When the 1995 Constitution was on the drafting board, his public lectures under the auspices of the Constitutional Commission on Human Rights, the Independence of the Judiciary and many other weighty matters were profound and practical. His encounter with the Premier, I remember, correctly assessed Ethiopia's embarking on a new dawn. In his later years, his advocacy for just compensation pursuant to International Humanitarian Law, as he served on the Ethio-Eritrean Compensation Commission following the war, reflected another landmark.

Jim Paul's abiding philosophy that societies are best served when they observe the rule of law is a beacon for all of us to follow.

---

*Special Advisor to the Prime Minister

James C.N. Paul: In Memoriam

Selamu Bekele*

I am honored to be asked by the Addis Ababa University Law School to remember Dean Paul (as we used to call him, that is, except Ababeya, who used to address him as Jim). I remember quite a lot about Dean James C.N. Paul. I was there from the start. I write about few of them here and now.

In the summer vacation of 1963 I was working in the accounting office of the then newly founded Haile Selassie I University (Addis Ababa University now) Packages of books started to arrive addressed to a non-existing law faculty in the then HSIU. I was ordered to look after them. Some time in August, a slim bespectacled and a disheveled middle-aged man appeared in our office. He very humbly and with a very low and slow voice asked for the packages of books sent to the Faculty of Law. I showed him. Our boss came and told two of us to show the gentleman what was then used to be called the Duke House. He asked for the key and was told that it will be searched and delivered. Any way, we went and showed him the Duke House. He looked around. Then he broke the back door of the building and managed to enter and open the door. The House was in great mess and dirty. Next day, some keys were found and given him.

That is how James C.N Paul founded the Faculty of Law. Soon enough, applications for entrance were invited. The rooms were cleaned and room 27 was arranged with desks. His office and other rooms for the rest of faculty and supporting staff were prepared. The Law Library was fitted with shelves and books. Those of us whose applications were accepted started class in Room 27.

He taught us Constitutional Law. I can now say Dean Paul established the Faculty of Law A.A.U. single handed. Certainly, he had competent and devoted assistance from his teaching faculty and administrative staff. He went to extra lengths to create amity and collegiality between the faculty and us students. He often invited us to his house for big parties. He also tried very hard to build the standard of the Faculty to that of the best Faculties of Law of USA, Canada and Europe. In short, the history of the Faculty of Law is one chapter in the history of James C.N. Paul. In the end, I can vouch that he was a gentle, humble and good human being. Let God bless and protect the family he left behind. Let his soul RIP. Condolences to his family.

---

*Attorney at law and consultant, Former student of Dean Paul

*Ever since, the building has remained the law school building

YOHANNES HEROUI: IN MEMORIUM (1940-2011)

Yohannes Heroui: An Eminent Jurist, a Great Scholar and a Selfless Gentleman of Immeasurable Integrity

Tilahun Teshome*

On the 30th of July 2011, the Ethiopian legal profession and, indeed, the entire justice loving community lost one of the most celebrated sons of the Nation in the person of *Gashe* Yohannes Heroui. The School of Law of the Addis Ababa University, with which he identified himself and which he served with at most zeal and dedication up until the day he left this world, has no words to express its grief over the death of this beloved scholar. *Gashe* Yohannes devoted his life to the cause of justice and truth long before he graduated from the Faculty of Law of the then Haile Selassie I University in 1966, as one of its first butch of graduates. He was a teacher, a mentor and an inspirational personality to all Ethiopians who joined the legal profession thereafter.

My personal acquaintance with *Gashe* Yohannes began in 1983 when I joined the Ethiopian judiciary, although I have heard of his reputation as a profound lawyer and a distinguished scholar long before I started working with him in that capacity. That he was a workaholic judge with a remarkable ability to identify complex legal issues and come up with appropriate solutions thereon is one of his incredible qualities that are still vivid in my memory. In all honesty, I can say that it was indeed an honor and privilege for me to work with and learn from him. As legal educators too, we have closely worked together here at the School of Law of the Addis Ababa University for nearly two decades. Once again, I had had the opportunity to witness his commitment to his duties and the zeal and dexterity with which he discharged his responsibilities.

A profound legal researcher and prolific writer that he is, with an amazing ability to express his ideas in both the English and the Amharic languages, *Gashe* Yohannes will remain a shining personality in Ethiopian legal research and scholarship for years to come. Not only was he able to produce and publish outstanding articles and commentaries on the different aspects of Ethiopian law in various scholarly and professional journals, he was also instrumental in causing the publications of numerous works by other professionals in his capacity as Chairman of the Editorial Board of the *Journal of Ethiopian Law*, as Editor-in-Chief of the *Ethiopian Bar Review, Law and Justice*, the *Supreme Court Law Report* and the *Report of Arbitral Awards* of the Ethiopian Arbitration and Conciliation Center, among a host of others.

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A person who paid immensely, and took all the clubbing with honor, for the causes and ideals he stood for, I am positive that those who closely know *Gashe* Yohannes will join me in describing him as a Great Jurist, Scholar and, above all, A SELFLESS GENTLEMAN OF IMMEASURABLE INTEGRITY.
MAY HE REST IN PEACE!!

Yohannes Heroui - Judge, Legal Scholar, and Editor of Numerous Legal Publications

Taddese Lencho*

The first encounter I had with Ato Yohannes Heroui was before I joined the law school, before I knew he was a legal scholar, at a time when law was a mere wisp of a word. It happened when I was a freshman student at Addis Ababa University. While having our usual strolls outside the main gate of the University after dinner, we came face to face with a man we could not have missed in the crowd. It was my friend who first saw him and drew my attention by exclaiming "There goes the philosopher!"

A gaunt-looking man (probably in his late forties at the time) was walking up the street carrying a large Tolstoyesque book with his right hand and holding a cigarette with the other. His features easily marked him out of the crowd. He wore a heavy spectacle from which his piercing eyes were easily recognizable and he had a heavy streak of hair on his face. Little did both of us know at the time that Ato Yohannes was the man whose judgments and works we would read when we eventually joined the Law School!

For us, a philosopher was defined by his physical characteristics: he was thin, heavily-bearded, smoked cigar and carried a huge book. He had all the accessories our youthful imagination associated with philosophers. It was perhaps the pictures of busts of ancient philosophers that we saw in introductory philosophy books that we read at the time that left this impression. Or perhaps, the ubiquitous pictures of Karl Marx and Frederick Engels during those heady days of socialism - I don't know. It turned out (as I was able to realize later) that Ato Yohannes was walking home that day from the Supreme Court where he was working at the time.

Since then, I met Ato Yohannes Heroui mostly through his meticulously edited legal publications and I was able to form an image of a quiet, unassuming but highly dedicated legal scholar, and when I met him in person years later, I realized that my impressions were not really far off the mark. If, as John Mason Brown said 'an author's style is his written voice, his spirit and mind caught in ink', I was probably right to have imagined a quiet but formidable worker behind the works Ato Yohannes left behind.

Ato Yohannes spoke quietly and his words flowed and seeped into your whole body, which heightened the experience of being with him. I did not (probably unfortunately) meet Ato Yohannes in classrooms, but having met and spoken to him in person, I could tell that Ato Yohannes was perhaps a better communicator through his various publications than his presence in classes.

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His quiet demeanor is least suited to classrooms where impressions are created more by flashy gestures, ostentatious displays of flair, flamboyant personalities and witty observations. He requires an understanding of a different kind, one which takes hold of you discreetly but never goes away once it gets hold of you. Building impressions from the individual works written by a person, you slowly admire the quiet person that works behind those works. The unassuming wisdom that his very presence exudes leaves you wanting to be like him even when you run after the other kind of life.

Ato Yohannes leaves lasting impressions even when he is least conscious of it. I remember him sitting in one of the rooms in the old Law School building[1] quietly poring over a large pile of paper carrying that regular companion of his: that cigarette between his fingers. One cannot but admire the quiet courage of this man brooding over a pile of student papers. I must have sneaked a glance into that room several other times but I could not remember a single person and compare it with the impression I had that day of Ato Yohannes. Watching Ato Yohannes that day taught me that there are artistic and memorable ways of reading student papers, or any papers for that matter.

Ato Yohannes' role in the editing of the major legal publications in the country is pretty well-known among lawyers who read legal publications. We all have a calling in life, and only a few seem to be able to discover and embrace it as a pursuit of passion. Ato Yohannes chose to spend his life on an activity which held out little promise in the way of gratitude - editing, but it all seemed that he was born to do it. He could sit patiently for hours over virtually unreadable legal materials and beat them into publishable forms. His meticulous and scrupulous attention to the minutiae of publishable material made him an ideal editor for legal publications. The court decisions that Ato Yohannes edited are masterpieces of legal prose in this country, and while we should appreciate the amount of attention that went into the original judgments, we should remember that it was the scrupulous editing of Ato Yohannes that made them what they are: eminently readable and thoroughly instructive. It was quite like him to have assumed so many editorial positions with little prospect of financial rewards or academic promotions.

It is idle to speculate now about what might have been but I always felt that the qualities that Ato Yohannes possessed were ill-served by our regimented academic establishment in which teaching in a classroom is taken as the main (at times the sole) duty and persons who could have contributed a lot in other aspects of academic life were not appreciated and rewarded enough. The Law School possessed little autonomy of its own to create a position that was

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[1] No room in the old Law School Building should be named after computers but this room is oddly named 'computer room'.

enabling to a temperament like that of Ato Yohannes. It was probably an inconvenience to him while he lived and a great loss to legal scholarship.

From what I have come to know about him, Ato Yohannes did not pine after fame, money or power: the three things he could have got with less exertion of energy and time. He was a lone soldier among books, fighting bravely no matter what the sacrifices. He was also a party unto his own: at times stubborn, uncompromising, and careless of the opinions of others. He was endearing for all of these things. You may stand at the far end of the spectrum of the lifestyle or political outlook of Ato Yohannes, but you still respected him for the quiet way he went about his business. Even in moments when you think he should have gone the other way (translation: your way), you would understand the nobility of his sentiments.

For most people working in the Ethiopian judiciary, their English suffers in the same proportion as their experience of legal practice is deepened. Not Ato Yohannes Heroui. His writings show that Ato Yohannes could easily inhabit the two worlds, without losing the content of either - the world of legal practice, dominated by the use of Amharic (and now multiple languages), and the academic world, dominated by the use of English as a medium of instruction and communication. That came as a result of his long years of disciplined dedication to both worlds. Ato Yohannes never lost touch with his academic self even as he immersed himself in the world of legal practice. His command of English was as spotless as his command of Amharic.

It was a testament to the thoroughgoing dedication of the man that Ato Yohannes was involved as a principal editor of most of the legal publications in this country. He was involved as editor of law reviews, such as the Journal of Ethiopian Law, the Ethiopian Bar Review and collection of Judgment Reports. His steadfast attention to quality helped establish quite a standard and contributed heavily-researched articles to the publications he helped edit.

As we mourn the passing of Ato Yohannes, we should remember what an exemplary life he led and how fortunate some of us are to have known him. His life was easy to admire but difficult to emulate. Let us hope that all those legal publications he stewarded will keep up the pace and quality he consistently liked to see. He is going to be dearly missed.

R.I.P

Yohannes Heroui -In Memoriam

Ato Selamuu Bekele *

Yohannes Heruy was a classmate, partner in academia and a good friend. He applied for admittance to then Faculty of Law of HSIU at the same time as I did. We were classmates in the first class of the Faculty of Law. He came to the Faculty from Harrar Military Academy. I understand that he finished all requirements, but left before being commissioned.

He was always one of the top four students in our class. He excelled in research and editing. We were appointed as editors of the then newly published Journal of Ethiopian Law. We ended up he becoming editor in chief of the case section and I that of the articles.

Later we both became members of faculty. I had the good fortune to teach law his father Ato Heruy in the extension program, and one of his brothers, Dawit, in the degree program. He later went to France and returned back and joined the Ethiopian Peoples' Revolution. I did not exactly join him there. Our friendship continued though inspite if that. I used to go often to his office in the municipality. He was loved and respected by the employees of the municipality of Addis Abeba. Although Ato Yohannes was radical in his political outlooks he was conservative in his academic persuit. He used to try to walk the narrow path academically. He was a great editor. The works he contributed in the Federal Supreme Court, Journal of the Bar Association, Journal of Ethiopia Law and to some books authored by some individuals is witness to his contributions to the literature and jurisprudence of Ethiopian Law.

He was also humorous. One can understand his humour only of one did understand Johnny.

He was selfless and very cynical in accumulating wealth. Sometimes I imaginal him as a hermit. He was truly selfless to the verge of carelessness. What I remember and shudder is what he went through during that dark period of white and red terror in the Ethiopian Revolution. We could have missed him and his great contribution to Ethiopian Law earlier. God be blessed that it never happened. Still he is untimely reaped.

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I always remember his nick name for me "melataw Berqe". Roughly translated as my special hairless/bold headed. I, for one, miss him. Let God bless and protect the relatives he left behind. Let his soul RIP.

ዮሐንስ ጎሩይ ጥበቡ፤ ስለ እርሱ እና ስለ ሥራዎቹ በጨረፍታ!

አቶ ታምሩ ወንድምአገኘሁ*

ዮሐንስ ጎሩይ ጥልቅ የሆነ የምርምር እና የማገናዘብ ችሎታ እና ተሰጥኦ የነበረው ምሁር ነበር። ይህን ክህሎት ያዳበረው ከሊቃውንት ቤተሰቦቹ እንደነበር መገመት ይቻላል። የሊቀ ጠበብትነት ማዕረግ የነበራቸው የእናቱ አባት ማለትም አያቱ የደብረሠላም ቀጨኔ መድኃኒዓለም ሊቅ ከህፃንነቱ ጀምሮ ዮሐንሴ እያሉ በመጥራት በቅርብ እንዳሳደጉት በህይወቱ ሳለ ይናገረው እንደነበር ሰምቻለሁ። በተጨማሪም አባቱ ከታወቁ የቤተ ክርስቲያን ሊቃውንት ቤተሰብ እንደሚወለዱ እና እርሳቸው ራሳቸውም ትልቅ የአቋዋቁዋም ሊቅ እንደነበሩ በአንድ ወቅት ራሱ ባቀረበው አጭር ጽሁፍ ላይ ገልጸታል።

ምናልባትም ገና በልጅነት ዕድሜው ከወላዶቹ ተሰውሮ ማንንም ሳያስፈቅድ እና ለማንም ሳይናገር ጎጃም ተሻግሮ ምናኔ ለመግባት ለአንድ ገዳም አለቃ ራሱን እንዲያቀርብ የገፋፋው ይህ ከወላጆቹ ያገኘው መንፈሳዊ አመለካከት ሳይሆን አይቀርም። በተጨማሪም የተቸገረን የመርዳት እና ሰብአዊ የመሆን ስሜቱ ጥንስስ እነዚህ በህፃንነቱ ከአሳዳጊዎቹ የቀሰማቸው አመለካከቶች ሳይሆኑ እንዳልቀረ ይገመታል። እኒያ የጎጃም የአንድ ደብር አለቃ የጨቅላው ዮሐንስን የምናኔ ጥያቄ አልደረስክም በማለት ውድቅ አድርገው ዮሐንስ በሄደበት እግሩ ባይመለስ ኖሮ ለዮሐንስ በብህትውናው ጉሮው የመግፋቱ ጉዳይ ምንም እንደማያስቸግረው ዓለማዊ ሕይወቱን ከመራበት አካሄድ መገንዘብ ይቻላል። በሚገርም ሁኔታ ዮሐንስ አርፎ አስከሬኑ ከቤት ሳይወጣ ግርግሩንና የድንኩዋን ተከላውን የተመለከቱ አንድ ተላላፊ የሠፈሩ አዛውንት የዮሐንስ ህልፈት ሲነገራቸው ከህዘን ጋር ስሜታቸውን የገለጡት *ኅይ ዮሐንስ የሕግ መነኩሴ* በማለት ነበር።

ለማንኛውም በአስተዳደጉ ያለፈባቸው የአስተሳሰብ አካሄዶች እስከመጨረሻው የሕይወት ዘመኑ እንዳልተለዩት ከአነጋገሩ፤ከአኗኗሩ፤ከአፃፃፉ፤በአንዳንድ በኩልም ከአስተሳሰቡ ማየት ይቻላል።

ዮሐንስ በሚናገረውም ሆነ በሚጽፈው በቃላት አመራረጡ በቁጥብነቱ በሚሰነዝረው አስተያየት ውሱንና ግልጽ ነው፤ የቋንቋ ችሎታው (አማርኛ እና እንግሊዝኛ) ምጡቅ ነበር። ሀሳቡን ከሚያስፈልገው በላይ አያንዛዛውም፤አሳጥሮም አያድበሰብሰውም፤ ጥርት እና ግልጽልጽ አድርጎ ሀሳብን የመግለጽ ግሩም ችሎታ ነበረው። ከረጅም ዐረፍተ ነገሮች ይልቅ አጠር አጠር ያሉ ሐረጎችን ይመርጣል። ሀሳቡን በተረጋገጡ ማገናዘቢያዎች ማጀብና ማስረገጥ ልማዱና ዘዴው ነበር። ማገናዘቢያዎችን ከተለያዩ ምንጮች ፈልጎና ፈልፍሎ ማግኘት ደግሞ ዮሐንስ እጅግ የተካነበት ዘዴ ነበር፤ ለዚህም የጥናት ጽሁፎቹ ቀዋሚ ምስክሮች ናቸው።

በተለይ በአማርኛ ሲጽፍ ባህላዊ መሰረቱን ያልለቀቀ ከውጭ ቋንቋ ጋር ያልተዳቀለ ኢትዮጵያዊ የሆኑ አዳዲስ ቃላትን ያካተተ አድርጎ ማቅረብ የሚያዘወትረው ልማዱ ነበር። በዚሁ መሰረት ባንድ ወቅት ካድሬ የሚለውን የባዕድ ቃል እናንኒሰጢስ የሚለው የግዕዙ ቃል ይተካዋል በማለት እየሳቀ የነገረኝ ትዝ ይለኛል። ለነገሩ ግን

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* የሕግ አማካሪና ጠበቃ

መጉዌ፤ዝኒ ክማሁ፤ምዕላድ፤ግዕዛት፤ምግባረ ሰብዕ፤ የምግባረ ሰብዕ ደንቦች ወዘተ የሚሉት ቃላት እና ሐረጎች እርሱ የሚጠቀምባቸው ወይም ያዳበራቸው ናቸው ለማለት ይቻላል::

ዮሐንስ ምርምር ሲያካሂድ ወይም የተጻፈ ሲያርም የራሱ የሆነ ስልት ነበረው:: በጥናት ወይም በዝግጅት ላይ ሲሆን ከማንም ጋር አይነጋገርም፤ ቢያናግሩትም አይሰማም፤ ቢጠሩትም መልስ አይሰጥም፤ ሰው ቢጮህም ድምጽ ቢያሰማም የሰማ ያየ አይመስልም:: ስለዚህ ማንኛውንም የምርምር ስራ መስራትን የሚመርጠው ሰው በማይኖርበት ጊዜ ነው:: ከዚህም የተነሳ በአብዛኛው የእርሱ የስራ ጊዜ የሚጀምረው የሌሎች የስራ ጊዜ ሲያበቃ ነው፤ መሸቶ ሰዎች ሲተኙ እርሱ ተቀምጦ ስራውን ይሰራል፤የስራ ሰዓት አልቆ ሰዎች ሲወጡ እርሱ ዘግቶ ስራውን ይቀጥላል፤ በዓል፤ የሳምንት የእረፍት ቀናት፤የእርሱ የስራ ጊዜ ናቸው! በመሆኑም በሰዓት ግባ በሰዓት ውጣ የሚለው *መመሪያ* ለእርሱ አይሰራም:: የሰራውንም ጨርሶ ከማቅረብ በቀር ስለድካሙም ሆነ ስለውጤቱ መናገርን ጨርሶ አይወድም:: ለሹመት ለሽልማት ለምስጋና ብሎ ሲሰራ አላየሁትም፤ ነጻነቱን እጅግ ስለሚያከብር ማንም እንዲዳፈርበት አይፈቅድም፤ ስለዚህ ከስራው የሚጠብቀው እርካታን እንጂ ሽልማትን ወይም ምስጋናን ስላልነበር ዮሐንስ የልብ እንጂ የዓይን ሰራተኛ አልነበረም:: የሚገርመው ግን ምን ጊዜም የዮሐንስ ቢሮ ቅጥ ባጣ ሁኔታ በወረቀት የታጨቀ መሆኑ ነበር:: እራሱ ካልሆነ በቀር አንድ የተለየ ወረቀት ፈልጎ ማውጣት ለእንግዳ ሰው ጭንቅ ነበር:: ዮሐንስ በዚህ ድክመቱ ለሚሰነዘርበት ወቀሳ መልሱ ሁሌም *There is always organization in disorganization* የሚል ነበር:: እውነትም የሚፈልገውን ከዚያ ትርምስ ውስጥ ማውጣት ለእርሱ የሚገድደው አልነበረም::

ዮሐንስን ለመጀመሪያ ጊዜ ያወኩት እርሱ መምህር እኔ ተማሪ ሆኜ በህግ ትምህርት ቤት በ1962 ዓ.ም. ነው:: ከዚያን ጊዜ ጀምሮ ዮሐንስን እንዳየሁት በአኗኗሩም ሆነ በአመለካከቱ ለምኞትም ሆነ ለቅንጦት ወይም ለሹመት የማይጨነቅ፤ ይልቁንም በአካባቢው የሚታየው የማህበራዊ ሕይወት አለመደላደል ብዙ የሚያሳስበው ሰው ሆኖ ነበር:: ከዚህም የተነሳ ብዙ ገንዘብ የማይበቃው ጥቂት ገንዘብም የማያንሰው ሰው ነበር:: ብዙ ገንዘብ የማይበቃው ካለው ለተቸገረ ሁሉ መስጠትን ስለሚወድ ሰጥቶ የማይበቃው በመሆኑ ሲሆን ጥቂት ገንዘብ የማያንሰው ደግሞ ፍላጎቱና ኑሮው ውሱን በመሆኑ እነዚህን ውስን ፍላጎቶች በቀላሉ ሳይከፋው ባለው ለመተዳደር የሚችል በመሆኑ ነው::

ዮሐንስ በተለያዩ መስሪያ ቤቶች ሰርቷል:: ሥራ የጀመረው ግን በቀድሞው ቀዳማዊ ኃይለ ሥላሴ ዩኒቨርስቲ ሕግ ፋኩልቲ በመምህርነት ይመስለኛል:: ከዚያም በኋላ በፍትህ ሚኒስቴር፤ በአዲስ አበባ ማዘጋጃ ቤት፤ በልዩ ፍርድ ቤት፤ በመጨረሻም በጠቅላይ ፍርድ ቤት ሰርቷል::

በፍትህ ሚኒስቴር ይሰራ በነበረበት ወቅት ህግን በማርቀቅ ረገድ ከፍተኛ ድርሻ እንደነበረው አስታውሳለሁ:: በልዩ ፍርድ ቤት በይግባኝ ሰሚ ችሎት ዳኝነት እንዲሁም በጠቅላይ ፍርድ ቤት በሰብሳቢ ዳኝነት በሰራበት ወቅት ራሱ ካረቀቃቸው እና በጋራ ከወሰናቸው በርካታ ፍርዶች በተጨማሪ የዮሐንስ የምርምር ሥራዎች የሚከተሉትን ይጨምራሉ፡-

1. ሕግ እና ፍርድ የተባለውን ፋና ወጊ የፍርድ ቤት የህግ መጽሔት በዝግጅት ኮሚቴ አባልነትና በዋና አዘጋጅነት ከ1975 እስከ 1979 መምራት፤
2. በተራ ቁ.1 በተነገረው ኃላፊነት የልዩ ፍርድ ቤትን የመጀመሪያ ደረጃ እና የይግባኝ ሰሚ ችሎቶችን ፍርድ ከ1975 እስከ 1979 በአራት መጽሐፍት አዘጋጅቶ ማውጣት፤
3. ወደ ጠቅላይ ፍርድ ቤት ከተዛወረ በኋላም ከዳኝነት ስራው በተጨማሪ፡-
   - ሕግና ፍርድ የተባለውን የጠቅላይ ፍርድ ቤት መጽሔት ጀምሮ ማካሄድ
   - ሕግና ፍርድ የተባለውን የጠቅላይ ፍርድ ቤት የፍርዶች መጽሔት ማዘጋጀት
   - የጠቅላይ ፍርድ ቤቱ ጉባዔ ጸሐፊ ጭምር ሆኖ መስራት ናቸው።

ዮሐንስ የምርምር ሥራውን ወደ ፌደራል ጠቅላይ ፍርድ ቤት ከተዛወረ በኋላም ቀጥሎ ጡረታ እስከወጣበት ጊዜ ድረስ አገልግሎቱን አበርክቷል፤ ጡረታ ከወጣ በኋላም ቢሆን የምርምር ስራውን አስፋፍቶ ቀጠለበት እንጂ አላቆመውም፤ በዚሁ መሰረት፡-

1. በአዲስ አበባ ዩኒቨርስቲ ሕግ ትምህርት ቤት በትርፍ ሰዓት ከማስተማሩም በላይ ትምህርት ቤቱ ለሚያሳትመው የሕግ መጽሔት ለረጅም ጊዜ የዝግጅት ቦርድ ሰብሳቢ በመሆን ሰፊ አገልግሎት አበርክቷል፤ በርካታ የምርምር ጽሁፎችን አርሞና አስተካክሎ ለሕትመት እንዲበቁ አደርጓል። ለዚህም ሙዋቹ ጄኔራል ታጠቅ ታደሰ በማስረጃ ሕግ ላይ አዘጋጅቶት የነበረው እና ለሕትመት ሳያበቃው የሞተው ረቂቅ እንደ ምሳሌ ሊጠቀስ ይችላል።
2. ከኢትዮጵያ ጠበቆች ማኅበር ጋርም በትርፍ ጊዜው በመስራት ማህበሩ ለሚያዘጋጀው የሕግ መጽሔት የዝግጅት ኮሚቴ አባልና ዋና አዘጋጅ በመሆን ለረጅም ጊዜ ከመስራቱም በላይ ጥልቀት ያላቸው በርካታ የምርምር ጽሁፎችንም ራሱ ጽፎ አሳትሟል። ከነዚህም መካከል፡-
   - በማስረጃ ሕግ የአስተያየት ማስረጃ ደንብ
   - ስለ ሰበር ሥልጣንና ስለ ሥርዓቱ ጥቂት ማስታወሻዎች
   - Registration of immovables under the Ethiopia Civil Code...
   - A few points on the interpretation of Art 701 of the Commercial Code.

በዚህም በተጨማሪ፡-

1. ለአዲስ አበባ ዩኒቨርስቲ ሕግ ትምህርት ቤት የቀድሞ ምሩቃን ማኅበርም የፐሮጀክት ጥናቶችን እየቀረጸ የማኅበሩ ተልዕኮ እንዲሳካ ብርቱ አስተዋጽኦ አድርጓል፤
2. ከኢትዮጵያ አርቢትሬሽን ኤንድ ኮንሲሊዬሽን ሴንተር ጋርም በትርፍ ጊዜው በመስራት ለተቋሙ የፐሮጀክት ሀሳቦችን ከመንደፉም ሌላ፤ ተቋሙ በሕግ ተማሪዎች መካከል በአገር አቀፍ ደረጃ ለሚያካሂደው ምስለ ፍርድ ቤት (Moot Court) ክርክር የሚጠቅሙ መመሪያዎችንና መከራከሪያ ነጥቦችን እያዘጋጀ አቅርቧል፤ በተጨማሪም ተቋሙ በአገሪቱ ፋና ወጊ የሆነውን

የግልግል ዳኝነት ውሳኔዎችን በሁለት ተከታታይ መድበል እንዲወጣ አድርጓል።

3. በግል ደረጃም የኢትዮጵያን ታሪክና ወቅታዊ ሁኔታ ባጭሩ የዳሰሰ እና በኢትዮጵያ ሰራተኛ ሕግ ላይ ያተኮረ ዝርዝር ጥናት በጋራ በእንግሊዝኛ ቋንቋ አዘጋጅቶ በProf. Dr.R. Blanpain ዋና አርታኢነት በKluwer Law International አሳታሚነት International Encyclopedia of Laws በሚባለው መድበል ውስጥ በኔዘርላንድ አገር እ.ኤ.አ በ2004 አሳትሟል። ዮሐንስ የሞተው ይህንን መጽሐፍ ከአዲሶቹ ሕጎች ጋር አስተካክሎ እንደገና ለማሳተም እየሰራ ባለበት ጊዜ ቢሆንም ባሁኑ ጊዜ የእርሱ ጅምር ተጠናቅቆ የተላከ ስለሆነ ሁለተኛው እትም በቅርብ ጊዜ ውስጥ ይወጣል ተብሎ ይጠበቃል። በመጨረሻም ዮሐንስ ያሰፈው ወይዘሪት ውብ ዓለም ዮሐንስ የምትባል አምሳያ ልጁን ተክቶ ነው፤ ይህቺ ልጅ በመጨረሻ ዘመኑ ጓደኛው፤ ረዳቱ፤ ተንከባካቢው፤ አስታማሚው ብቻ ሳትሆን ሁሉንም ሆና ታደርግለት የነበረውን እንክብካቤ በአካባቢው የነበሩ ሁሉ የሚያስታውሱት ነው።

ለማጠቃለል *እስመ ስሙ ይመርሆ ሀበ ምግባሩ* እንዲሉ ዮሐንስ ጎሩይ ጥበቡ ትቶልን ያለፈው ትንሽ ነው ባይባልም ወቅትና ሥፍራ ቢፈቅዱለት ኖሮ ሌሎች በርካታ ጎሩያን ስራዎችን ለመስራት የሚያስችል የአእምሮ ዐቅም እንደነበረው መጠራጠር አይቻልም።

መሬት ትቅለለው!!!!

የሰ/መ/ቁ. 57435
ግንቦት 29 ቀን 2003 ዓ.ም

ዳኞች፡-ሐጎስ ወልዱ
አልማው ወሌ
አሊ መሐመድ
ነጋ ዱፍሣ
አዳነ ንጉሤ

አመልካች፡- የአዲስ አበባ ከተማ ባለአደራ ጊዜያዊ አስ/የመሬት ልማት ቦርድ - ነገ/ፈጅ ሀደሽ ከዋኒ
ተጠሪ፡- ወ/ሮ ዘውዲቱ መኩሪያ - አልቀረቡም
መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

ለዚህ የሰበር ክርክር መነሻ የሆነው ክስ የተጀመረው በአዲስ አበባ ከተማ አስተዳደር የመጀመሪያ ደረጃ ፍርድቤት ሲሆን የአሁን የአመልካች ተከሳሽ ተጠሪዋ ደግሞ ከሳሽ ነበሩ፡፡

የክሱ ፍሬ ቃልም ለ50 ዓመታት በሚቆይ የሊዝ ውል በአዲስ አበባ ከተማ ቂርቆስ ክ/ከተማ ቀበሌ 20 ክልል ውስጥ ስፋቱ 2835 ካሬ ሜትር የሆነውን ቦታ ከይዞታ ማረጋገጫ ጋር ተሰጥቶኝ ተከሳሽ የጀመርኩትን ግንባታ እንዲቋረጥ በማድረግ ሌላ ተመሳሳይ ቦታ ይሰጣት በሚል ሥልጣን በሌላቸው ሰዎች በማስወሰን ሁከት የፈጠረብኝ ስለሆነ ሁከቱ በፍርድ ይወገድልኝ የሚል ነው፡፡

ተከሳሽም በሰጠው መልስ ከከሳሽ ጋር ተደርጎ የነበረ ውል የሊዝ ሕግ በሚያዘው መሠረት ተቋርጧል፡፡ ቦታው ቀደም ሲል ለኢትዮጵያ ሠራተኞች ማህበር ኮንፌደሬሽን ተሰጥቶ የነበረ በመሆኑ ምክንያት ለሕዝብ ጥቅም ሲባል ከከሳሽ ጋር የነበረ ውል የተቋረጠ ሲሆን ለከሳሽ ግን ሌላ ተመሳሳይ የሆነ ቦታ እንዲሰጣት ተወስኗል ብሏል፡፡ ጉዳዩን ያየው የሥር የመ/ደ/ፍ/ቤትም የሊዝ ውል ፈራሽ ተደርጎ ለከሣሽ ተመሳሳይ ቦታ ይሰጣት የተባለው የሊዝ ውልን ያልተከተለ በመሆኑ ተከሳሽ የፈጠረው ሁከት ይወገድ ሲል ውሳኔ ሰጥቷል፡፡

የአሁኑ አመልካችም ለሥር የአዲስ አበባ ከተማ አስተዳደር ይግባኝ ሰሚ ፍ/ቤት ይግባኝ ቢያቀርብም በፍ/ሥ/ሥ/ህ/ቁ. 337 መሠረት የይግባኙ መዝገብ ተዘግቷል፡፡ የሥር ሰበር ሰሚ ችሎትም በሥር ፍ/ቤቶች ውሣኔ የተፈፀመ መሠረታዊ የሆነ የህግ ስህተት የለም በሚል የአመልካችን የሰበር አቤቱታ ውድቅ አድርጓል፡፡
በሥር ፍ/ቤቶች ውሣኔ ላይ መሠረታዊ የሆነ የህግ ስህተት ተፈጽሟል በማለትም የአሁን አመልካች ቅሬታውን ለዚህ ችሎት ያቀረበ ሲሆን በዋናነት የዘረዘራቸው ነጥቦችም፡-

ክሱ ሁከት በሚል የቀረበ ቢሆንም የይዞታ ባለመብትነት ጥያቄ በመሆኑ የሥር ፍ/ቤቶች አከራክረው ለመወሰን ሥልጣን የላቸውም በሚል ያቀረብነውን መቃወሚያ አለመቀበላቸው ተገቢነት የለውም፡፡

በሊዝ አዋጅ ቁጥር 272/94 አንቀጽ 15/ለ/ መሠረት ለህዝብ ጥቅም ሲባልና ይዞታው በመደራረቡ ምክንያት አስተዳደራዊ መፍትሄ የተሰጠበት ጉዳይ በመሆኑ ክሱ ተቀባይነት የለውም የሚሉ ናቸው፡፡

ለዚህ የአመልካች ቅሬታ ተጠሪ በሰጠችው መልስ አመልካች የሊዝ ውሉ ተቋርጧል ይባል እንጂ ውሉ አልተቋረጠም፡፡ ሁከቱ የተፈጠረው በተጠሪ ሥር ባለ ይዞታ ላይ ነው በማለት በሥር ፍ/ቤቶች ውሳኔ ላይ የተፈፀመ መሠረታዊ የሆነ የህግ ስህተት የለም በማለት ተከራክሯል፡፡

የግራ ቀኙ ክርክር ከዚህ በላይ የተገለፀ ሲሆን እኛም የሥር የአዲስ አበባ ከተማ አስተዳደር የመ/ደ/ፍ/ቤት የሥር ከሳሽ በይዞታዬ ላይ ተከሳሽ ሁከት ፈጥሮብኛል በማለት ያቀረበችውን ክስ አከራክሮ ለመሰወን የሥረ ነገር ሥልጣን ነበረው ወይስ አልነበረውም የሚለውን ጭብጥ ይዘን ክርክሩን እንደሚከተለው መርምረናል፡፡

የተሻሻለው የአዲስ አበባ ከተማ አስተዳደር ቻርተር አዋጅ ቁጥር 361/95 አንቀጽ 41 የአዲስ አበባ ከተማ አስተዳደር ፍ/ቤቶች በፍትሃብሄር ጉዳዮች ስለሚኖራቸው የዳኝነት ሥልጣን የሚደነግግ ሲሆን በዚህ በተጠቀሰው አንቀጽ ንዑስ ቁጥር "1" በፊደል "ሀ" የከተማውን መሪ ፕላን አፈፃፀም የሚመለከት የይዞታ ባለመብትነት፣ የፈቃድ አሠጣጥ ወይም የቦታ አጠቃቀምን በተመለከተ የሚነሡ ጉዳዮች የከተማው አስተዳደር ፍ/ቤቶች ሥልጣን መሆኑ ተነግሯል፡፡ የተጠሪም ክስ ግን ከአመልካች ጋር በገባነው የሊዝ ውል መሠረት ባለይዞታ ሆኜ የያዝኩትን መሬት አመልካች ሌላ አላመ ለማዋል ሲል የጀመርኩትን ግንባታ በመከልከል ሁከት ፈጥሮብኛል የሚል ነው፡፡ ይህ አመልካች ያቀረበችው ክስ አመልካችና ተጠሪ የገቡትን የሊዝ ውል መሠረት ያደረገ እንጂ የከተማ መሪ ፕላን አፈፃፀምን መሠረት በማድረግ የቀረበ የይዞታ ባለመብትነት ክስ አይደለም፡፡

በመሆኑም ከዚህ በፊት በተመሳሳይ ጉዳይ በሰበር መዝገብ 56273 እንደተገለፀው የይዞታ ባለመብትነት ጋር በተያያዘ ለከተማው አስተዳደር ፍ/ቤቶች ክስ ሊቀርብ የሚችለው ይኸው የይዞታ ባለመብትነት ክስ መሠረት ያደረገው የከተማውን መሪ ፕላን አፈፃፀምን የሚመለከት ከሆነ ብቻ ነው፡፡

ከዚህ ከላይ ከተጠቀሰው ውጪ ግን የይዞታ ባለመብትነት ክስ ሁከትን ጨምሮ መቅረብ ያለበት ለከተማው አስተዳደር ፍ/ቤቶች ሳይሆን ለፌዴራል ፍ/ቤት ነው፡፡ ስለሆነም የሥር የአዲስ አበባ ከተማ አስተዳደር የመ/ደ/ፍ/ቤት ተጠሪ የሊዝ ውልን መሠረት በማድረግ ያቀረበችውን የሁከት ይወገድ ክስ ተቀብሎ በማከራከር የወሰነው በህግ ባልተሰጠው የሥረ ነገር የዳኝነት ስልጣን በመሆኑ ውሣኔው መሠረታዊ የሆነ

የህግ ስህተት የተፈፀመበት ሲሆን የሥር የከተማው አስተዳደር ይግባኝ ሰሚ ችሎትም ሆነ የከተማው አስተዳደር ሰበር ሰሚ ችሎት የሥር የከተማው አስተዳደር የመ/ደ/ፍ/ቤት ያለሥልጣኑ የወሰነውን ተቀብለው ማጽናታቸው መሠረታዊ የሆነ የህግ ስህተት ያለበት ነው።

ው ሳ ኔ

1. የአዲስ አበባ ከተማ አስተዳደር የመ/ደ/ፍ/ቤት በመ/ቁ/02918 በቀን 03/07/2002 ዓ.ም. በዋለው ችሎት የሰጠው ፍርድ በፍ/ሥ/ሥ/ሥ/ሕ/ቁ. 348/1/ መሠረት ተሽሯል።
2. የሥር ከተማ አስተዳደር ይግባኝ ሰሚ ችሎት በመ/ቁ.13421 በ09/09/2002 ዓ.ም በዋለው ችሎት የሰጠው ትዕዛዝ እንዲሁም የከተማው አስተዳደር ሰበር ሰሚ ችሎት በመ/ቁ. 13606 በቀን 04/10/2002 በዋለው ችሎት የሰጠው ትዕዛዝ ተሽረዋል።
3. የሥር ፍ/ቤት በቀረበው ጉዳይ ላይ የሥረ ነገር ሥልጣን የለውም ተብሏል። በመሆኑም ተጠሪዋ ሥልጣን ላለው የፌደራል ፍ/ቤት ክስ የማቅረብ መብት አላት።
4. የዚህን ፍ/ቤት ወጪና ኪሣራ የግራ ቀኙ ተከራካሪዎች የየራሳቸውን ይቻሉ ብለናል።
5. መዝገቡ የተዘጋ ስለሆነ ወደ መዝገብ ቤት ተመላሽ ይሁን።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት።

File No. 57435[1]

Judges: Hagos Woldu
Almaw Wolle
Ali Mohammed
Nega Dufsa
Adane Nigussie

Applicant: Land Development Board, Caretaker Administration of Addis Ababa City

Respondent: W/o Zewditu Mekuria

Judgment

The subject matter of this cassation hearing commenced at the First Instance Court of Addis Ababa City Government. At the stated initial tier of court, the present applicant was the defendant, whereas the present respondent was the petitioner. The then petitioner brought a legal action against the present applicant seeking cessation of interference in her possession. In her statement of claim, she contended that she was provided with a plot of land to the tune of 2835 square meters in *Kebele* 20 of Kirkos Sub-City in Addis Ababa. She stated this plot of land was given to her as per the contract of lease concluded for duration of 50 years. She made it clear that she was also given the title deed over this plot of land. However, she went on to state that there has been interference in her possession by brining the construction work on the plot to a halt under the pretext that decision has been to provide her with a replacement plot of land. She further states that the individuals who made the decision to divest her of the plot already given to her are not entitled to do so. She prayed the Court to pronounce order of cessation of interference with her possession.

The then defendant argued that the contract concluded with the petitioner has been cancelled in conformity with Lease proclamation. It went on to state the contract concluded with the petitioner is cancelled as the plot of land had already been provided for Ethiopian Workers Association Confederation. The

[1] Translation and reporting by Yonas Birmata, (LLB, LL.M); Lecturer, AAU, School of Law

defendant justified its decision based on public interest and stressed that a replacement plot has been provided for the petitioner.

The First Instance Court decided that the cancellation of the contract of lease is contrary to lease law and rescinded the decision by the defendant to cancel the contract and ordered restoration of the plot of land to the petitioner and cessation of interference.

Though the present applicant took appeal from the decision of the First Instance Court to the Appellate Court of Addis Ababa City Government, the appeal was dismissed pursuant to Article 337 of the Civil Procedure Code. The lower court of cassation also dismissed the petition of the present applicant for lack of fundamental error of law in the decisions of the lower courts. The applicant has presented this pleading alleging the existence of a fundamental error of law in the decisions of the lower tiers of court which considered the matter.

The main arguments invoked by the applicant to support its claim that there is a fundamental error of law with the decisions of the lower courts include the following:

- Lower courts failed to accept the preliminary objection on the part of the present applicant that the issue involved pertains to possession though it was presented as mere case of cessation of interference with possession
- The claim on the part of the then plaintiff is unfounded as the matter was a subject of administrative decision based on public interest and overlapping of possessions based on Article 15(b) of Proclamation 272/2002.

In response to this, the respondent argued that the contract of lease has not been terminated, in spite of the fact that the applicant alleged it is terminated. She went on to state there is no fundamental error of judgment in the holdings of the lower tiers of courts ordering the cessation of interference on her possession.

Having laid out the background to the case, the Cassation Division of the Federal Supreme Court examined the matter by framing the issue whether or not the First Instance Court of Addis Ababa City Government has material jurisdiction to entertain the case and decide over the matter.

Article 41 of the Revised Charter of Addis Ababa City concerns itself with the civil jurisdiction of courts of law of the city administration. Article 41(1)(a) of the Proclamation provides that Addis Ababa City Courts shall have civil jurisdiction on suits on possessory right, issuance of permit or land use as relating to the enforcement of the City Master Plan. The claim of the respondent relates to her contention that the applicant has prevented the construction work on the plot of land of which she is the rightful possessor with a view to allocate the same plot for a different purpose in violation of the contract of lease concluded. Therefore, the claim of the respondent is based on the contract of lease and not a claim of possession based on enforcement of the City Master Plan.

Thus, as was stated in Cassation Case File Number 56273, suits may be brought before Addis Ababa City Courts only where the claim of possession is based upon enforcement of the City Master Plan. Apart from this, possessory actions including cessation of interference with possession must be submitted only to federal courts. Therefore, the judgment rendered by the First Instance Court of Addis Ababa concerning the claim of the respondent for cessation of interference with possession predicated upon the contract of lease in the absence of material jurisdiction has a fundamental error of law. Moreover, the decisions of the Appellate and Cassation of Divisions of Addis Ababa City Courts confirming the erroneous judgment of the First Instance Court also suffer from fundamental error of law.

Decree

1. The judgment and injunction rendered by the First Instance Court of Addis Ababa in file number 02918 is quashed pursuant to Article 348(1).
2. The judgment of the Appellate Court of Addis Ababa in file number 13421 and the judgment of the Cassation court of Addis Ababa in file number 13606 have been quashed.
3. Decision is made to the effect that the First Instance Court does not have material jurisdiction over the matter. Therefore, the respondent is entitled to bring her case before the appropriate court.

ሐምሌ 22 ቀን 2001 ዓ.ም

ዳኞች፡- መንበረፀሐይ ታደሰ
ሐጎስ ወልዱ
ሒሩት መለሰ
በላቸው አንሺሶ
ሱልጣን አባተማም

አመልካች፡- ፋሲል ብርሃኑ - ቀርበዋል
ተጠሪ፡- ዓቃቤ ሕግ /የኦሮሚያ ክልላዊ ብሔራዊ መንግሥት/ - አልቀረቡም

ፍርድ

የሰበር ችሎት አመልካች በተወሰነበት የጥፋተኝነት እና ቅጣት ውሳኔ ላይ ባቀረበው ማመልከቻ መነሻነት ግራ ቀኙን ካከራከረ በኋላ ይህን ፍርድ ሰጥቷል፡፡

ለጉዳዩ መነሻ የሆነው ዓቃቤ ሕግ በአመልካቹ ላይ ያቀረበው የወንጀል ክስ ነው፡፡ ዓቃቤ ሕግ በ1/8/2000 ዓ.ም. በተጻፈ ክስ አመልካቹ በ1996 ዓ.ም የወጣውን የወንጀል ሕግ አንቀጽ 543(3) በመተላለፍ የካቲት 8 ቀን 2000 ዓ.ም በግምቱ ከጠዋቱ ሦስት ሰዓት አካባቢ በጂማ ዞን ስካሩ ወረዳ በቲሮ ቁምቢ ቀበሌ ውስጥ ኬላ ጐሼ በሚባል ቦታ የሰሌዳ ቁጥሩ 3-42631 አ.አ የሆነ አይሱዚ የሕዝብ ማመላለሻ መኪና ያለ ጥንቃቄ ሲያሽከረክር መኪናው ተገልብጦ መኪናው ውስጥ ሲጓዙ የነበሩትን ሁለት ሰዎች በቸልተኝነት ገድሏል በማለት የወንጀል ክስ መስርቷል፡፡

ጉዳዩ የቀረበለት ፍርድ ቤት ሦስት የዓቃቤ ሕግ ምስክሮችን፣ የትራፊክ ፕላንና የመኪናው የቴክኒክ ምርመራ መግለጫ ከተቀበለ በኋላ ተከሣሹ እንዲከላከል በማዘዙ 2 የመከላከያ ምስክሮችንም ሰምቷል፡፡

ፍርድ ቤት የቀረቡት የዓቃቤ ሕግ ምስክሮች ከጂማ ወደ አዲስ አበባ በመሄድ ላይ እያለ ኩርባ ቦታ ላይ ሲደርሱ መገልበጡን አረጋግጠዋል፡፡ ከእነዚህ የዓቃቤ ሕግ ምስክሮች አንደኛው መኪናው በመካከለኛ ፍጥነት ይጓዝ እንደነበር ሲመሰክር ሁለተኛው የመኪናውን ፍጥነት መገመት እንዳልቻለ ገልጿል፡፡ ሦስተኛው ምስክር ግን ተከሣሹ በፍጥነት ሲያሽከረክር እንደነበርና ፍጥነቱን ሳይቀንስ ኩርባው ላይ በመድረሱ መኪናው መገልበጡን ገልጿል፡፡ ሦስቱም ምስክሮች በዚህ ምክንያት ሁለት ተሳፋሪዎች መሞታቸውንም መስክረዋል፡፡ የተከሣሹ ሁለት የመከላከያ ምስክሮችም እንደዚሁ በመኪናው ተሳፍረው ይጓዙ እንደነበረ ገልጸው በክሱ በተገለጸው ቦታ ላይ ሲደርሱ አንድ በሬና እረኛ ወደ መንገዱ ድንገት ስለገቡብት እነሱን ለማደን ሲል ተከሣሹ መኪናውን ኩርባው ላይ ከቀኝ ወደ ግራ ሲጠመዝዝ መኪናው ተንሸራትቶ መገልበጡንና በዚህ ምክንያት ሁለት ሰዎች መሞታቸውን መስክረዋል፡፡ ፍጥነቱን በሚመለከት አንደኛው

ምስክር በጥሩ ሁኔታ በመጓዝ ላይ እንደነበር ሲመሰክር ሌላኛው ግን በግምት ከ50-60 ኪሎ ሜትር በሰዓት ይጓዝ እንደነበር ገልጸዋል።

ጉዳዩን የያዘው ፍርድ ቤት ይህን በግራ ቀኙ የቀረበውን ማስረጃ ከተመለከተ በኋላ ተከሣሹ ኩርባ ላይ ከ50-60 ኪሎ ሜትር በሰዓት በመጓዙ ድንገት የገቡበትን በሬና እረኛ ለማትረፍ ብሎ ወደጐን ሲይዝ መኪናው ተንሸራቶ አደጋው ሊደርስ እንደቻለ ተረድቻለሁ በማለትና ተሳፋሪዎቹ ሊሞቱ የቻሉትም ተከሣሹ ቀስ ብሎ መንዳት በነበረበት ቦታ ላይ በፍጥነት በማሽከርከሩ ነው በማለት ተከሣሹ የወንጀል ሕጉን 543(3) በመተላለፍ ጥፋተኛ ነው ብሏል። የቅጣት አስተያየት ከተቀበለ በኋላም በ5 ዓመት ጽኑ እሥራት እና 10,000 ብር እንዲቀጣ ወስኗል።

ተከሣሹ በዚህ ውሳኔ ቅር በመሰኘት ለኦሮሚያ ጠቅላይ ፍርድ ቤት በማቅረቡ የጥፋተኝነት ውሣኔን አጽንቶ ቅጣቱን ወደ 3 ዓመት ጽኑ እሥራትና 5ሺ ብር መቀጮ ዝቅ እንዲልለት አድርጓል። የኦሮሚያ የሰበር ችሎት ጉዳዩ በአቤቱታ ቀርቦለት በድምጽ ብልጫ መሠረታዊ የሕግ ስህተት አልተገኘበትም በማለት መዝገቡን ዘግቷል። በዚህ ሁኔታ ጥፋተኛ ተብሎ የ3 ዓመት እሥራትና 5,000 ብር መቀጮ የተጣለበት ተከሣሽ ታኅሣሥ 14 ቀን 2001 ዓ.ም. በተጻፈ ማመልከቻ የፍርድ ቤቶቹ ውሳኔ መሠረታዊ የሕግ ስህተት የተፈጸመበት መሆኑን በማተት ውሳኔው እንዲሻርለት ጠይቋል። የአሁኑ አመልካች በዚህ ሰበር ችሎት አጥብቆ የሚከራከረው መኪናው የተገለበጠው ድንገት ኩርባ ላይ የገቡትና አንድ እረኛና አንድ በሬ ለማዳን በማሰብ መኪናውን ወደ ግራ አቅጣጫ ስለጠመዘዝኩት ነው፤ በመሆኑም በዚህ ሂደት ሕይወታቸው የጠፋው ሁለት ተሳፋሪዎች በአደጋ ምክንያት ሞቱ ከሚባል በስተቀር በኔ ቸልተኝነት ሞቱ ተብሎ እኔ ጥፋተኛ ልሆን አይገባኝም በማለት ነው። ከዚህ በላይ ጥፋተኛ የተባለበት የወንጀል ሕግ አንቀጽ 543(3) እግረኛን ገጭቶ ለገደለ እንጂ መኪና ተገልብጦ ሰው ለሞተበት አሽከርካሪ ተፈጻሚ ሊሆን አይገባውም የሚል ክርክር አቅርቧል። የአመልካችን የሰበር አቤቱታ መነሻ በማድረግ ተሳፋሪዎቹ የሞቱት በአሽከርካሪ ቸልተኝነት ነው ሊባል ይገባል? ወይስ አይገባም? የሚለውን የሕግ ነጥብ ለማጣራት ጉዳዩ ዓቃቤ ሕግም ባለበት ሁለቱ ባለጉዳዮች የቃል ክርክር እንዲያደርጉበት ተደርጓል።

የሰበር ችሎት ከላይ የተጠቀሰው አጠቃላይ የክርክሩ ሂደት አግባብ ካላቸው የወንጀል ሕግ ድንጋጌ እና አመልካችና መልስ ሰጪ በዚህ ችሎት ቀርበው ካሰሙት የቃል ክርክር ጋር በማገናዘብ ተመልክቷል። ከቀረበው ፍሬ ነገርና ከተወሰነው ውሳኔ አንጻርም አመልካችን በወንጀል ጥፋተኛ ለማለት በወንጀል ሕግ አንቀጽ 543(3) የተጠቀሱት መስፈርቶች ተሟልቷል? ወይስ አልተሟሉም? የሚለውን ነጥብ አጣርቷል። አመልካቹ በቸልተኝነት ሰው በመግደል ወንጀል ፈጽሟል ተብሎ የተቀጣ በመሆኑ በሕጉ ቸልተኝነት የሚያቋቁሙ መስፈርቶች መሟላት አለመሟላታቸውን አጣርቷል። ይህ ችሎት በዋናነት የመረመረው የሕግ ነጥቡን ብቻ ቢሆንም የሕጉን አግባብነት በትክክል ለመመዘን በሥር ፍርድ ቤት የተረጋገጡትን ፍሬ ነገሮች በቅድሚያ ማስቀመጥ አስፈላጊ ሆኖ አግኝተነዋል።

ጉዳዩ በሥር ፍርድ ቤቶች ሲታይ አመልካች ከጂማ ወደ አዲስ አበባ ሲጓዝ መኪናው መገልበጡና ከተሳፋሪዎች መካከል ሁለቱ መሞታቸው ተረጋግጧል። መኪናው

ሲገለበጥ የቻለው መኪናው ከ50-60 ኪሎ ሜትር በሰዓት ሲጓዝ ከፊት ለፊት አንድ እረኛ በሬውን ለመመለስ በቅርብ ርቀት ስለገባበት እንደሆነም በሥር ፍርድ ቤቶች ግንዛቤ ተወስዶበታል። እረኛው መኪናው መንገድ ውስጥ የገባበትን መኪናው የተገለበጠበት ቦታ ኩርባ እንደሆነም በሂደቱ ተጣርቷል። መኪናው የቴክኒክ ብልሽት ያልነበረበት መሆኑም ከቀረበው የቴክኒክ ሪፖርት ተረጋግጦአል። እነዚህ በፍርዱ ሂደት የተረጋገጡት ፍሬ ነገሮች ሲሆኑ አመልካች ጥፋተኛ የተባለበት ሕግ ይዘት ደግሞ ከዚህ ቀጥሎ እንመለከታለን።

አመልካቹ በዓቃቤ ሕግ ክስ የተመሰረተበት የወንጀል ሕግ አንቀጽ 543(3)) በመተላለፍ ሁለት ሰዎች በቸልተኝነት ገድሏል በማለት ነው። በመሆኑም የተረጋገጡት ፍሬ ነገሮች የተጠቀሰውን ሕግ የሚያቋቁሙ መሆን አለመሆናቸው ለማረጋገጥ ሕጉ ቸልተኝነት አለ የሚለው ምን ሁኔታዎች ሲሟሉ እንደሆነ መመልከቱ ተገቢ ነው። በወንጀል ሕጉ አንቀጽ 57 በግልጽ እንደሰፈረው "ለድርጊቱ ኃላፊ ሊሆን የሚገባው ሰው አስቦ ወይም በቸልተኝነት አንድ ወንጀል ካላደረገ በቀር በወንጀል ጥፋተኛ አይሆንም" በአንጻሩ አንድ ሰው "የፈጸመው ድርጊት በሕግ የሚያስቀጣ ቢሆንም ምንም ጥፋት ሳያደርግ ወይም ከአቅም በላይ በሆነ ኃይል ምክንያት ወይም በድንገተኛ አጋጣሚ ነገር የተፈጸመ ወይም የደረሰ ሆኖ ሲገኝ በወንጀል ሕግ ሊፈረድበት አይገባውም" በማለት የወንጀል ሕጉ አንቀጽ 57(2) ይደነግጋል። ከዚህ የሕጉ አጠቃላይ አባባል መገንዘብ የሚቻለው በአንድ ድርጊት ምክንያበት አንድነ ሰው በወንጀል ጥፋተኛ ነው ለማለት ከሳሽ የሆነው ዓቃቤ ሕግ ድርጊቱ የተፈጸመው ሆን ተብሎ ወይም በቸልተኝነት መሆኑን ማስረዳት የሚጠበቅበት መሆኑን ነው። ድርጊቱ ሆን ተብሎ ወይም በቸልተኝነት የተፈጸመ መሆኑ ማስረጃ ካልቀረበ ወይም ድርጊቱ ከአቅም በላይ ወይም በድንገተኛ አጋጣሚ የተፈጸመ መሆኑን የሚያስረዳ ማስረጃ በተከሣሽ በኩል ከቀረበ የተከሰሰውን ሰው በወንጀል ሕግ ጥፋተኛ ብሎ መፍረድ ከሕጉ መንፈስ ውጪ ነው። በወንጀል የተከሰሰ ሰው ቸልተኛ ነበር ወይስ አልነበረም የሚለው ጥያቄ በወንጀል ሕጉ በአንቀጽ 59 የሰፈረውን ድንጋጌ መሠረት በማድረግ የሚወሰን ነው። የዚሁ አንቀጽ ንዑስ አንቀጽ አንድ አሁን ለተያዘው ጉዳይ በቀጥታ አግባብነት ያለው ቢሆኑም የሕጉን ይዞታ እንዳለ ማስቀመጡ ጠቃሚ ነው። 59(1) ማንም ሰው በቸልተኝነት የወንጀል ተግባር አድርጓል የሚባለው፡-

(ሀ) ድርጊቱ በወንጀል ሕግ የሚያስቀጣ ውጤት ሊያስከትል እንደሚችል እያወቀ አይደርስም የሚል ግምት ወይም ባለማመዛዘን፣ ወይም
(ለ) ድርጉቱ በወንጀል የሚያስቀጣ ውጤት ሊያስከትል እንደሚችል ማወቅ እያለበት ወይም እየቻለ ባለመገመት ወይም ባለማሰብ ድርጊቱን የፈጸመ እንደሆነ ነው።..
"የእንግሊዘኛው ትርጉም ደግሞ እንደሚከለተው ይደነግጋል Article 59
1) A person is deemed to have committed a criminal act negligently where he acts:
a. by imprudence or in disregard of the possible consequences of his act while he was aware that his act may cause illegal and punishable consequences; or
b. by a criminal lack of foresight or without consideration while he should or could have been aware that his act may cause illegal and punishable consequences...

በዚህ ድንጋጌ መሠረት አንድ ሰው በቸልተኝነት ወንጀል ፈጽሟል የሚባለው ውጤቱን እያወቀ ውጤቱ አይደርስም ከሚል መነሻ ድርጊቱን የፈጸመ እንደሆነ ወይም ደግሞ የወንጀል ውጤት የሚያስከትል መሆኑን ባያውቅም ውጤቱን ማወቅ ነበረበት ወይም ጥረት ቢያደርግ ውጤቱን ማወቅ ይችል ነበር ማለት ሲቻል ነው፡፡ በመሆኑም ቸልተኝነት አለ ለማለት ሕጉ የሚጠቀምበት ዋነኛ መስፈርት የተከሰሰው ሰው በድርጊቱና በውጤቱ መካከል ያለውን ግንኙት አስመልክቶ ያለው ወይም ሊኖረው የሚገባው ግንዛቤ ነው፡፡ ድርጊቱን የፈጸመው ሰው የነበረው እውቀትና ግንዛቤ ወይም ሊኖረው የሚገባው እውቀትና ግንዛቤ የሚመዘነው የሰውዬው እድሜ፣ ያለው የኑሮ ልምድ፣ የትምህርት ደረጃው፣ ሥራውና የማኅበራዊ ኑሮ ደረጃው ግምት ውስጥ በማስገባት እንደሆነም የሕጉ አንቀጽ 59(1) ይደነግጋል፡፡

አሁን በቀረበልን ጉዳይ አመልካች የሚከራከረው ከላይ የተጠቀሱት መስፈርቶች ስላልተሟሉ በቸልተኝነት ሰው በመግደል ጥፋተኛ ልሆን አይገባም በማለት ሲሆን ዓቃቤ ሕግ በሌላ በኩል የሕግ መስፈርቶች ተሟልተዋል የሚል ሙግት አቅርቦአል፡፡ ጉዳዩን መጀመሪያ ያየው የጂማ ዞን ከፍተኛ ፍርድ ቤት አመልካችን በቸልተኝነት ሰው በመግደል ጥፋተኛ ያለው ቢሆንም የቀረቡለትን ማስረጃዎች በዝርዝር ሕጉ ካስቀመጠው መስፈርት አንጻር ስለመመዘኑ በፍርዱ በግልጽ ያሰፈረው ነገር የለም፡፡

ከላይ እንደተገለጸው አመልካች ጥፋተኛ ነህ የተባለው ከጂማ ወደ አዲስ አበባ በአመልካች አሽከርካሪነት ሲደረግ በነበረ ጉዞ መኪናው በመገልበጡና ሁለት ተሳፋሪዎች በመሞታቸው ነው፡፡ መኪናው ሲገለበጥ ከ50-60 ኪሎ ሜትር በሰዓት ፍጥነት የነበረው መሆኑ ምስክሮች የገለጸ ሲሆን በጉዞ ላይ እያለ ኩርባ ላይ ሲደርስ አንድ እረኛ ከበሬ ጋር ወደ መንገድ እንደገቡበትም ተመስክሯል፡፡ መኪናው ሊገለበጥ የቻለው ሹፌሩ እረኛውንና በሬውን ላለመግጨት ሲል ወደ ግራ ሲጠመዘዝ መኪናው በመንሸራተቱ ነው፡፡ በዚህ ሁኔታ የተከሰተው የሁለት ሰዎች ሞት አመልካችን ሊያስጠይቅ የሚችለው በአሽከርካሪነት ሥራው ማድረግ የነበረበትን ጥንቃቄ ሳያደርግ ቀርቶ በወንጀል ሕጉ አንቀጽ 59(1) የተገለጸውን ያሟላ እንደሆነ ነው፡፡

ከማኅደሩ ዝርዝር ለመገንዘብ እንደተቻልነው ሹፌሩ /አመልካች/ መኪናውን ከ50-60 ኪሎ ሜትር በሰዓት ያሽከረክር ነበር የሚል ምስክርነት የተሰጠው በባለሙያ አይደለም፡፡ መኪናው በዚህ ፍጥነት ይጓዝ ነበር ያሉት መኪናው ውስጥ የነበሩ አንድ የዓቃቤ ሕግ ምስክር እና አንድ የከሳሽ ምስክር ናቸው፡፡ በመሰረቱ እነዚህ ሁለት ተሳፋሪዎች መኪናው ይጓዝበት የነበረውን ፍጥነት በትክክል ይናገራሉ ብሎ መገመት የሚቻል አይደለም፡፡ በመሆኑም ፍርድ ቤቱ መኪናው በዚህ ፍጥነት ይጓዝ ነበር በማለት ለደረሰበት መደምደሚያ የሚያበቃ በቂ ማስረጃ አልቀረበለትም፡፡

ከዚያም በላይ መኪናው ከ50-60 ኪሎ ሜትር በሰዓት ይጓዝ ነበር እንኳን ቢባል ከከተማ ውጪ በነበረ ጉዞ በዚህ ፍጥነት ማሽከርከር በአሽከርካሪው በኩል ጥንቃቄ ጉድለት ነበር ለማለት የሚያስችል አሳማኝ ማስረጃ አልቀረበም መኪናው የሕዝብ ትራንስፖርት በመሆኑ ከጂማ ወደ አዲስ አበባ ሲጓዝ በዚህ ፍጥነት መንቀሳቀሱ ጥፋት ሊባል የሚችል አይደለም፡፡ መኪናው በተገለበጠበት ቦታ አካባቢ የፍጥነት ጣሪያ የነበረ መሆኑ አልተረጋገጠም ወይም ከጅማ እስከ አዲስ አበባ ባለው መንገድ ወይም በአጠቃላይ

ከከተማ ውጪ በሚደረግ ጉዞ ከ50 ኪሎ ሜትር በሰዓት በላይ መንዳት ክልክላ ስለመኖሩም አልተገለጸም። መኪናው ዓቃቤ ሕግ ባቀረበው ማስረጃ የቴክኒክ ችግር እንደልነበረበት በመረጋገጡ በመኪናው ልዩ ባህርይ ምክንያት ተከሳሹ ከ50 ኪሎ ሜትር በሰዓት በታች መንዳት ይጠበቅበት ነበር ሊባል አይቻልም። ስለሆነም መኪናው ከመገልበጡ በፊት ሹፌሩ መፈጸም የነበረበት የጥንቃቄ እርምጃ አለመወሰዱ የሚያሳይ ነገር የለም።

መኪናው በዚህ ሁኔታ ላይ እያለ አንድ እረኛ ድንገት ከገባበት አሽከርካሪው ማድረግ የሚጠበቅበትን ፈጽሟልን? የሚለው ጥያቄ መልስ የሚፈልገው ሌላው ነጥብ ነው። ኩርባው ላይ ሲደርስ በቅርብ ርቀት እረኛና በሬ መኪናው መንገድ ላይ ሲገቡ አሽከርካሪው የተለያዩ አማራጮች እንደነበሩት መገመት ይቻላል። አንደኛው እረኛውንና በሬውን ገጭቶ ማለፍ ነው፣ ሁለተኛው ወደ ቀኝ ለመጠምዘዝ እረኛውን ከነከብቱ ለማዳን መሞከር ነው። በማስረጃ እንደተረጋገጠው መኪናው ወደ ቀኝ ቢጠመዘዝ ገደል ውስጥ ይገባ ነበር። በመሆኑም አሽከርካሪው ይህንን አማራጭ አለመወሰዱ የጥንቃቄ ጉድለት ፈጽሟል ሊያሰኘው አይችልም። ወደ ግራ በመጠምዘዝ መንገድ ውስጥ ድንገት የገባውን ሰው ለማዳን መሞከሩን እርግጥም ይህንን ሰው ከሞት አደጋ መታደጉም የጥንቃቄ ጉድለት ሊባል አይችልም። እንዲያውም ሰውዬውን ለማዳን ምንም ሙከራ ሳያደርግ ፊት ለፊት የሚያየውን ሰው ጨፍልቆ ቢያልፍ ከፍ ያለ ወንጀል ይፈጽም እንደነበር ግልጽ ነው። አመልካች የቀረበውን የመጨረሻ አማራጭ በመጠቀም መኪናውን ወደ ግራ ሲጠመዝዝ መኪናው እንደሚገለበጥና ከተሳፋሪዎች መካከል ከፊሎቹ እንደሚሞቱ ያውቅ ነበር? ይህንስ እያወቀ ነው ድርጊቱን የፈጸመው? አያውቅም ከተባለስ የወሰደው አማራጭ ለሰዎች ሞት ምክንያት ሊሆን እንደሚችል ማወቅ ነበረበት ማለት ይቻላል? የሚሉት ጥያቄዎች ቸልተኝነት ነበረ ወይም አልነበረም ለማለት መመለስ የሚገባቸው ጥያቄዎች ናቸው። በመሠረቱ ለነዚህ ጥያቄዎች መልስ በመስጠት አመልካችን የቸልተኝነት ወንጀል ፈጽሟል ሊያሰኝ የሚችል ማስረጃ ወይም የሙያ አስተያየት በዓቃብ ሕግ በኩል አልቀረበም። በበኩላችን ከፊት ለፊት ካጋጠመ አደጋ ለመዳን መኪና ወደ ቀኝ ይሁን ወደ ግራ ሲጠመዘዝ ሁሌም ይገለበጣል ወይም የመገልበጥ እድሉ ሰፊ ነው ለማለት አልቻልንም። በመሆኑም አሽከርካሪው የመኪናውን መገልበጥ ቀደም ብሎ ያውቅ ነበር ለማለት የሚቻል አይደለም። መኪናው ሊገለበጥ እንደሚችል ማወቅ ነበረበት ማለትም የሚቻል አይደለም። በመሆኑም አሽከርካሪው የመኪናው መገልበጥ በጉዞ ላይ በተፈጠረና ከአሽከርካሪው ቁጥጥር ውጪ በሆነ የእረኛው ድንገት መግባት የተፈጠረ አደጋ እንጂ በአሽከርካሪው ቸልተኝነት የተፈጸመ የወንጀል ድርጊት ነው ማለት አልቻልንም። ከተሳፋሪዎቹ መካከል የሁለቱ መሞትም የዚህ አደጋ ውጤት እንጂ የቸልተኛ ድርጊት ውጤት ነው ማለት አልቻልንም። የሰው መሞት በሕግ ሊያስጠይቅ እንደሚችል ግልጽ ነው። ሆኖም ይህ ውጤት በሕግ ሊያስጠይቅ የሚችለው ለሞቱ ምክንያት የሆነው ሰው ጥፋተኛ ሆኖ ሲገኝ ነው። ጥፋተኛ የሚሆነው ደግሞ ድርጊቱ ሆነ ተብሎ ወይም በቸልተኝነት የተፈጸመ እንደሆነ ነው። አሁን በቀረበልን ጉዳይ የሁለት ተሳፋሪዎች ሞት የተከሰተው በአሽከርካሪው ቸልተኝነት ሳይሆን በድንገተኛ አጋጣሚ በሆነ የመኪና መገልበጥ አደጋ ነው።

ጉዳዩ የቀረበለት ፍርድ ቤት የአሁኑን አመልካች በቸልተኝነት የሰው መግደል ወንጀል

ጥፋተኛ ያለው የቀረበለትን ማስረጃ ከሕጉ ጋር በተገቢው ሁኔታ ሳያገናዝብ ነው። ለውሳኔው መሠረት ያደረገው የመኪናው መገልበጥ ለሁለት ሰዎች ሞት ምክንያት መሆኑን ብቻ ነው። አመልካቹ ሰዎቹ የሞቱት በአደጋ እንጂ በቸልተኛ የወንጀል ድርጊት አይደለም እያለ ከመጀመሪያው ጀምሮ የተከራከረ ቢሆንም ፍርድ ቤቶቹ ለዚህ ክርክር ትኩረት በመስጠት በአደጋና በቸልተኛ ድርጌት መካከል ያለውን ልዩነት አልመረመሩም በዚህም ምክንያት በሕጉ መንፈስ ወንጀለኛ መባል ያልነበረበት ሰው ጥፋተኛ በማለት በእስርና በገንዘብ እንዲቀጣ ውሳኔ መስጠታቸው የሕጉን ግልጽ ድንጋጌ የሚጥስ ሆኖ ስላገኘነው በዚህ ጉዳይ የጂማ ዞን ከፍተኛ ፍርድ ቤት እንዲሁም የኦሮሚያ ጠቅላይ ፍርድ ቤትና ሰበር ችሎት የሰጡት የጥፋተኝነትም ሆነ የቅጣት ውሳኔ መሻር አለበት ብለናል።

<u>ውሣኔ</u>

1. የጂማ ዞን ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 10769 ጥቅምት 18 ቀን 2001 ዓ.ም. በሰጠው ውሣኔ፣ የኦሮሚያ ጠቅላይ ፍርድ ቤት በመ.ቁ 71726 ጥቅምት 26 ቀን 2001 ዓ.ም. የሰጠው ውሳኔ እንዲሁም የኦሮሚያ ሰበር ችሎት በወ/ቁ 70164 ታኅሣሥ ቀን2001 ዓ.ም. የሰጡት ውሣኔ ተሽረዋል።

2. አመልካች የወንጀል ሕግ አንቀጽ 543(3) ተጠቅሶ ከቀረበበት ክስ ነጻ ነው ብለናል።

3. አመልካች በዚሁ ችሎት ትእዛዝ ያስያዘው የዋስትና ገንዘብ ካለ ይመለስላቸው።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት።

Hamle 22, 2001 [E.C][1]

Justices: **Menbere Tsehai Tadesse**
Hagos Weldu
Hirut Melesse
Belachew Anshiso
Sultan Abate Temam

Applicant - Fasil Berhanu - Present.
Respondent - The Prosecutor of the Oromia State - Absent.

Judgment

This appeal is lodged by the Applicant from the decision of the Cassation Division of the Supreme Court of Oromia. This court has heard the oral arguments of both parties.

The initial cause for the case at hand is the killing of two passengers who were travelling in a car driven by the Applicant[2]. The incident took place at Jimma Zone, Sikaru Wereda, Tiro Kebele, at a place called Kella Goshe, at 9 AM. The Applicant is charged under Art.543 (3) of the Criminal Code, for causing the death of the passengers, negligently.

The lower court that has entertained the case at first, has heard witnesses from both sides and examined the traffic plan and the technical inspection reports of the bus, submitted to it. The prosecution witnesses testified that the cause for the death was the swerving of the wheel of the bus by the driver and the resultant overturning of the bus at a curve. Regarding the speed at which the bus was being driven, one witness testified that it was medium, another that he cannot estimate the speed and a third one that it was excessive [beyond the limit]. The third witness further testified that the incident came to pass because the driver failed to reduce his speed when he approached the curve. The two defense witnesses on their part testified that, the driver was forced to swerve to the right because he saw a shepherd and an ox that suddenly entered into the road. According to their testimony, this act of swerving forced the bus to overturn and this has resulted in the death of the two passengers. Regarding

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[1] Decision of the Federal Supreme Court Cassation Division, translated and reported by Ato Tsehai Wada (Associate Professor of Law, AAU School of Law). The File number of the case could not be traced due to recording problems.

[2] Plate No.3 - 42631, Isuzu public transport vehicle, hereinafter 'the bus'.

the speed, one of them testified that it was good, while the other testified that it was approximately between 50 to 60 km/hr.

This court then convicted the present Applicant and passed a sentence of 5 years of rigorous imprisonment and a fine of 10,000 Birr. This court based its decision on the fact that the present Applicant was driving at an excessive speed and that he failed to slow down at that particular place. Though the present Applicant lodged his appeal to the Supreme Court of Oromia, praying for the reversal of the decision, the (it) court upheld the conviction, but reduced the term of imprisonment to 3 years and the fine to 5,000 Birr. An application was lodged at the Cassation Division of the Supreme Court of Oromia which dismissed the application by majority on the ground that there is no point of law that can enable it to entertain the case.

The Applicant at this court strongly contends that he swerved to the left in order to save an ox and a shepherd that suddenly entered into the road and the result that ensued should be considered to have been caused by an accident than his own negligent act and that he should not have been convicted [in the first place]. He has also argued that Art.543 (3) of the Criminal Code, under which he was convicted, applies to a person who has run over and killed a pedestrian but not a driver whose passengers are killed by car accident.

This court has heard the oral arguments of both parties in order to check whether the deceased died as a result of the negligent act of the driver. It has also checked whether the facts established by the lower courts meet the elements of the relevant provisions of the law under which the Applicant is charged as well as the article that defines 'negligence'. Though this court has mainly concentrated on the legal issues, it has found it necessary to put first, the facts established by the lower courts, for this will help to evaluate the relevance of the law correctly.

During the trials at the lower courts, it was proved that: the bus was being driven at a speed of between 50 to 60 km/hr; the main cause for the death of the two passengers was the overturning of the bus at a curve, and this was in turn caused by the [swerving of the wheel] in order to save a shepherd who suddenly entered into the road to return back an ox that has already entered into the road. The courts have also admitted evidences proving that the bus had no technical defect [at the relevant time]. We shall now turn to examining the elements of the relevant articles under which the Applicant is convicted [in light of the evidences submitted to the courts and testimonies of the witnesses].

The prosecution charged the present Applicant under Art.543 (3) of the Criminal Code for causing the death of two individuals. Accordingly, it will be proper to see whether the facts established by the lower courts meet the

elements of the article cited and identify the elements of the relevant article of the code that defines negligence. Per Art.57(2) of the code, " No one can be convicted under the criminal law for an act penalized by the law if it was performed or occurred without there being any guilt on his part, or was caused by force majeure, or occurred by accident". What we can understand from the overall contents of this article is that, in order to convict a person for his acts, the prosecution has to first prove that the act was committed either intentionally or negligently. Convicting a person in the absence of evidences which prove that the act was done intentionally or negligently or while the accused has adduced evidences that prove that the act occurred accidentally, is nothing but going beyond the spirit of the law. Whether or not a person has committed a negligent act shall be tested against the elements of Art.59 of the code. Given the fact that Art.59 (1) is relevant to the case at hand, its contents are excerpted here below:

1. *A person is deemed to have committed a criminal act negligently where he acts:*

   a. *By imprudence or in disregard of the possible consequences of his act while he was aware that his act may cause illegal and punishable consequences; or*

   b. *By a criminal lack of foresight or without consideration he should have been aware that his act may cause illegal and punishable consequences.*[3]

According to this provision, a person is deemed to have committed a crime negligently, [only] when it can be concluded that he did the act knowing the consequences of his act but disregarding the consequences or he did not know that his act may cause illegal consequences but he should have known such consequences or should have known the consequences had he taken the necessary care to do so. Accordingly, in order to determine that an act was done negligently, the main standard of the law is determining the awareness [knowledge] of the accused in relation with the cause and the effect of the act or the awareness that he is expected to have. Art.59 (1) provides that " A person is guilty of criminal negligence when, having regard to his personal circumstances, particularly to his age, experience, education, occupation and rank , he fails to take such precautions as might be reasonably be expected in the circumstances of the case.[4]

In the case at bar, the Applicant is arguing that given the fact that the above elements are not met, he should not have been convicted for the crime of

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[3] Note - The court has cited both the Amharic and English versions of the sub article.

[4] Art.59 (1)(b) second paragraph.

negligent homicide, while the prosecution is arguing that all the elements are met. The Zonal Court of Jimma that was first seized of the case has convicted the present Applicant for negligent homicide, but it said nothing regarding whether the evidences submitted to it have met the standards of the law.

As stated above, the Applicant was convicted for causing the death of two passengers as a result of the overturning of the car that he was driving and which was travelling from Jimma to Addis Ababa. The witnesses testified that the car was being driven at a speed of 50-60 km/hr and that while reaching at a curve of the road, he met a shepherd and an ox that suddenly entered into the road. The cause for the incident was the driver's act of swerving to the left in order to save the ox and the shepherd from harm and the car's slipping as a result of this. The Applicant shall be convicted of this act, [only] if the death of the two passengers was caused by an act of a driver who failed to take the necessary care that was required of him, and that meets the standards of Art.59(1) of the Criminal Code.

As we have noted from the files of the case, the testimony that the driver [present Applicant] was driving at a speed of 50-60 km/hr is not given by an expert witness. The fact that the vehicle was being driven at this speed was testified by a witness for the prosecution and another defense witness. In principle, it cannot be said that the two witnesses can correctly testify as to the speed at which the vehicle was being driven. Accordingly, the court that has concluded that the vehicle was being driven at this speed did so without having sufficient evidence.

Moreover, even though it may be said that the vehicle was being driven at a speed of 50 - 60 km/hr, it is not proved that driving at this speed outside of the city limit is a [satisfactory] proof to show that the driver has failed to take the necessary care [required of him under the circumstances]. As the vehicle is a public transport car [bus], the fact that it was being driven at this speed on the road from Jimma to Addis Ababa cannot make [the driver] at fault [criminally liable]. The fact that there was a road sign indicating the speed limit at the place where the incident took place is not proved either. [Moreover] the fact that driving a car at a speed exceeding 50 km/hr is prohibited on the road from Jimma to Addis Ababa or anywhere outside of the city limit is not indicated [proved]. Given the fact that the vehicle had mechanical defect is not proved by the prosecution, it cannot be concluded that based on the special condition of the vehicle, the driver is expected to drive it at a speed lower than 50km/hr. Accordingly, nothing is shown to prove that the driver has failed to take the necessary measures before the overturning of the bus.

Whether or not the driver has done the necessary act required of him while he was under this situation wherein a shepherd suddenly entered into the road, is

an issue that demands an answer. It can be presumed that a driver who is confronted by a shepherd and an ox that were crossing the road at a close distance has different alternatives. One of these alternatives is to run over the shepherd and the ox, while the second alternative is to attempt to save them from harm by swerving to the right. As proved by the evidences, had the vehicle been swerved to the right[5], it would have fallen into a precipice. Accordingly, the fact that the driver did not take this alternative cannot make one conclude that he has failed to take the necessary care. The fact that he attempted to save the person who has suddenly entered into the road by swerving to the left and that he succeeded in saving this person from death cannot lead one to conclude that there was failure to take care. For that matter, had he failed to take any measure to save the person from such harm, and simply run over him, it is clear that he would have committed a serious crime. Giving answers to the questions that: did the Applicant know that some of his passengers would die if he takes the last alternative, swerves the vehicle to the left and that it would have overturned?; did he do this act while being aware of this fact [consequence]?; if it may be presumed that he had no such awareness, is he expected to know that the alternative that he took would have resulted in the death of individuals? [is crucial] in order to determine whether there was negligence on the part of [the driver]. In principle, no evidence or expert testimony is adduced on the part of the prosecution by way of giving answers to these questions and prove that the Applicant has committed a negligent act. We on our part cannot conclude that swerving a car either to the right or left while being confronted by [such sudden incident] will always result in the overturning of the car or the probability that such a result may ensue is high. Accordingly, it cannot be concluded that the driver had prior knowledge regarding the overturning of the car. It cannot also be concluded that he is expected to know [anticipate] the overturning of the car. Accordingly, we cannot conclude that the incident took place as a result of the negligent act of the driver, but rather it was caused by the sudden entry of the shepherd into the road, which is an event beyond the control of the driver. We cannot also conclude that the death of the two passengers is the result of a negligent act, but it was rather the result of the accident. It is known that killing another is a criminal act. This crime, however, makes one criminally liable when it is caused by the act of a person who can be made criminally liable. Such a person can be made criminally liable when he commits the act either intentionally or negligently. In the case at bar, however, the death of the two passengers was

[5] It appears that there is a confusion regarding the direction of the swerving of the wheels, for it is indicated 'to the left' at some places and 'to the right' at others. But, it seems that it swerved the right and the left side was a precipice.

caused by an accident that caused the bus to overturn but not the negligent act of the driver.

The court that entertained the case convicted the present Applicant without testing the compatibility of the evidences submitted to it with the elements of the [relevant provisions of the relevant article] of the law. It based its decision on fact that the overturning of the vehicle has caused the death of the two passengers, alone. Despite the fact that the present Applicant was arguing from the beginning that the death of the passengers was caused by an accidental event , but not a negligent act, the courts, however, have not given due attention to this issue, and failed to establish the distinction between accidents and negligence acts. Accordingly, their decisions that have convicted a person who should have been acquitted and punishing him to imprisonment and a fine is found to be contrary to the express provision of the law. We have, accordingly, overturned the conviction and punishment passed by the Zonal High Court of Jimma and the Cassation Division of the Supreme Court of Oromia.

Decision

1. The decision of the Zonal High Court of Jimma on File No. 10769 rendered on Tikimt 18, 2001 and the decision of the Supreme Court of Oromia on File No.. 71726 rendered on Tikimt 26, 2001 are hereby quashed.

2. The Applicant is acquitted of the crime brought against him under Art.543 (3) of the Criminal Code.

3. Let the bail bond posted by the Applicant in this court, if any, be returned to him.

የፌደራል ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት በሰ/መ/ቁ 17320 መጋቢት 18 ቀን 2000 ዓ.ም በሰጠው ውሳኔ ላይ የቀረበ አስተያየት

አወል ሰኢድ*

በተሰጠው ውሳኔ ላይ የሰፈሩትን ፍሬ ነገሮች በአጭሩ ስንመለከት ተጠሪ ሆነው የተሰየሙት 1ኛ ዶር ሻወል ገብሬ 2ኛ/ ወ/ሮ ሸዋርካብ ተሾመ የጋራ ንብረታቸው የሆነውንና አዲስ አበባ ከተማ በወረዳ 10 ቀበሌ 22 ቁጥሩ 715/2 የሆነውን የማይንቀሳቀስ ንብረት አስመልክቶ እንዲያስተዳድርላቸውና እንዲሸጥላቸው የውክልና ሥልጣን ለአቶ ገዛኸኝ በልሁ ሰጥተው ነበር፡፡ ተወካዩ በተጠሪዎች በተሰጠው የውክልና ሥልጣን ማስረጃ ሳይሆን 1ኛው ተጠሪ ዶ/ር ሻወል ገብሬ ለአቶ ገዛኸኝ በልሁ የካቲት 12/1989 ዓ.ም በተፃፈና በአዲስ አበባ ውልና ማስረጃ ጽ/ቤት በኩል በተረጋገጠ ውክልና አማካይነት አመልካች ከሆነው የኢትዮጵያ ንግድ ባንክ የተጠሪዎች ንብረት የሆነውን ቤት በመያዣነት በመስጠት ብር 200,000.00 (ሁለት መቶ ሺህ ብር) ሊበደርበት ችሏል፡፡

ተጠሪዎች ባልሰጡት የውክልና ሥልጣን በአመልካችና በወኪሉ መካከል የተፈፀመው የመያዣ ውል እንዲፈርስላቸው አመልክተው ጉዳዩ በመጀመሪያ ደረጃና ይግባኝ ደረጃ የቀረበላቸው ፍ/ቤቶች ውሉ እንዲፈርስ በመወሰናቸው ጉዳዩ የሕግ ስህተት ያለበት በመሆኑ ተፈጽሟል የተባለው ስህተት እንዲታረም ጉዳዩ ለሰበር ችሎቱ እንዲቀርብ ተደርጎ ሰበር ችሎቱ የሥር ፍ/ቤቶች ውሳኔ የሕግ ስህተት ያለበት ሆኖ ስላገኘነው የሥር ፍ/ቤቶችን ውሳኔ በመሻር በተጠሪዎች ወኪልና በአመልካች የኢትዮጵያ ንግድ ባንክ መካከል የመሠረተው የመያዣ ውል በሕግ ፊት አስገዳጅነት ያለው ውል ነው በማለት ውሳኔ ሰጥቶአል፡፡

የፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት ውሳኔውን ለመስጠት መሠረት ያደረጋቸው የሕግ ድንጋጌዎች የፍ/ሕግ ቁጥር 2206 ንዑስ ቁጥር 1 እና ቁጥር 3049 ንዑስ ቁጥር 2 ናቸው፡፡ ሰበር ችሎቱ በአመልካችና በተጠሪ መካከል የመያዣ ውል ለመመሥረት እንዲቻል በተጠሪዎች ወኪል ያውም በአንደኛው ተጠሪ አማካይነት እንደተሰጠ ተደርጎ የነበረውን የውክልና ሥልጣን ተጠሪዎች ካቀረቡት ክርክር አንፃር ተገቢነት እንደሌለውና ለቀረበው ጉዳይ አግባብነት ያለው ሰነድ ተጠሪዎች ቀደም ሲል የሰጡት የውልክና ሥልጣን ሰነድ እንደሆነ አድርጎ ነው፡፡ ተጠሪዎች በሥር ፍ/ቤት ያቀረቡት አቤቱታ በማያውቁትና ባልሰጡት የውልክና ሥልጣን ተመሥርቶ በአመልካችና በወኪሉ መካከል የመሠረተው የመያዣ ውል ይፍረስልን የሚል ሲሆን አመልካችም የመያዣ ውሉን የመሠረትኩት ተጠሪዎች ቀደም ሲል የሰጡን የውልክና ሥልጣን መሠረት አድርጌ ነው የሚል ክርክር አላቀበም፡፡

የአመልካቹ የመከራከሪያ ነጥብ የቀረበልኝ ሰነድ የመያዣ ውሉን ከአመልካቾች ወኪል ጋር ለመዋዋል የሚያስችለኝ ነው በማለት ብቻ ነው፡፡ ይህ ከሆነ ደግሞ ከክርክሩ አካሄድ አንፃር ተገቢነት የሚኖረው ጭብጥ በአመልካችና በተጠሪዎች ወኪል ተብሎ በቀረበው ግለሰብ መካከል የተመሠረተው የመያዣ ውል ሊፈርስ ይገባዋል ወይስ አይገባውም የሚል ሊሆን ይገባል፡፡ ከቀረበው ፍሬ ነገር አንፃር ሲታይ የአመልካቾች

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* ጠበቃና የሕግ አማካሪ፣ ቀድሞ በአዲስ አበባ ዩኒቨርስቲ ሕግ ት/ቤት ሌክቸረር

ወኪል በተጠሪዎች በኩል ተሰጥቶት የነበረው የውልክና ሥልጣን ለአመልካች ቀርቦ ቢሆን ኖሮ የመያዣ ውሉ ሊመሠረት የሚችልበት ሁኔታ እንዳልነበረ ነው፡፡ በሌላ በኩል አመልካቾች አልሰጠነውም የሚሉት የውክልና ሥልጣን የተጭበረበረ ሰነድ ሆኖ ቢገኝ ፍ/ቤቶች ይህንን አይነቱን ድርጊት ለማጣራት መውሰድ የሚገባቸው እርምጃ በዝምታ ሊታለፍ ይገባዋልን? የተጭበረበረ ሰነድን መሠረት አድርጎ የተመሠረተ ውል ንፁሀን ዜጎች ላይ የሚደርሰው ጉዳት ከግምት ውስጥ ሊያስገባ አይገባውምን? ከዚህም በላይ የውልክና ሥልጣን አቅርቦ የማይንቀሳቀስ ንብረት በማስያዣ አስይዞ ለራሱ ጥቅም የሚውል የብድር ውል ሲገባ ከፍተኛ ጥንቃቄ እንዲደረግ አይጠበቅምን?

የሰበር ችሎት በውሳኔው ላይ ለሰፈሩት ፍሬ ነገሮች ውሳኔ ለመስጠት እንዲያስችለው መሠረት ያደረገው ተጠሪዎች ለአቶ ገዛኸኝ በልሁ የሰጡትን የውክልና ሥልጣን ሆኖ የተሰጠው ትንታኔው ሲታይ በዚህ ውክልና ሥልጣን ላይ እንደተገለፀው ተጠሪዎች የማይንቀሳቀስ ንብረታቸውን እንዲያስተዳድሩ እንዲሸጡ እንዲለውጡን ለሶስተኛ ወገን ለማስተላለፍ እንዲችሉ ለወኪላቸው ሥልጣን መስጠታቸው በፍ/ብ/ህግ ቁጥር 2206 ንዑስ ቁጥር 1 እንደተገለፀው በውክልና ሥልጣን ማስረጃው የተገለፁትን ጉዳዮች ተከታታይና እንደ ልምድ አሠራር አስፈላጊ ተግባራትን የመፈፀም ሥልጣንን የሚያካትት በመሆኑ የተጠሪዎች ተወካይ ቤቱን አስመልክቶ የሰጠው ልዩ የውልክና ሥልጣን በውክልና ማስረጃው በግልፅ የተመለከቱትን ጉዳዮችና በውክልና ማስረጃው ባይገለፅም በተጠቀሰው የህግ ቁጥር የሚሸፈኑ ጉዳዮን የመፈፀም ችሎታ እንደሚጨምር ለመረዳት ይቻላል በማለት አመልካች ከተጠሪዎች ወኪል ጋር የመሠረተው የብድር ውል ከሽያጭ በመለስ የተደረገ ውል ስለሆነ የሚነቀፍ እንዳልሆነ ነው፡፡

ሰበር ችሎቱ ለፍ/ብ/ህግ ቁጥር 2206 የሰጠው ትርጉም ሲመዘን የሕጉን መንፈስ ያልተከተለ ይመስላል፡፡ በመጀመሪያ ህጉ ስለ ልዩ ውክልና ያስቀመጠውን ድንጋጌ ከሌሎች የህግ ድንጋጌዎች ጋር በማዛመድና በተለይም የእንደራሴነት (ወኪልነት) ተቋም በህጉ ውስጥ እንዲካተት ከተደረገበት ዓላማ ጋር በተያያዘ መልክ መተርጎም አለበት፡፡ የፍ/ብ/ህግ ቁጥር 2205 ስለ ልዩ ውክልና ሲገለፅ አንዱ ተወካይ ከአስተዳደር ሥራ በቀር ሌላ ሥራ ለመሥራት የሚያስፈልግ ሲሆን ልዩ የውክልና ሥልጣን እንዲኖረው አስፈላጊ ነው፡፡ ተወካዩ ልዩ የውክልና ሥልጣን ከሌለለው በስተቀር ይልቁንም የማይንቀሳቀስ ንብረቶችን መሸጥ ወይም <u>አሲዞ ለመያበር</u>፣ካፒታሎችን በአንዱ ማህበር ዘንድ ለማግባት የለውጥ ግዴታን ውል መፈራረም ያለመግባባትን በግልግል ለመፍታት፣ ለመታረቅ ውል መግባት ስጦታ ማድረግና በአንድ ጉዳይ ፍርድ ቤት ቀርቦ መከራከር አይችልም፡፡ ስለሆነም አንድ ልዩ ውክልና ያልተሰጠው ተወካይ የሰበር ችሎቱም ጠቀም አድርጎ እንዳለፈው ወኪል አድራጊውን በመወከል ተግባሩን የሚያከናውነው በፍ/ብ/ህግ ቁጥር 2204 የተጠቀሰውን የአስተዳደር ሥራ ብቻ ይሆናል፡፡

ህጉ ለልዩ ውክልና ከሰጠው ትኩረት አንፃርና በአጠቃላይም በወኪልነትን ለመቋቋም ከታለመለት አላማ አንፃር፤

ሀ) *ተወካዩ ከወካዩ ጋር በሚያስተሳስረው ግንኙነት ውስጥ ጥብቅ የሆነ ቅን ልቦና ሊኖረው ይገባል፡፡ የፍ/ብ/ህግ ቁጥር 2208/1/*

ለ) ተወካዩ ሥራውን የሚፈፅመው በተለይም ለወካዩ ጥቅም ሊሰጥ በሚልበት መንገድ ብቻ ነው፤ስለዚህም በወኪልነቱ በሚሠራው ሥራ ወካዩ ሳያውቅ አንዳችም ጥቅም ለግሉ መውሰድ አይችልም፡፡ የፍ/ብ/ህግ ቁጥር 2209/1/

ሐ) የእንደራሴነት ሥልጣን የሚተረጎመው ሳይስፋፋ በጠባቡ ነው፡፡ የፍ/ብ/ህግ ቁጥር 2181/3/

እነዚህንና ሌሎችም በህጉ ውስጥ የሰፈሩትን ድንጋጌዎች ስንመለከት የወኪል ተግባር ለዉክልና ሰጪዉ ጥቅም ፍፁም ቅንነት በተሞላበት ሁኔታ የተሰጠውን ህጋዊ አደራ መወጣት ነው፡፡ ይህ ከሆነ ደግሞ ባልተሰጠው ውክልና ተመርኩዞ ያውም ለራሱ ለተወካዩ ጥቅም ሲባል የተመሠረተ የመያዣ ውል በህግ አህባብ ተፈፃሚ እንዲሆን ፈተጽሞ መበረታታት የለበትም፡፡

የሰበር ችሎት ለ ፍ/ህግ ቁጥር 2206/1 የሰጠው ትርጉም በወካይና በተወካይ መካከል ሊኖር የሚገባውን ተዓማኒነትና ፍፁም ቅን ልቦና የሚጠይቅ ግንኙነት ከግምት ያስገባ አይደለም፡፡ የፍ/ከ/ህግ ቁጥር 2206/11 በግልፅ እንዳሰቀመጠው፤

ልዩ ውክልናው ላይ ተዘርዝረው የተመከለቱትን ጉዳዮችና የነዚህኑ ተከታታይና ተመሳሳይ የሆነውነን እንደ ጉዳዩ አይነትና እንደ ልማድ አሥራር አስፈላጊ የሆነውን ከማከናወን በቀር ለተወካዩ ሌላ ሥልጠን አይሰጠውም፡፡

ምንም እንኳ በይዘት ለውጥ የሌለው ቢሆንም የፍ/ብ/ህግ ቁጥር2206/11 የእንግሊዝኛው ቅጂ ድንጋጌውን የበለጠ ግለፅ ያደረገዋል፡፡

Special agency shall confer upon the agent authority only to conduct the affairs specified therein and their natural consequences according to the nature of the affair and usage.

የፍ/ብ/ህግ ቁጥር 2206/1/ን በጥሞና ካየነው አንድ ወካይ አንድ ተወካይ ቤቱ ወይም የማይንቀሳቀስ ንብረቱን አስመልክቶ እንዲሸጥ፣ እንዲለወጥ ለሶስተኛ ወገን እንዲያስተላልፍ ልዩ የውክልና ሥልጣን ቢሰጠው ይህንን ሥልጣን አስመልክቶ በግልፅ ያልጸፀቀሱ ነገር ከመሸጥና ከመለወጥ ጋር ተያይዞው እንደልናድ አሠራር የሚታዩትን ለምሳሌ ገንዘብ የመቀበልን፣ደረሰኝ የተሰጠበትን፣የንብረቱን መረጃዎችየማስተላለፍ፣ወዘተ የሆኑትን/incidental/ተግባራት ያከናውናል ማለት እንጂ ለመሸጥና ለመለወጥሥልጣን የተሰጠው ወኪል ለራሱ ጥቅም የማይንቀሳቀስ ንብረት የማያገኛ ውል ሊፈፅም ይችላል ማለት አይደለም፡፡ ህጉ በዝርዝር ለይቶ ያስቀመጣቸውን ተግባራት ለማከናወን አንድ ተወካይ ልዩ የውክልና ሥልጣን እንደሚያስፈልገው ጠቅሶ በተለይም የማይንቀሳቀስ ንብረት አሲዞ ለመበር ልዩ የቅክልና ሥልጣን እንደሚያስፈልገው በማያሻማ ሁኔታ አስቀምጦ እያለ ትርጉም የማያሻማ ድንጋጌ ፍለጋ ለምን እንደተሄደ ግለፅ አይደለም፡፡

የሰበር ችሎቱ ውሳኔውን ለማጠናከር የተጠቀመበት ሌላው የህግ ድንጋጌ የፍ/ብ/ህግ ቁጥር 3049 ንዑስ ቁጥር 2 ነው፡፡ ፍ/ብ/ህግ ቁጥር እንደሚከተው ይነበባል፡፡

ለራስ እዳ ዋስትና እንዲሆን አንድ የማይንቀሳቀስ ንብረትን እዳ በመያዣነት ለመስጠት የሚቻለው የማይንቀሳቀስ ንብረት ለመቸጥ ችሎታ ያለው እደሆነ ነው፡፡ የፍ/ብ/ህግ ቁጥር 3049 ንዕስ ቁጥር2 የእንግሊዝኛ ቅጂ እንደሚከተለው የነበባል፡፡

A person may not secure his debt by mortgage unless he is entitled to dispose of the unmemorable for consideration.

የሰበር ችሎቱ አንድ ተወካይ የማይንቀሳቀስ ንብረት ለመሸጥ ለመለወጥ ውክልና እስከተሰጠው ድረስ ከፍ/ብ/ህግ2206/1/አንፃር የመያዣ ውል ለመዋዋል የሚከለክለው ነገር እንደሌለ ከተነተነ በኃላ ይህ ተወካይ የማይንቀሳቀስውን ንብለት ለመሸጥ ችሎታ ያለው በመሆኑ ከፍ/ብ/ህግ ቁጥር 3049 ንዕስ ቁጥር 2 አንፃርም ቢሆን ንብለቱን አሲይዞ መበደር እንደሚችል ነው። እዚህ ላይ ሊነሱ የሚገባቸው ጥያቄዎች

1ኛ/ ለማንም ጥቅም ነው የመያዣ ውሉን ያደለገው?

2ኛ/ ተወካይ የመሸጥ የመለወጥ ሥልጣን ቢሰጠው ችሎታ ያለው ወካዩ ነው ወይስ ተወካዩ?

በወካይ እና በተወካይ መካከል ሊኖር የሚችለው ግንኙነት ግልፅ ነው። ተወካይ ተግባሩን የሚያከናውነው በተወካዩ ስም እንጂ በራሱ ችሎታ ሊፈፅመው የሚችለው ነገር የለም። አንድ ተወካይ በዉክልና ሰጪዉ የማይንቀሳቀስ ንብረት እንዲሸጥ እንዲለውጥ ስልጣን ቢሰጠው በፍ/ብ/ህግ ቁጥር 3049/2/ እንደተገለፀው ችሎታ ሊኖረው የሚችለው ዉክልና ሰጪዉ እንጂ ተወካዩ ሊሆን አይችልም። በፍ/ብ/ህግ ቁጥር 3049/2/ በግልፅ እንደሰፈረው ይኸው ችሎታ የሚጠየቀው ሰው የማይንቀሳቀስ ንብረቱን አስይዞ ብድር ማግኘት ወካዩ እንጂ ተወካዩ ሊሆን አይችልም። በሌላ አነጋገር ተወካዩ የመሸጥ የመለወጥ ውክልና ካለው የወካዩን ንብረት ለራሱ እዳ ዋስትና አስይዞ ሊበደርና ለራሱ ጥቅም እንዲያደርግ ህጉ ይፈቅዳል ማለት ነው። ይህ ሊሆን እንደማይችል ከህጉ ከራሱ መረዳት ይቻላል።

በአጠቃላይ ሲታይ ተጠሪዎች ባልሰጡት የውክልና ሥልጣንና ለቀረበው ፍሬነገር አግባብነት በሌላቸው የህግ ድንጋጌዎች ላይ ተመርኩዞ የተሰጠው ውሳኔ የአስገዳጅነት ባህርይ ስለሚኖረው መታረም ያለበት ይመስለኛል።

Recording of Reason and Consolidation of Suits Comment on the Decisions given by the Federal Supreme Court in File Numbers 41243 and 36353

Tewodros Meheret*

This comment relates to two decisions given by the Cassation Division of the Federal Supreme Court on the same object and the same date. That is the reason why they are made the subject matter of this comment. The cases have both procedural and substantive dimensions. However, the focus of this comment is the procedural issues incidental to the cases which, in fact determined the outcome of the cases with respect to the substantive rights of the parties. Three procedural issues are selected which arise from the two cases. The first is the practice of courts not to record their reasons for decisions which is extensively adopted by appellate courts. The second issue correlates to the specific procedural question of consolidating the two cases which has affected the position the Court has taken. The third issue is the introduction of additional evidence and the discretion of courts in allowing or prohibiting new evidence. These cases have been given final decision after passing through the different courts in the hierarchy of federal judiciary. In this comment we will examine the background of the cases and the issues that arise wherefrom and finally the conclusion to be made.

I. Background

As stated above this comment involves two cases decided in files no 41243 and 36353 by the Cassation Division of the Federal Supreme Court. In both files the parties are the same, albeit with different roles. The decisions are given by the same Division of a court on the same date i.e 22/8/2001 E.C. The disputes in both files relate to the same property.

In file no. 36353, W/ro Menbere Engidawork is the applicant while Ato Betseha Merhawi is the respondent. In file no. 41243 Ato Betseha Merhawi is the applicant while W/ro Menbere Engidawork is the respondent. In both files the object of the dispute is a house located in Addis Ababa Bole Sub-city Kebele 05 whose no. is 067 and the focal point of the dispute correlates to the validity and performance of the sale agreement involving the house concluded on 16/2/1998 E.C.

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The decisions of the Cassation Division of the Supreme Court are a simple confirmation of the judgments given by lower courts. They are composed of only two paragraphs Most of the issues are brought about by the dissenting opinion recorded in the decision. Thus, the following issues transpire when we read the dissenting opinion:

- Whether in the cases under consideration consolidation was dispensable
- Whether one of the cases under consideration the court correctly rejected relevant evidence
- Whether courts are at liberty not to state/record reasons in their judgments

In the forthcoming discussion an attempt will be made to address those issues which arise from the cases. Before going deep into dealing with the subject matters, a brief background of the cases is presented below.

1.1 The case initiated by W/ro Menbere Engidawork

In the action instituted in the federal High Court (file no. 22320), she requested the Court to grant the relief that the defendant be ordered to deliver the house which he took possession of by virtue of the power of attorney which is revoked and to pay rent. The defendant replied that he is in possession of the house by virtue of the sale agreement signed on 16/2/1998 E.C , not by a power of attorney. While this case was pending, the plaintiff requested the Court to allow her to submit the judgment of another court which rejected the request of the defendant for transfer of title as per the sale agreement signed on 16/2/1998 E.C. But this request was turned down. The Court rendered judgment on the merit on 4/11/1998 saying that the application lodged by the plaintiff is rejected as it claims that the defendant is holding the house as an agent while in actual fact it is the sale agreement that gives him the right. This judgment is upheld on appeal to the Federal Supreme Court. The Cassation Division also confirmed it by majority. As stated above the judgment of the Division is too brief to reveal the rationale behind supporting the decisions of lower courts. However, the minority opinion is plainly articulated setting forth why it dissents from the position of the majority in the following words:

> *«... በመዝገብ ቁጥር 36353 አመልካች ለተጠሪ ቤቱን አያስረክብም የሚለውን የስር ፍርድ ቤት ውሳኔ አጽንቶ በዚህ መዝገብ (በመ/ቁ 41243 ማለት ነው) ደግሞ በአመልካች የቀረበው የቤት ሽያጭ ውል ተጠሪን አያስገድዳትም የሚለውን የበታች ፍርድ ቤት ውሳኔ ማጽናቱ አመልካችንም ሆነ የተጠሪን መብት በፍርድ እንዲቀጭ*ና ተፈጻሚ *ለማድረግ የማያስችል እርስ በእርሱ የሚቃረን ነው...»*
>
> *(Confirming the decision in file no. 36353 which says that the respondent should not deliver the house and the decision in this file which declares that the sale agreement doesn't bind the defendant is self defeating and contradictory and prejudicial to the rights of the parties* (translation mine)).

1.2 The case initiated by Ato Betseha Merhawi

This suit was instituted in the Federal First Instance Court (file no. 10771) by Ato Betseha Merhawi on 27/12/1995 E.C requesting the court to order the defendant, W/ro Menbere Engidawork, to appear before the notary public and sign the form to transfer title of the house he bought from the defendant by a sale contract signed on October 26, 16/2/1998 E.C. The defendant responded by denying the sale contract. The Court framed the issue of whether there is a contract to bind the defendant and rejected the suit by a judgment given on 26/4/1998. The Court reasoned that the thumb-mark of the defendant who is illiterate is not authenticated by a notary, registrar or a judge, thus not binding on her. An appeal to the Federal High court confirmed the judgment of the lower court on the same ground. The Cassation Division of the Federal Supreme Court by majority confirmed the judgments given by the lower courts. Here also, the judgment is too brief to reveal the rationale behind the support for the decisions of lower courts whereas the position of the minority opinion is clearly articulated. The dissenting opinion is not on the merits of the case, but rather on a procedural issue. It contended that the two files should have been consolidated.

II. Issues Arising from the Decisions

The above cases make it clear that we have two cases which refer to the same object and the final decree by the Cassation Division is by majority. Thus, the questions whether the above two cases should have been consolidated, whether additional evidence should have been admitted and whether the court has the discretion to dispense with recording the rationale of its decision arise therefrom. We will examine each of these questions below.

2.1 Consolidation of suits

The first issue to be addressed is whether in those particular cases under consideration consolidation of the two cases was proper as contended by the dissenting judge. The reason why the majority opinion didn't concur on the consolidation of the cases is not to be found in the decision it has rendered and it is not rational to speculate. Rather, the reason stated by the minority opinion will be examined in light of the facts of the cases and the law.

The consolidation of two actions is appropriate only if the legal requirements are fulfilled. Articles 8(1) and 11(1&2) of the Civil Procedure Code lay down the rule for consolidating suits or appeals. The prerequisites are:

- two or more suits or appeals are pending
- they are between the same parties litigating in the same title
- they are pending in the same court (or even in different courts)
- same or similar questions of law or fact are involved

In the cases at hand, we have two cases pending in the same court namely, the Cassation division of the Federal Supreme Court. The parties are the same even if they shift positions as applicant and respondent in the two cases. The only requirement that remains to be appraised profoundly is whether the same or similar question of law or fact arises in the two cases.

The details of the facts of the case are presented above. It has been pointed out that in both files the object of the dispute is a house located in Addis Ababa Bole Sub-city Kebele 05 whose No. is 067. The remedies sought with respect to this same house by the parties were reclaiming possession of the house and transfer of title. W/ro Menbere Engidawork requested the court to order the restoration of occupancy of the house while Ato Betseha Merawi pleaded that ownership must be transferred. The basis for the claim of Ato Betseha was the agreement for the sale of the house concluded on 16/2/1998 E.C while the claim of W/ro Menbere was based on the revocation of the power attorney which was alleged to be the reason why the house was in the possession of Ato Betseha.

Further, one of the grounds that W/ro Menbere invoked for her application to the Cassation Division is that the trial court, ie, the Federal High Court refused to admit as evidence a prior judgment of the Federal First Instance Court which invalidated the sale contract of 16/2/1998 and rejected Ato Betsha's claim of ownership of the house on the basis of this contract... The High Court in rendering its judgment stated that the suit claims that the defendant is holding the house as an agent while in actual fact it is the sale agreement that gives him the right he has over the house.

As a result, we have two judgments giving different effects to the same contract: a court said that it is not binding revoking the sale contract on the basis of which ownership as well as possession was claimed by the purported buyer. Another court held that same contract justifies possession as the defendant adduced the sale contract by which he has become the owner. Hence, a document abandoned by a court is accepted as justifying the defense by another court. Even if apparently the action brought by w/ro Menber was originally possessory, the defendant responded that he has more title than mere possession based on the sale contract he concluded with the plaintiff/seller. First, in both cases it the right arising from the sale agreement which is the basis of claim or defense and the status of this document should be addressed in both files. Second, in both cases ownership is made an issue since Ato Betsha's defense against the claim of possession was the contract which supposedly conferred ownership right on him. Thus, it is obvious that the two suits involve similar (if not the same) questions of law and fact.

Consolidation of the two suits was a point of consideration, in file number 41243 as it can be gathered from the dissenting opinion. The judge who argued in favor of consolidation said that

> ...በዚህ መዝገብ የሰጠውን ውሳኔ የሚቃረንና ችሎቱ በዚህ መዝገብ የሰጠውን ውሳኔ ዋጋ የሚያሳጣ ውሳኔ በሰበር መዝገብ ቁጥር 36353 ሚያዚያ 22 ቀን 2001 ዓ.ም የሰጠ በመሆኑ ሁለቱ መዝገቦች የፍትሐብሔር ሕግ ቁጥር 11/5/ መሠረት ተጣምረው ጉዳዩ መቋጨትና የመጨረሻ ውሳኔ ማግኘት ሲገባው የአመልካችም ሆነ የተጠሪን መብት የሚያጣብብና በእንጥልጥል በሚያስቀር መንገድ መወሰኑ ተገቢ አይደለም በሚል ምክንያት ተለይቻለሁ::
>
> *(I have dissented from the majority as the bench has given a decision on April 30, 2009 in file no. 36353 which contradicts and invalidates the decision given in this file while the two files should have been consolidated pursuant to Art 11(5) of the Civil Procedure Code and disposed of rather than deciding the case in such a way that constricts the rights of the parties and leaves the matter unresolved.*(translation mine))

The device of combining actions enables the court to merge several actions into one and renders a single judgment for what has become a single action. Ethiopian law recognizes this device and sets procedural prerequisites which have been discussed above with the conviction that the same issues shouldn't be resolved by two different courts or divisions of a court.[1] These requirements and the rationale behind its adoption are more or less similar in different jurisdictions. Several benefits accrue because of consolidation of actions. First, it increases the productivity of courts by arranging for simultaneous resolution of issues or entire action. Second, it avoids the inconvenience, delay and expense multiple actions entail. [2] It further prevents inconsistent and contradictory judgments in relation to the same issue.

The test for whether actions should be consolidated is essential even if the general perception is that it is purely the discretion of courts whether to allow consolidation or not.[3] In some jurisdictions it suffices if the actions involve at

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[1] R.A.Sedler, Ethiopian Civil Procedure, (HSIU, Addis Ababa, 1968), p.50

[2] Jack H. Friedenthal, M.K.Kane, A. R. Miller, Civil Procedure(3rd ed.), (west group, St. Paul Minn. 1999) p. 323-324

[3] In fact, unlike the gist of Article 11, Article 8 of the Civil Procedure Code implies that courts are prohibited from entertaining "any suit in which the matter in issue is also directly and substantially in issue in a previously instituted civil suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such civil suit is pending in the same or any other court in Ethiopia having jurisdiction to grant the relief claimed. One solution suggested in Article 8 when we have suits so closely connected that they cannot properly be tried separately is consolidation. See Art. 8(3) of the Civil Procedure Code.

least one common question of law or fact.[4] Ethiopian law permits consolidation if the same or similar question of law arises. Sedler argues that consolidation is proper if the suits are so closely connected that they cannot be tried separately.[5] The Cassation Division reiterated the importance of consolidation in the case of Sheraton Addis v. Eyasu Megersa et al.[6] In that case the court consolidated two files as the appellate court's divisions had given contradictory judgments which would be very difficult to execute. Consolidating the two files, the Division stressed three purposes to be achieved thereby: speed, avoidance of contradictory judgments, and integrity of judgments.

As rightly enunciated by the dissenting judge, the two cases under consideration should have been consolidated because as the above analysis unravels the legal requirements for consolidation have converged. The dissenting opinion shows the contradiction in the two decisions that a contract does not bind a party and that same contract justifies the possession of the other party. The law allows a court to order consolidation of suits or appeals of its own motion if the legal requirements are met.[7] Consolidation of the two cases was a matter of deliberation among the judges and it should have been ordered. With the limitation to weigh the opinion of the majority in the absence of the rationale behind their decision, it can be said that consolidation was proper. However, the basis for consolidation is article 11(1) of the Civil Procedure Code and not article 11(5) as argued in the dissenting opinion since that latter speaks about cases pending in different courts.

2.2 Additional evidence

The request to introduce additional evidence was raised in the High Court by the plaintiff, W/ro Menbere. In the middle of the proceeding, she requested the Court to allow her to adduce a decision of the Federal First Instance Court (the same decision confirmed by the Cassation Division in file no. 41243) as additional evidence. The decision stated that the sale contract which was the basis for the defense is not binding on the plaintiff. Generally, if the document is relevant and the party has good cause for the delay, it should be admitted. Let us examine the relevance of the document and the reason why it was not produced earlier in order to determine whether it was appropriate for the court to deny admission.

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4 Ibid.

5 Supra note 11, p. 373

6 See የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች ቅጽ 8 ገጽ 67. This decision was given seven days after the cases at hand were decided.

7 Civ. Orc. Code , Art. 11(1)

The evidence the plaintiff sought to introduce pertains to the sale agreement which is the ground of defense. If a party relies on a document to assert his claim or defense and that very document is invalidated by a court, it is obvious that it is relevant for the disposal of the case. The evidence is relevant because the argument of the defendant with respect to the power of attorney is that it is conferred on him for the purpose of facilitating the execution of the sale. In other words, he was cotending that the power of attorney is just an extension of the sale contract by which ownership is transferred to him. The evidence was pertinent and it was necessary to decide the case. If the document is relevant, it should have been admitted so long as the plaintiff can show that she was in good faith and not reckless.

The law provides that parties should introduce all the evidence they have in support of their pleadings at the time of lodging their claim or defense. Such pleadings should be supported by the list of witnesses to be called at the hearing and of the documents on which a party relies and certify the list to be complete.[8] The assumption is that all the evidences relevant to the case are produced by the parties and nothing is left. Thus, the principle is that parties are precluded from producing evidence afterward. The law recognizes two exceptions to this general rule. They are:

1. Where the parties or their pleaders produce, at the first hearing of the suit, a documentary evidence (Art 137(1) Civ. Proc. C)[9]
2. Where evidence which should have been produced is not produced due to good cause, (Art 256 Civ. Proc. C)

In addition to these exceptions, the court may order additional evidence to be adduced where it considers that the issues cannot be correctly framed without the examination of some person not before the court or without the inspection of some document which it deems relevant. [10] Based on its relevance to the facts of the cases, we will focus on the second procedural remedy for failure to introduce evidence together with pleadings.

The law is palpable as it doesn't allow the presentment of any document which should have been but is not annexed to or filed with the pleading or produced at the first hearing, the only exception being the remedy under art. 256 of the Civil Procedure Code. [11] It gives room for the introduction of such evidence if

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[8] Civil Procedure Code of Ethiopia, Art 223(1) and 234(1)

[9] The application of Article 137 is controversial. Courts and scholars are not at one, either. Some argue that such evidence is one which has already been included in the annex while others insist that it includes documents not mentioned in the annex.

[10] Civil Procedure Code, Art 249

[11] Art 137(3) of the Civil Procedure Code of Ethiopia In fact the interpretation of Art 137 is not the same among courts. I have observed courts accepting evidence which is not

there is good cause.[12] The new evidence was not available at the time of instituting the action and the plaintiff cannot be at fault of producing the evidence. It is not, therefore, due to the negligence or the fault of the plaintiff that the evidence was not submitted together with the pleading or at the hearing. The courts are expected to be liberal[13] in admitting new evidence if they are above suspicion such as fabrication after the suit. By the same token, Sedler argues that there should be good cause unless the party made no effort to produce the evidence.[14]

One important consideration worth raising here is whether it is mere discretion of the court not to admit evidence even if it is discernible that there is serious and sufficient reason. The law states that refusal of a court to admit evidence which ought to have been admitted[15] is ground for admission of additional evidence in the appellate court. In other words, if the lower court unjustifiably turns down the admission of relevant evidence, then the appellate court can alleviate the ensuing injustice. This is a control mechanism by which the exercise of discretion by a lower court can be checked even though this is also the discretion of the appellate court. In file No 29861, a case between w/ro Hitsehat Fisehatsion and w/ro Almaz Terefe et al, the Cassation Division emphasized the importance of admitting relevant evidence in a similar case and reversed the decision of lower courts for their failure to examine such evidence. In other words, it is a fundamental error of law to ignore evidence which was brought to the attention of the court as per the procedural rules.[16]

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mentioned in the annex at the first hearing and courts rejecting to introduce such evidence. But sub-article 2 elucidates that it is not a requirement to include the evidence in the annex in order to produce it at the hearing. Further, sub-article 3 makes reference to both as alternatives.

[12] Comparing the two versions of the Code on can reach at different conclusions. The English version seems to underline default of a party in which case the court has two options while the Amharic version appears to envisage two possibilities: default of a party and good cause for each of which a different solution is provided for

[13] Supra note 9 , p. 848

[14] Supra note 11, P. 177, note 101

[15] The term "ought to have been admitted" was interpreted to mean should be admitted in the exercise of sound discretion." See C.K. Takwani, p.290

[16] የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች ቅጽ 8 ገጽ 37. It is interesting to note that in that case the decisions of lower courts were quashed because they didn't examine the judgement of another court which was relevant to dispose the case.

2.3 **Recording of Reasons**

The selected cases are typical in exposing the practice of ending cases summarily by appellate courts without recording reasons. The final pronouncement of the decision of the Cassation Division has two parts: the position of the majority and the dissenting opinion. The majority simply stated that the decision of the lower court is confirmed. One possible explanation is that it need not rewrite the reasoning of the lower court to which it subscribes. Ignoring the substantive challenge to be posed against such a contention, in one of the cases we have an issue which is not touched upon by the lower courts: consolidation of the cases. In other words, there is no reason given by any of the lower courts and by the Cassation Division as to why the two suits or appeals should not be consolidated.

But before going to particulars of the cases at hand, it is prudent to raise the general question whether courts are at liberty to choose not to state their justifications for a particular way of ending a dispute. It can be observed that it has become commonplace for appellate courts to close appeals instantaneously without recording reasons. It is particularly alarming to witness summary closure of cases which were heard in appeal. This is also the practice in the Cassation Division of the Supreme Court. In fact, it can be said that this could ease the burden of courts, i.e., writing reasons for those cases which have no ground at all. It can also be a good reason for the speedy disposal of cases and timely judgment. But, apart from such practical considerations which, of course, can be challenged by overriding interests, such practice is proper only if it is backed by the law.

The power of the appellate court is either to confirm, vary or reverse the decision of a lower court from which an appeal is preferred.[17] Presumably, the need to state reason is not to be disputed in reversing or varying a decision. We will have, however, a practical problem when appellate courts confirm decisions.[18] In this regard, the law appears to have introduced two options.[19] The first is dismissal at once. Accordingly, Article 337 of the Civil Procedure Code empowers the court to "dismiss the appeal without calling on the respondent to appear, if it thinks fit and agrees with the judgment appealed from." The second alternative is to give judgment as per Article 347 of the

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[17] Art 348 of the Civil Procedure Code of Ethiopia.

[18] The Cassation Division is subject to the same rules even if it is not an appellate court. It is Article 348 on which the Cassation Division basis its decision on. See also Art. 7 of Federal Courts Proclamation no. 25/1996

[19] Art 339/2/ of the Civil Procedure Code seems to have introduced the third alternative by which the court could dismiss the case after calling but without hearing the respondent.

Civil Procedure Code which goes as "the Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the court from whose decree or order the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment."

A judgment is defined as the statement given by a court of the grounds of a decree or order[20]. As to its contents, it is provided that the judgment contains the points for determination, the decision thereon and the reasons for such decision. These are the fundamental components of a judgment and when the appellate court reverses or varies the judgment appealed from, it is required to state in addition the relief to which the appellant is entitled.[21] It is evident that an appellate court should state the reason for its decision when it reverses[22], varies or confirms a judgment from which the appeal is preferred. Recording of reason is recognized as one of the duties of appellate courts and its importance is accentuated as follows:

> *Recording of reasons in support of a judgment may or may not be considered to be one of the principles of natural justice, but it cannot be denied that recording of reasons in support of a decision is certainly one of the visible safeguards against possible injustice and arbitrariness and affords protection to persons adversely affected.*[23]

But judicial reasoning, which refers to the process of thought by which a judge reaches a conclusion and to the written explanation of the process in a published judgment, accomplishes other purposes, as well. The process of thought doesn't suffice as its clandestine nature could curb enforcement of judicial accountability. Further, it is underscored that an explanation of the reasons for a decision is owed not only to the unsuccessful litigant, but to everyone with an interest in the judicial process, including other institutions of government and ultimately the public.[24] The absence of reason in a judgment affects the reliability of a judgment and in some jurisdictions it is established

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[20] Civil Procedure Code of Ethiopia, Art 3

[21] Civil Procedure Code of Ethiopia, Art 182

[22] In fact this can also be an issue and we cannot take it for granted even if the law is unambiguous that to reverse a decision of a lower court, appellate courts would give a reason. The cassation has given a binding decision in file no. 38844 in the case of Addis Ababa Roads Authority v. Gad Business PLC saying that appellate courts cannot reverse the decision of a lower court without recording reason. See የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች ቅጽ 8 ገጽ 90.

[23] C.K. Takwani, Civil Procedure (Eastern Book Company,Delhi, 1997) p. 236

[24] Tony Blackshield,, Judicial Reasoning, http://www.win-more-cases.com/toolkit/extras/how-judges-decide-cases.html, visited on September 2,2011

that such decisions will be reversed by the appellate court on the ground of failure of the lower court to discharge its duties.[25]

Distinction can be drawn between the situation whereby the court confirms the decision of the lower court without calling on the respondent to appear, and after hearing the defendant. Article 347 is clear in that judgment must be given and consequently reason must be recorded when the court has called and heard the defendant. The issue is whether the court is relieved from stating reasons when it summarily dismisses an appeal. The law merely empowers the court to dismiss the appeal if it agrees with the judgment appealed from. In effect it consents and adheres to the judgment appealed from and the reasons incorporated therein. The question that follows is as to what justifies requiring the court to state its reason when it subscribes to the position of the lower court. It can be presumed that the court gives an order closing the file in which case there is no reason to be recorded.

At any rate, it has become obvious that the court is under legal obligation to record its reasons for the decision where it has called the defendant and heard the parties. Accordingly, in disposing the case at hand the majority have not recorded their reasons as required by the law despite the fact that the respondents were called in both cases and heard. If the law is clear, the courts are not at liberty to disregard it. As has been exposed above the law requires them to give judgment and record their reasons. That being the letters of the law, judges should abide by them as they "shall be directed solely by the law."[26]

If the appellate court dismissing appeal under Art 337 may not have to record its reasons for dismissing the appeal (because there is no reason to be recorded as the appellate court agrees with the holding and reasoning of the lower court), why should the same court be expected to record its reasons for confirming the holding and reasoning of the lower court simply because it heard the respondent? Don't you think that a court (whether trail or appellate) has to reason out whenever it gives a decision?

III. Conclusion

It has become conspicuous from the above discussion that the dissenting opinion was correct in addressing the procedural problems the cases presented. The consolidation of the cases could have resulted in a decision which can be consistent and conclusive in resolving the dispute. One of the explanations for the doctrine of consolidation is the consistency or integrity of

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[25] D. F. Mulla, The Code of Civil Procedure, (13th ed. Edited by P.M. Bakshi) (Butterworths, New Dalhi,200), p.907

[26] FDRE Constitution , Article 79/3/

judgments which is what is missing in the decisions given in the files at hand. Further, if relevant evidence is turned down, it will result in injustice. It could also entail inconsistency as witnessed in the cases considered which gave two contradictory effects to a single contract.

The majority in simple terms confirmed the judgment of lower courts. In these particular cases, no reason has been given as to why the actions should not be consolidated or the evidence shouldn't be admitted. Assessment of the reason of the majority was not possible as no reason is recorded with respect to any of the issues critical or incidental to the cases. The decision contains only the decree without stating the reasons thereto. Under the circumstances, the court was required to render judgment which naturally comprises, among other things, the rationale for the decision. This is not a discretion rather a duty for courts since the law compulsorily calls for them to record their reasons.

Apart from resulting in compliance with the law, recording of reasons serves other purposes. A decision of a court primarily brings to an end a particular dispute between litigants. But that is not the only purpose particularly taking into account that decisions of the Cassation Division of the Supreme Court and the interpretation contained therein are binding on lower courts. Thus, a decision is a statement of law as such decisions stand as precedents. The legal system and its development is a function of the application of the law particularly by courts of law. Decisions of courts will be used as reference in understanding, testing or explaining existing law. It might provoke the amendment of an existing law or initiation of a new legislation. It may inspire academic research or illustrate a particular legal theory or enrich legal discourse. But, the above benefits are hardly realistic unless the majority opinion or a judgment is backed up by the reason why the issues are resolved in that particular way.

The Ethiopian Tax System: Cutting Through the Labyrinth and Padding the Gaps*

Taddese Lencho**

"Why may not that be the skull of a lawyer? Where be his quiddities now, his quillities, his cases, his tenures, and his tricks?"

William Shakespeare, ***Hamlet****, Act 5, Scene 1, lines 100-101*

"... and look at your laws: criminal law, civil law, property law, commercial law, international law, the law of the sea, law and order, legal codes, legal books..."

From 'Excess' by Sebhat Gebre-Egziabher, in ***SEED and Other Short Stories****, Retold by Wendy Kindred, p. 4*

Introduction

In a moment of dismissive hubris, Ethiopian tax system may be described as a loose agglomeration of proclamations, regulations, directives, rules, etc, which despite their loose ends and rough edges, seem to fulfill the singular purpose for which they are designed, namely raising revenues for the Ethiopian government. In the face of these loosely connected laws, one is tempted to conclude like Jacques Vanderlinden did more than forty years ago about the Ethiopian legal system as a whole: that is, it does not as yet exist.[1] The Ethiopian tax system has not been blessed with the excellent organization of many of the modern laws of Ethiopia - which (thanks to the codification project the country undertook in the 1950s and 1960s) were organized into well-written codes. A system (understood as an orderly arrangement of rules and institutions) is not the first impression that one gets out of coming face to

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* This article is also slated to be published in Issue 20, No. 2 of Michigan State Journal of International Law.

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[1] Jacques Vanderlinden, *Civil Law and Common Law Influences on the Developing Law of Ethiopia*, 16 Buff. L. Rev. 250, 250-266 (1966-1967), at 250; Vanderlinden denied the Ethiopian legal system had yet existed after Ethiopia commissioned some of the most distinguished jurists at the time to codify 'its' laws - the Penal Code in 1957, the Civil, Commercial, and Maritime Codes in 1960, the Criminal Procedure Code in 1961 and the Civil Procedure Code in 1965

face with the dizzying array of taxes scattered almost haphazardly in so many disparate pieces of legislations.

Luckily, we don't have to subscribe to impossibly high standards (which appear to inform the opinions of Professor Vanderlinden) to qualify a given system as a legal system. If, in the words of John Henry Merryman, a legal system is understood merely as 'an operating set of legal institutions, procedures and rules', it is possible to qualify the rules of any sovereign state as a legal system, regardless of the degree of legal organization involved and the level of legal development in a given country.[2] In a sense, it is possible to speak in terms not only of a legal system as a whole, but also parts of that legal system, such as criminal justice system, revenue system, or as this article proposes, a tax system. To the extent it is possible to detect a hierarchy of institutions, laws, and procedures (however imperfectly these are understood), it is possible to write about a tax system like that of Ethiopia, without losing sight of the fact that some tax systems are better organized and more coherent than others. The Ethiopian tax system has an operating set of legal institutions (such as the parliament, tax authorities, and tax appeal tribunals and courts), procedures (for assessment, collection and complaints handling), and rules (the constitution, proclamations, regulations, directives, etc).

The modern 'Ethiopian tax system' (let's put it, provisionally, in quotation marks) is a product of more than half a century of experimentation in legislation and tax reform. It had neither the grand lawgiver to guide and direct it from behind nor a clear set of overarching policies to inform its directions.[3] Since its humble beginnings in the 1940s, the modern Ethiopian tax system has developed and evolved by fits and starts as the needs for revenue arise, as governments change and as the economy and international situations shift. Over the course of this period, the Ethiopian tax system went through some major revisions and numerous piecemeal amendments.[4]

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[2]John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 1-4*, in John Henry Merryman, David S. Clark and John O. Haley, (2nd ed. 1985), The Civil Law Tradition: Europe, Latin America, and East Asia, Contemporary Legal Education Series, 1994, at 3

[3]As Eshetu Chole wrote, "it [the Ethiopian tax system] evolved in an *ad hoc* basis, in response to specific needs and pressures, i.e., in a planning vacuum"; see Eshetu Chole, *Towards a History of the Fiscal Policy of the Pre-Revolutionary Ethiopian State: 1941-1974*, in Eshetu Chole, Underdevelopment in Ethiopia, Organization for Social Science Research in Eastern and Southern Africa (OSSREA), 2004, at 63

[4]The major tax reforms in Ethiopia occurred in the 1940s, in the aftermath of the Ethiopian revolution of 1974, after the fall of the Derg in 1991 and most recently in the 2002 tax reforms.

This article will attempt to show that there is a system behind the apparently haphazard and disparate pieces of tax legislations of Ethiopia. No one has ever looked at the Ethiopian tax system as a whole (not as legal scholars would have liked it anyway) and it is therefore no surprise if the Ethiopian tax system strikes one as random, disorganized and incoherent in places. We are more accustomed to talking (if ever) about income taxes (even then, of specific income taxes), the value added tax or the customs duties than of the Ethiopian tax system as a whole.

Since the jurisprudence of Ethiopian taxation is yet to develop fully, the article will draw upon the comparative experience of some tax systems elsewhere to illuminate the 'gaps' in and suggest future directions for the Ethiopian tax system. Some of the terminologies used in this article are adopted from other tax systems for heuristic purposes. Due to the paucity of information on regional tax practice, the article will not deal with taxation at the regional level, except where federal laws impact the operation of regional tax systems.[5]

This article is divided into two parts. Part I of the article will address the constitutional and administrative issues surrounding the Ethiopian tax system. The second part will deal with the organization and sources of tax laws, including tax dispute settlement schemes in Ethiopia. The article will end with a conclusion and some recommendations. Through the legal and institutional arrangements that have made the Ethiopian tax system into what it is (in spite of the gaps and loose ends), the article aims to draw attention to the patterns that underlie the Ethiopian tax system.

I

1. The Federal Arrangement in Ethiopia and Taxation Powers

The fundamental authority to tax is derived from the Constitution of 1995, which, following the federal structure, shares tax powers between the Federal Government and the Regional States. [6] The Ethiopian Constitution goes to greater lengths than other areas of power in allocating taxation powers between the Federal Government and the Regional States.[7] The Constitution

[5]This is not a significant omission, as the Federal Government has had an overwhelming influence over the regional tax system, to the extent the latter is said to exist.

[6]See The Constitution of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta*, 1st year, No. 1, 1995, Articles 95-99

[7]On the implications of the specificity of the Ethiopian Constitution, see Taddese Lencho, *Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About*, 4 Mizan Law Review, No. 2, (December 2010), at 31-51

classifies taxation powers as 'taxes exclusive to the Federal Government'[8], 'taxes exclusive to the Regional States'[9], 'taxes concurrent to both the Federal Government and the Regional States' [10] and 'taxes undesignated'.[11]

With the exception of customs duties, which are the exclusive preserve of the Federal Government, most other taxes are sliced into pieces by the Ethiopian Constitution and shared between the Federal Government and the Regional States on the basis of certain set formulas. Income taxes on employment income are, for example, shared on the basis of the identity of employers so that if an employer is a Federal Government or an international organization, the Federal Government exercises the power to impose tax on the employees, and if an employer is a state government or a private enterprise, state governments get to levy tax on the employees.[12] The Constitution follows similar patterns of tax-power sharing on most other taxes.[13]

The Ethiopian federal arrangement follows the dual structure in which all the three branches of government (legislative, executive and judicial) co-exist in respect of the Federal and Regional powers. This, in taxation, means in principle that both the Federal Government and the Regional States enjoy full legislative, executive and judicial powers in respect of taxation powers reserved to them. In practice, however, the Federal Government has had the most dominant presence in the legislation of taxation respecting not just 'federal exclusive taxes' but also 'concurrent taxes' and at times even 'regional exclusive taxes'.[14] Although Regional States have the prerogative to issue their own tax laws in respect of tax sources reserved to them by the Constitution, many of the Regional States for a while used federal tax laws to levy and collect regional taxes.[15] The Regional States did not immediately exercise their legislative powers of issuing their own tax legislations. Some of the Regional Governments have begun issuing their tax legislations recently. However, the

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[8] Constitution, *supra note* 6, Article 96; the Constitution headlines these powers simply as 'federal power of taxation', 'state power of taxation'; the word 'exclusive' is added here to highlight what these powers actually mean.

[9]Id, Article 97

[10]Id, Article 98

[11]Id, Article 99; there is an implicit fifth category: a tax designated by the Constitution but requiring re-designation via an amendment of the Constitution.

[12]Id, see Articles 96(2) and Article 97(1)

[13]Profit taxes are assigned on the basis of the legal status of the business enterprise subject to profit taxes; similarly, sales taxes appear to be assigned on the basis of the legal status of the business enterprise collecting sales taxes; taxes on federally owned and regional-state-owned enterprises are assigned to the federal and regional states respectively; see Taddese Lencho, *supra note* 7, at 38-40.

[14]Ibid

[15]See Taddese Lencho, *supra note* 7, at 43-45

exercise of the legislative power over taxation still remains a formal matter because the Regional Governments have yet to fully exercise their taxation powers. Many of the Regional States that have issued their own tax laws have used federal tax laws as models with the result that there is virtually no difference in substance between federal tax laws and regional tax laws.[16]

One of the striking features of the Ethiopian Constitution on matters of taxation is the unusual specificity and detail of provisions that assign taxation powers between the Federal Government and the Regional States. Since the Ethiopian Constitution is unusually concrete and specific in the area of tax powers, its language in this respect leaves very little room for argument about which layer of government has what tax powers. Nonetheless, some issues remain contentious. One is the exercise of concurrent powers. The Constitution gives out very little as to how the concurrent tax powers are to be exercised in practice.[17] Following the practice of other federal systems, several options may be open to both layers of the Ethiopian federation.[18] The Regional States may impose their own taxes in addition to the Federal Government taxes. The Regional States may choose to impose additional tax rates on an otherwise federal tax law. Or the Regional States may choose to agree with the Federal Government to share the proceeds of federally collected tax. In Ethiopia, it is the third option that prevails, presumably because there is a hint to that effect in Article 62(7) of the Constitution.[19] The Federal Government levies and

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[16]This form of tax legislation has created some curious developments in the Ethiopian Federation, casting doubts over the capacity and the will of the Regional States to chart their own autonomous course. The only area of tax law where the Regional States have not copied from federal tax laws is the agricultural income tax laws, presumably because there is no federal agricultural income tax law - agricultural income taxes are the exclusive preserve of the Regional States under the Ethiopian Constitution; see Article 97(2) and (3) of the Ethiopian Constitution; see also Deso Chemeda, *Agricultural Income Taxation in Oromia*, Senior Thesis, Addis Ababa University, Faculty of Law Library Archives, 2008 (unpublished); even today, many of the Regions invoke federal tax laws like the Federal Turnover Tax law of 2002 to collect turnover taxes.

[17]See Solomon Nigussie (2006), *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Wolf Legal Publishers (WLP), at 136-137

[18]See Anwar Shah, *"Introduction: Principles of Fiscal Federalism"*, in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives, A Global Dialogue on Federalism*, vol. 4, (McGill: Queen's University Press), 2007, at 21.

[19]Article 62, sub-article 7, of the Ethiopian Constitution empowers The Federal House of Federation (HOF) to determine the division of revenues derived from joint Federal and State sources; which must be the case because the Federal Government collects joint/concurrent tax sources; See Constitution, *supra note* 6, Article 62(7); in this regard, it is also instructive to review the practice prior to the ratification of the Constitution. During the transition period, the division of revenues was regulated by a proclamation issued during the transition period; that proclamation has a clear

collects concurrent taxes. The revenues from concurrent taxes are shared on the basis of a revenue-sharing scheme approved in 2004 by the House of the Federation (HoF).[20]

The other contentious area is the meaning of 'undesignated taxes'. In the assignment of expenditure powers, the Ethiopian Constitution follows what might be described as the principle of residuality, which is stipulated in Article 52 of the Constitution. All expenditure powers which are not expressly stated as federal powers or concurrent powers of the Federal Government and the Regional States are assumed to be reserved as the powers of the Regional States. This is not the case for taxation powers. Taxes not designated as either 'federal exclusive' or 'state exclusive' or 'concurrent to both' should be referred to the joint session of the House of the Federation and the House of Peoples' Representatives, which shall determine by a two-thirds majority vote on the exercise of powers of taxation.[21]

What really constitutes 'undesignated' in the world of taxes has been a subject of some debate in practice. The Ethiopian Constitution refers to many types of taxes by name. The Ethiopian Constitution may have also mentioned some taxes in substance but not in name. A case in point is the value added tax (VAT). VAT is not mentioned in name but in substance (if we take it to be in the family of sales taxes in general), it is mentioned in several provisions of the Constitution.[22] If we take 'undesignated' to mean literally 'unmentioned', VAT

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provision regarding the levying and collection of 'joint' or 'concurrent' revenues'. It provides that 'joint' taxes shall be collected by the central (federal) government and the proceeds distributed among Regional States on the basis of derivative principles. There is reason to believe that this practice continued unabated after the Constitution has replaced the proclamation in 1995; see Proclamation No. 33/1992, a Proclamation to Define the Sharing of Revenues between the Central Government and the National/Regional Self-Governments, *Negarit Gazeta*, 52nd year, No. 7, Article 8(4); see also Taddese Lencho, *supra note* 7, at 42

[20]The revenue sharing scheme instructs the Federal Government to share with the Regional States 50% of the proceeds of profit and dividend taxes, 30% of the indirect taxes and 40% of the mineral taxes; the Federal Government also controversially took over the administration of VAT (part of which would have fallen under the jurisdiction of the Regional States) and decided to return the proceeds to the Regional States based on the sources from which VAT is being collected (i.e., derivative principle); see Solomon Nigussie, *supra note* 17, at 140 and 210

[21]Constitution, *supra note* 6, see Article 99

[22]Id, see Articles 96(1), (3), 97(4), (7), and 98(1); the literature on VAT invariably classifies VAT as a sales tax; see, for example, Alan Schenk & Oliver Oldman, *Value Added Tax: A Comparative Approach, with Materials and Cases*, Transnational Publishers, 2002, at 24; John F. Due and Ann F. Friedlaender, Government Finance, Economics of the Public Sector, 2002, at 404ff; at the time of the ratification of the Constitution in 1994, VAT was unknown in Ethiopia and it could not have been mentioned by the

qualifies as an undesignated tax and therefore falls under Article 99 of the Constitution. When VAT was first proposed as a new source of tax at the beginning of this century, some members of the Joint Houses questioned whether VAT was indeed an Article 99 matter, or whether its introduction as a federal tax required the amendment of the Constitution.[23] Apparently, not many put much stock in the merit of those debates, and when the matter came to the vote, the Joint Houses unanimously gave the power to impose VAT to the Federal Government (apparently taking VAT as an undesignated tax).[24] But in an apparent U-turn, the Federal Government later agreed to return to the Regional States the proceeds of VAT collected from sources reserved to the Regional States.[25] If VAT were a federal tax as the Joint Houses at first seemed to think, there would be no need to share the revenues with the Regional States. The Federal Government could have treated VAT as any of the federal exclusive taxes and used the proceeds either for its direct budgetary needs and/or distributed the proceeds in the form of federal grants. The Federal Government probably realized upon assuming the power to levy and collect VAT that VAT was after all not an undesignated tax but a designated tax (as a sales tax) requiring the exercise of power over VAT at multiple jurisdictions – federal, Regional State and concurrent. In any case, the decisions reached over the years with respect to the introduction of VAT illustrate the practical problems arising from characterizing 'undesignated-ness' under the Ethiopian Constitution.

The subject of 'undesignated taxes' is not always contentious, however. There are many clear cases in which the Constitution failed to designate the power over certain taxes and the Joint Houses appropriately intervened to designate these taxes. Excise taxes on private enterprises, income taxes on royalties from the exercise of copy rights and patents, income taxes on interest from bank deposits are not designated in the revenue provisions of the Constitution. The Joint Houses met and designated excise taxes on private enterprises as 'concurrent taxes', income taxes on interest accruing from bank deposits as 'federal taxes', income taxes on royalties derived by individuals as 'regional taxes', and income taxes on royalties derived by enterprises as 'concurrent

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drafters in name. At that time, Ethiopia had a general sales tax law that applied upon manufacturers or producers and importers of goods and services only, and it is therefore little surprise that the Constitution mentions this type of sales tax, and not the VAT.

[23]See Berhanu Assefa, *"Undesignated Powers of Taxation in the Distribution of Fiscal Powers between the Central and State Governments under the FDRE Constitution,"* Senior Thesis, Addis Ababa University, Faculty of Law Library Archives, 2006, unpublished, at 59-60

[24]Id, p. 60; VAT was issued as a federal tax law in 2002; see Value Added Tax Proclamation No. 285/2002, *Federal Negarit Gazeta*,8th Year, No. 33

[25] See Solomon Nigussie, *supra note* 17, at 140

taxes'.[26] Since none of these taxes could be said to be designated either in name or substance, there would be little debate over the decisions the Joint Houses took.

2. Constitutional Limits on Taxation Powers

Apart from the limitations federalism imposes upon the powers of taxation, a number of provisions in the Federal Constitution impose additional limitations upon the taxation powers of the Federal Government and Regional States. Constitutional issues pertaining to taxes are perhaps as numerous as the constitutional issues themselves. Taxes may affect the right to property, equality, privacy, freedom of expression, speech, religion, etc.,[27] which shows that issues of taxation may be co-extensive with constitutionally recognized liberties and freedoms. Here we shall limit ourselves to those limitations that are distinctly and commonly tied to taxation powers.

In writing about the limits on taxation powers, we cannot (unfortunately) go beyond the bare language of the Ethiopian Constitution - for there are no cases as yet, to the best of the writer's knowledge, to illuminate for us what the Constitution might mean in this regard. Our principal reference in this regard is Article 100 of the Ethiopian Constitution. Although it carries an unfortunate title 'directives on taxation' - which downplays and understates the force of the provision - there is little doubt that Article 100 of the Constitution is intended as a limit on taxation powers of the Federal Government and Regional states.[28] Since the objective of this article is not simply to restate the principles and limitations laid down in the Constitution but also to highlight gaps (if any) in it, we shall have recourse below to some other limitations that are not clearly recognized under the Ethiopian Constitution.

2.1. *The Principle of Tax Legality*

The first limitation found in some constitutions is the principle of tax legality. The modern principle of tax legality is a derivation from the great historical

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[26]Minutes of the 1st Joint Session of the House of Federation and the House of Peoples Representatives (Meskerem 26, 1996 E.C. in Amharic), quoted in Berhanu Assefa, *supra note* 23, at 62-63

[27]See Tracy A. Kaye and Stephen W. Mazza, *United States - National Report: Constitutional Limitations on the Legislative Power to Tax in the US*, 15Mich. State J. Int'l L.2, (2007), at 489-490; David Gliksberg, *Israel - National Report*, 15 Mich. State J. Int'l L.2, (2007), at 371ff; see also Stephen W. Mazza and Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States*, 54Am. J. Comp. L., (Fall 2006), at 641-670

[28]The Amharic version of the Constitution has the final authority in the event of conflict between the English and Amharic versions of the Constitution. The Amharic version of the Constitution uses the word *'merihowoch'*, which roughly translates as 'principles'. In this regard, the Amharic version is closer to the spirit of the Constitution; Constitution, *supra note* 6, see Article 106

battles fought between legislative and executive bodies over the power of taxation. Taxation is historically the crucible of the struggle for supremacy of powers between the legislative and executive bodies.[29] From the *Magna Carta* to the English Revolution of 1688, to the American Independence, taxation was the battle cry of those who sought to keep the power of taxation in the hands of the legislative (representative) bodies of the government - hence the colorful slogan 'no taxation without representation'.[30]

At the minimum, the principle of tax legality means that taxation must have a legal basis, and this is recognized as a constitutional precept in most legal systems.[31] This requirement is written into the constitutions of many countries, and even in those countries where it has not obtained explicit constitutional recognition, it has been derived from other constitutional principles like 'equality in taxation' (Switzerland) or constitutional provisions guaranteeing personal freedom (Germany).[32]

Beyond the threshold consensus that taxation must have a legal basis, there is no agreement as to what else the principle of tax legality requires in a given tax system.[33] One area where the principle of tax legality has some relevance is over the extent to which legislatures can delegate tax law making authority to the other branches of government.[34] The principle of tax legality can be understood not only as a principle that ensures the supremacy of the legislature over tax matters but also as a precept that constrains the powers of the legislature (in this case its power to delegate taxation powers to the other branches of government). In this regard, the principle of tax legality can be understood to mean 'no delegation of taxation powers whatsoever' and at the other extreme it can also mean delegation of taxation powers is permissible for the legislature so long as a constitution allows delegation of legislature powers

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[29]As William B. Barker writes: '...one of the most important movements' in the development of the modern state 'has been the struggle to remove the power to tax from monarchs and to place that power exclusively in the hands of legislators.' See William B. Barker, *The Three Faces of Equality: Constitutional Requirements in Taxation*, 57 Case W. Res. L. Rev. 1, 2006; see also Frans Vanistendael, *"Legal Framework for Taxation"*, in Victor Thuronyi (ed.), Tax Law Design and Drafting, International Monetary Fund, vol. 1, 1996, at 16

[30]See William B. Barker, *supra note* 29; Frans Vanistendael, supra note 29, at 16 and 18

[31]Frans Vanistendael, *supra note* 29, at 16

[32]Id, pp. 16-17

[33]Id, p. 17;tax legality may be understood to prohibit tax authorities from entering into agreements with individual taxpayers, or to limit administrative discretion in granting tax privileges, or to enjoin courts and tax tribunals to construe tax laws strictly; see Victor Thuronyi, *Comparative Tax Law*, Kluwer Law International, 2003, at 71

[34]Frans Vanistendael, *supra note* 29, at 17

generally.[35] The position that appears to have won acceptance in many systems is the intermediate position that makes delegation of certain taxation powers permissible so long as the legislature has specified the so-called 'essential' or 'basic' elements of the tax in the enabling act or principal tax statute.[36] Some Constitutions are very particular about what elements of tax should be specified in a tax act approved by parliaments. The Constitution of Greece, for example, requires that parliamentary tax acts should set out in the tax law a definition of the basic elements of taxation, such as the subjects of the tax, the property subject to tax, the tax rate, and exemptions.[37] On the question of delegation, the constitution of Greece prohibits delegation of the 'basic' or 'essential' elements of tax to the executive branches.[38] The Constitution of Greece goes so far as to specifically proscribe the retroactive application of tax statutes.[39]

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[35]Ibid

[36]Ibid

[37]Theodore Fortsakis, *Greece – National Report*, 15Mich. State J. Int'l L.2, (2007), at 328; in the United States, courts have reached similar conclusions over the power of US Congress to delegate taxation powers to the executive branches. US courts have held that the power of taxation is not subject to delegation 'to either the other departments of the government, or to any individual, private corporation, officer, board or commission'. The legislature cannot leave too much discretion with the executive as to enable the latter to select the property to be taxed, or determine 'the basis for the measurement of the tax' or define 'the purpose for which the tax' is levied. The powers of taxation that are delegable are those that are 'merely advisory or ministerial in their nature, such as computing the levy, fixing the rate or enforcing the payment'. Powers that are advisory or ministerial in their character have been interpreted to include 'the power to value property, the power to extend, assess and collect the taxes and the power to perform any of the innumerable details of computation, appraisement and adjustment'; see 84 C.J.S. Taxation §8, at 56 and 59

[38]Quoted in Theodore Forstakis, *supra note* 37, at 329

[39]A partial quote from Article 78 of Greece Constitution may be instructive here:

1. No Tax shall be levied without a statute enacted by Parliament, specifying the subject of taxation and the income, the type of property, the expenses and the transactions or categories thereof to which the tax pertains;
2. A tax or any other financial charge may not be imposed by a retroactive statute effective prior to the fiscal year preceding the imposition of the tax;
3. Exceptionally, in the case of imposition or increase of an import or export duty or a consumer tax, collection thereof shall be permitted as of the date on which the Bill shall be tabled in Parliament, on condition that the statute shall be published within the time-limit specified in article 42 paragraph 1, and in any case not later than ten days from the end of the Parliamentary session;

The current Constitution of Ethiopia does not explicitly require that taxation must have a firm basis in law passed by the Parliament, but this can be derived from a provision of the Constitution that grants the Federal Parliament the power to impose taxes and duties on sources reserved to the Federal Government.[40] In addition, the Federal Government has issued a public financial administration law which appears to recognize the principle of tax legality as requiring that any tax must have a firm basis in law.[41] Although this law does not have constitutional status, it shows at least that the principle of tax legality in its minimum requirement is recognized in Ethiopia.

Beyond this, it is unclear if the principle of tax legality is recognized in the sense of strictly regulating the delegation of taxation powers and/or prohibiting the retroactive application of taxation. The current Constitution of Ethiopia contains no provision that might even remotely constrain the Ethiopian parliament from delegating the essential elements of taxation powers to the executive branches. The question is whether, in the face of the silence of the Constitution, the Ethiopian parliament can delegate wholesale taxation powers to the executive branches, and if, in particular, the Ethiopian parliament can give full powers to the Council of Ministers or the Ministry of Finance or for that matter the Ethiopian Revenues and Customs Authority (ERCA) to define by regulations or directives the tax base, the tax rates and the taxpayers? A recent amendment to the income tax law of Ethiopia - which introduced windfall profits tax into Ethiopia - came close to doing just that. After broadly defining 'windfall profits', the income tax amendment law delegated to the Ministry of Finance broad powers to define 'windfall profits' and to determine the tax rates through directives.[42] This law clearly devolves

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4. The object of taxation, the tax rate, the tax abatements and exemptions and the granting of pensions may not be subject to legislative delegation; quoted in footnote 2, Theodore Forstakis, *supra note* 37, at 328-329.

Non-retroactivity is treated by some writers as a separate limitation on taxation powers; see Victor Thuronyi, *supra note* 33, at 76- 81

[40]Constitution, supra note 6, Article 55(11)

[41]Article 10(1) of the Federal Financial Administration law states that 'no public money shall be collected except when authorized by law'; see the Federal Government of Ethiopia Financial Administration Proclamation No. 648/2009, *Federal Negarit Gazeta*, 15th year, No. 56

[42]See Income Tax (Amendment) Proclamation No. 693/2010, *Federal Negarit Gazeta*, 17th year, No. 3; the relevant provision of the amendment Proclamation empowers the Minister (of Finance) to prescribe (by directives) the amount of income to be considered as windfall profit, the businesses that are subject to tax on windfall profits, the date on which the tax will become effective, and the manner in which the tax is to be assessed and the factors to be taken into account for assessment; see Article 2 (2) and 2(3).

broad discretionary powers of taxation upon an executive branch of government.

However this type of delegation is viewed in the future (if at all such an issue is taken to the House of the Federation - the body with the power to handle issues of constitutional interpretation in Ethiopia), the constitutional constraints upon the delegatory powers of the Ethiopian parliament appear to be weak at best. We may infer this from the practice of tax power delegation - which, although not conclusive, does suggest that delegation of taxing powers is not frowned upon as in some other systems.

The Ethiopian parliament makes extensive use of delegation - if the tax laws are anything to go by. One of the powers that the Parliament routinely delegates to the executive branches is the power to exempt taxpayers - sometimes with a proviso and at other times without any strings attached. Tax exemption powers are liberally delegated to the executive branches. We can cite many examples of liberal delegation of exemption powers in the Income Tax Law of Ethiopia, which has a provision that, for example, empowers the Council Ministers to exempt income for 'economic, administrative or social reasons'.[43] We can also cite examples from the Ethiopian Value Added Tax Law which authorizes the Ministry of Finance to exempt supplies from VAT without having to seek the approval of the Parliament.[44]

It is not just exemption powers that are liberally delegated to the executive branches. The Ethiopian Parliament makes extensive use of delegations that tend to create new obligations or increase existing obligations of taxpayers. These types of delegations are not couched in as clear a language as the powers of exemption, but the consequence is all the same - these delegations confer broad powers of taxation upon the executive to define the obligations of taxpayers (in effect create new obligations). An example of this form of delegation is found in the VAT Proclamation of 2002. The Proclamation empowers the Ministry of Finance to increase or reduce VAT registration threshold[45], which may not, at first sight, appear to increase the tax obligations of taxpayers, but whenever the Ministry moves to redefine the administrative

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[43]Income Tax Proclamation No. 286/2002, *Federal Negarit Gazeta*, 8th year, No. 34, Article 13(e); the Council of Ministers has used this power to exempt some types of employment income from tax; see Council of Ministers Income Tax Regulations No. 78/2002, *Federal Negarit Gazeta*, 8th year, No. 37, Article 3

[44]VAT Proclamation, *supra note* 24, see Article 8(4); the Ministry has used this power to exempt certain transactions from VAT; see, for example, the exemptions for supplies of medical supplies, bread and milk and fertilizers; in Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1995 E.C., in Amharic, unpublished

[45]See VAT Proclamation, *supra note* 24, Article 16(2)

reach of the VAT (by reducing the threshold), the consequence is bringing within the VAT network more and more registrants - in effect increasing their tax obligations or at least their tax burdens in the process.[46]

The most recent example of a liberal delegation (perhaps too liberal for comfort) is to be found in a recent amendment to the Income Tax Proclamation of 2002.[47] The amendment has introduced a 'new' source of taxable income into the income tax regime of Ethiopia - windfall profits. After broadly defining 'windfall profits' as 'any profit obtained by any person as a result of a change occurred (*sic*) in local or international economic or political situations without its efforts,'[48] the amendment Proclamation confers extensive powers upon the Ministry of Finance to determine from time to time the sources of income which are to be subject to the windfall profits tax and the tax rates.[49] The Ministry has issued a directive shortly after the issuance of the Proclamation targeting 'windfall profits' derived by banks from devaluation of Ethiopian currency - Birr.[50] An interesting feature of the directive is that it purports to apply the tax upon 'windfall profits' derived by banks before the Proclamation and the Directive were issued (both the Proclamation and the Directive were issued in November, 2010, but the taxes were to be applicable upon profits allegedly obtained by banks from foreign exchange holding back in September, 2010, when the Ethiopian Government devalued Birr by almost 20%).[51] The directive is therefore not only an evidence of broad exercise of executive powers but also of retroactivity.

To sum up, the liberal use of delegation of taxing powers to the executive does seem to indicate that the principle of tax legality is not recognized in Ethiopia.

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[46]Another example of a delegation which empowers the executive branch to increase tax obligations is found in Articles 64 and 117 of the VAT Proclamation and the Income Tax Proclamation of 2002 respectively. These provisions delegate to the Council of Ministers the power to issue regulations for the 'proper implementation' of the respective proclamations. The Council of Ministers has used these provisions to issue a regulation for the obligatory use of cash register machines; the Council has also used this power to delegate its delegated power to the Ministry of Revenues and the latter has issued directives defining the obligations of various parties in the use of the sales register machines; see Council of Ministers Regulation to Provide for the Obligatory Use of Sales Register Machines No. 139/2007, 13th year, No. 4 and Ministry of Revenues, Directive No. 46/2007 - Directive to Provide for the use of Sales Register Machines, unpublished

[47]See Income Tax Amendment Proclamation, *supra note* 42

[48]Id, see Article 2(1)

[49]Id, see Article 2(2)

[50]See Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development Directive No. 29/2003, A Directive to Impose Tax on Windfall Profits of Banks, in Amharic, unpublished, 2003 E.C.

[51] Id, see Article 5

However, simply because tax delegations are liberally employed does not mean that the practice is right. Unfortunately, there are no formal channels for challenging delegations of taxing powers and even if there are, there has never been this tradition of challenging discretionary administrative actions in courts or other tribunals,[52] and as a result, the practice of delegation has never been subjected to scrutiny by courts or other tribunals.

2.2 The Principles of Fidelity to Sources of Taxes and Procedural Fairness

Unlike the principle of tax legality, the principles of fidelity to sources of taxes and procedural fairness are recognized in the Ethiopian Constitution - in Article 100(1). Article 100 (1) is perhaps the most inscrutable of all the limitations we find in the Ethiopian Constitution. It is so inscrutable that even finding a proper title for it has been a challenge. It states that both the Federal Government and Regional States 'shall ensure that any tax is related to the source of revenue taxed and that it is determined following proper considerations'. We notice from the language of Article 100 (1) that it is a composite of two related limitations. One of the limitations is on the relationship between the tax and the source of revenue taxed and the other is a variant of due process required in the levying of taxes.

The first requirement in Article 100(1) is that the taxes the Federal Government or the Regional States impose be related to the 'source of revenue' taxed. The phrase 'source of revenue' may be construed as the sources of revenue assigned to the two layers of the Ethiopian federation. We have already seen how the Ethiopian Constitution assigns taxes between the Federal Government and the Regional States (**see above**). Some 'sources of revenue' are designated as 'federal exclusive' (Article 96), some as 'state exclusive' (Article 97), some as 'concurrent' (Article 98), and there are some that are yet to be designated by the Joint Houses (Article 99). We may say Article 96 taxes are sources of revenue for the Federal Government, Article 97 taxes are sources of revenue for the Regional States, and Article 98 taxes are sources of revenue for both layers. Article 100 (1) appears to be saying that the two layers should ensure that the taxes they impose in practice be faithful to the sources designated as theirs in Articles 96, 97 and 98 of the Constitution.

This begs some inconvenient questions. Can either of the two layers of the Ethiopian federation levy and collect taxes, which are related to, but not

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[52]Taxpayers may, of course, challenge the constitutionality of delegations whenever the Tax Administration or the executive in general are suspected of violating some provisions of the Constitution; so far, no such challenges have been known to have been mounted by taxpayers; Constitution, *supra note* 6, see Article 62 (1) and 83; see also Ibrahim Idris, *Constitutional Adjudication under the 1994 FDRE Constitution*, 1Eth. L. Rev., (August 2002), at 67-75

expressed in, Articles 96-98 of the Constitution? Can the Federal Government, for example, impose payroll taxes on 'Federal Government employees' and justify that as a federal tax because the payroll taxes are imposed on employees of the Federal Government? Can the Regional States impose 'education taxes' or 'health taxes' on farmers and cooperative societies as in the old times when these taxes were tied to agricultural land and income? Are these related enough to Articles 96 and 97 of the Ethiopian Constitution? If they are deemed related, how do we distinguish 'related' taxes from 'undesignated' taxes?

The lines between 'related' taxes and 'undesignated' taxes are not well-defined in the Ethiopian Constitution. Nonetheless, both the Federal Government and Regional States have in practice continued to levy and collect taxes which are not expressly stated in the Constitution as theirs. The Regional States, for example, have authorized the levying and collection of municipal/property taxes although these taxes are not expressly mentioned in the Constitution as regional government taxes.[53] The Federal Government has, on its part, introduced surtax on imports - which is probably the most perfect example of a tax which is related to the sources of revenue assigned to the Federal Government.[54] The Constitution does not make direct reference to surtax on imports, but since, the Federal Government has exclusive jurisdiction over taxes on imports and exports, the Federal Government may have been justified in introducing surtax on imports without having to go to the Joint Houses for designation.[55]

So far these practices have gone uncontested because both levels of governments tend to tolerate one another in the levying and collection of certain taxes. The Federal Government has not challenged the levying and collection of municipal taxes, and nor have the Regional States really challenged the Federal Government over the levying and collection of some taxes which are not designated by the Constitution.

The absence of contest from either side does not show that the tension between 'related' taxes and 'undesignated' taxes is a chimera. The tensions may come to the surface when opposing political forces control Federal Government and

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[53]See, for example, Addis Ababa City Government Revised Charter Proclamation No. 361/2003, *Federal Negarit Gazeta*, 9th year, No. 86, Article 52(6)

[54]See Import Sur-Tax Council of Ministers Regulations No. 133/2007, *Federal Negarit Gazeta*, 13th year, No. 23

[55]Constitution, *supra note* 6, see Article 96(1); the introduction of sur-tax on imports is consistent with the power of the Federal Government to 'levy and collect customs duties, taxes and other charges on imports and exports'; although sur-taxes are not mentioned, they are related to the exclusive jurisdiction of the Federal Government over international trade taxes.

regional government bodies.[56] There is nothing in the Constitution that prevents either the Federal Government or the Regional States from triggering the 'undesignated' button in Article 99 - which is simply referring controversial taxes to the arbitration of the Joint Houses.

In any event, Article 100 (1) should be construed so strictly as to permit both layers of governments to levy only taxes which are so related to the taxes expressly stated in the Constitution that there may not be a need to refer the matter to the verdict of the Joint Houses. Article 99 of the Ethiopian Constitution has already stated that taxes which are undesignated by Articles 96-98 are to be determined by the Joint Houses. There is a reason why the Ethiopian Constitution has departed from its approach in the area of expenditure assignment, which is based on the principle of residuality. The Constitution is very particular about the assignment of taxes in Articles 96-98. The Constitution is also very particular about the fate of 'undesignated' taxes in Article 99. It does appear that neither the Federal Government nor the Regional States are willing to cede powers over 'undesignated' taxes. In cases of doubt, all undesignated taxes, including those that are 'related' to the sources of revenue assigned in Articles 96-98 should be referred for arbitration of the Joint Houses and be designated properly. Otherwise, the potential for abuse of 'related tax' powers is innumerable.[57] The Constitution that has gone to great lengths to specify the taxation powers of both layers of government cannot be read as to condone the liberal use of 'related' tax powers.

As for the second limitation in Article 100(1), we shall have recourse to constitutional limitations elsewhere in search of clues as to what the limitation might mean. One limitation we find in some constitutions is the 'principle of equality', which may be taken to have two meanings: procedural and substantive.[58] In its procedural context, the principle of equality may require the law (in our case, tax law) to 'be applied completely and impartially, regardless of the status of the person involved'.[59] Substantively, the principle

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[56]At the moment, the ruling party (the Ethiopian Peoples' Revolutionary Democratic Front - EPRDF) controls all the reins of power in both the Federal Government and Regional States either through its constituent parties or through its affiliates.

[57]Unless one of the two layers complains about the levying of 'related taxes' or unless taxpayers challenge the levying of 'related taxes', there is a possibility that the Federal Government or the Regional States may establish their right to impose these taxes, as it were, by tradition - despite what Article 99 of the Constitution states.

[58]See Frans Vanistendael, *supra note* 29, at 19, see also Victor Thuronyi, *supra note* 33, at 82-92

[59]Frans Vanistendael, *supra note* 29, at 19; in some countries, equality is understood in its procedural aspect only, requiring merely that governments apply the law as written although the law itself may discriminate among different categories of

has been understood in some countries to require equal treatment of 'persons in equal circumstances'.[60] The obvious prohibition in this regard is the differential taxation of persons on grounds of ethnicity, religion, gender or political affiliation.[61] In France, for example, the principle of equality has been construed to prohibit the denial of procedural rights to some citizens but not to others,[62] while in Germany, the Constitutional Court interpreted it as calling for equal taxation of similarly situated persons and held that *de facto* unequal taxation of interest income was unconstitutional.[63]
Another principle of tax limitation, which might throw some light on the meaning of Article 100(1) of the Ethiopian Constitution, is the principle of fair play or public trust in tax administration.[64] The principle addresses the rights of tax payers during tax administration. The principle has been held to require tax administration to notify a taxpayer of any action it may take relating to the taxpayer and to afford a taxpayer all the rights of process.[65] The principle has also been held in some countries to mean that taxpayers 'can rely on the statements of tax administration' provided that taxpayers have given the tax administration 'a full and fair representation of the facts'.[66]

Still another limitation might be of some relevance - the principle of proportionality, which has been used by western European courts to require proportional relationship between the goals to be attained and the means used by the legislator.[67] This principle is said to have prohibited excessive taxes, which may, incidentally be, proscribed by constitutional guarantees of private property and the freedom of commerce and industry.[68]

In the end, we cast about so many constitutional limitations in other tax systems in the hopes of approximating the meaning of Article 100(1) of the Ethiopian Constitution. We can only speculate as to the meaning of the two limitations in Article 100(1) until a dispute arises and somehow, those charged with the interpretation of the Constitution (the HoF in Ethiopia) explain for us what it means. The best clue to the meaning of these limitations is to be found in actual cases, of which there are none at the moment.

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taxpayers; see David Elkins, *Horizontal Equity as Principle of Tax Theory*, 24Yale Law & Policy Review1(Winter, 2006), at 63

[60]See Frans Vanistendael, *supra note* 29, at 19

[61]Ibid

[62]See Id, at 20

[63]Ibid

[64]See id, at 21-22

[65]Id, at 21

[66]Ibid

[67]See id at 22-23

[68]Id, at 23

2.3. Intergovernmental Immunity

It is quite common for federal structures and constitutions to impose the limitation of 'intergovernmental immunity'. We shall take the development of intergovernmental immunity in the United States to highlight the issues surrounding the doctrine of intergovernmental immunity. In the US, the limitation of intergovernmental immunity grew out of a series of cases in which the US Supreme Court defined and redefined the limits of intergovernmental immunity.[69] At first the doctrine of intergovernmental immunity was used by the US Supreme Court to prohibit the Federal Government from imposing taxes on income derived from state bonds, extending the immunity even to those who made contracts with the states.[70] The limitation worked both ways - in other words, it served as a limitation on states to impose taxes on those who made contracts with the US Federal Government. This limitation was gradually relaxed in later cases. Under the modern doctrine of intergovernmental immunity, the states can impose taxes on private persons who do business with the US Federal Government and the Federal Government can do the same, even though the financial burden of the tax falls indirectly upon the states or the Federal Government. As long as the tax does not discriminate against those who do business with either the Federal Government or the states, the tax will stand constitutional scrutiny.[71] What does not stand constitutional scrutiny is a tax that imposes a direct burden upon either the Federal Government or the states.[72]

The Ethiopian Constitution is fairly explicit about intergovernmental immunity. In Article 100(3), it states that neither the Federal Government nor the Regional States can impose taxes on each other's property, unless the property is a profit-making enterprise. However, it can be argued that the modality of revenue assignment in the Ethiopian Constitution already precludes the possibility of most cases of intergovernmental taxation in Ethiopia. As we saw above, the Constitution divides tax powers between the Federal Government and the Regional States on the basis of set formulas that assign taxes based on their association with either of the levels of the Ethiopian Federation. Although the Ethiopian Constitution excepts profit-making federal or state government enterprises from 'intergovernmental immunity', it is unlikely that these enterprises will become the subject of taxation, as the Federal Government has been assigned the power to levy and collect most

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[69] Federal Tax Course, CCH Editorial Publication, Chicago, 2000, at.118; see also Kenneth W. Dam, *the American Fiscal Constitution*, 44 Univ. Chi. L. Rev.2 (Winter 1977), at 290

[70] See Pollock vs. Farmers Loan and Trust Co., 157 U.S. 429 (1895), quoted in Federal Tax Course, *supra note* 69, at 119

[71] Federal Tax Course, *supra note* 69, at 118-119

[72] Id, at 119

taxes on enterprises it owns as Regional States are assigned the power to levy and collect taxes on the profit-making enterprises they own. Currently, the value added tax (which is a federal tax) is levied upon private contractors that have supply or service contracts with Regional States, which means that Regional States pay the VAT to the Federal Government. It is not clear if Regional States may challenge this and similar other taxes on grounds of 'intergovernmental immunity'. So far, none of the Regional States have raised challenges.

2.4. Principle of Non-Discrimination

Another limitation closely associated with federal structures is the prohibition of discrimination in taxation. Unlike 'intergovernmental immunity', however, the principle of non-discrimination (or against discrimination) is mostly invoked against the constituent states of a federation. When states in a federal system are entrusted with the power of taxation, a distinct threat of discrimination arises particularly against out of state residents, businesses or goods. In the US, the principle of 'non-discrimination' is developed through judicial review to curtail the power of states from discriminating against out of state residents, businesses or goods.[73] Taxpayers challenged and succeeded in getting state taxes struck down on the ground that these taxes are discriminatory. In ***Toomer vs. Witsell,***[74] the US Supreme Court struck down one licensing fee on non-resident shrimp boat owners imposed at a rate a hundred times greater than residents. In ***Lunding vs. New York Tax App. Trib.,***[75] the US Supreme Court struck down a New York law that prevented non-residents from deducting alimony payments. In ***Davis vs. Michigan Department of Treasury,***[76] the state of Michigan granted blanket exemption from state taxation of all retirement benefits paid by Michigan or its political subdivisions while keeping in place taxation of retirement benefits paid by all other employers, including the Federal Government. The US Supreme Court held that the exemption by Michigan State was discriminatory and failed constitutional scrutiny.[77]

The US Supreme Court has also used the so-called 'dormant commerce clause' doctrine to limit the powers of states in this regard.[78] The doctrine has been held to prohibit state discrimination of interstate commerce as well as undue

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[73]See Kenneth W. Dam, *supra note* 69, at 282-287

[74]334 U.S. 385 (1948), cited in Tracy A. Kaye and Stephen W. Mazza, *United States - National Report, supra note 27,* at 511

[75]522 U.S. 287 (1998), cited in ibid

[76]89-2, USTC ¶ 9456, cited in Federal Tax Course, *supra note* 69, at 119

[77]See Federal Tax Course, *supra note 69,* at 119

[78]Tracy Kaye and Stephen Mazza, *United States - National Report, supra note* 27, at 511-512; see also Kenneth W. Dam, *supra note* 69, at 282-283

burdens on commerce.[79] In ***Boston Stock Exchange v. State Tax Comm,***[80] for example, the U.S. Supreme Court held that a state that provides a direct commercial advantage to local business is imposing a tax which discriminates against interstate commerce.

The principle of non-discrimination, which in the U.S. is developed through judicial review, is explicitly recognized in the Australian Constitution.[81] The Australian court has used the Constitution to strike down exemptions that were available to in-state residents on discriminatory basis.[82] The Ethiopian Constitution does not contain a non-discrimination clause specifically for taxes. There is a general equality clause in Article 25 of the Constitution, and there is a provision that gives to the Federal Government the power to regulate inter-state commerce.[83] It is not clear if these provisions in the Ethiopian Constitution may be used to constrain the power of the states from discriminating against out of state residents, businesses or goods. Once again there are as yet no cases in which any of the regional state taxes have been failed on grounds of discriminatory treatments of out-of-state citizens or businesses.

2.5. Adverse Impact and Benefit Principles

At the outset, it must be stated that these two limitations are not related, except for the fact that the Ethiopian Constitution (for some curious reasons) treats the two in one sub-article. Article 100(2) of the Ethiopian Constitution states two limitations on tax powers but given the ambiguity of the limitations involved, it is difficult to say that these are indeed limitations. The first limitation is the 'adverse impact' limitation. The Constitution enjoins the Federal Government and the Regional States from exercising their tax powers in ways that would adversely impact the tax powers of the other. The opportunities for adverse impact are too numerous to count here. Let's take some examples if only to raise questions.

The Federal Government has issued investment incentive laws that have an impact on the capacity of the Regional States in raising revenues from sources assigned to them by the Constitution.[84] The ostensible rationale of these

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[79]Tracy Kaye and Stephen Mazza, *United States – National Report, supra note* 27, at 512

[80]428, U.S. 318, 329 (1977) quoted in id, at 513

[81]Section 117 of the Australian Constitution, quoted in Miranda Stewart and Kristen Walker, *Australian National Report,* 15Mich. J. Int'l L.2 (2007), at 238

[82]Commission of Taxes v. Parks, (1933) St R Qd 306, quoted in Miranda Stewart and Kristen Walker, *supra note* 81, at 238

[83]Constitution, *supra note* 6, see Article 51(12)

[84]See Investment Proclamation No. 280/ 2002, *Federal Negarit Gazeta,* 8th year, No. 27; Investment Amendment Proclamation No. 373/2003, *Federal Negarit Gazeta,* 10th year, No. 8; Council of Ministers Regulations on Investment Incentives and Investment

investment laws is the attraction of investment -foreign and domestic.[85] The principal instrument for attraction of investments in this country has been the use of tax incentives in various forms. For example, investments in agro-processing and manufacturing industries at the moment enjoy a five-year income tax holiday, which may be extended under certain circumstances.[86] Should the Regional States be constrained by the federal investment laws and restrain themselves from taxation of investors who enjoy a tax holiday under the federal investment laws? The answer to this question depends on which side of the federal aisle we wish to take sides. If we look at the issue from the vantage point of the Federal Government, we may argue that the Regional States are constrained by the federal investment policy from levying taxes on investors who are exempted from tax by the Federal Government. But we may also look at the issue from the vantage point of the Regional States. The investment laws (no matter how well-intentioned they may be) have an adverse impact on the capacity of the Regional States to raise revenues from sources assigned to them by the Constitution. Shouldn't the Federal Government exercise equal restraint when it comes to the legitimate revenue interests of the Regional States? There are many contentious issues like these that require resolution through practical cases -of which we can adduce none at this point.

The second prong of Article 100(2) appears to make 'benefits received' by members of the public as a consideration for levying of taxes by both the Federal Government and the Regional States. The 'benefit principle' is a well-known and established principle in the literature of taxation, although the constitutional recognition of it is of doubtful value. It is a principle that is often invoked for sentimental and rhetorical reasons in tax literature than for explaining the practice of taxation.[87] It may have limited application in the area of fees and a few other taxes but that is just about it. It is extremely difficult for taxpayers to challenge a tax on the ground that no benefits are received by them, and it is equally difficult for the government to establish correspondence between what it collects from taxes and the public services it provides to taxpayers. The apparent incorporation of the 'benefits principle' in the Ethiopian Constitution is one of the reasons why we should cast doubts about

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Areas Reserved for Domestic Investors No. 84/2003, *Federal Negarit Gazeta*, 9th year, No. 34

[85]See Investment Proclamation No. 280/2002, *supra note* 84, the preamble

[86]Council of Ministers Regulations on Investment Incentives and Investment Areas Reserved for Domestic Investors No. 84/2003, *Federal Negarit Gazeta*, 9th year, No. 34, see Article 4

[87]See, Laurie Reynolds, *Taxes, Fees and Assessments, Dues and the "Get What You Pay for" Model of Local Government, Florida Law Review*, April 2004; Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership and Ability-to-Pay Principles*, 58Tax L. Rev. , (summer 2005); see also John F. Due and Ann F. Friedlaender, *supra note* 22

the binding force of constitutional limitations upon the powers of taxation in Ethiopia.

3. The Federal Tax Administration

For a long period of time, tax administration in Ethiopia was an appendage of ministries that did not have administrative specialization over the assessment and collection of taxes - the Ministry of Trade and Industry before the Italian occupation (1936) and the Ministry of Finance after the Italian occupation (1941).[88] Administrative units or departments within these Ministries were charged with tax administration. The preferred mode of organization was the organization of administrative units around the types of taxes rather than the functions of tax administration.[89]

One mode of organization that prevailed for a long time was an organization of tax administration units or departments for assessment and collection of taxes on international trade (customs duties, sales and excise taxes on imports and exports) and another one for domestic (internal) taxes or revenues (income taxes, sales and excise taxes, stamp duties on domestic transactions). The administrative units for assessment and collection of international trade taxes were organized under the 'customs departments' or 'customs authorities' while those for the administration of domestic taxes were organized under 'inland revenue departments' or 'inland revenue authorities'. There were also times when specific taxes had their own tax administration units or departments within the Ministries (e.g., income tax departments, excise tax departments). The separation of tax administration for domestic and

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[88]Tax administration was the domain of the Ministry of Commerce and Customs (established in 1907) before the Italian occupation; see Bahru Zewde, *"Economic Origins of the Absolutist State in Ethiopia (1916-1935)"*, in Bahru Zewde, *Society, State and History, Selected Essays*, Addis Ababa University Press, 2008, p. 113. See also Mahteme Sillassie Wolde Meskel, *Zikra Nagar*, 2nd Issue (in Amharic), 1962 E.C., pp. 171-174; Abebe Hunachew, *About the Ethiopian Customs Authority*, in *Gebi Lelimat*, vol. 3, No. 3, May 2007, in Amharic, p. 37; the Ministers (Definition of Powers) Amendment No. 2) Order, No. 46 of 1966 (repealed), Article 29: one of the powers of the Ministry of Finance is the power to 'ensure that tax laws are properly enforced and that all revenues due from taxes, customs and excise duties, fees and monopoly dues and other sources are properly assessed, collected and accounted for; Ministers (Definition of Powers), Order, 1943 (repealed), Article 29(d); Proclamation No. 145/1955 (repealed); Income Tax Proclamation No. 173/1961 (repealed), Article 20

[89]See Melkamu Belachew, *"Powers and Functions of the Federal Inland Revenue Authority (FIRA) and the Position of the Tax Appeal Commission,"* Senior Thesis, Addis Ababa University, Faculty of Law Library Archives, unpublished, 2003; tax administration may be organized by the type of tax, function (e.g., processing, auditing, etc) or by the type of taxpayers (e.g., large taxpayers offices) or by the type of businesses or ownership; see Catherine Baer, Oliver Benon, Juan Toro, *Improving Large Taxpayers' Compliance*, International Monetary Fund, Washington D.C., 2002, at 6

international transactions had the effect of parallel tax administrations for those taxes which were levied on both domestic and international transactions. For example, customs departments or administrations assessed and collected sales taxes on imports and Inland Revenue Departments assessed and collected sales taxes on domestic transactions.[90]

With the establishment of the Federal Government Revenue Board in 1995, Ethiopian Tax Administration was for the first time organized as a separate and autonomous government body.[91] The Board was established to oversee and coordinate the operations of three federal revenue agencies at the time: the Inland Revenue Authority, the Ethiopian Customs Authority and the National Lottery Administration.[92] A reorganization of Ethiopian tax administration in 2001 elevated tax administration to a ministerial level, creating the Ministry of Revenues (MoR). Like its predecessor, the Federal Government Revenue Board, the Ministry of Revenues was established to coordinate and supervise the three revenue agencies of the Federal Government, namely, the Federal Inland Revenue Authority (FIRA), the Ethiopian Customs Authority (ECuA) and the National Lottery Administration.[93]

The most recent reorganization and restructuring of tax administration - which occurred in 2008 - merged the three revenue agencies of the Federal Government into one authority - the Ethiopian Revenues and Customs Authority (ERCA).[94] This reorganization of Federal Tax Administration has relegated the task of tax administration from ministerial level to an authority, but, in substance, the reorganization has in fact strengthened the powers of the

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[90]See Income Tax Proclamation No. 173/1961 (now repealed), Article 20; Alcohol Excise Tax Proclamation No. 217/1965 (repealed), Articles 31-35; Proclamation to Consolidate and Amend the Law Relating to the Customs No. 145/1955 (repealed), Article 5

[91]The Federal Government Revenues Board was established as an autonomous organ of the Federal Government with accountability to the Council of Ministers at the time; see Federal Government Revenues Board Establishment Proclamation No. 5/1995, *Federal Negarit Gazeta*, 1st year, No. 5, Articles 2(1), 2(2); some Regional States have continued coupling tax administration with the functions of regional finance bureaus, and some regions have established revenue bureaus separate from finance bureaus; see, for example, a Proclamation of Oromia National Regional Government Revenue Bureau No. 98/2005, *Megeleta Oromia*, 13th year, No. 12

[92]Federal Government Revenues Board Proclamation, *supra note* 91, Article 4 (2)

[93]See Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 256/2001, *Federal Negarit Gazeta*, 8th year, No. 2 (repealed and replaced by Proclamation No. 471/2005)

[94]By the way, the National Lottery retained some autonomy even after the merger under the supervision of the ERCA; See Council of Ministers National Lottery Administration Re-establishment Regulation No. 160/2009, 15th year No. 21

Tax Authority.[95] Recent tax administration reforms have introduced a number of changes to Ethiopian tax administration, only some of which are mentioned here under for their instructive value.

For the first time, the tax authority (ERCA) has assumed the powers to investigate and prosecute tax and customs offenses directly, without having to rely upon the goodwill of the regular police and prosecution offices as was previously the case. Under the reforms of 2008, most of the investigation and the prosecution work are to be handled within the tax authority.[96] The elevation of the tax authority to that of 'prosecutor and investigator' of tax and customs crimes relegates the regular police and prosecution offices to mere supporting acts like the apprehension of suspects, production of witnesses, seizure and control of contraband and the accompanying of customs transit goods and vehicles.[97] The technical matters of tax and customs crime investigation and prosecution are now the exclusive preserve of tax administration.

The other significant reform of recent times is the decision to create special personnel administration rules and procedures for employees of ERCA. Shortly after the major reorganization of Ethiopian tax administration, special personnel administration regulations were issued in 2008 governing employees of ERCA. The 'Special Personnel Administration Regulations' of 2008 is a *sui generis* legislation governing most issues pertaining to the employment relationships of the personnel of ERCA. The Regulations have special rules for the personnel of ERCA governing classification, salary, allowances, recruitment, promotion, internal transfer, re-deployment, training, performance evaluation, incentives and benefits.[98] The Regulations have special rules even for working hours (the maximum weekly working hours is 43, not 48), annual leave, and special leaves.[99]

Some of the special rules and procedures of the 'Special Personnel' Regulations are bound to become controversial for they depart from and at times conflict

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[95]ERCA is organized as an authority with direct accountability to the Prime Minister. It is headed by a Director General and Deputy Director Generals appointed by the Prime Minister. Under them, the Authority has prosecutors and administrative employees; Ethiopian Revenues and Customs Authority (ERCA) Establishment Proclamation No. 587/2008, *Federal Negarit Gazeta*, 14th year, No. 44, see Article 9

[96]Id, see Article 16

[97]Id; see also Customs Proclamation No. 622/2009, *Federal Negarit Gazeta*, 15th year, No. 27, Articles 18(2) and 86

[98]Administration of Employees of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation No. 155/2008, *Federal Negarit Gazeta*, 14th year, No. 49, see Articles 4, 5, 6, 7, 8, 9, 10, 15-17 and 18

[99]Id, see Articles 20-23

with the general rules of civil service regulations in Federal Civil Service laws. In the section on 'Duties, Ethics and Disciplinary Measures', for example, the Regulations introduce several novel requirements and procedures, which are not contemplated in the Federal Civil Service Laws.[100] The Regulations are one of the first to require prospective and existing employees (of ERCA) to submit property held in their names or in the name of their spouses or minor children for registration, no doubt to combat corruption.[101] The Regulations contain a long list of offenses which entail rigorous penalties for infractions of the various duties detailed in the Regulations, once again intended to combat corruption.[102]The new rules might have been well-intentioned (driven probably by the desire to stamp out corruption), but they are bound to raise concerns largely because of the possible conflicts between the special Regulations and the existing Federal Civil Service Laws.

The new Regulations confer sweeping powers upon the Director (of ERCA) to dismiss any employee upon mere suspicion of corruption.[103] The decision of the Director is final, taking away the rights employees of the Authority had had under Ethiopia's Federal Civil Service Laws.[104] A former employee of the Authority who was dismissed under the new Regulations maintained that the Regulations denied him the right to contest the decision in courts and challenged the Regulations before the Federal Service Agency Administrative Tribunal.[105] The Administrative Tribunal, however, held that the issue raised an issue of constitutional interpretation and referred the matter to the Council of Constitutional Inquiry.[106] The Council did not see anything unusual about denying judicial review and ruled that the matter did not raise constitutional interpretation. The decision of the Council strengthens the now powerful arm of ERCA in tax administration. The establishment laws, the personnel regulations as well as the decisions reached over their legality signal the ever increasing powers of ERCA in all aspects of tax administration. It is quite evident that ERCA has assumed hitherto unheard of powers of prosecution

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[100]Id, see part seven

[101]Id, see Article 26

[102]These include accepting or seeking any kind of benefit from customers, divulging confidential information, and obstructing the proper course of service delivery; id, see Article 31

[103]Id, Article 37(2)

[104]Federal Civil Servants Proclamation No. 515/2007, *Federal Negarit Gazeta*, 13th year, No. 15, see Article 74

[105]*Ato Ibrahim Mohammed vs. Ethiopian Revenues and Customs Authority*, Federal Administrative Tribunal, Appeal File No. 00852/2001, *Yekatit* 26, 2002 E.C., in Amharic, unpublished

[106]*In a Matter of Federal Civil Service Agency Administrative Tribunal*, Council of Constitutional Inquiry, File No. 101/12/2001, *Yekatit* 1, 2002 E.C, in Amharic, unpublished

and investigation of tax and customs offenses as well as regulation of its own employees, perhaps untroubled by the country's Federal Civil Service Laws in the latter case.

Recent tax administration reforms have clearly concentrated the powers over tax administration in ERCA, but ERCA is by no means the sole player in tax administration. Other government bodies are involved in tax administration, albeit in a limited capacity. The Ministry of Finance may have ceased as a tax administration body since 1995, but it is still involved in some capacity in tax administration.[107] The Ministry of Finance is a major player in the field of issuing tax exemptions and directives on the implementation of the principal tax laws. The Ministry receives applications for exemptions and grants tax exemptions on case by case basis. The Ministry is also involved in the formulation of the fiscal policy of the Federal Government, whose instruments happen to be taxes and duties, among others.[108] Other governmental bodies, like the Federal Investment Agency, the Ministry of Mines and Energy, Ministry of Tourism and Culture and the National Bank of Ethiopia, are also involved in tax administration in more limited capacity.[109] The Ethiopian Investment Board (now Agency) is active in the area of tax incentives, where it has issued directives to define and determine the extent of tax incentives provided by the Investment laws of the country.[110]

The diffusion of tax administration in the hands of multiple government bodies may have been unavoidable but it has side effects. Sometimes, conflicts of jurisdiction may arise between the different government bodies. Jurisdictional conflicts may, for example, arise between the regular prosecution offices or the Federal Anti-Corruption Commission on the one hand, and the prosecutors of ERCA on the other, over the characterization of certain offenses, which, depending on who is looking at them, may be characterized either as corruption offenses or customs/tax offenses. The chances for conflicts of

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[107]Income Tax Proclamation, *supra note* 49, see Article 13 (d) (iii) and VAT Proclamation, *supra note* 24, Article 8(4)

[108]See Definition of Powers and Duties of the Executive Organs of the FDRE Proclamation No. 471/2005, *Federal Negarit Gazeta*, 12th year, No. 1, Article 19(10))

[109]Council of Ministers Regulation on Investment Incentives and Investment Areas Reserved for Domestic Investors No. 84/2003, *Federal Negarit Gazeta*, 9th year, No. 34, see Articles 4(4) (7), 9, 10(2); Ministry of Mines and Energy, Directive to Determine the type and quantity of vehicles to be imported free of duty for mining projects, *Sene* 2001 E.C., in Amharic, unpublished; Ministry of Culture and Tourism, Directive to Determine conditions for Duty Free Importation of vehicles by tour operators and tour guides, *Ginbot* 2000, in Amharic, unpublished.

[110]See Ethiopian Investment Commission, Directive Issued by the Ethiopian Investment Commission to determine the agricultural products that enjoy five year income tax holidays, in Amharic, unpublished.

jurisdiction or lack of coordination have been considerably reduced as a result of recent reforms to merge the authorities that are directly involved in tax administration, but there are still many government bodies involved (at least indirectly) in tax administration, raising concerns of mis-coordination and conflicts of jurisdiction.

II

1. The Organization of Tax Laws in Ethiopia

A logical organization of laws, particularly of tax laws, is critical for the proper comprehension of the tax system.[111] Different legal systems organize their tax laws differently, ranging from those countries that organize their tax laws in codes to those that issue tax laws in scattered pieces of legislation. The organization of tax laws in different legal systems is one minor paradox in and of itself. The status of a country as a civil law country has not had any impact on codification of tax laws. A number of countries, such as Cameroon, Colombia, Cote d'Ivoire, France, Gabon, Kazakhstan and the United States, have organized their tax laws in a code.[112] While France has a tax code, many other civil law countries remain without tax codes.[113] The United States has a tax code although it is a common law country.[114]

Organization of tax laws in a code has many advantages. Judged purely in terms of accessibility and intelligibility, the organization of rules in a formal code with logically coherent arrangement of rules is without doubt the most preferred form of rule organization. By organizing all general areas of definitions and administrative provisions in a single section, codes help eliminate duplication of definitions and administrative provisions in individual pieces of legislation.[115] Codes overcome the possible treatment of general definitions and administrative provisions in separate pieces of tax legislations and help avoid differing and at times conflicting interpretations.[116] Codes are excellent media for rationalizing the organization of the whole tax system as they force tax reformers to think about how the parts fit into the whole. It may be feared that codes make frequent amendments difficult (and are therefore unfit for fast changing areas of the law, such as tax laws) but

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[111]Victor Thuronyi, *"Drafting Tax Legislation"*, in Victor Thuronyi (ed.), Tax Law Design and Drafting, vol. 1, International Monetary Fund, 1996, at 79

[112]Id, at 80, footnote 29

[113]Id, at 81

[114]As the US experience attests, having a tax code is no guarantee to simplicity of taxation; see Michael Graetz, *Essay: One Hundred Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 Yale L. J.2, (Nov. 2002), at 261-310; see also Sanford M. Guerin and Philip F. Postlewaite, *Problems and Materials in Federal Income Taxation*, 6th edition, Aspen Law and Business, 2002, at 885ff; Victor Thuronyi, *supra note* 33, at 17-19

[115]Victor Thuronyi, *supra note* 111, at 80

[116]Ibid

subsequent amendments can be automatically consolidated into the code, by adding section or articles or repealing and replacing obsolete sections and provisions.[117] This process of amendment - called 'textual amendment' - can make the whole body of tax laws more accessible (at least physically) with regular updates of amendments and changes.[118] In sum, the organization of tax laws in codes can contribute immeasurably to taxpayer compliance and reduce the uncertainty of what the law is, as taxpayers can be confident that they have all the tax laws before them.[119]

Organizing tax laws in a tax code is not always desirable, even if possible. Only rules of general application with the power to endure the test of time can be organized in codes, while ephemeral rules should be contained in specific tax laws that are more amenable to frequent revisions and amendments.[120] Some countries that do not have tax codes have opted for the next best thing, i.e., consolidation, which by careful organization of the separate tax laws with cross references, achieves virtually the same result as the tax codes.[121] Another option, followed in some countries, is to consolidate and issue tax rules of general application (e.g., administrative provisions) in a 'revenue' or 'fiscal' law and flank these by an array of individual tax legislations.[122]

In the organization of its formal laws, Ethiopia is squarely in the camp of civil law countries. Since 1950s and 1960s, Ethiopia has organized most of its civil, commercial and criminal laws and procedures in codes. However, many laws, most notably in the tax area, have remained outside the code system of organization. The country has not attempted to organize the tax laws since modern tax laws were introduced in the 1940s. The closest Ethiopia has come to organizing tax laws into a systematic body of laws is through the

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[117]Id, at 81

[118]Id, at 82; the organization of tax laws in a code would have received endorsement from Adam Smith who, in his famous treatise "the Wealth of Nations", developed four maxims of a good tax system, one of which happens to be 'certainty' of tax obligations. Adam Smith thought of his maxim of certainty so important as to place it above all of the other maxims: *"The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty."* Adam Smith, *An Enquiry Into the Nature and Causes of the Wealth of Nations*, with an Introduction by Max Lerner, the Modern Library, New York, 1937, at 778

[119]Id, at 81

[120]Victor Thuronyi, *supra note 111*, at 81

[121]Ibid

[122]Victor Thuronyi cites Germany, Belgium, Austria, Spain, Russia, Chile and Brazil as examples of countries that have general revenue or fiscal laws; ibid

Consolidated Laws project, which was unfortunately terminated in 1975.[123] Since then, partial attempts were made to organize some tax laws. Several pieces of tax legislations in the area of excise taxation were brought together in 1990[124] and similar attempts were made for income taxes in the 2002 income tax reforms. Sadly, these attempts were soon forgotten and the situation went back since then to the old system of issuing piecemeal legislations whenever a need arises for revision of this or that tax law.[125]

The tax laws of Ethiopia are presently found scattered not just in different tax laws but in other laws of Ethiopia. Many other laws of Ethiopia contain tax rules and provisions. In some forms of legislations, tax matters feature significantly while in others tax matters may appear in one or two articles in a body of legislation dealing with many other matters, taxation being one insignificant side note. Tax rules are found in significant numbers in investment laws, for obvious reasons. Tax incentives are some of the major instruments of attracting investment (domestic or foreign) and it is no surprise

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[123]The Consolidated Laws of Ethiopia arranged legislations other than those in the codes of Ethiopia by subjects, one of which was taxes. All taxes in force at the time were consolidated by subject and any amendments to specific provisions were inserted after each provision (under consolidation note), and what is more, the Consolidated Laws even included some court decisions of the Ethiopian high courts and the Supreme Court (note of decision) so readers of the laws would immediately know any amendments made to specific provision and decisions reached on specific subject of tax law. But the Consolidated Laws of Ethiopia was not an official publication of the Government at the time. It was initiated by the Faculty of Law of Addis Ababa University in collaboration with the Office of the Prime Minister at the time. Although *Consolidated Laws* was not official, its utility in making tax legislations accessible was undeniable. The *Consolidated Laws of Ethiopia* was in part an attempt to systematically organize laws outside the codes of Ethiopia but the project was discontinued after 1975 and has since never been revived; the 1975 Supplement of the Consolidated Laws of Ethiopia appeared with a strange apology for consolidating laws of the feudal regime; see Consolidated Laws of Ethiopia, Supplement 1, The Faculty of Law, Haile Sellassie I University, 1975.

[124]See Sales Tax Council of State Special Decree No. 16/1990, *Negarit Gazeta*, 49th year, No. 11

[125]In 2008 alone, several tax law amendments were issued separately; see Income Tax (Amendment) Proclamation No. 608/2008, *Federal Negarit Gazeta*, 15th year, No. 5; Value Added Tax (Amendment Proclamation No. 609/2008, *Federal Negarit Gazeta*, 15th year, No. 6; Turnover Tax (Amendment) Proclamation No. 611/2008, *Federal Negarit Gazeta*, 15th year, No. 8; Excise Tax (Amendment) Proclamation No. 610/2008, *Federal Negarit Gazeta*, 15th year, No. 7; Stamp Duty (Amendment) Proclamation No. 612/2008, *Federal Negarit Gazeta*, 15th year, No. 9; Council of Ministers Income Tax (Amendment) Regulations No. 164/2009

that the rules about tax incentives occupy a central position in these laws.[126] In many other laws of Ethiopia, however, tax rules may appear in one or two articles, if at all.[127]

To date, the Ethiopian tax legislation field is chaotic, disorganized, uncoordinated and worse, making it difficult for an average taxpayer to make sense of her obligations under the various tax laws in force. Because tax laws are uncoordinated, most tax legislations repeat certain provisions as if this were not already provided for in other tax legislations. One area where so much ink could surely have been saved is in the definition areas, where certain terms appear repetitively as if these terms were not already defined in another tax law. One can, for example, take the definition of 'body' for tax purposes - which is found in many tax proclamations of Ethiopia. There is reason to believe that the definition of 'body' should be uniform for all tax laws, but because of the absence of a tradition of having certain general tax laws, we find ourselves reading the same definition repeated in so many tax laws of Ethiopia.[128] The same can be said for the definition of terms like 'person', 'related person', and 'authority' in different tax laws of Ethiopia.
Similarly, administrative provisions (which are of general application) are repeated in individual legislations without reference to other legislations - something which could have been avoided had Ethiopia had something like 'general tax administration' law or 'general fiscal' law, as in some countries. The result of these repetitions has at times been the provision of incompatible or contradictory administrative procedures in different tax legislations of Ethiopia. We may cite a few examples to illustrate the problems. In the Income Tax and VAT proclamations, taxpayers dissatisfied with assessment of tax must first appeal to the Tax Appeal Commission before going to courts, but in the Stamp Duty Proclamation of 1998, taxpayers could appeal directly to the High Court from the assessment made by the Tax Authority. This procedural

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[126]See, for example, Council of Ministers Regulations on Investment Incentives and Investment Areas Reserved for Domestic Investors No. 84/2003, *Federal Negarit Gazeta*, 9th year, No. 34, Articles 4-11

[127]See, as examples, the Labor Proclamation No. 377/2003, *Federal Negarit Gazeta*, 10th year, No. 12, Article 112; Public Servants Pension Proclamation No. 345/2003; *Federal Negarit Gazeta*, 9th year, No. 65, Article 51; Proclamation to Provide for the Issuance of Government Bonds No. 172/1961, *Negarit Gazeta*, year 20, No. 11, Article 6 of the Proclamation to Provide for the Issuance of Government Bonds No. 262/1969, *Negarit Gazeta*, Year 28, No. 12, Article 7.

[128]Please compare the definition of 'body' in the Income Tax Proclamation No. 286/2002, *supra note* 43, Article 2(2) with almost identical definitions in the Value Added Tax Proclamation No. 285/2002, *supra note* 24, Article 2(5) and in the Excise Tax Proclamation No. 307/2008, *Federal Negarit Gazeta*, 9th year, No. 21, Article 2(3)

discrepancy was later discovered and corrected by an amendment.[129] Such a discrepancy was probably created inadvertently, but these kinds of errors are inevitable when similar matters are to be dealt with in individual legislations. Similarly, there is some discrepancy in the administrative schemes of complaints handling in disputes involving stamp duties and other types of taxes. In many other tax disputes, an administrative tribunal called the 'Review Committee' has been established since 2002, but the tribunal is not available for disputes involving stamp duties. Such a discrepancy can only be explained by the existence of separate legislations pertaining to the same matter, namely dispute settlement.

Ethiopia has an admirable track record in organizing some of its modern laws into codes, which have stood the test of time, but it has not followed this with respect to tax laws. What has prevented Ethiopia from collecting its general tax provisions in a single body of rules? It has in part to do with the approach to reform taken with respect to taxes, which is different from the approach taken in many other aspects of Ethiopian law. The approach to tax reform has been one of gradualism or incrementalism, which piles one amendment over another until the original tax legislation is eventually obliterated as a result of numerous subsequent amendments to the original legislations. This approach to tax reform has for so long prevented Ethiopian tax reformers from looking at tax laws in their totality. Not even the comprehensive tax reforms of 2002 could overcome this problem of obsessing with individual sections of separate tax legislations rather than the impact of the amendment or revisions of a part upon the consistency of the whole.

2. The Sources of Tax Law

2.1. Tax Proclamations and Regulations

Most substantive and procedural rules pertaining to taxation flow from tax proclamations and regulations. Tax proclamations are quite easily the most important sources of substantive tax obligations in Ethiopia. Some tax proclamations are bulkier and more detailed than others. Some have layers of subsidiary legislations under them and others are their lonely self.

The difference between tax proclamations and regulations is more a matter of form than substance. To be sure, tax regulations are derivative legislations – issued only pursuant to the authority given in tax proclamations. But in terms of the subject matters covered, there is really very little difference between tax proclamations and regulations. We may be predisposed to associate tax proclamations with more substantive (not to say weightier) matters than tax regulations but the situation on the ground is really haphazard.

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[129] Stamp Duty (Amendment) Proclamation No. 612/2008, *Federal Negarit Gazeta*, 15th year, No. 9, see Article 2(2)

In theory, tax regulations should be limited to details and technical matters[130] but in practice tax regulations cover as many substantive issues as the tax proclamations. Upon reading some provisions, we wish some provisions in tax regulations were addressed in tax proclamations and some provisions in tax proclamations were relegated to the regulations.[131] The subject matter of tax exemptions is a perfect example of how little difference exists between the subject-matters of tax proclamations and regulations. Tax exemptions are found in both the tax proclamations and regulations. Indeed, we may attribute as many tax exemptions to the regulations as to the proclamations.[132] In the end the one reliable (and surefire) distinction between tax proclamations and tax regulations is that the former pass through the scrutiny of the parliament while the latter are issued by the Council of Ministers.

The whole idea of delegating power to issue regulations to an executive body like the Council of Ministers is in order to attend to details that cannot be dealt with in tax proclamations.[133] But ironically, tax regulations in Ethiopia are issued almost at the same time (or immediately thereafter) as the tax proclamations. The Council can hardly have time to consider and develop the

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[130]See James C.N Paul and Christopher Clapham, *Ethiopian Constitutional Development*, Source Book, Vol. 2, at 532; see also Henry Ordower, *General Report*, Michigan State Journal of International Law, Vol. 15, No. 2, 2007, at 177-178

[131]Consider the following provisions for contrast; Article 72 of the Income Tax Proclamation (2002) requires taxpayers to include certain details in the income tax assessment notification (gross income, taxable income, rates, taxes due, penalty, interest, etc) and Article 3 of the Income Tax Regulations (2002) lists the types of income from employment that are exempted from employment income tax (medical allowance, transportation allowance, traveling allowance, etc). Article 72 deals with a matter that is purely procedural and technical while Article 3 is as substantive as it can get. If we seriously think about it, Article 3 of the Regulations should have been included in the Income Tax Proclamation and Article 72 could have been safely relegated to the Regulations. The same subject matter is sometimes treated in tax proclamations and sometimes in tax regulations. The rate and method of depreciation is determined for income tax purposes in the Income Tax Proclamation, while the same subject matter is determined in a directive for purposes of exemptions from customs duties; the rate of depreciation of vehicles under the Income Tax Proclamation is 20% while under the customs directives, it is 10%; compare Article 23 of Income Tax Proclamation No. 286/2002 with Ministry of Revenues Directive No. 3/1996 E.C., in Amharic, unpublished.

[132]For example, the exemptions from employment income tax for transportation, traveling, hardship, and medical allowances are found in the income tax regulations, not in the Proclamations; see Income Tax Regulations, *supra note* 43, Article 3

[133]Legislative bodies delegate certain legislative powers to the executive bodies for different reasons: pressure of work, to achieve flexibility and for reasons of technicality; see Paul & Clapham, *supra note 130*, at 532; see also Henry Ordower, *General Report*, 15Mich. State J. Int'l L.2, (2007), at 177-178

technical details needed to complete the tax proclamation in the interval between the issuance of tax proclamations and tax regulations. So the wisdom of issuing some rules in the tax regulations as opposed to in the tax proclamations is questionable. And the tax regulations have in the past been as inflexible as the tax proclamations. Indeed the regulations are revised less frequently than the tax proclamations, which should have been the other way around. One must therefore wonder if the tax regulations are issued for the objectives they are intended for, which is to give the executive some flexibility to provide for details as the changes dictate. One would also expect the regulations to be more numerous and voluminous, but in practice, the proclamations actually far outnumber the regulations and they are more voluminous.[134]

2.2. Tax Directives

Tax directives do not get as much attention in academic writing and court cases as they deserve but they are issued in large numbers by administrative agencies or bodies associated with taxation. In the galaxy of laws in Ethiopia, tax directives occupy a rank below tax regulations which are issued by the Council of Ministers. Both the tax proclamations and tax regulations of Ethiopia anticipate that the legislative field of taxes is hardly complete until tax directives are issued covering a wide-range of issues.[135]

Tax directives are issued by either ministerial bodies (most notably the Ministry of Finance) or other public bodies organized as authorities or commissions. In the past, tax directives were far and few in between, but directives have increased in sheer number and diversity in recent times. All the public bodies connected with tax administration have been busy issuing one or another form of directives in the area of taxes. Recent tax administration reforms have clearly had an impact in this regard. With the strengthening of the tax administration bodies, we have seen an increasing number of directives in taxation.

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[134]At least in the tax area, one cannot help feeling that the whole business of the Council of Ministers issuing tax regulations was more a matter of following the custom than the commitment to looking after the details and technical matters. The proof for this is that the regulations issued simultaneously with the Income Tax Proclamation of 2002 simply continued the tradition established back in the 1950s and 1960s; compare Council of Ministers Regulation No. 78/2002 with Council of Ministers Regulation No. 258/1962.

[135]There are many provisions in our tax laws that delegate powers of ruling making to executive bodies; see for example, Income Tax Proclamation, *supra note* 43, Articles 13(d)(iii), 13(e), 42, 46, 68(2), 68(3), 69(2), 114(2), 117; Income Tax Regulations, *supra note* 43, Articles 3(h), 24(3), 27; VAT Proclamation, *supra note* 24, Articles 8(3), 16(2), 22(2), 22(6), 22(7), 30 and 64

The sheer number and diversity of these directives makes it difficult to classify them, but we must classify them if we wish to understand the role of directives in the Ethiopian tax system. In terms of the administrative bodies that issue these directives, we may find tax directives from authorities as diverse as Ministry of Finance and Ministry of Education.[136] Many of the tax directives hail from the Ministry of Finance, but there are significant numbers of directives from the Ethiopian Revenues and Customs Authority (ERCA) or its predecessors. The tax laws anticipate directives from the Ministry of Justice (on the subject of the composition, membership, etc of the Tax Appeal Commission),[137] the Ethiopian Investment Agency (on the subject of tax incentives accorded to investors) and National Bank of Ethiopia (NBE) (on the subject of special (technical) reserves required of financial institutions and deductible under the income tax law).[138]

Because of the extensive delegating-provisions scattered throughout the tax laws of Ethiopia, the directives issued by administrative agencies cover a wide range of subjects, so much so that it is difficult to pin them down into categories or patterns. One way of making sense of the field of directives is to employ a classification adopted in other tax systems. A useful classification may be that between 'legislative', 'interpretative' and 'procedural' directives, as developed by the US courts for 'regulations', which are the equivalent of directives in Ethiopia.[139] In the US, legislative directives (regulations)[140] are distinguished from interpretative ones in the sense that 'legislative' directives may 'create, modify or extinguish rights and obligations' of taxpayers, and 'set down additional substantive requirements'.[141] 'Legislative' regulations have the 'force and effect of law' unless the issuing authority has exceeded 'the scope of its delegated power or is contrary to the law, or is unreasonable' in

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[136]For directive from the Ministry of Education, see Ministry of Education, Higher Education Institutions Cost Sharing Scheme Directive No. 002/1995, in Amharic, unpublished.

[137]Although the law authorizes the Ministry of Justice to issue directives regarding the composition, membership, etc of the Tax Appeal Commission, we have yet to see one

[138]See Income Tax Proclamation, *supra note* 49, Article 26; one characteristic of tax directives (not a very important one) is that they are issued by diverse administrative bodies.

[139]See Federal Tax Course, *supra note* 69, at 132; see also James W. Pratt and William N. Kulsrud, *Individual Taxation*, Dame Publications, Inc., Taxation Series, 1999 Edition, at 2.22

[140]'Regulations' in the US is the equivalent of our 'directives'. In the hierarchy of Ethiopian laws, 'regulations' occupy a higher rank than directives, because while 'regulations' are issued by the Council of Ministers, 'directives' are issued by individual ministries, authorities or commissions.

[141]Federal Tax Course, *supra note* 69, at132; 73 C.J.S., Public Administrative Law and Procedure §87

issuing these types of regulations.[142] Legislative regulations that pass muster according to these standards are generally binding both upon the IRS and taxpayers.[143] 'Interpretative' regulations are not accorded the 'force and effect of law' although courts have attached considerable weight to them arguing that these regulations 'express a long-continued administrative practice' and constitute 'body of experience and informed judgment'.[144] "Procedural Regulations" (directives) - identified by the subject matters treated in them - give directions to taxpayers on what information they need to supply and how tax administration is internally organized and conducted.[145]

As administrative jurisprudence is yet to develop in Ethiopia, no distinction is drawn among directives. If we make distinctions based on jurisprudence developed elsewhere, it is not because the administrative agencies that issue directives are aware of the distinctions nor because Ethiopian courts know them as such but because it is a helpful heuristic device to make sense of the world of tax directives in Ethiopia. All types of directives exist in an undifferentiated mass in practice. There are as many legislative (perhaps more) directives as there are the interpretative and procedural ones in Ethiopia. If we define legislative directives as those issued pursuant to a specific authority in the higher ranked tax laws (proclamations and regulations), almost all directives in Ethiopia will qualify as legislative directives because we can trace the authority for issuing all directives to provisions in higher ranked tax laws.
A fact which is seldom acknowledged in the Ethiopian tax system is how frequently the Ethiopian tax administration engages in interpretation of tax laws through the various directives it issues.[146] There are many tax directives which define, restrict and expand upon the meanings of terms and concepts mentioned in principal tax legislations. These directives define the scope of benefits and/or of obligations mentioned in principal tax legislations. They define technical concepts that are left undefined or ambiguous in the principal laws.

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[142]Federal Tax Course, *supra note* 69, at 132

[143]Ibid

[144]Ibid; Skidmore v. Swift and W. 323 U.S. 134 (USSC, 1944), cited in Pratt and Kulsrud, *supra note* 139, at 2.22

[145]Pratt and Kulsrud, *supra note* 139, at 2.22

[146]Tax administrations have made considerable forays into the interpretative function/field as a result of the incomplete or contradictory and unworkable nature of many of the provisions of tax laws and the impossibility of immediate judicial clarification, but doubts are raised over the impartiality of the tax authorities, and courts are generally seen as the last arbiters in matters of interpretation; see Notes and Legislation, *Judicial Review of Regulations and Rulings under the Revenue Acts*, Harvard Law Review, vol. 52, No. 7 (May, 1939), at 1163-1164

An income tax directive issued in 2003, for example, states that 'technical services', which are mentioned as taxable in the Income Tax Proclamation, include 'satellite services' provided by providers abroad.[147] Another income tax directive, issued by the Ministry of Revenues delimits the scope of transportation allowance excluded from the income tax and restricts the amount of allowance that can at any one time be excluded from the tax. [148]

We may also find directives whose chief objective is to explain administrative procedures, help taxpayers understand the procedural steps needed to pay taxes or simply provide details of information that taxpayers need to furnish in order to fulfill their various obligations. For lack of a better term, we may call these procedural directives.[149] The role of procedural directives is in the main to assist taxpayers in the understanding of tax laws - applied to tax laws, this is no mean task. They help bring the technical and complex language of tax laws down to the level of the average taxpayer. They simplify, clarify, and explain tax proclamations and regulations. A directive issued in 2003, for example, simplifies the process of income tax computation for all the classes of income taxpayers in Ethiopia.[150] The directive simplifies the computation of tax by providing a much easier table of computation for schedule A, B, C and D taxpayers. It also provides directives on subjects like accounting year, tax declaration forms and rewards for providing information leading to the discovery of undeclared income. This type of directive adds very little to the substance of the income tax laws, but it helps taxpayers and tax administrators wade through the complex structure of the tax system.[151]

The third types of directives- the legislative directives - are actually more numerous than the purely interpretative directives. We may identify these directives either by their targets or subjects treated in them. By their targets, we may distinguish specific legislative directives from general legislative directives. Specific legislative directives aim at specific taxpayers and are usually limited by time. These types of directives are most common among

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[147]Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1996 E.C., in Amharic, unpublished

[148]Federal Democratic Republic of Ethiopia, Ministry of Revenues, *Hamle* 1, 1995 E.C., in Amharic, unpublished

[149]Procedural directives may also be called 'administrative' directives; see Notes and Legislation, *Judicial Review of Regulations and Rulings under the Revenue Acts*, 51 Harv. L. Rev. 7 (May, 1939), at 1163

[150]Federal Democratic Republic of Ethiopia, Federal Inland Revenues Authority, Directives No. 1/2003, unpublished

[151]For procedural directives, one may also look at directives like a directive issued to provide for the use of sales register machines (Directive No. 46/2007) and its amendment (Directive No. 51/2007); A directive to provide for the Issue and Implementation of Tax Identification Numbers (Directive No. 11/2008)

directives that grant tax exemptions. We can take directives that grant exemptions to the Ethiopian Airlines (from the payment of all taxes on its Aircraft purchases), to Cuban expatriates (from the payment of income tax) and Addis Ababa City Administration (from the payment of VAT on acquisition of construction materials for its low cost housing projects) as examples of specific legislative tax directives.[152] Specific tax directives are often sent as letters or memos to members of the relevant tax administration for purposes of giving full effect to the contents of the directives. As such, these directives do not contain much of the formalism that characterizes legal documents. They are usually not made public and as such they are probably only known to the relevant members of the tax administration and of course the beneficiaries of the tax exemptions.

General legislative tax directives, on the other hand, are easily identifiable as legal texts because they are couched in a language of formal law, with all the paraphernalia of legal jargons, definitions and legal provisions (some even contain preambles stating the general objectives of the directives). Many of these directives are numbered by the issuing authorities, although they are no longer published in the Negarit Gazeta - the official outlet of legal publications in Ethiopia.

By the subjects commonly treated in general legislative tax directives, we may identify two types of directives - those that grant tax exemptions and those that tend to increase the obligations of taxpayers. One feature of Ethiopian tax system is the wide diffusion of the power of tax exemption powers. The Ethiopian parliament has granted a number of tax exemptions in proclamations, but has also delegated extensive exemptions powers to the Council of Ministers as well as the various administrative agencies of the Federal Government. The general legislative directives that exempt taxpayers are the result of these delegations by the Parliament. The Ministry of Finance has, for example, been empowered to exempt goods and services from VAT and the Ministry has so far issued directives to exempt imports or domestic supplies of medicine and medical supplies, bread and milk, agricultural inputs and stationeries.[153] There are also general legislative directives which tend to increase the obligations of taxpayers. Administrative agencies obtain the power to issue these types of directives, like those that exempt taxpayers, from the tax

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[152]See Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1998 E.C., in Amharic, unpublished; Federal Democratic Republic of Ethiopia, Ministry of Revenues, 1998 E.C., in Amharic, unpublished; Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1996 E.C., in Amharic, unpublished.

[153]See Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1995 E.C., in Amharic, unpublished.

proclamations and sometimes the tax regulations. These types of directives are particularly prominent among VAT directives.[154]

Directives that grant exemptions are virtually unknown among the wider population of taxpayers, presumably because their effect is to relieve some taxpayers from payment of taxes. They may (surely do) have an impact upon the overall equitability of the tax system, but tax equity is too abstract a matter at the moment to lead to controversies. On the contrary, those directives that tend to increase the obligations of taxpayers (as in the examples given above) stir controversies among taxpayers - which is as it is to be expected.[155]

Directives have increased in sheer size and numbers in recent times, partly as a result of the reorganization of the tax authorities. The size of tax directives is estimated to be at least three times thicker than that of tax proclamations and regulations combined. While directives are clearly useful in making tax laws more intelligible to average taxpayers, a worrying development of recent times is that almost all of the directives remain unpublished and therefore inaccessible to the majority of taxpayers. Ethiopia has certainly regressed in this regard. In the past, all laws of the government, including directives and the other subsidiary forms of legislation like public notices, were issued in the Negarit Gazeta (the official legal gazette of the Ethiopian Government).[156] Even appointments of public officials were published in the Negarit Gazeta.

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[154]The Ministry of Revenues (the predecessor of ERCA) has issued a number of directives which are perceived by the taxpaying community as increasing their tax obligations. The Ministry has issued directives to extend the registration obligations to certain types of business *en bloc*; flour factories, jewelry stores, computer and electronic stores, plastic products factories, shoe manufacturers, leather products stores, and contractors have been subjected to obligatory registration regardless of their annual turnover as a result of these directives; see Ministry of Revenues, FDRE, Ref. No. 01/A29/306/45, *Sene* 17, 1995 E.C, in Amharic unpublished; Ministry of Revenues, FDRE, Ref. No. 2A VAT - 72/42, *Nehassie* 27, 1996 E.C., in Amharic, unpublished

[155]By the way, these controversies are rarely fought in courts because of the absence of administrative laws that show taxpayers the ways of challenging administrative directives. Taxpayers are therefore reduced to raising their complaints informally to the tax authorities or voicing their objections in newspapers; see 'Business Community Twice Dissatisfied with Customs Authority Talks', Addis Fortune, 13 September 2009; 'Over fifty Face Tax Authorities to Question Enforcement,' *Addis Fortune*, 2July 2009.

[156]The Negarit Gazeta establishment Proclamation No. 1/1942 required the publication of proclamations, decrees, laws, rules, regulations, orders, notices and subsidiary legislations; it also required publication of notices concerning appointments, dismissals, titles, decorations, and honors and notices for the general information concerning matters of public interest; see Negarit Gazeta Establishment Proclamation No. 1/1942, *Negarit Gazeta*, Year 1, No. 1

Nowadays, only proclamations and regulations are issued in the Negarit Gazeta, with most of other subsidiary forms of legislations kept in the files of respective government authorities.[157] The result is that many taxpayers are unaware that these directives even exist let alone understand their imports. Because directives are no longer published in official gazettes, the tax authorities do not show as much attention to the language of directives as they do with the proclamations and regulations. A recent ruling by the Cassation Division of the Federal Supreme Court to the effect that directives do not have to be published in the Negarit Gazeta to have a legally binding effect only helps to entrench a disturbing development of administrative agencies issuing directives without having to publicize them in Negarit Gazeta.[158]

So far we have focused upon the content of directives and the various forms they may assume in practice. Another issue of perhaps no less importance in the field of tax directives is the procedures for issuing directives. The procedures for issuing tax proclamations are well-established by law, as the Ethiopian Parliament has issued law-making procedures for laws approved by the Parliament.[159] Some tax systems have well-established and detailed administrative rules for issuing tax directives or regulations. In the US tax system, for example, the US Treasury first publishes a proposed regulation (the equivalent of our directive here) in the form of "Notice of Proposed Rule Making".[160] It then waits for at least thirty days to allow taxpayers to comment on the proposed rule. After a review of taxpayer comments, the proposed regulation (directive) is revised and re-proposed for another round of commenting by taxpayers, and only after that is it issued in its final form. There are no known procedures for issuing directives in Ethiopia. The administrative agencies empowered to issue directives (e.g. the Ministry of Finance) are not bound to follow any specific procedures before they issue directives. They may issue directives without consulting anybody or they may consult some of the stakeholders when they feel like it. It may be necessary to develop procedures so that all interested parties (or stakeholders, as the cliché has it) are consulted before a directive becomes a law and binding upon taxpayers. Consultations give taxpayers the opportunity to submit views, data,

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[157]This in spite of a law that requires all laws of the Federal Government to be published in the Federal Negarit Gazeta; see Federal Negarit Gazeta Establishment Proclamation No. 3/1995, *Federal Negarit Gazeta*, 1st year, No. 3, Article 2(2)

[158]Ethiopian ***Revenues and Customs Authority (ERCA) vs. Ato Daniel Mekonnen***, Federal Cassation Court, File No. 43781, Federal Supreme Court, Research and Legal Support Department, *Hidar* 2003 E.C., in Amharic, at 388

[159]See Federal Democratic Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No. 470/2005, *Federal Negarit Gazeta*, 11th Year, No. 60

[160]See Sanford M. Guerin and Philip F. Postlewaite, *supra note* 114, at 30; see also Pratt and Kulsrud, *supra note* 139, pp. 2.21ff ; Federal Tax Course, *supra note* 69, at 131

and arguments to the tax authorities enabling the latter to make appropriate revisions and take corrective measures or even withdraw directives which are counterproductive.[161]

2.3. Advance-rulings

Advance rulings, or administrative rulings have become important instruments in the implementation of tax laws in many tax systems.[162] Developed tax systems have had a long tradition of issuing advance rulings upon request.[163] And many developing countries have incorporated procedures in their laws for seeking authoritative statements from the tax authorities through advance rulings.[164] Advance rulings provide taxpayers with the opportunity 'to obtain a more or less binding statement from the tax authorities concerning the treatment of a transaction or a series of contemplated future (sometimes past) actions or transactions'.[165]Advance rulings are fact-specific opinions of the tax administration in response to a taxpayer request based on contemplated transactions. Since they are fact specific, a taxpayer is generally required to give a full and fair representation of all the relevant facts.[166]

The practice of issuing advance rulings in other tax systems is developed to 'avoid conflict and litigation by establishing in advance an authoritative interpretation of the tax law, so that a taxpayer has full security in the way the tax law will work out in a specific situation'.[167] Rulings are similar to what courts would do in specific cases except that rulings make use of hypothetical cases or transactions and they apply to cases with similar factual situations set out in hypothetical case or transaction of a ruling. Their objective is to inform and guide taxpayers and tax officers.[168] They inform taxpayers of the position of Tax Administration on a certain transaction and 'help avoid future controversy and litigation' with the tax administration and they promote voluntary compliance by taxpayers.[169]

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[161]See Guerin and Postlewaite, *supra note* 114, at 30

[162]Frans Vanistendael, *supra note* 29, at 61

[163]Frans Vanistendael cites countries such as Australia, Canada, the Netherlands, the United Kingdom and the United States; see id, at 61

[164]Countries like Ghana, South Africa, Uganda, Mauritius, and Tanzania from Africa have rules or procedures for obtaining authoritative advance rulings from the tax authorities of the respective countries.

[165]Carlo Romano, Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System, 2002, Doctoral Series, International Bureau of Fiscal Documentations, p. 78, accessed at Googlebooks

[166]Frans Vanistendael, *supra note* 29, at 61

[167]Ibid

[168]Corpus Juris Secundum 47 A.C.J.S. Internal Revenue §9, Data updated June 2009

[169]Ibid

According to Frans Vanistendael,[170] a systematic approach to the practice of advance rulings must respond to the following questions:

i) Whether the ruling is limited to the taxpayer who requested the ruling, or whether others can also rely upon the ruling provided their factual situations fit in it;
ii) Whether the ruling is regularly published or not;
iii) Whether the ruling is public or private, with the distinctions;
iv) the administrative official issuing the advance rulings;
v) Whether the issuing of advance ruling is confined to the central Tax authorities, or whether regional or local authorities can also issue the rulings in their respective jurisdiction (an important consideration in federal systems);
vi) the procedures for requesting advance rulings, and for deciding on and issuing the rulings; and
vii) the circumstances under which the tax administration may change its position as expressed in its advance ruling;

As it is to be expected, different tax systems approach 'advance rulings' differently, to the extent they recognize them in their tax administrations. In some countries, advance rulings may be issued by a tax inspector,[171] and in other countries, tax administration cannot issue binding advance rulings at all, because in these countries, the very idea of an administrative branch issuing binding rulings goes against the principle of legality.[172] Sweden offers perhaps a unique example of a system in which an independent council is established to entertain requests for and issue advance rulings.[173]

In some tax systems, the practice of ruling-making has developed to such an extent as to create various categories of rulings. The IRS (the equivalent of ERCA) in the US issues a number of guidelines in the form of rulings for taxpayers. The most prominent examples of rulings are the 'revenue rulings', 'revenue procedures' and 'private letter rulings'.[174] Revenue rulings are issued in the form of memorandum of law (containing issues to be addressed, the facts pertaining to these issues and a legal analysis of the issues).[175] Revenue rulings are official pronouncements of the IRS and are published in the official publication of the IRS - Internal Revenue Bulletin.[176] Revenue Procedures

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[170]Frans Vanistendael, *supra note* 29, at 61

[171] Frans Vanistendael cites Netherlands as an example; ibid

[172]Ibid

[173]Id, at 62

[174]James R. Lapenti, the United States, in Hugh J. Ault and Brian J. Arnold, *Comparative Income Taxation*, A Structural Analysis, 3rd edition, Aspen Publishers, 2010, at 192

[175]Ibid

[176]See Federal Tax Course, *supra note* 69, 136; see also Pratt and Kulsrud, *supra note* 139, at 2.23 - 2.24

explain the procedural issues that taxpayers face in dealing with the IRS.[177] Private letter rulings are addressed to a specific taxpayer who has requested guidance from the IRS.[178] They are 'written statements issued to a specific taxpayer interpreting and applying tax laws to the taxpayer's specific set of facts'.[179]

In the US, taxpayers may rely upon revenue rulings unless the law upon which the ruling is based has changed.[180] Taxpayers other than the taxpayer to whom private letter rulings are addressed may not rely upon the position of the IRS in private letter rulings.[181] Both revenue rulings and letter rulings mostly result from taxpayer requests for letter rulings. The difference is that revenue rulings are extrapolations from the private rulings and are therefore intended for the general population of taxpayers whose situations fall within the factual transactions described in the revenue rulings.[182]

The practice of issuing advance rulings is not as well known and established in Ethiopia as it has been in other countries. In fact, one cannot even say that they exist as distinct legal categories. However, there have been few occasions in which the Ethiopian tax authorities were asked to furnish what can only be described as an advance ruling in the circumstances. It is not clear if the tax authorities were consciously engaged in the practice of advance rulings or doing this just as a matter of administrative courtesy.

Employees of St. Paul Hospital vs. Ministry of Health involved dispute over the exclusion from taxable income of special allowances paid to doctors and other staff of St. Paul Hospital in consideration of their exposure to bad smells and other risks connected with their operation on dead bodies.[183] St. Paul Hospital used the expression 'hardship allowance' to refer to the special allowance paid to its employees to describe the special hardship faced by these employees while operating on dead bodies. The employees at St. Paul Hospital believed that this allowance should fall within the meaning of 'hardship allowance' as that expression is known in the Income Tax Regulations of 2002

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[177]James R. Lapenti, *supra note* 174, p. 192; see also Federal Tax Course, *supra note* 69, at 133; see also Hoffman Smith Willis (ed.), *Individual Income Taxes*, West's Federal Taxation, 1996 Edition, at 2-9

[178]James R. Lapenti, *supra note* 174, at 192

[179]Federal Tax Course, *supra note* 69, at 134.

[180]James R. Lapenti, *supra note* 174, at 192

[181]Ibid

[182]Sometimes, the IRS develops revenue rulings from technical advice to district offices of the IRS, court decisions, suggestions from tax practitioner groups and various tax publications; see Willis, *supra note* 177, at 2-9.

[183]For details, see Solomon Teshome, *"The Scope of Tax Exclusions under the Ethiopian Employment Income Tax Regime,"* Senior Thesis, Addis Ababa University, Faculty of Law, 2008, unpublished, at 15ff

and demanded that the payments be excluded from the base of the income tax.[184] The people at the Ministry of Health were not so certain.

The Ministry of Health wrote a letter to the Tax Administration asking for its opinion on whether the special allowance constituted 'hardship allowance' within the meaning of the Income Tax Regulations. In an internal memo written by the Legal Division of the Tax Authority and addressed to the head of the Authority, which was eventually communicated to the Ministry of Health, the Tax Authority sought to rely upon the Amharic version of the Income Tax Regulations in which the expression 'hardship allowance' is rendered as *'yebereha abel'* in Amharic, which in English literally means 'desert allowance', a much narrower and more specific rendition than the English version of 'hardship allowance'.[185] The position of the Tax Authority was that the meaning of hardship allowance should be limited to payments made in consideration of extreme weather conditions (the weather conditions may be too hot or too cold climates). Upon receiving the letter from the Tax Authority, the Ministry of Health and St. Paul Hospital decided to withhold tax due upon the special allowance made to employees of St. Paul Hospital

This case involving the meaning of 'hardship allowance' in the aforementioned case and many cases like it would have been an excellent opportunity for the tax administration to inform taxpayers in general about its position on what the scope of hardship allowance is. It would also have been an opportunity for developing a distinct legal category known elsewhere as 'advance rulings'. The Tax Authority responds to taxpayers individually rather than publishing its opinion to a general population of taxpayers.[186] What we can say at this

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[184]See Income Tax Regulations, *supra note* 49, Article 3 (c)

[185]The position of the head of the Tax Authority is incidentally consistent with the rule of interpretation that gives precedence to the Amharic version in cases of conflict between the English and Amharic versions of the law; see Federal Negarit Gazeta Establishment Proclamation No. 3/1995, 1st year, No. 3, Article 2(4)

[186]There was reportedly a similar issue over the meaning of 'hardship allowance' before the *St. Paul Hospital* case, this time involving employees of Muger Cement Factory. Muger Cement Factory paid (or used to anyway) its employees a special allowance for undergoing exposure to the heat and dust of heavy machinery, and for lack of a better expression, this allowance was called 'hardship allowance'. Informally, some officers of the Tax Authority stuck to the literal meaning of 'hardship allowance' in the Amharic version of the Income Tax Regulations and rejected the exclusion of the allowance from the income tax. Solomon Teshome, who wrote his senior essay on exclusions from employment income tax, gives another instance in which the meaning of hardship allowance can be a source of controversy. He offers the example of a collective agreement in the Ethiopian Telecommunications Corporation in which the expression of hardship allowance is used to refer to payments for not just enduring the hardship of harsh weather conditions but also of

moment is that many of the issues surrounding advance rulings (including the question of its very existence) are not yet settled in the Ethiopian tax system. We don't know if these rulings are binding or even persuasive, whether they should be published (and be available in the public domain), which administrative unit should issue these rulings, and questions of that nature.

Granted that these practices are not yet fully developed in our tax system, there is a lot to be said for their development in Ethiopia. Even where they are merely persuasive, advance rulings have a lot of advantages to commend them. They cut down future conflicts considerably by informing taxpayers in advance of the position of the Tax Authority on certain transactions. They cut down costs arising from litigation, helping the courts to concentrate only on matters over which there is disagreement on the ruling. They also build the capacity of the Tax Authority to expand on the jurisprudence of taxation in the country. Advance rulings can also be used as precursors to what the Tax Administration may legislate through directives, if need be. What is originally couched in the advance rulings may crystallize into directives, regulations and proclamations, putting the rules on a firmer and more solid ground than hastily concocting rules to suit the times.

2.4. *Administrative Publications, Tax Guides, Tax Forms, and Public Notices*

It has become an unavoidable feature of modern tax administration to assist in tax administration with voluminous administrative commentaries, manuals, guides and circular letters. Some of these administrative commentaries, manuals, guides and circular letters are available for internal use only while others are published as exegesis for the taxpaying community. Whether they go by the name of 'statement of revenue practice' (as in the UK), or 'interpretation bulletins' (as in Canada), 'IRS Publications' (US) or in general by the names of administrative commentaries, instructions, guides, manuals or circular letters, there is little question that these materials are interpretative documents controlling the behavior of countless tax administration officers and taxpayers.[187] In those countries where their legal status has been called into

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high cost of living. The first allowance paid for harsh weather conditions (for places like *Dalol* Depression and *Gambella*) is rendered in Amharic as *'yebereha abel'* – consistent with the Amharic version of the Income Tax Regulations- while the second type of allowance is rendered as *'yenuro wudenet abel'* – roughly translating into English as 'cost of living allowance'. But it is possible to render both as 'hardship allowance' in English. Whatever our position may be in each case, issues like these could have been resolved for all taxpayers through the devices of 'advance rulings' rather than through individual and informal communications between taxpayers and the Tax Authority. See Solomon Teshome, *supra note* 183, at 19-20

[187]See Frans Vanistendeal, *supra note* 29, p. 60; Federal Tax Course, *supra note* 69, p: 135

question, courts have held them not to be binding upon the taxpayers.[188] Should taxpayers choose to rely upon interpretations put upon the various tax laws by the tax administration, however, they have been held to be binding upon the administration which issued them.[189] If the tax administration inserts a disclaimer in administrative commentaries, manuals or guides, however, it is difficult for taxpayers to invoke interpretation in these administrative documents as authority.

Tax administration commentaries are not unknown in Ethiopian Tax Administration. The introduction of the Value Added Tax in 2002 for the first time was accompanied by the issuance of a VAT Guide for taxpayers (and tax administrators) both in English and Amharic.[190] The Ethiopian Tax Authority also developed some manuals to help tax officers' deal with some murky and technical issues in their operations.[191] The administrative manuals are primarily for internal consumption of the tax administration officers, and they are usually not made available to the taxpayers. In addition, because Ethiopian Tax Authorities have yet to create their own official publications, the tax guides that have so far surfaced appear only informally and often remain unpublished. These manuals make constant reference to the tax laws, but it is naive to expect that all the terms in these manuals are consistent with the tax laws.

Supposing there is a challenge on their legality, should courts have recourse to these manuals? And how far can taxpayers rely upon these manuals? How public should these internal manuals be for taxpayers not just to know what the tax authorities do but also even to challenge them when they find them to be inconsistent with the laws? How different is a tax guide issued by the Tax

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[188]Courts in Belgium, Canada, Germany and Spain have specifically rejected administrative interpretation of tax laws in administrative manuals, circular letter or guides; see Frans Vanistendael, *supra note* 29, at 60, see footnote 208

[189]Id, p. 60

[190]The Guide was reportedly developed by the drafter of Ethiopian VAT law - Professor Alan Shenck- who must have realized the difficulties ahead in coming to terms with this new form of taxation. The drafter produced the VAT Guide upon his own initiative and not as a consequence of some tradition to provide a guide to newly introduced tax laws; see Value Added Tax (VAT): Basic VAT Guide for Tax Payers, Tax Reform Office, VAT Sub-program, June/2002, Addis Ababa, Ethiopia, unpublished

[191]These manuals include Collection Manual, Value-Added Tax Audit Manual, and Assessment and Audit Operating Manual; see Federal Inland Revenue Authority, **Revenue Collection Manual**, January 2005, Addis Ababa; Ministry of Revenue, Federal Inland Revenue Authority, **Value-Added-Tax (VAT) Audit Manual**, January 2005, Addis Ababa; Ministry of Revenue, Federal Inland Revenue Authority, **Assessment and Audit Operating Manual**, January 2005, Addis Ababa, unpublished.

Administration from a textbook written by a tax expert for classrooms in the universities or even a consultancy firm for use by its clients? These are at the moment unanswered questions because taxpayers have never challenged the few administrative manuals and guides issued by the Ethiopian Tax Administration. Besides, there are no administrative rules that fix the status and rank of administrative publications in controlling the meaning of the various taxes in Ethiopia.

Apart from the tax guides and manuals, which are far and few in between, we have the tax forms, which should not be underestimated as 'interpretative' documents. More than even the tax guides or manuals, they are essential in the implementation of the tax laws. Tax forms are interpretative instruments, 'perhaps the only interpretation that most people ever see and read'.[192] They are the ones that bring taxes from the firmament of abstractions to the actuality of computation and payment of taxes. In the words of Stanley Surrey, the tax forms perform the task of 'compressing the vast body of statutory and administrative material into the compact, readily understood and readily administered set of forms required for a mass tax'.[193]

The tax forms are more numerous and widely available than the tax guides and manuals. Many of the tax forms are issued in the form of directives (for example, the directive cited above on computation of income tax under the different schedules of Ethiopian income tax has tax forms attached to it) and therefore assume the status of directives in Ethiopian tax law hierarchy. But there are many more out there which are issued or reproduced informally to help taxpayers cope with the many intricacies of tax laws.[194]
Again the legal status of tax forms in the interpretation of tax laws (whether they come in the form of directives or not) is shrouded in mystery. There has never been an occasion for challenging the tax forms in the past. This is certainly not because the forms are unimpeachable. In fact, an expert scan of these forms will reveal so many loopholes in the forms as to justify a serious challenge to the forms.

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[192]Stanley S. Surrey, *Treasury Department Regulatory Material under the Tax Code*, Policy Sciences 7(1976), at 517

[193]Ibid

[194]The following tax forms are issued via directives: a Directive on VAT invoices; see Ministry of Revenues, date unknown, in Amharic (with English subtitles), unpublished; A directive on the Implementation of Income Tax Proclamation No. 1/1995 E.C., Federal Inland Revenue Authority, in Amharic (with English sub-titles), unpublished; there are many directives that are used informally within the tax authorities; see FDRE, Ministry of Revenues, Federal Inland Revenue Authority, Business Income Tax Declaration (with Annex); Excise Tax Declaration Form; Value Added Tax Declaration Form, etc, unpublished

Finally, we have the "public notices", which are becoming more and more common in the recent practices of Ethiopian Tax Administration. Like the directives, "public notices" flow from a special provision in a higher law, usually a directive.[195] They are issued to a group of taxpayers to inform them of their duty, say, of registration by a certain date. The Ethiopian Tax Administration does not have its own regular publications in which these notices appear. In stead, Ethiopian tax authorities use daily and weekly newspapers to reach the targeted taxpayers. Presently, the "public notices" are published in *Addis Zemen*, the government Amharic daily newspaper.[196]

The question that arises with respect to "public notices" is once again whether they have any legal significance? They are not entirely devoid of legal significance if we examine their contents, although they look like simple announcements. The "public notices" often set a deadline for registration or for use of sales register machines which are connected to the tax authorities as information transmitters. These deadlines may be considered 'unreasonable' or 'unfair' but there are presently no administrative procedures available to taxpayers to challenge these notifications before administrative tribunals or courts.

2.5. Tax Dispute Settlement: Tax Cases as Sources of Law

As in many other countries, tax disputes in Ethiopia follow a slightly different channel of dispute settlement from other forms of disputes.[197] The first

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[195]See Ministry of Revenues, Directive Issued to provide for the Use of Sales Register Machines No. 46/2007, in Amharic, unpublished.

[196]One example of a public notice will suffice. Article 5 of Directive No. 46/2007; - (a Directive to Provide for the Use of Sales Register Machines) - states that the Tax Authority will announce the commencement period of the obligation to use sales register machines for each category of taxpayers. A public notice was issued following this Directive informing hotels, restaurants, bars, cafeterias, patisseries and supermarkets of their duty to make preparation for the use of the sales register machines. A second public notice was issued ordering all large taxpayers (with the exception of public institutions, banks, insurance companies and public and freight transport companies) to purchase the machines and start using them within one month of the notice; see Ministry of Revenues, in Amharic, unpublished; *Addis Zemen*, Amharic daily, Tir 16, 2000 E.C; *Addis Zemen, Ginbot* 30, 2001 E.C.,

[197]It is quite common to establish special dispute settlement schemes for taxation in many countries; in the UK, taxpayers can appeal to General Commissioners (a body of lay persons assisted by a qualified clerk) or Special Commissioners (who are highly qualified persons). The Commissioners in the UK are the equivalent of our Tax Appeal Commissions. A further appeal lies to High Court from the Commissioners but only on questions law, just like in our case; see John Tiley, *Revenue Law*,5th ed., Hart Publishing, 2005, at 75; under the Australian tax system, a taxpayer dissatisfied with the results of the Commissioner's(the equivalent of the

opportunity taxpayers have to resolve disputes exists with the tax administration itself - with the assessors, where most of the errors or misunderstandings should be resolved. Taxpayers who find themselves in disagreement with the tax administration have another opportunity once again within the tax administration, but this time, a body set up within the tax administration composed of four members drawn from the different units of the tax administration, will entertain their case - the Review Committee.[198] Members of the 'Review Committee' are different from the tax assessors or inspectors, and in that sense they enjoy a certain level of autonomy and independence. But they are appointed by the head of the Tax Authority (and are still part of the Tax Administration in a way).

The Review Committee has the power to receive applications of taxpayers and reduce, or waive penalties, interest and tax imposed by the tax administration.[199] The Committee is not constrained by procedural or judicial niceties. At times, the Committee deals with several, even disparate cases *en masse* if all the applicants in these cases request, say, waiver of penalties.[200] In the end, the Review Committee has the power to make recommendations only. The head of the Tax Authority may accept the recommendations of the Committee, in part or as a whole or may completely reject it - but in a diplomatic sense, when the head of the Tax Authority disagrees with their recommendations, s/he simply remands the case to them with observations for further review.[201]

Tax Authority (ERCA) in Ethiopia) internal review has the right to proceed to the Federal Court or the Administrative Appeals Tribunal; Graeme S. Cooper et al, Cooper, Krever & Vann's Income Taxation, *Commentary and Materials*, Thomson Legal & Regulatory Ltd, 2005, at 891.

[198]See Income Tax Proclamation, *supra note* 49, Article 104; by the way, there is another review committee, organized along similar lines, for the purpose of settling 'minor customs regulations violations'. This Committee is established under the authorization of the Customs Proclamation of 1997 (now replaced); Minor customs regulations are defined as differences of not more than 10% between the customs declarations by taxpayers and the findings of inspections by the customs officers. The ostensible rationale for the establishment of the review committee was to save the time and the cost that would otherwise have been spent in litigation in courts; See Article 8(2) of Customs Proclamation No. 60/1997 (now replaced by Proclamation No. 622/2009) and Ministry of Revenues, Administrative Settlement of Customs Regulations Violations Directive No. 37/1998, in Amharic, unpublished.

[199]See Income Tax Proclamation, *supra note* 43, Article 105(1) (a)

[200]In one case, the Committee reviewed a case involving 29 different complainants and forwarded its opinion that the complainants be made to be pay 10% of the penalties imposed on them; see A.S.G. Magdlinos et al, unpublished.

[201]See Income Tax Proclamation, *supra note* 43, Article 105(2): the members of the Review Committee have some directives to guide them on matters like waiver of

Taxpayers dissatisfied with the recommendations of the Review Committee or the decisions of tax authorities may appeal to the Tax Appeal Commission (TAC), a tribunal set up within the executive branch under the Ministry of Justice.[202] Although the Commission is still within the executive branch of government, the Tax Appeal Commission enjoys relative autonomy and independence as it is organized outside the Tax Administration. The members of the Commission are to be drawn from 'among persons having good reputation, acceptability, integrity, general and professional knowledge, and from among persons who have not committed any offense in connection with tax and tax administration'.[203] The composition of the Commission is to reflect the interests of the major stakeholders in tax administration - the government and taxpayers. Although the composition of the Commission is to be determined by a directive to be issued by the Ministry of Justice, no such directive has yet been issued.[204] Nonetheless, the composition of the Commission somehow reflects the diversity of the stakeholders in tax administration: the members are drawn from the Ministry of Trade and Industry, the Ministry of Finance, the Ethiopian Customs and Revenue Authority and the Ministry of Justice, the last occupying the position of a chairperson in the Commission.[205]

Like the Review Committee, the members of Tax Appeal Commission are not expected to adhere strictly to the niceties of judicial procedures - after all most of the members of the Commission are not necessarily lawyers, although the stakeholders incline to sending members with legal background to these kinds of tribunals. The Commission's composition from the stakeholders in tax administration is in large measure designed to address disputes in ways that satisfy the interests and demands of the various stakeholders even if that sometimes means going off the beaten path of judicial procedures. That is why the Commissioners in some instances make up their own rules as they go along particularly in cases where the law is silent.

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penalties; see Ministry of Revenues, FDRE, Waiver of Tax and Duty Administrative Penalties Directive No. 5/1996, in Amharic, unpublished

[202]Income Tax Proclamation, *supra note* 43, Article 107

[203]Id, Article 114 (1)

[204]Id, see Article 114(2)

[205]In the old days, the Commission had members of the business community (represented from the Chambers of Commerce) in its ranks, but this was discontinued recently; there are apparently plans to recall the Chambers to its membership; interview with Ato Dawit Teshome, Ministry of Justice, on May 20, 2010; the old income tax laws required members of the business community to be represented in the Commission; the 1961 Income Tax Proclamation for example provides that 'at least half of all members of each commission shall be chosen from amongst merchants and persons carrying on professional occupations'; Article 50 of Income Tax Proclamation No. 173/1961 (now repealed)

In ***Ghion Industrial and Commercial PLC v. IRA***,[206] the Commissioners were faced with, among others, the question of whether travel expenses for some of Ghion's executives who traveled abroad (sometimes with high officials of the Ethiopian government on trade promotions) were deductible from its gross income. IRA (the Inland Revenue Authority) rejected these expenses on the ground that the documents presented to prove the expenses were not reliable. The Commissioners accepted the contention of the Tax Authority but allowed deduction of 25% of the expenses allegedly made by Ghion, apparently exercising their power of equity. In ***Metebaber Hotel v. IRA***,[207] the Commissioners allowed deduction of 75% of some costs like transportation expenses and 50% of costs allegedly incurred for the repair of the Hotel, once again exercising their power of equity.

It is difficult to assert with certainty what role the Tax Appeal Commissioners play in the establishment of tax norms in Ethiopia. They are not bound to follow the dicta of their prior rulings, but because they deal with issues of repetitive nature, it is hard to believe that they willfully disregard their prior rulings. In fact, one who reads the decisions of the Tax Appeal Commission cannot but conclude that the Commissioners repeat their prior rulings in subsequent cases without acknowledging it. Unfortunately, the decisions of the Tax Appeal Commission are not published. Taxpayers cannot therefore know how the Commissioners will react to certain factual situations.

An appeal from the decisions of the Tax Appeal Commission lies to the High Court - the first opportunity the regular courts have to entertain tax cases; even then, only when an error of law (rather than fact) is found in the judgment of the Tax Appeal Commission.[208] If the High Court finds that an error of law is made in the judgment of the Commission, it points the error out and remands the case to the Commission for review of the case based on the error of law found.[209] The High Court cannot go into the determination of the merits of the case.

Determining questions of fact from questions of law has never been easy, and it is not just in Ethiopia that this question has defied clear distinctions.[210] There

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[206]Tax Appeal Commission, File No. 368, in Amharic, unpublished

[207]Tax Appeal Commission, File No. 523, in Amharic, unpublished

[208]Income Tax Proclamation 286/2002, *supra note* 49, Article 112 (1); by the way, the cited sub-article does not say 'high court', but the repealed tax laws specifically refer to the 'high court' from which the practice of appealing to the high court has been derived.

[209]Income Tax Proclamation 286/2002, *supra note* 49, Article 112(2)

[210]In the UK, the construction of documents or statutes is considered as a question of law while the question of whether the document was signed on a certain date was held as a question of fact; similarly the question of whether a trade is being carried

are no hard and fast rules for distinguishing questions of fact from questions of law. There are many reported cases in Ethiopia addressing this issue, albeit in an inconclusive manner.[211]

A second appeal lies from the judgment of the High Court to the Supreme Court which has the same power of finding errors of law in the judgments of the lower tribunals and remanding the case for further review.[212] Those aggrieved with the decision of the Supreme Court (or for that matter, the High Court) have one last opportunity to seek review if the decisions of the Supreme Court or the High Court 'contain fundamental error of law'.[213]
In the pure civilian tradition of the role of courts, judicial interpretation is not a source of binding law for other cases.[214] But it may have persuasive power, which is acknowledged by jurists.[215] Modern Ethiopian legal system subscribed to the civilian tradition of confining the role of courts to just disposing of cases before them. The interpretation of laws by courts may be persuasive at various levels, but because of the limited diffusion of judicial interpretation among courts and the academia, even the persuasive power of judicial interpretation is limited in the best of times.

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on is a one of fact but the question of the meaning of trade is one of law; in an apparent swipe at the difficulty of distinguishing a question of law from a question of fact, Dickinson wrote memorably that 'matters of law' grow downwards into the roots of fact while matters of fact reached upwards without a break into matters of law' (Administrative Justice and the Supremacy of Law (1927), quoted in John Tiley, *supra note* 197, p. 76

[211]See, for example, ***Barnadoni Guiseppe v. Inland Revenue Department*** (High Ct, , Addis Ababa, 1965), 2J. Eth. L., at 334), where the High Court quashed the decision of the TAC on the ground that the Commission's decision to impose a fine on a taxpayer was based on allegations not made by either party to the appeal; ***Mulugeta Ayele vs. Inland Revenue Department***(High Ct., Addis Ababa, 1965), 2J. Eth. L., at 340), where the High Court reversed the decision of the TAC on the ground that the Commission increased tax assessment on its own motion; see, however, ***Mosvold (Ethiopia) Ltd. v. Inland Revenue Department*** (High Ct., Addis Ababa, 1967), 4J. Eth. L., at 104), in which the High Court held that the decision of the TAC that disallowed the deduction of a sum, as being interest on an alleged loan, was a question of fact and therefore not subject to review by the Court;

[212]Income Tax Proclamation, *supra note* 49, Article 112(3)

[213]See Federal Courts Proclamation No. 25/1996, *Federal Negarit Gazeta*, 2nd year, No. 13, Article 10

[214]See George Krzeczunowicz, *Code and Custom in Ethiopia*, 2J. Eth. L.2, (Dec. 1965), at 434

[215]M. Planiol and G. Ripert, Treatise on the Civil Law (12th ed. 1939) (translation, Louisiana State Law Institute, 1959). Vol. 1, No. 227, quoted in Krzeczunowicz, *supra note* 214, at 434.

The role of courts in the creation of legal norms through interpretation received a boost in 2005 when a law was passed conferring binding effect upon the interpretation of law by the Cassation Division of the Federal Supreme Court in a decision involving not less than five judges.[216] The interpretation binds both federal and regional courts at all levels except the Cassation Division itself, which has apparently the power to reverse and even contradict itself in subsequent decisions.[217] Putting aside the various controversies surrounding this power of the Cassation Division of the Federal Supreme Court,[218] there is little doubt that the 2005 law elevated the decision of the Cassation Division from one that was limited to disposing of cases before it to having a binding effect upon cases having similar factual situations before lower courts.

The tax dispute settlement schemes all the way up to the Supreme Court follow the narrow strip of disputes that arise from assessment of taxes, as if all the disputes taxpayers may have with the tax administration arose from assessment only. The language of tax laws has been unwittingly restrictive in this regard. This has the unfortunate consequence of limiting the choice of taxpayers to challenging the actions of tax authorities only when the actions have something to do with tax assessment.[219] The jurisdiction of the Review Committee is limited to reviewing requests by taxpayers to compromise penalties, interest and tax liabilities – which are all related to assessments by the tax authorities. The jurisdiction of the Tax Appeal Commission is also limited to reviewing appeals from the assessment of tax by the Tax Administration or the decisions of the Review Committee. The Courts are limited to reviewing these decisions for errors of law only.

From this restrictive channel of dispute settlement in taxation, we may be inclined to conclude that all disputes in taxation have something to do with tax assessments. Tax disputes are not confined to tax assessments. Some disputes may have nothing to do whatever with tax assessments. Taxpayers may wish to challenge the 'legality' of tax directives. It may be that the conventional tax dispute settlement channels are never meant to accommodate disputes arising from the exercise of so many discretionary powers by the tax authorities. Even in other tax systems, these rights to challenge decisions of the tax authorities

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[216]See Federal Courts Proclamation Re-Amendment Proclamation No. 454/2005, *Federal Negarit Gazeta*, 11th year, No. 42, Article 2(1)

[217]Ibid

[218]See Muradu Abdo, *Review of Decisions of State Courts over State Matters by the Federal Supreme Court*, 1Mizan L. Rev.1, Vol. 1, No. 1, June 2007, at 66ff; see also Kalkidan Aberra, *Precedent in the Ethiopian Legal System*, 2 Eth. J. L. Education1, January 2009, at 23ff.

[219]All cases that appear before courts have something to do with assessment; there have never been cases challenging the other actions of the tax authorities, interview with Ato Mustafa Ahmed, Federal High Court, Tax Division, June 22, 2010

other than those related to tax assessments are often clarified and stipulated in other laws, like administrative and constitutional laws. We may take the UK and Australian tax systems for illustration.

In the UK, taxpayers may challenge the actions of tax authorities on grounds of "illegality', 'procedural impropriety' or 'irrationality.[220] These kinds of disputes follow the ordinary dispute settlement schemes for administrative disputes.[221] Under Australian legal system, the actions of the tax authorities may be reviewed on grounds of 'denial of natural justice', 'failure to observe required procedures', 'lack of jurisdiction or authority', 'an exercise of the power for improper purpose', 'the making of an error of law', 'a decision based upon irrelevant consideration'.[222] Taxpayers have additional opportunities to challenge tax authorities before the office of the ombudsperson.[223]

As far as the right to judicial review is concerned, it is not yet clear if Ethiopian taxpayers can raise objections to, say, tax directives, and where they can go to raise objections. To date, none of the innumerable tax directives issued by the Ministry of Finance and ERCA have faced any challenges on grounds of being *ultra vires*. However, a recent case before Ethiopian courts, though not on tax directives, promises that Ethiopian courts might be open to challenges to directives.[224] It is also legally possible to bring these kinds of challenges to the Ethiopian Office of Ombudsperson, which has the authority, among others, "*to supervise that administrative directives ... by executive organs ... do not contravene the constitutional rights of citizens and the law....*"[225] However, the fact that no cases have as yet been filed in this regard shows how narrowly tax disputes are viewed in Ethiopia.

Conclusion and General Recommendations

With all its imperfections, there is a system underlying all of the taxes in Ethiopia. This article has attempted to bring to light the patterns that under

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[220]See John Tiley, *supra note* 197

[221]Ibid

[222]Cooper et al, *supra note* 197, at 895

[223]Ibid

[224]See ***National Bank of Ethiopia (NBE) vs. Hibret Bank S.C., Ato Iyesuswork Zafu, and Workshet Bekele Demissie***, Federal Supreme Court, Cassation Division File No. 44226, Tahsas 15, 2003 E.C., in Amharic, unpublished. In this case, the respondents challenged a directive issued by the National Bank of Ethiopia as *ultra vires*, and the lower courts concurred with their arguments, but the Cassation Division of the Supreme Court overruled the decisions of the lower courts in the regard, holding that directives can override an earlier Proclamation as long these directives are issued pursuant to the power given in a later Proclamation.

[225]See Institution of the Ombudsman Establishment Proclamation No. 211/2000, *Federal Negarit Gazeta*, 6th year, No. 41, Article 6(1)

gird the Ethiopian tax system, all be it through the prisms of tax systems elsewhere. It was the modest aim of this article to go beyond the usual suspects - tax proclamations and tax regulations- to understand how the system works from top to bottom. In all candor, many aspects of the Ethiopian tax system are yet to be worked out and some recent developments promise that the system is working on some of its gaps. Having said that, however, there is still a long way to go before we spell and pronounce every word in the 'Ethiopian tax system'. The attempt to look at the system as a whole should not blind us to the major gaps of the Ethiopian tax system. We can only mention here some of the major gaps and problems of the Ethiopian tax system.

The first problem is the accessibility of tax laws. This problem is not limited to tax laws, of course, but because of the nature of taxes, the problem is more pronounced. The first problem of accessibility is the whole organization of tax laws. The legislative field of taxes is so chaotic and disorganized that it is difficult for an average taxpayer to have a clear idea of her obligations under the various tax laws of Ethiopia. There are many pieces of legislation for one type of tax alone. Amendments are made piecemeal, and the tax administration has so far made no attempt to organize these systematically and logically in order to make them accessible and intelligible to taxpayers.

The other problem on the subject of accessibility is that some of the laws are not available in official publications. Although the law requires publication of all laws of the Federal Government in the Federal Negarit Gazeta, directives and other subsidiary legislations have stopped coming through the Negarit Gazetta. In the old times, even appointments of public officials and some other weighty notices were published in the Negarit Gazeta. Nowadays, all we get from the Negarit Gazeta is the proclamations and the regulations. A large of body of rules issuing from different administrative agencies is simply kept in the files of the respective agencies with the public kept in the dark about the extent and content of these directives. To their credit, the Ethiopian Tax Authorities have put most of the directives on line,[226] but how many people know that these directives are available online and how many in Ethiopia have access to the internet to be able to access these directives? Since these are official documents, the proper place for them is the official gazette for legal publications- Negarit Gazetta. The least the Ethiopian Tax Administration can do for taxpayers is to publish them in the Negarit Gazetta. Of course, it should do more than that. It should provide a compendium of all tax legislations and regulations in force, with updates on regular basis.

Another area of concern is the issue of delegation of taxing authority to unrepresentative administrative agencies. That administrative agencies should

[226] visit www.erca.gov.et last visited on June 18, 2011

have rule making power, there can be little question about it. The only question is whether administrative agencies should have wide discretion and be able to determine whether one should pay tax or not, or by what rate one should pay tax. Great historical battles (from the *Magna Carta* onwards) were fought on this question of whether unrepresentative branches of government can impose taxes or exercise the power of exemption. Blanket exemption powers are often delegated to executive bodies with little restraint over how these important powers are exercised in practice. These exemption powers have far-reaching implications on the equitability of the tax system in general and must not be seen lightly. Tax laws that delegate to the executive the power to define the nature and the rate of taxes are even more of a concern than those that grant the executive the power to grant tax exemptions.

Tax directives (in all forms) have proliferated in recent times. The size of directives is estimated to be three times thicker than the tax proclamations and tax regulations. The subject matter of directives is as diverse as the number of directives out there. We must recognize that directives affect the lives of taxpayers as much as (if not more than) tax proclamations and regulations. Their numbers and volumes are only going to increase as the Ethiopian tax administration gains experience and resources. It is therefore about time that we direct our attention to directives- the procedures, the issuing authorities, and the like. Except in some purely technical matters, directives should be preceded by consultative forums and invite comments from the taxpaying community and even think-tanks (if there are any in the tax field) before they are written into law. Consultations overcome many a rancor and create a tax compliance environment based on voluntary compliance rather than compulsion.

The role of the Ethiopian Tax Administration in the area of facilitating uniform interpretation of tax laws through such tools like advance rulings or letters and manuals has been quite negligible. If anything, the Ethiopian Tax Administration has been tentative, sometimes making forays into the field and then ceasing these kinds of services to the taxpaying community. Much of it is understandable, given the resource constraints of the Ethiopian Tax Administration. Again as the authority gains in strength (as it should), it should take advantage of these avenues of 'tax awareness' and facilitate 'voluntary compliance' by taxpayers- as its goal is or should be.

More importantly, the status of advance rulings and other subsidiary legal documents should be clarified. How much can taxpayers actually rely upon the advance rulings of the Tax Authority in their future dealings? A strong tradition of challenging the procedures and rules of the Tax Authority has not taken root in Ethiopia, with the result that we do not know how courts will

view some trailblazing administrative developments, particularly in the area of advance rulings.

The channels of tax dispute settlement seem to restrict the appeal process to cases having something to do with assessment by the Tax Authority. This has the tendency of discouraging taxpayers from challenging the actions of the Tax Authority that are not in the nature of assessment. There is a plethora of directives issuing from the Tax Authority in recent times. These directives affect the rights and obligations of taxpayers in one way or another. Taxpayers should be able to challenge these directives, their legality and consistency with higher laws.

Almost all cases that appear before the Tax Appeal Commission and the courts have been in reaction to assessment of tax and of penalties. It is surmised that the tax laws may have been responsible for this state of affairs. Even if a taxpayer contemplates challenging the other actions of the Tax Authority, she would not know where to start and to go. A strong tradition of judicial review of administrative directives, interpretations and actions has not developed in Ethiopia to give taxpayers the opportunity to challenge the tax authorities on matters that have little to do with tax assessments. Although this is not a matter of taxation *per se*, the need for administrative law and procedure for challenging the various actions of the tax authorities is probably more urgently felt in taxation than in any other area of governmental action.

A Critical Reflection on the Legal Framework Providing Protection for Plant Varieties in Ethiopia

Fikremarkos Merso*

1. Introduction

In 2006, Ethiopia issued the first law providing protection for plant varieties with the main objective of boosting agricultural production and productivity by recognizing and rewarding the efforts and investments of plant breeders. This article seeks to analyze that law. The analysis centers around two main issues. First, the article assesses the law particularly in the light of its own objectives. While rewards or incentives for breeders constitute an important objective, whether the provisions of the law adequately reflect this is one important issue this article has attempted to address. Second, since 2003 Ethiopia has been in the process of accession to the World Trade Organization (WTO) and as part of this process it would be required to provide protection for plant varieties either through a patent, an effective *sui generis* system or a combination of the two systems as prescribed by the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) - one of the major agreements of the WTO. Ethiopia's law may be regarded as a *sui generis* system as envisaged by the TRIPS Agreement and the other important area of analysis in this article is whether or not the key provisions of the law are in conformity with the TRIPS Agreement. In that light, the article attempts to make a preliminary examination of the salient provisions of the Ethiopian legal framework providing protection for plant varieties in the light of the provisions of the TRIPS Agreement. In addition, the article attempts to identify conceptual deficiencies, gaps and limitations in the law and makes some recommendations for possible action.

The article is organized as follows. The first section sets the context for examination of the main issues of discussion in the subsequent sections by making a cursory look at the emergence and development of intellectual property (IP) protection for plant-related innovations as well as by outlining the relevant TRIPS provisions on the subject. It then takes up the thorny issue of when and under what conditions a plant variety protection would be considered 'effective' for the purpose of the TRIPS Agreement. This will be followed by a detail examination of the different elements of the Ethiopian legal framework on protection of plant varieties based on the guidelines of effectiveness of a *sui generis* system outlined in the previous section. The paper concludes by providing critical insights into and perspectives on the Ethiopian legal framework by raising a range of issues related to the harmony between the objectives of the law and its actual provisions as well as to its compatibility with the TRIPS Agreement.

2. Emergence and development of IP protection for plant-related innovations

For centuries, plant varieties had been developed and used in agriculture through

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traditional plant breeding where private ownership of such varieties through intellectual property rights (IPRs) had not featured prominently as an issue. Even with the emergence of modern plant breeding, plant varietal development had historically been taken as the responsibility of the public research institutions. As the varieties were developed as public good, the issue of IPR protection of the varieties was not high on the agenda. IPR protection for plant varieties became an important issue with the emergence of commercial plant breeding, the understanding being such a protection plays an important role to promote and reward innovation in plant breeding.[1] But from the very beginning the issue of IPR protection for plant-related innovations had been controversial. On the one hand, such innovations are borne in seeds which can make myriads of copies of themselves in the natural growth process; the release of a propagating material of a plant enables the reproduction of the variety without any further control of the breeder and the commercial breeding sector asserted that without IPR protection for such innovations the breeder would be in danger of loosing benefits from his many years of research and breeding efforts. On the other hand, it was not clear if allowing monopoly rights over plant-related innovations through IPRs would be in the public interest since such a protection would restrict access to the protected varieties. Furthermore, from a technical point of view, given the self-replicating nature of plants, it was not clear if such innovations would fit into the hitherto existing traditional IPRs which were created for machine-related innovations.

In the face of increased pressure from the emerging commercial plant breeding and seed industry in the United States (U.S.) and Europe for the creation of a mechanism to reward plant breeding, two different approaches emerged. The first was a bold experiment to accommodate plant-related innovation within the existing patent system and the second, an attempt to develop a different reward system out of the patent system. The *US Plant Patent Act*, the fist ever law providing IPR protection for plant-related innovations, came into force in 1930.[2] The Act was indeed innovative in the sense that it attempted to modify the existing patentability criteria for inventions to suit plant-related innovations.[3] However, the scope of application of the Act was limited to asexually propagated plants (such as through budding, grafting and layering), fruit and ornamental species. Needless to say, it did not prevent use of the protected variety as parental material for sexual propagation.[4] All the sexually-propagated species (those grown from seeds) and the majority of the asexually-propagated species being excluded from the scope of the law and that the right holder was not entitled to prevent the use of the protected variety for propagation

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[1]A.J. van Wijk, D.J.F. Eaton & N.P. Louwaars , 'Framework for the Introduction of Plant Breeders' Right in the Developing Countries' (Unpublished Wageningen Centre for Genetic Resources, 2003) 13.

[2]The Plant Patent Act of 1930, 35 U.S.C. 161-164.

[3]Thus in recognition of disclosure of innovations relating to living things, the law requires disclosure "as complete as is reasonably possible", Ibid, at 162.

[4]V. Henson-Apollonio, *Intellectual Property and Patent Regimes in Biotechnology and their Impact on Agricultural Development in Developing World*, in P. Christou & H. Klee (Eds), Handbook of Plant Biotechnology, (WILEY Publishing, Hoboken, NJ, 2004) 27.

even for commercial purposes, the incentive it promised for the commercial breeders was limited and the precursor Patent Act was far from being a truly patent law for plant-related innovations. A specific law on the protection of plant varieties outside the patent system came in the U.S. only in 1970 when the *Plant Variety Protection Act* was issued.[5]

The advent of modern biotechnology[6] has brought a different dimension to the development of protection for plant-related innovations. The 1970s saw a rapid scientific breakthrough in the life sciences including the refinement of the recombinant DNA techniques, sequencing of the genome of a virus, the cloning of human genome.[7] These and other scientific developments were increasingly viewed as a great potential for producing new products and processes of considerable economic significance and IPR protection was increasingly viewed as a critical tool to ensure returns from investments made in the area.

The modest beginning of extending patent protection for a genetically modified microorganism (GMOs) following the 1980 slim majority (5:4) decision of the U.S. Supreme Court in *Diamond v. Chakrabarty*[8] which for the first time recognized

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[5]The Plant Variety Protection Act of 1970 (PVPA), 7 U.S.C. 2321-2582.

[6]The Convention on Biological Diversity (CBD) defines biotechnology as "Any technological application that uses biological system, living organisms, or derivatives thereof, to make or modify products or processes for specific use" (The Convention on Biological Diversity adopted at Rio in 1992 came into force in 1993, U.N Doc. UNEP/Bio. Div/N7-INC.S/4. Article 2 'Use of Terms'). On the other hand, the Food and Agricultural Organization (FAO) defines modern biotechnology as "...a range of different molecular technologies such as gene manipulation and gene transfer, DNA typing and cloning of plants and animals." See Food and Agricultural Organization (FAO) , 'FAO Statement on Biotechnology' (Rome, 2000) available at http//:www.fao.org (accessed on 12 May 2010) .

[7]The scientific breakthrough was achieved because of the discovery of the Deoxyribonucleic acid (DNA), the substance which carries the hereditary characteristics, by Waston and Crick in 1953 followed in 1973 of the demonstration by Stanley Cohen Herbert Boyer that DNA from different species could be assembled and inserted into another (host) organism through a process known as recombinant DNA (rDNA) technology. See in general Mill, O., Biotechnological Inventions: Moral Restrains and Patent Law (ASHGATE Publishing, 2005) 15.

[8]*Diamond v Chakrabarty*, 447 U.S. (United States Supreme Court Reports) 303, 100 S. Ct. (Supreme Court Reporter) 2204 (1980). Before 1980, the policy of the US Patent Office was to refuse applications for patents on living organisms. The basis for refusal was the long-standing "products of nature" doctrine, which specified that although processes devised to extract products found in nature could be patented, the products themselves were not patentable subject matter because they were not inventions. Accordingly, when Ananda Chakrabarty applied in 1972 for a patent on a living bacterium capable of consuming oil slicks, the application was refused. Chakrabarty appealed, and in 1979 the case reached the US Supreme Court. In June 1980, by a close majority, the Supreme Court held that Chakrabarty had a right to a patent on the microorganism under the existing patent law. The majority noted that the relevant distinction was not between animate and inanimate things, but between products of nature and human-made inventions; patentable subject matter included "everything under the sun that is made by man", including living

patentability of a living organism *per se*[9], expanded to an animal (an Oyster) in 1987.[10] The *Harvard Onco-Mouse* (a genetically modified mouse which was highly susceptible to cancer because it had a human oncogene) became the first mammal to be considered an 'invention' by the U.S. Patent and Trademark Office (USPTO) in 1988.[11] The current state of the law in the U.S. offers opportunities for plural regimes of protection for plant-related innovations: utility patents, Plant Patent Act (PPA) and Plant Variety Protection Act (PVPA). Patents are also available to microorganisms, genes, cells and DNA as well as human body.

In Europe though the need to provide some form of protection for plant breeders was long recognized, the patent system was regarded as inappropriate to protect plant-related innovations because, among other things, it was understood that plant-related innovation would not meet the patentability criteria such as novelty and inventive step.[12] A different approach was accordingly adopted to reward plant

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organisms produced using genetic technology.

[9]Actually, the US Patent Office had granted a Patent to Louis Pasture in 1873 for purified yeast, which is regarded by many as the first patent on life forms. But even if it is true that the patent was granted for "yeast free from organic germs of disease, as an article of manufacture" (US Patent 141'072), it was granted with the understanding that the claim relates to inanimate things. As noted the understanding in the US before *Diamond v Chakrabarty* was that living things were "products of nature" not patentable inventions. That is why the USPTO had refused to recognize living matter as a patentable subject matter until the decision in *Diamond v Chakrabarti.* It is to be noted that the claimed invention in *Diamond v Chakrabarty* was the bacterial strain itself not useful products derived therefrom which makes it a living thing *per se* claim. Pasture's patent attracted little attention at the time probably because it was taken as an isolated incident not capable of setting precedence as biotechnology had not yet began to show its breakthroughs at the time.

[10]*Ex parte* Allen, 2 U.S.P.Q.2d (1987). In this case the patent applicants developed a method for producing a new variety of sterile polyploidy oysters of the *Crassostrea gigas* species. Even if the patent examiner rejected the patent claim as the new variety of oyster was not manufactured by man which decision was confirmed by the USPTO though for a different reason (not satisfying the 'obviousness' requirement under 35 U.S.C 103), the Board of Patent Appeals and Interferences reversed the holding reiterating the Supreme Court's strong language in Chakrabarty, "anything under the sun that is made by man is patentable." The understanding was that the particular oyster had not existed before and was thus a patentable subject matter under 35 U.S.C 101 (2 U.S.P.Q.2d at 1428). From this time on the USPTO has taken the position that non-naturally occurring non-human multi-cellular living organisms including animals are patentable subject matter within the scope of 35 U.S.C 101 (See USPTO Rule published in 1077 Off. Gaz. Pat. Office 24 on Apr. 21, 1987).

[11]Harvard Onco-Mouse, 447 USP.307. The USPT granted U.S. patent No. 4,736,866 to a transgenic non-human mammal, a genetically engineered mouse. Harvard scientists isolated a gene that causes cancer in mammals, including humans, which was then injected into already fertilized mouse ova. Some of the mice produced this way developed breast cancer within a few months of their birth. The mice would enable scientists to monitor both the course of the disease and its causes.

[12]M Llwelyn, 'The Legal Protection of Biotechnological Inventions: An Alternative

breeders at the beginning through different non-IPR mechanisms such as protected seals for seeds from the original breeder, and monetary rewards, and later through a plant breeder right (PBR). The individual measures of the European countries to provide protection for plant breeding were harmonized through the *International Convention for the Protection for New Varieties of Plants*[13] (the UPOV Convention). The *European Patent Convention* (EPC)[14] has unequivocally banned patent protection for plant varieties and currently all countries which make up the EU but Greece are members of the UPOV. The *Directive of the European Parliament and of the Council on the Legal Protection of Biotechnological Inventions*[15] (the European Biotech Directive) has expanded patentability of biological materials with a view to creating a more favorable condition for the development of modern biotechnology. Actually, the European Biotech Directive has come up with a clear position on life patenting that no invention should be refused patents merely because a living matter is involved.[16] Though, true to the tradition in Europe as embodied in the EPC, the European Biotech Directive provides that plant and animal varieties are not themselves subject to patents, invented plants and animals are patentable in as much as the claim is not directed to a plant or animal variety as such.[17]

On the other hand, even if developing countries have long recognized the critical role of modern varietal improvement to their agricultural development, they have sought to achieve this objective through publicly funded research systems both at the national and international levels where IPRs play a little role.[18] For a range of moral/ethical and policy considerations, most of these countries used to exclude living things in general from patentability and only few had a law providing PBR protection for plant varieties. As of 1995, when the WTO agreements entered into force, there were only seven developing countries with IPR regimes for plant varieties, none of them a Least Developed Country (LDC).[19]

Approach'(1997), 3 European Intellectual Property Review 117.

[13]The International Convention for the Protection of New Varieties of Plants of December 2, 1961 as revised on November 10, 1972, on October 23 1978 and on March 19, 1991. UPOV is the French acronym of the organization administering the conventions, *L'Union internationale pour la protection des obtentions végétales.*

[14]Article 53.b, Convention on the Grant of European Patents (European Patent Convention), done at Munich, 5 October 1973.

[15]Directive 98/44/EC of the European Parliament and the Council of 6 July 1998 on the Legal Protection of Biological Inventions, Official Journal of the European Communities, I. 213/13, 30 July 1998.

[16]The recitations of the European Biotech Directive clearly recognize that biotechnology is a high risk investment and requires legal protection for innovations in the field with a view to encourage investment, productivity and industrial development.

[17]See Article 4(1) and 4(2), the European Biotech Directive.

[18]See in general R.E Evenson & D. Gollin, Crop Variety Improvement and its Effect on Productivity: The Impact of International Agricultural Research,(CABI Publishing, 2003).

[19] They are Argentina, Chile, Uruguay, Colombia, Mexico, Zimbabwe and Kenya. See Jaffe and van Wijk 'The Impact of Plant Breeders' Right in Developing Countries', Technical Paper of the Special Program on Biotechnology and Development Cooperation (Ministry of Foreign Affairs of the Netherlands, 1995) 23.

With the coming into force of the TRIPS Agreement, it has become an obligation for all WTO Members to provide protection for plant varieties either through patents, an effective *sui generis* system or a combination of the two.

3. The TRIPS Agreement and Plant-related innovations: setting the context

Article 27.1 of the TRIPS Agreement provides the basic principle that members should provide patent protection for all types of inventions in any field of technology. Then the second sub-article provides inventions which may optionally be excluded from patentability. In particular, Article 27.3(b) of the TRIPS Agreement provides as follows:

> Members may also exclude from patentability plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system of any combination thereof.

In relation to plant-related innovations, there could be different options under Article 27.3(b) including the following: to exclude plants and plant varieties from patentability and provide protection for plant varieties by a *sui generis* system; to not exclude plants and plant varieties from patent protection; to not exclude plants from patentability but provide an effective *sui generis* system of protection for plant varieties.

Although the breadth of Article 27.3(b) remains controversial, it is nonetheless one of the areas where the TRIPS Agreement has apparently provided flexibility to WTO Members to design their own plant variety protection taking into account their specific needs if they opt for the *sui generis* system. It is to be noted that the TRIPS Agreement has not even attempted to provide a general guideline as to what the *sui generis* system should look like, let alone to prescribe minimum standards of protection, save the vague requirement that such a system be 'effective.'

However, despite the apparent flexibility, Article 27.3(b) seems to have accomplished one important task: it has forced all WTO Members-including developing countries and LDCs that did not have plant varieties protection regimes before- to look for a mechanism for protection of plant-related innovation within a defined time frame; one obvious impact of this being the increase in membership to UPOV, the only *sui generis* plant variety protection system at the international level. The fact that the UPOV has been a readily available mechanism coupled with the understanding that it is generally regarded as compatible with the TRIPS Agreement might have persuaded a number of WTO Members to accede to the UPOV. Membership to this Convention has increased from 27 in 1994 to 68 by November 2010.

Nonetheless, what is stated above may not necessarily lead to the conclusion that the TRIPS Agreement was the *raison d'être* for developing countries in general and LDCs

in particular to look for a mechanism for protection of plant-related innovations. Actually, a number of these countries had embarked upon economic liberalization, including in the agricultural sector, in the 1980s and 1990s, before the TRIPS Agreement entered into force, where IPR protection in general and protection of plant varieties in particular was taken as part of the package of economic liberalization in the agriculture sector.[20] In some of these countries, plant variety protection was thus foreseen even before the term *sui generis* was inscribed in the WTO vocabulary. It would therefore be difficult to make the whole issue of protection of plant-related innovations as purely the invention of the TRIPS Agreement. This state of affair necessitates viewing the issue of plant variety protection in the context of the broader global socio-economic order since the end of the Cold War which has been propelled by globalization including economic reforms through economic liberalization.

3.1. The *sui generis* option for protection of plant varieties

As noted before, the *sui generis* system has been taken as a preferred option for protection of plant varieties in developing countries in general and the LDCs in particular including Ethiopia. An understanding of this system is in order for the analysis of the Ethiopian legal regime on the subject.

Sui generis is a Latin term defined as 'of its own kind/genus or unique in its characteristics.'[21][The authenticity of Wikipedea for academic writing is highly controversial given its open access. There are dictionaries for Latin Maxims; Black's Law also defines Latin Maxims including '*sui generis*'] In the TRIPS context, the term *sui generis* may be understood in two different ways. First, it is a peculiar type of IPR designed to provide protection for plant varieties taking into account the peculiar nature of plant-related innovations (biological nature). Second, it may also mean a special kind of IPR for plant varieties designed taking into account the particular needs and interests of the country in question, subject to the mandatory provisions of the TRIPS Agreement, if any. The peculiarity of the system could thus relate both to the subject matter of protection and the needs and priorities of the particular country that provides it. This being a flexible system, a country may design its *sui generis* system taking into account a range of policy issues such as the state of the domestic seed industry, the state and capacity of the public breeding sector, the state

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[20]For example in India the need for protection for plant-related innovations was discussed during the late 1980s and early 1990s and such a protection was foreseen by the 1988 Seed Policy of the Country which mirrored the reforms the country started in the agricultural sector. See A. Ramana , 'India's Plant Variety and Farmers' Right Legislation: Potential Impact on Stakeholder Access to Genetic Resources', (EPTD Discussion Paper No.96, 2003). In China, too, reforms in the Agricultural and seed sectors started almost at the same time as in India where PBRs were foreseen as one component of the reform. See K. Bonwoo, *et al.*, 'The Economics of Generating and Maintaining Plant Variety Rights in China' (EPTD Discussion Paper No.100, 2003). In Ethiopia, PBR protection was foreseen by the 1992 National Seed Industry Policy at a time where the country has embarked upon economic reforms.

[21]See Wikipedia, the Free Encyclopedia; available on line at http://en.wikipedia.org/wiki/Main_Page (accessed on 5 October 2010).

and capacity of the private breeding sector, the national seed supply system, the nature and state of the farming community, agricultural needs of the country, the state and capacity of biotechnology and impact on research and development (R&D), international technology transfer, and farmers' position and role in the economy.[22]

3.1.1. UPOV as a *sui generis* option under TRIPS

The UPOV Convention provides a kind of IPR for plant breeders which are commonly known as plant breeders' rights (PBRs). There are three Acts of UPOV: the 1961 Act, the 1978 Act and the 1991 Act where the rights of the breeder have been strengthened by each subsequent Act. In order for a plant variety to be eligible for protection under the UPOV Conventions it should not only be new but also distinct, uniform and stable ('DUS'). The 1961 and 1978 Acts of UPOV require members to provide protection for varieties of limited species and genera but protection should progressively extend to more species and genera;[23] the subject matter of protection was limited to the reproductive or vegetative propagating material of the variety.[24] The acts requiring the authorization of the breeder were limited to the acts of sale or offering for sale and the production for commercial marketing of the reproductive or vegetative propagating material of the variety.[25] Different exceptions and limitations to the rights of the breeder such as the farmers' and breeders' exceptions[26] were envisaged with a view to achieving different public policy objectives; patent and PBR protection (dual protection) was prohibited[27] and the rights of the breeder lasts for 15 years (18 years in case of trees and vines).[28]

The 1991 Act of UPOV has introduced fundamental changes to the system with a view to enhancing the right of the breeder. The major changes brought by the UPOV 1991 Act include: possibility of double protection of plant varieties through patents and PBR;[29]its application to all species and genera;[30]extension of the subject matter of protection to essentially derived varieties and under some circumstances to the

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[22]See the International Plant Genetic Resource Institute (IPGRI), Key Questions for Decision Makers: Protection of Plant Varieties under the WTO TRIPS Agreement (Rome: Italy, 1999).

[23]UPOV 1961 and 1978 Acts, Article 4.

[24]Ibid, Article 5.1.

[25]Ibid.

[26]While farmers' exception is inferred from the fact that the acts requiring the authorization of the breeder are the commercial production of the variety, the breeders' freedom to use the variety for the purpose of developing another variety is clearly provided for, with some limitations, under Articles 5.2 and 5.3 of the 1961 and 1978 Acts respectively. Article 9 of the two acts also makes provision on the possibility of limiting the rights of the breeder.

[27]UPOV 1961 and 1978 Acts, Article 2.1.

[28]Ibid, Article 8.

[29]This is in contrast to Article 2(1) of UPOV 1978 Act which clearly prohibits double protection.

[30]UPOV 1991 Act, Article 3. This is again in contrast to Article 4(1) of UPOV 1978 Act which sates that the convention may apply but not required to all species and genera.

harvested material and even to products made from the harvested material;[31] expansion of the acts requiring the authorization of the breeder;[32] inclusion of the farmers' privilege as an optional exception with conditions;[33]extension of the minimum period of PBR protection from 15 to 20 years;[34] and inclusion of a national exhaustion rule.[35]

There have been concerns from developing countries and the LDCs in particular that the UPOV Convention neither mirrors their peculiar situations nor addresses their interests. This is especially true of the 1991 Act which has significantly enhanced the rights of the breeder and severely limited the possibility of exceptions and limitations to protect public interest such as the possibility of farmers to save and exchange among themselves seed from a protected variety which is crucial for agricultural development in such countries. Undoubtedly, the UPOV system in general reflects the economic structure prevalent in the developed countries. It is the manifestation of the growing needs of commercial breeders to protect their improved varieties. It may not thus fit well into the realities of developing countries and LDCs.

Even if UOPV is not mentioned in the TRIPS Agreement and hence cannot be taken as the standard to evaluate the effectiveness of the *sui generis* system, it still is relevant in the whole discussion about *sui generis* system for protection of plant varieties for a range of reasons. First, it could be taken as one ready-made *sui generis* option WTO Members may wish to adopt. In this sense, accession to the UPOV Conventions could avoid the hurdle of drafting a new system of protection for plant varieties while ensuring its TRIPS compatibility. Furthermore, it is the only plant variety regime at the international level with rich experience in protection of plant varieties for about five decades. Members may thus prefer to accede to the Convention rather than looking for an entirely new system which is not yet tested in practice. Second, UPOV could be taken as a basis for the *sui generis* system and some of its principles could easily be adapted to the peculiar needs of each country. This indeed is what the practice shows. Several PBR laws have taken some of the principles of UPOV either as they are or by modifying them to specific needs. Actually, no *sui generis* system has yet been developed which is entirely different from UPOV Conventions. The *sui generis* systems developed so far have been informed by the UPOV Conventions and some principles have even been taken directly from the latter. This is the case in Ethiopia as well as we shall see later in this article. Third, there are already demands in the TRIPS Council, in the context of the

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[31] Ibid, Articles 14(2), (3) and (5).

[32]Acts requiring the authorization of the breeder now include production or reproduction (multiplication), conditioning for the purpose of propagating, offering for sale, selling or other marketing, exporting, importing, and stocking for any of the above purposes (Ibid, Article 14(1)).

[33]Ibid, Article 15(2).

[34]See UPOV 1978, Article 8 and UPOV 1991, Article 19(2).

[35]UPOV 1991, Article 16.

review of Article 27.3(b), that UPOV be specifically mentioned under Article 27.3 (b) as the only TRIPS-compatible *sui generis* system.[36] Though it is difficult to predict the outcome of the review at this stage it is not unimaginable that the UPOV would be the standard for the *sui generis* system under Article 27.3(b). Fourth, post-TRIPS practices of developed countries also suggest that UPOV has been taken as a TRIPS-compatible *sui generis* plant variety protection and, as we shall see later in this article the future seems towards further harmonization of IPRs and it is not unimaginable that plant variety protection could be harmonized along UPOV standards. Fifth, the controversy surrounding the effectiveness of a *sui generis* system may not continue indefinitely and it could probably be resolved by the WTO Dispute Settlement Body (DSB) where interpretation along the UPOV line cannot be ruled out.

3.1.2. The effectiveness of the *sui generis* system

It is submitted here that three important considerations should guide the interpretation of the term 'effective' under Article 27.3(b) of the TRIPS Agreement. First, in interpreting the term note should be taken of the rationale for providing the *sui generis* system as one option for protection of plant varieties under the TRIPS Agreement. The *sui generis* system was the result of a compromise among different interests where WTO Members were given sufficient flexibility to design their law in an area they consider critical, taking into account their different policy objectives. Any interpretation of the term 'effective' should not thus diminish or go against the carefully balanced flexibility under Article 27.3(b). In that light, the objectives (Article 7)[37] and principles (Article 8)[38] of the TRIPS Agreement should be used to interpret the provisions of the agreement including the term 'effective.' This would mean that Members would have sufficient flexibility to design their system with a view to achieving the objectives of the TRIPS Agreement. Second, the *sui generis* system should be an IPR, a right in property and should consequently exhibit the peculiar characteristics of a property right in intangibles. *Inter alia*, it should allow the plant breeder to say no to third parties in relation to some acts affecting the protected variety. Third, the *sui generis* system is foreseen in the context of the WTO and should thus naturally mirror the general tenor of the multilateral trading system by incorporating the fundamental principles of the WTO.

The UPOV claims that its Conventions provide an effective *sui generis* system for the protection of new varieties of plants, as required by Article 27.3(b) of the TRIPS Agreement.[39] Some WTO members have also tried to define the effectiveness of the

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[36]See for example, US submission to the TRIPS Council, WT/GC/W/107, 3 November, 1998.

[37]Article 7 states that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to socioeconomic welfare and to the balance of rights and obligations."

[38]The relevant part of Article 8 states that the Members could take measures to promote the public interest in sectors of vital importance for their socioeconomic and technological development.

[39]UPOV, 'Submission to the TRIPS Council on the Review of Article 27.3(b)',

sui generis system in terms of UPOV standards. A similar view has been echoed by the International Seed Federation which asserted that to be effective, a plant variety protection should as a minimum conform to the requirements of the 1991 Act of UPOV.[40] However, the TRIPS Agreement which is characterized by extensive reference to preexisting international treaties has not done so when it comes to the UPOV Conventions. The absence of a reference to the UPOV though it predates the TRIPS negotiation should be interpreted to mean that WTO Members did not wish to make use of the UPOV standards to determine the effectiveness of the *sui generis* system under the TRIPS Agreement. It has been asserted that the UPOV was not mentioned in the TRIPS Agreement because while the 1978 Act was considered obsolete, the 1991 Act had not entered into force at the time of the adoption of the Agreement.[41] However, the assertion does not hold water in view of the fact that the TRIPS Agreement has even referred to the Washington Treaty on integrated circuits, a treaty which has never entered into force.[42] Thus, any attempt to define the *sui generis* system in terms of the UPOV standards amounts to re-enactment of Article 27.3(b) of the TRIPS Agreement, but that obviously requires renegotiation of the provision.

Another attempt to define the effectiveness of the *sui generis* system has come from William Lesser, who argues that an effective *sui generis* system for protection of plant varieties should be viewed as the parallel of patents in the field of biological inventions, the only reason for providing a *sui generis* being the special nature of biological inventions.[43] Lesser asserted that "A plant breeder right system that parallels the checks and balances of major patent systems is... considered to be effective within the TRIPS context."[44] The implication of this contention is that the *sui generis* system would be 'effective' when it provides similar protection to patents except the difference attributed to the special nature of biological inventions. The same view was implied, though not directly stated by the WTO Secretariat in its attempt to explain the difference between a patent and a *sui generis* system as the later provides "more flexibility to adapt to particular circumstances arising from the technical characteristics of inventions in the field of plant varieties such as novelty and disclosure."[45]

The above interpretations reduce the flexibility in the *sui generis* system only to the

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IP/C/W/347/Add.3, 11 June 2002.

[40]International Seed Federation, 'ISF View on Intellectual Property' (Bangalore, 2003), available at http://www.worldseed.org/isf/0n_intellectual_property.html (last accessed on 4 May 2011).

[41]J. Watal, Intellectual Property Rights in the WTO and Developing Countries (Klwer International, The Hague, 2002) 140.

[42]Treaty on Intellectual Property in Respect of Integrated Circuits, Done at Washington, D.C., 26 May 1989 (commonly referred to as the Washington Treaty).

[43]See W. Lesser, 'An Economic Approach to Identifying an Effective *Sui Generis* System for Plant Variety Protection' (2000) 16 Agribusiness, 96-114.

[44]Ibid.

[45]See WTO Document WT/CTE/W/50 of 20 May 1997.

technical nature of plant-related innovations. But as noted at the beginning of this Section, flexibility of the *sui generis* system relates both to the nature of the innovation and to the peculiar circumstances of the countries that design it. Under this interpretation, even the UPOV Conventions may fail the test of effectiveness in the eye of the above interpretation. For example, viewing the effectiveness of the *sui generis* system only from the point of view of the technical (biological) nature of the innovations may well go against the farmer's and breeder's exemption recognized under UPOV because these exemptions are neither recognized under the patent system nor can they be justified on account of the biological nature of the innovations.

Actually, the technical-oriented interpretation does not answer the question why the patent system should be taken as a reference for evaluating the effectiveness of the *sui generis* system while the TRIPS Agreement allows WTO Members to exclude that option altogether. This patent-PBR nexus is obviously against the letter and spirit of Article 27.3(b). There is no *a priori* reason to make parallels between the patent and the *sui generis* systems in order to determine the effectiveness of the latter under Article 27.3(b). The interpretation will go not only against the idea that the *sui generis* system provides sufficient flexibility for members to design their PBR law but also the understanding on the part of both WTO and developed countries that the UPOV Convention, which allows flexibilities and exceptions beyond those accommodated by the patent system, is nonetheless effective for the purpose of the TRIPS Agreement.

Still another view is that effectiveness refers to the availability of effective enforcement and judicial remedy for the rights.[46] One may say that effective enforcement without effective standards makes little sense. But then the question is does the effectiveness refer to the standards of the rights to be provided by the *sui generis* system? An affirmative answer to this question encounters two problems, at least. First, it has to also show what level of rights is required for the system to be effective.[47] This again presupposes the existence of minimum standards for the *sui generis* system which, as we noted earlier, is not the case. Second, the implication of this interpretation will be against the very rationale of Article 27.3 (b). As stated earlier, the Agreement does not seek to harmonize minimum standards of protection as far as the *sui generis* system is concerned. If the effectiveness requirement under Article 27.3(b) were to be interpreted as referring to the standards of protection, then it amounts to indirect harmonization of minimum standards since such an interpretation necessarily implies the existence of some general standards of protection. This will be against the letter and sprit of Article 27.3. (b) as it significantly diminishes the flexibility inherent in the Article which is the outcome of compromises of different interests of Members. What should then be the elements of effectiveness?

As an IPR, the effective *sui generis* system should include the basic elements of a

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[46] IPGRI (1999) *supra* note 22.

[47] See D. Leskien and M. Flitner, 'Intellectual Property Rights and Plant Genetic Resources: Options for *sui generis* system', (1997), 6 Issues in Genetic Resources, 341.

property right. First, it should define the subject matter of protection, that is, a 'plant variety' because the TRIPS Agreement requires protection for a 'plant variety' and defining the subject matter is thus mandatory. But there is no further obligation to define it in one way or the other. It is up to each Member to define what a 'plant variety' is. Adopting the UPOV definition, though it is the accepted practice at the moment, is, however, optional. Second, the criteria for the protection should clearly be defined, otherwise what is protected and what is not remains unknown. Again there is no obligation to follow the UPOV 1991 standard. But as a matter of fact, so far no *sui generis* system has emerged with other criteria than those provided for in the UPOV (novelty and DUS).[48] Third, the right of the breeder in relation to the protected subject matter should be defined, or else the breeder would not be able to know what acts in relation to the protected subject matter require his/her authorization. This is obviously an important element of a property right including IPR. But again there is no specific standard in relation to the scope of the right; it is basically up to each Member to define the standard taking into account its own public policy objectives. While there is no minimum threshold as such, there should, nonetheless, be a clearly defined right to the breeder where he can exclude third parties in relation to some acts. Broadening or narrowing the rights could be made taking into account the special situations and interests of each Member. Fourth, as a system envisaged by a WTO Agreement it should obviously include the core principle of the trading system: national and most favored nation treatments. Fifth, the exceptions, exemptions and limitations to the right should be clearly defined. There are no as such clearly defined limits on such exceptions, exemptions or limitations even if the current practice is to provide exceptions in favor of farmers and breeders as well as compulsory license for reasons of public interest.[49] Obviously, the exceptions and exemptions should not be too broad to make the right of the breeder meaningless because in that case it would be difficult to talk of protection of the right of the breeder as such. If the exceptions, exemptions and limitations are broadly defined, there should be compensation for the breeder otherwise the right would be deprived of its meaning as a property right. Six, the period of protection should be determined. There is no minimum period as such though most PBR laws provide more than 15 years protection. Seventh, there should be an administrative and judicial procedure and infrastructure to allow the breeder to enforce his rights and take action in case the rights are infringed. This is not special to IPRs; it is available to any property right under the due process principle. But it will be particularly important under the TRIPS Agreement given its emphasis on enforcement of IPRs. In the absence of effective enforcement providing for the rights would become meaningless.

If a *sui generis* system is designed as a property right regime in accordance with what is stated in the foregoing paragraphs, it will be difficult to challenge it as being not effective under the TRIPS Agreement.

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[48]That is what a study on 33 PVP Laws has revealed. See Centre for Agricultural Economics and Policy Research, 'Plant Variety Protection: Lessons from a Cross Country perspective' (Policy Brief 11, New Delhi, 2003).

[49] Ibid.

4. Protection of plant-related innovations in Ethiopia

4.1. Agriculture in Ethiopia

The Ethiopian economy relies heavily on agriculture which constitutes about 50 percent of the GDP, 90 percent of export and 84 percent of total employment. Agriculture in Ethiopia is dominated by small-scale farmers who account for 95 percent of the cultivated land, mainly for subsistence needs.[50] This makes agriculture more than a mere economic activity; it is a source of livelihood, food security, culture and communal wellbeing. The farming practice is outdated, and in most cases dependent on low yielding traditional technologies, with limited use of improved seeds, fertilizer and chemicals. It is also vulnerable to the vagaries of nature as it is primarily rain-fed. As a result agriculture in Ethiopia is characterized by low level of productivity and the country has always been suffering from persistent food shortages and at times famine. For a variety of reasons, the disproportionately large number of the farming community has not been able to feed the country.

Successive regimes in the country took agriculture at the centre of socio-economic development with a varying degree of emphasis, though.[51] The current Government has made rural-centered agricultural development as the overarching development policy of the country where food security and poverty alleviation have been given top priority.

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[50]Ibid, at 84.

[51]Fostering agricultural development with a view to meeting domestic demand, as well as a source of foreign exchange has been a prominent issue in the development policies the country knows of since the 1950s. Although the subsistence agriculture was considered obsolete and more attention was given to the industrial sector in the first five-year development plan of the country (1957-1961) which was adopted during the Imperial period, the need for providing utmost attention to the small holders' peasant agriculture, the source of livelihood for the majority of the people, was taken as indispensable for overall development of the country in the second five year development plan of the Imperial regime (1963-67). But the latter policy document emphasizes that large-scale farming is the way to transform the country's agriculture and the economy in general. See Imperial Ethiopian Government Ministry of Finance and Development (1957), "First Five Year Plan", Addis Ababa; Imperial Ethiopian Government Ministry of Finance and Development (1962), "Second Five Year Plan", Addis Ababa.

The Military Marxist junta that came to power by overthrowing the Imperial order had taken several measures in the agriculture sector. In consonant with the Marxist ideology it decided to pursue, it vowed to eliminate exploitation of the proletariat through ownership and control of the major means of production. Chief among the measures taken by the military junta, otherwise known as *Derge*, was the March 1975 Rural Land Proclamation which dismantled the hitherto land tenure system by nationalizing all rural land and redistributing it to the peasants. The *Derge* recognizes the key role of the agriculture in its National Democratic Revolution (1976), its overall development policy. Accordingly, it took several measures to transform the agricultural sector though with little success. It was at this time that Ethiopia saw the Great Famine of 1984 which clearly shows the failure of the agrarian reform taken by the then government.

Since 1991 Ethiopia has been taking different reform measures in the economy including in the agriculture sector. Import tariffs have been reduced, prices have been deregulated, export subsidies have been abolished, the seed and agricultural input sectors have been liberalized and opened for the private sector, and subsidies for agricultural input such as fertilizer, herbicide and insecticide have been abolished- to mention some of the major reform measures. On the other hand, the country's drive to food security and economic development has demanded greater attention to agricultural research.[52] Government's major policies from the *Rural Development Policy and Strategy*[53], to the *Agricultural Research Policy*[54] to *Science and Technology Policy*[55] all recognize agricultural research as a key tool for enhancing agricultural productivity, ensuring food security and promoting economic development in general. In recognition of the weak state of agricultural research in the country the *Rural Development Policy* states that the major emphasis in the short and medium terms should be on the selection and adaptation of the available foreign technology to the country's situations rather than on the development of entirely new technologies which not only requires significant capacity and resources but also takes longer time.

Private agricultural R&D accounts only for about 0.5 percent of the total agricultural R&D investment[56] and as things stand now agricultural R&D in the country is almost exclusively the task of the public institutions.

4.2. The seed sector

The seed supply system in the country is largely based on informal seed exchange and sell by and among farmers in informal market networks outside the formal or commercial market. Small farmers account for more than 85 percent of the seed supply in the country while the remaining is taken care of by the formal seed sector comprising mainly of public research and higher learning institutions.[57] Both the formal and informal seed sectors were operating without any policy guidance until 1992 when the first *National Seed Industry Policy* (NSIP) of the country was adopted.[58] The NSIP has foreseen the development of a healthy seed industry in the country

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[52]C. Bonte-Freidheim *et al* , 'Financing Agricultural Research: the Challenge Ahead' ISNAR Briefing paper No.11 (The Netherlands: The Hague, 1994).

[53]Government of Ethiopia, 'The Rural Development Policies, Strategies and Instruments of the Federal Democratic Republic of Ethiopia', unofficial translation from Amharic to English by the Ministry of Information (Addis Ababa, Ethiopia, 2002).

[54]Government of Ethiopia, 'Agricultural Research Policy of Ethiopia', (Addis Ababa, Ethiopia, 1997).

[55]The Transitional Government of Ethiopia, 'Science and Technology Policy of Ethiopia' (Addis Ababa, Ethiopia, 1993).

[56]M. Nienke and M. Solomon, 'Agricultural Science and technology Indicators', ASTI Country Brief No.9, IFPIR-ISNAR (Rome, Italy, 2003), p. 2.

[57]K. Tafesse, 'Towards seed industry development in Ethiopia', (FAO, Rome), available at http://www.fao.org/ag/agp/agps/georgof/Georgo17.htm (accessed on 11 October 2010).

[58]The Transitional Government of Ethiopia 'National Seed Industry Policy of Ethiopia' (Addis Ababa, Ethiopia, 1992).

and envisaged the participation of the private sector in the seed sector (both in the production and distribution or supply system). Although the NSIP recognizes the role of the private sector and envisages their participation in the seed sector, it also provides that in the short and medium terms the public sector will continue to play the major role in the seed production, multiplication and supply system.[59] It is recognized that the role of the private sector in seed production and supply is negligible and the public sector will continue to be the major producer and supplier of seeds.[60] The NSIP has also made it clear that the public sector will be responsible for the production and supply of seeds which do not attract the attention of the private sector but are important for the peasantry.[61] It also recognizes the informal seed sector and provides for its organization at the community/village level.[62]

The NSIP is the fist document that has foreseen the adoption of different laws in the plant breeding and seed sector: seed law to regulate seed trade, control seed quality and standards, and a law providing for plant breeders' and farmers' rights. While the former law was issued in 2000, the latter followed in 2006.

Despite the reforms in the agricultural sector, the role of the private sector in plant breeding and seed supply remains negligible and the Ethiopian Seed Enterprise (ESE), a public institution, has remained the dominant actor in the formal seed sector.[63] The only visible private seed company is the Pioneer Hi-bred which has been incorporated as Pioneer Hi-bred Ethiopia (PHE) but its role in the seed sector has remained very limited. PHE has been engaged in the production of hi-bred maize where it produced about 1,517.6 MT in 2002, negligible compared to the 100,000 MT estimated seed need in the country.[64] Even the ESE was able to produce about 20, 171.6 MT in the same year which is only 12 percent of the market.[65] Reports show that the farmers were not willing to buy even the limited produce of the ESE and PHE for different reasons and their sale has been declining over the years. In 2002, for example, the ESE and PHE managed to sell only 18 percent and 16.5 percent of their available stock respectively.[66] This is a clear indication that the seed production and supply system in Ethiopia relies heavily on the informal seed sector. The seed law which was foreseen by the NSIP was adopted in 2000 as the Seed Proclamation.[67] The Seed Proclamation requires that, any person wishing to engage in the production, processing, distribution or marketing of prescribed seeds must

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[59]Ibid, Section 4.14.

[60]Ibid, Section 12.1.

[61]Ibid, Section 5.05.

[62]Ibid, Section 5.04.

[63]Tefesse *supra* note 58.

[64]Beniot Raymakers, 'Consequences of Reduction in Agricultural Input Sale in Ethiopia', UN Emergency Unit for Ethiopia, available at http://www.africa.upenn.edu/EUE/M_eue.html (accessed on 2 November 2010).

[65]Tafesse *supra* note 58.

[66]Raymakers, *supra* note 65.

[67]Proclamation No.206 of 200, Seed Proclamation, *Federal Negarit Gazeta*, 6th Year No.36 (June 2002).

first obtain a competence assurance certificate from the National Seed Industry Agency - the institution empowered to implement the Proclamation.[68] A new variety of any plant species should be approved named and registered based on the terms and conditions set out by the Release Committee.[69] Any prescribed seed on sale should have a label specifying that it is certified and showing the variety name, type of crop and the day of production and testing.[70] However, the Seed Proclamation does not apply to seed produced by a farmer and directly sold to another farmer except where the farmer advertises the sale of seeds.[71] Imported seeds should, among other things, confirm to Ethiopian seed standards and requirements, labeled and packed and comply with the law on quarantine.[72] There is also a specific requirement for genetically modified (GM) seeds: such seeds may only be imported if they are "in conformity with provisions of the law issued regarding the importation of genetically modified plants and other pertinent directives."[73] Even if the requirement in the Seed Proclamation is not specific, it appears that it is referring to biosafety regulations. Ethiopia has already put in place biosafety regulations in the form of the Biosafety Proclamation.[74] Interestingly, there is no equivalent requirement for GM seeds produced locally and it is not clear why such a requirement applies only to imported seeds. The law also bans the import and sell of seed whose second generation cannot germinate or seed which has terminator gene technology.[75]

4.3. Plant variety protection

4.3.1. The need for plant variety protection in Ethiopia

The issue of IPR protection for plant varieties is new to Ethiopia as is in most developing countries though such a law was envisaged by the Seed Industry Policy

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[68]Ibid, Article 6.

[69]Ibid, Article 4.

[70]Ibid, Article 6.

[71]Ibid, Article 3.

[72]Ibid, Article 15.

[73]Ibid, Article 15.5.

[74]Proclamation No 655 of 2009, Biosafety Proclamation, *Federal Negarit Gazeta*, 15th Year No.36 (September 2009). The Biosafety Proclamation provides that any person wishing to engage in any transaction involving GMOs should secure either the advanced informed agreement or the authorization of the concerned authority as appropriate (Article 8.1). Thus all acts involving GMOs are subject to AIA or authorization from the concerned agency except for contained use which would be determined by directive to be issued by the Authority (article 8.13). In principle the law applies to transactions involving the release into the environment of GMOs for use as pharmaceutical, food, feed or processing unless otherwise determined by the Authority under a directive (Article 3). It also provides in a separate provision that the "precautionary principle" is the guiding principle in the implementation of the law and underlines the need for caution particularly when "there is scientific uncertainty about the risk." The draft law also provides rules on specific issues such as risk assessment and management, labeling and traceability, liability, etc. Detailed discussion of the law is however beyond the scope of this paper.

[75]Seed Proclamation, Article 15.6.

as far back as 1992. After several years in the making the first ever law on protection of plant varieties was finally enacted in January 2006 as a Proclamation to Provide for Plant Breeders' Right[76] (the PBR Law). Even if the law has already come into force, it is still important to raise the question why plant variety protection (PVP) has emerged as legislative issues in the country in the first place, not least because the answer to the question would enable us understand the policy the law is supposed to promote. Different reasons could necessitate the adoption of a PVP law:

- To address the demand from the domestic plant breeding/ seed sector;
- The urge to promote and encourage the domestic plant breeding and seed sectors;
- The urge to attract foreign investment in the plant breeding/seed sectors;
- To meet treaty obligations (such as TRIPS, UPOV, CBD etc); or
- As part of economic liberalization/reforms of a country.

Historically, PBRs have their roots in the emergence of private industry in the area of plant breeding and seed sectors.[77] However, this does not seem the case in Ethiopia. In the 1990s policy changes were introduced in the agricultural sector as part of the overall economic reform program the country has embarked on. Till then, plant breeding as well as the seed multiplication and supply were entirely carried out by the public institutions. As noted earlier, despite the reforms in the agricultural sector, the reality even today is that plant breeding and the seed production and supply still remains by and large in the hands of the public institutions. The role of the private sector in agricultural R&D and seed production and supply has been very limited. Unlike in other countries where a strong private sector influenced or even shaped PVP laws, the private sector in Ethiopia was not in a position to demand such a law or to influence its development. Rather, it is the PBR Law itself that seeks to promote the emergence of the private sector in the area.

In the same vein, agricultural R&D in Ethiopia is publicly funded and guided by the country's priority for food security and poverty alleviation where the role of PBR has not clearly been recognized and articulated. The public institutions have shown little interest in IPR issues in general, far from demanding or influencing the enactment of the PBR Law. In view of this, it is difficult to conclude that the PBR Law of Ethiopia has been a direct outcome of the demands of the domestic plant breeding/ seed industry.

Attracting foreign investment in the area of plant breeding and introducing new varieties to the country may also be taken as one of the driving forces behind the introduction of the PBR Law. Though nothing to that effect has been directly stated in the preamble, it was clearly stated in the Parliamentary Committee Report during the deliberation and adoption of the PBR Law by House of Peoples' Representatives (HPRs) that: "The Proclamation [to provide for Plant Breeder's Right] would

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[76]Proclamation No.481 of 2006, Proclamation to Provide for Plant Breeders' Right, *Federal Negarit Gazeta*, 12th Year No.12 (February 2006).

[77]See in general Kloppenburg, J.R, First the Seed: the Political Economy of Plant Biotechnology, (Cambridge University Press, 1988).

encourage investment and pave the way for the utilization of new plant varieties released abroad."[78] Nonetheless, how far the PBR Law would serve this purpose is an open question which would be taken up later in this article.

Treaty obligation could also be an important consideration for the adoption of the PBR Law. Ethiopia has already ratified the *Convention on Biological Diversity* (CBD)[79] and the *International Treaty on Plant Genetic Resources* (ITPGR),[80] both with direct relevance to and impact on the issue of protection of plant-related innovations. Further, Ethiopia is in the process of accession to the WTO and as part of the accession it needs to provide for protection of plant varieties as required by Article 27.3 (b) of the TRIPS Agreement. The Parliamentary Committee Report stated above asserts that the PBR Law will facilitate the country's accession to the WTO.[81] However, despite the assertion of the Parliamentary Committee, the Ethiopian PBR Law does not directly or indirectly indicate that it is meant to meet the requirements of the TRIPS Agreement. Actually, the law was envisaged back in 1992- before the country made the decision to join the WTO and even before the TRIPS Agreement itself came into being and the term *sui generis* was inscribed in the PVP vocabulary. The PBR Law could not thus be a direct response to the TRIPS Agreement though the latter might have added the impetus to the process of its adoption. It being envisaged in 1992, at the time when the country embarked on economic reforms, the PBR Law should basically be understood and best explained in the context of the broader economic reform the country has embarked on since 1991.

Though the emergence of PVP in Ethiopia should basically be understood in the context of the changes in policy environment in the 1990s, it does not follow that the law has not been influenced in one way or the other by regional and global developments. Actually, its provisions appear to be the result of the interplay of international, regional and national political and economic developments in relation to defining property rights over GRs. As such, the TRIPS Agreement, the UPOV, the ITPGR, the CBD and the *African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources* (the African Model Law)[82]have all influenced or in some instances directly

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[78]Report of the Rural Development, Natural Resources and Environmental Protection Standing Committee of the House of Peoples' Representatives, as quoted by Walta Information Centre, 'House discusses and endorses two bills' (Addis Ababa 3 January 2006).

[79]The Convention on Biological Diversity adopted at Rio in 1992 came into force in 1993, U.N Doc. UNEP/Bio.Div/N7-INC.S/4.

[80]The International Treaty on Plant Genetic Resources for Food and Agriculture, adopted in November 2001 by FAO Conference (Resolution 3/2001) and came into force on 29 June, 2004.

[81] Ibid.

[82]The Organization of African Union(OAU) (now African Union, AU) Summit of Heads of State and Government, adopted this Model Law in Ouagadougou in 1998, and recommended that it be the basis of national laws in member countries. See J. A. Ekpere, 'The OAU's Model Law for the Protection of Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources: An Explanatory Booklet' OAU Scientific,

constituted key elements of the Ethiopian PBR Law. The latter was adopted in 2006, three years after the country has decided to join the WTO, and the TRIPS Agreement should obviously have been one important consideration in shaping its provisions. As we shall see later, plant varieties are protected by and large on the basis of the UPOV standards of protection, part of the farmers' rights provisions is taken from the ITPGR, while the provisions dealing with the scope of and limitations to the rights of the breeder are largely taken from the African Model Law.

The PBR Law should therefore be understood from the broader national, regional and global political and economic contexts from which it emerged and by which it has directly or indirectly been informed.

4.3.2. Protection criteria

Under the PBR Law, PBR is available to a 'plant variety.' The definition of a 'plant variety' is directly taken from Article 1(VI) of the UPOV 1991 Act. A 'variety' is defined as "a plant grouping within a single botanical taxon of the lowest known rank, which can be: defined by the expression of the characteristics resulting from a given genotype or combination of genotypes; distinguished from any other plant grouping by the expression of at least one of said characteristics and considered as a unit for being propagated unchanged."[83] But not all plant varieties are capable of protection; protection is limited to a 'new plant variety' which is separately defined in terms of the standards of protection under the UPOV system: novelty, distinctiveness, stability and uniformity or homogeneity.

One peculiar feature of the Ethiopian PBR Law is that it does not have a specific provision dealing with the criteria of protection for plant varieties. The criteria are simply included in the definition of a 'new plant variety.'[84] Thus the criteria for protection are determined by the definition of a 'new plant variety' rather than by a specific provision in the body of the law. The effect is that a variety would be 'new', when, in addition to being novel, it is distinct, stable and homogenous. While the

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Technical and Research Commission (Addis Ababa, Ethiopia, 2000).

[83]The PBR Law, Article 2.7.

[84]A new plant variety is defined as a variety which:

a/ is, by reason of one or more identifiable characteristics, is clearly distinguishable from all varieties the existence of which is a matter of common knowledge at the date of application for a plant breeders' right;

b/ is stable in its essential characteristics, in that after repeated reproduction or multiplication at the end of each cycle, remains true to its description;

c/ having regard to its particular features of sexual reproduction or vegetative propagation, is sufficiently homogenous or is a well-defined multi-line; and

d/ its material has not been sold or otherwise disposed of to others by the breeder for the purposes of commercial exploitation of the variety:

i/ in the territory of Ethiopia, earlier than one year before the date of filing of application for plant breeders' right with the Ministry; or

ii/ in the territory of any other state, earlier than six years in the case of varieties of tree, fruit tree, or grape vines, or in the case of varieties of other species, earlier than four years before the date of the application.

reason for such an approach is unclear, the eligibility criteria are at the heart of the whole plant variety protection system and are therefore too important to be left for a definition. Even ordinarily, to say that a variety is 'new' only when it is distinct, stable, uniform and novel makes little sense and such understanding goes beyond the ordinary meaning of the term 'new.' It is not clear why the PBR Law has taken this approach rather than stating the criteria of protection in the body of the law clearly.

The PBR Law does not use the term 'novel' but provides the novelty criterion under the UPOV as one element of the definition of a 'new plant variety.'[85] The central point is that the variety for the protection of which an application is filed should not have been sold or disposed of for purposes of commercial exploitation for a definite period before the application was made. The law provides no exception to the novelty requirement unlike UPOV 1978 Act. Nevertheless the requirement is that the variety should not have been sold or disposed of for purpose of "commercial exploitation." Under UPOV 1978 Act, disposing of the material for small-scale processing, trials, or for testing by authorities are acts taken as exceptions that would not affect the novelty of the variety.[86] Under the PBR Law such acts would not affect the novelty of the variety as they are not done for 'commercial exploitation.' Thus, the definition of novelty in terms of the "commercial exploitation" of the variety accommodates more exceptions than the one under UPOV 1978 which merely lists a few exceptions to novelty. Under the Ethiopian PBR Law, the breeder can publicly use the variety for any purpose other than "commercial exploitation" without any fear of losing novelty.

It appears that discovered varieties are not protected under the PBR Law. This emanates from the definition of a 'breeder' as a person who "has bred and developed a new plant variety". Under UPOV 1991 a 'breeder' is defined as a person "who bred or discovered and developed a plant variety" which appears to include discovered and then developed varieties.[87]

Crafting and implementing a PBR system is a task of enormous legal and technical complexity. By adopting the criteria of the UPOV which have been tested and practiced over four decades, the Ethiopian PBR Law avoided any possible legal, scientific and technical complexity that may arise in a newly crafted system of PBR protection. The PBR Law does not provide the list of species or the number of species it covers. Rather it empowers the Ministry of Agriculture and Rural Development (the Ministry) to determine the species to be covered as well as to revise the list from time to time.[88] While the PBR Law appears to foresee a gradual expansion of the species to be included in the list, it does not fix the minimum number of species to be covered which makes it incomplete and unenforceable until such time that the Ministry comes up with the list of species to be covered thereby.

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[85]PBR Law, Article 5.d.
[86]UPOV 1978 Act, Article 6.1(b).
[87]UPOV 1991 Act, Article 1(IV).
[88] Ibid, Articles 3.1 and 3.2.

The TRIPS Agreement does not determine the minimum number of species which should be covered by the *sui generis* and it is for each member to determine the number of species to be covered in the system based on its public policy objectives. The Ethiopian PBR Law could not thus be challenged as incompatible with the TRIPS Agreement in this regard as long as the number of species it covers is determined. In the last couple of years, the Ministry has been in the process of developing a regulation with a list of species to be covered which is expected to be completed soon.[89] Because of the absence of the regulation with a list of species foreseen by the PBR Law, there is so far no registration carried out and no certificates have been issued by the Ministry.[90]

4.3.3. Protected subject matter and scope of the right of the breeder

Article 5 which is directly taken from Article 30 of the African Model Law defines the scope of the breeders' right. It determines two important issues: first, the subject matter of the right of the breeder; second, the scope of the right of the breeder. It reads as follows:

Article 5. Scope of the right

1. Subject to the exemptions and restrictions provided for in this Proclmation, a plant breeders' right entitles the holder an exclusive right to:

a. sell, including the right to license other persons to sell, plants or propagating material of the protected variety; and

b. produce, including the right to license other persons to produce, propagating material of the protected variety for sale.

2. The carrying out of the activities referred to in sub-article (1) of this Article by other persons with respect to a protected vareity is prohibited unless with the authorization of the holder.

In terms of subject matter, the breeder's right is thus limited to 'plants' or 'the propagating material.' In this regard the PBR Law seems to have basically followed the UPOV 1978 Act where the right of the breeder is limited to the reproductive and vegetative propagating material (as in the Ethiopian law though the latter uses the term 'plant' rather than 'vegetative propagating material'). As discussed earlier, under UPOV 1991 Act, the right of the breeder could also extend to the harvested material from the protected variety and even to products made directly from the harvested material.

By limiting the rights of the breeder to the productive and vegitatively propagating material of a protected variety, the PBR Law rightly avoided the possible excessive control by the breeder of the chain of transactions involving the variety as well as the

[89]Interview with Mr. Mesfin Kebede, Variety Release and Registration Performer, Ministry of Agriculture, 2 August 2011. Mr. Mesfin disclosed that a project designed to develop a regulation and to revise the PBR Law itself is being carried out by the International Development Law Organization (IDLO) which is expected to be completed by the end of 2011.

[90] Id.

complexity that may ensue in the PVP system in a country where capacity is limited. A *sui generis* system may not be challenged as an ineffective under the TRIPS Agreement as long as it provides protection in relation to the propagating material of the protected variety. Under the PBR Law the right of the breeder does not extend to the so-called 'essentially derived varieties.'[91] The extension of the breeder's right to essentially derived varieties may have advantages and disadvantages. In the Ethiopian context, there is an absolute need to encourage even minor adaptations of the domestic breeders. The domestic breeding industry has to start from the scratch and develop gradually through adaptations to existing varieties. As noted, the PBR Law seeks to encourage an almost nonexistent domestic breeding industry, and the lack of recognition of adaptations to existing varieties even if essentially derived from protected varieties may discourage the emergence and development of a domestic plant breeding industry and thus goes against the objective of the PBR Law itself. On the other hand, the extension of the rights of the breeder to essentially derived varieties creates complexity in the PVP system in Ethiopia where capacity is limited. It may also give the breeder control over a wide range of subject matter thereby preventing others from using the protected variety.

It is to be noted that the principle of essential derivation could not be used to protect "farmers' varieties"[92] and even most of the varieties developed by the public agricultural research institutions in Ethiopia since the principle, at least as enshrined under UPOV 1991, applies only to varieties derived from protected varieties. While farmers' varieties are not protected varieties under the Ethiopian PBR Law, public research institutions have generally been reluctant to protect their varieties. The UPOV principle of essential derivation may be modified to exclude varieties which are essentially derived from farmers' varieties and varieties developed by the public research institutions though such varieties are not themselves protected. While that is certainly possible, the Ethiopian PBR Law has not attempted to do so. This would have indeed been one mechanism to protect the "farmers' variety." One reason for not doing so could be that the whole issue of essential derivation would create complexity in the system in Ethiopia where capacity and experience is lacking.

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[91]Under Article 14(5) (b) of UPOV 1991 Act the right of the breeder is extended to 'essentially derived varieties.' A variety is deemed to have been essentially derived from another variety (the initial variety) when:

i. it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;

ii. it is clearly distinguishable from the initial variety and

iii. except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

[92]"Farmer variety" is defined as "a plant variety having specific attributes and which has been discovered, bred, developed, nurtured by Ethiopian farming communities or a wild relative about which Ethiopian farming communities have common knowledge" (Article 2.8 PBR Law).

Even in relation to the propagating material, acts requiring the plant breeder's authorization are limited. The authorization of the breeder is required for the *sell* of the propagating material and *production* of the propagating material *for sale*. It means that the authorization of the breeder is not required for importing, exporting, advertising, stocking, etc. of the protected variety as in UPOV 1991.[93] The law also differs from UPOV 1978 Act where the authorization of the breeder is required for the purpose of commercial marketing, the offering for sale and the marketing of the propagating material.[94] The offering for sale of the protected variety for example does not require the authorization of the breeder under the Ethiopian PBR Law. What is more, the use of the term 'sell' rather than 'commerce' or 'commercial marketing' as in the UPOV 1978 Act may be interpreted as implying a further limitation to the rights of the breeder. 'Marketing' includes but not necessarily limited to sell as it may involve other transactions than the sell of the variety. However, the act which requires the authorization of the breeder is limited to 'sell', that is a direct exchange of the protected variety for money. What is intended seems the exclusion of the use of the variety for commercial purposes which may not necessarily be an immediate sale of the variety.

In the same vein, the act which requires the authorization of the breeder is to 'produce' the propagating material and it is not clear if this includes reproduction (multiplication) of the protected variety. UPOV 1991 clearly requires authorization of the breeder for both 'production' and 'reproduction' (multiplication).[95] In this light, the omission of 'reproduction' in the law could be interpreted as intentional limitation of the acts requiring the authorization of the breeder. On the other hand, such a restriction of the acts requiring the authorization of the right of the breeder could render the already restricted right of the breeder almost meaningless. Thus, it is submitted that the word 'produce' should be viewed as including 'reproduce' as well. Strictly speaking, reproduction is still production of the protected variety. In any case, not all production or reproduction of the variety requires authorization of the breeder; authorization is required for the production or reproduction of the protected variety for sale. Arguably, production/reproduction of the protected variety for marketing, rather than for direct sale, does not require authorization of the breeder.

As discussed earlier, to the extent that the PBR Law has given exclusive rights to the breeder, though limited, it may not possibly be challenged as inconsistent with the TRIPS Agreement. The question is whether or not the law stands true to its own objectives.

4.3.4. Exemptions to the right of the breeder

Article 6 of the law which deals with exemption to the right of the breeder is directly taken from Article 31 of the African Model Law. The following acts have been taken as exemptions to the rights of the breeder under Article 6.1:

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[93]UPOV 1991 Act, Article 14.1.

[94]UPOV 1978 Act, Article 5.1.

[95]UPOV 1991 Act, Article 14.1(a) (i). UPOV 1978 Act does not specifically mention "reproduction" or "multiplication."

- propagate, grow and use a protected variety for purposes other than commerce;
- sell plants or propagating material of the variety as food or for any other use that does not involve growing the plant or propagating material of the protected variety;
- sell plants or propagating material of a proteced variety as they are within a farm or any other place where plants of the variety are grown;
- use plants or propagating material of the variety as an initial source of variation for purpose of developing another new plant variety except where the person makes repeated use of plants or propagating material of the variety for the commercial production of another variety;
- sprout the protected variety for use as food for home consumptioin or for the market;
- use the protected variety in further research, breeding or teaching;
- obtain, with the conditons of utlisation, the protected variety from genebanks or plant genetic resources centres.

Looking at the 'exemptions' stated above, the first observation is that most of the acts in the list are not within the scope of the right of the breeder under Article 5. In such cases the exemptions are made to rights which do not exist in the first place. For example, the rights of the breeder do not extend to the non-commercial use of the variety because the acts requiring his/her authorization are limited to sell and to produce the variety for the purpose of sale. Thus, stating the non-commercial use of the variety as an exemption makes little sense because the right from which the exemption is sought does not exist. On the other hand, providing exemption for the non-commercial use of the variety seems to suggest that all commercial uses of the variety require authorization of the breeder. Nonetheless, as stated earlier, that does not seem the case and the acts requiring authorization of the breeder are narrowly defined (sell and produce for sale) and do not seem to cover all commercial uses of the variety.

Similarly the use of the variety for breeding *per se*, research, and teaching is not within the scope of acts requiring authorization of the breeder under Article 5. Even whether or not the breeder's exception, that is the use of the the propagating material as initial source for developing another variety, is truly an exemption under the PBR Law is questionable. The use of the variety as initial source to develop another variety even if it is for commercial/marketing ends may not necessarily be covered under the narrowly defined acts requiring the authorization of the breeder under Article 5: to 'sell' or to 'produce for sale' of the protected variety. The commercial breeder may use or multiply the protected variety for commercial purposes but not as such for direct sale and the acts which require authorization of the breeder are the production of the variety for the purpose of sale. In this sense one may argue that under the Ethiopian PBR Law the right of the breeder to use the protected variety as initial source for developing another variety is not exception because it is not included in the acts requireing authorization of the breeder in the first place. The phrase "except where the person makes repeated use of plants or propagating material of the variety for the commercial production of another variety" under Article 6 seems to have little meaning for the same reason.

Similarly, the use of the protected variety for food or other purpose which does not require the use of the variety as a propagating material is of course out of the perview of the plant variety protection and thus it is not within the right of the breeder. Indeed, it seems that the only act in the list which could have required authorization of the breeder thereby constituting a sensible exemption is the sale of the plants or the propagating material where the variety grows since such an act involves direct sale of the propgating material. But even in that case, the exemption does not apply to the farmers, who are the most likely users of the exemption, since, as will be discuused later, farmers have the right to sell seeds of any protected variety except as certified seed traders.

4.3.5. Restriction on plant breeder's right

Apart from the exemptioins discussed above there are aslo cases where the rights of the breeder could be restricted. Article 7 which is again taken from Article 33 of the African Model Law, lists reasons for which the breeder's right may be restricted by the Ministry on account of 'public interest.' The Article states as follows:

1/The Ministry may, when public interest so requires, due to the following grounds, put restriction on the exercise of a plant breeders' right.

a) problems arises due to competitive practices of holders;
b) food security, nutritional or health needs, or biological diversity are adversely affected;
c) a high proportion of the protected variety offered for sale is being imported;
d) the requirements of the farming community for propagating material of a particular protected variety are not met; and
e) it is considered important to promote public interest for socio-economic reasons and for developing indigenous and other technologies.

2/ When the Ministry decides to put restrictions on the exercise of the plant breeders' right, it shall:

a) give to the holder the copy of the decision setting out the particulars of the restriction;
b) give public notice of the restriction;
c) specify the compensation to be awarded to the holder;

3/ Where the holder is dissatisfied with the compensation decided to be paid, he may lodge his appeal in accordance with Article 34 [Article 30] of this Proclamation.

Even if the grounds for restriction of the breeders' right are seemingly listed in an exhaustive manner, they are defined in broad and general terms. The ground for restricting the breeders' right "to promote public interest for socio-economic reason" may, for example, be interpreted broadly to cover a wide-range of issues. The restriction is to be made on the exercise of the plant breeder' rights, that is, on the acts requiring the authorization of the breeder: selling and producing for sale of the propagating material.

The scope of the restriction of the exercise of the rights of the breeder is far from clear. It appears that the restriction could range from temporary suspension to total ban on the exercise of the rights. If, for example, the restriction is to be imposed because "biological diversity is adversely affected" by the exercise of the right of the breeder, then, the measure could go as far as banning the exercise of the rights of the breeder in relation to a particular variety. However, the restrictions under Article 7 are to be made on account of public interest and only upon payment of compensation. What is more, the amount of compensation to be fixed by the Ministry is subject to judicial scrutiny. Article 7 is additional to another restriction, a compulsory license, which is treated separately under Article 8.

As noted, the scope and meaning of this restriction is far from clear; nor is its purpose. In some of the cases, merely restricting the breeders' right makes little sense; some of the grounds for restriction of the rights of the breeder could be better handled by other laws than the PBR Law even without the need for paying compensation to the breeder.

a) Where problems arise due to competitive practices of holders

The first ground for restricting the exercise of the breeders' right is when a problem arises from the anticompetitive practices of the right holders. The PBR Law does not define "competitive practices", nor does it provide for practices which are prohibited as anticompetitive in the realm of plant variety protection. In Ethiopia, the issue of competition is governed by the *Trade Practices and Consumer Protection Proclamation (the TPCPP)*[96] the scope of which is applicable to all persons involved in any commercial activity, thus including plant breeders.[97] The *TPCPP* generally defines anticompetitive practices and prescribes measures that could be taken against any person engaged in anticompetitive practices. The relationship between the restriction of the breeders' right for anticompetitive reasons and the *TPCPP* is far from clear.

One possible interpretation of this paragraph of Article 7 is that the *TPCPP* is the appropriate law that governs the issue of competition and the remedies thereof because the PBR Law neither defines anticompetitive practices nor provides special cases of anticompetitive practices in the context of plant breeding. Thus, the issue of anticompetitive practice including in plant breeding would be determined in accordance with the provisions of the *TPCPP*. When an anticompetitive practice is established in accordance with the provisions and procedures of the *TPCPP*, the Ministry could then take its own measures, that is, restrict the exercise of the right of the breeder, in addition to the measures that might have been taken in accordance with *TPCPP*.

But then the question that begs an answer is whether or not compensation should be paid for restricting the exercise of the right of the breeder on account of anticompetitive practices which have duly been established in accordance with the

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[96]Proclamation No. 685 of 2010, the Trade Practices and Consumer Protection Proclamation, *Federal Negarit Gazet* 16th Year No. 49 (August 2010).

[97]Ibid, article 4.

appropriate law. Anticompetitive practices bring with them administrative measures or even a criminal responsibility under the *TPCPP*, but they entail payment of compensation for the breeder when the Ministry invokes them to restrict the right of the breeder. This makes little sense and there is no reason to pay compensation in such cases to the extent that the measure is directed at and limited to remedying the anticompetitive practices of the breeders. Many jurisdictions consider anticompetitive practices as abuse of IPRs and provide rules for different measures to remedy the problem. Compensation for the IPR holder for abuse of his rights is simply unjustifiable. Even in case of patents, an IPR that entitles stronger rights to an inventor, compulsory licenses could be issued by a government to remedy anticompetitive practices with limited compensation or in some cases even royalty-free.[98] Similarly, under the TRIPS Agreement 'the need to correct anticompetitive practices may be taken into account in deciding the amount of remuneration' to be paid to the patent owner when his/her right is restricted through a compulsory license which could be interpreted to mean that a compulsory license could be granted to address anticompetitive practices of patent owners upon payment of less compensation than the normal or even without any compensation.[99] Payment of compensation for restricting the rights of the breeder on account of anticompetitive practices is not thus justified. The PBR Law should have clearly defined anticompetitive practices as abuse of PBR entailing restriction of the rights of the breeder without any compensation. As the PBR Law stands now, the anticompetitive practices of PBR holders could only be taken into consideration in fixing the amount of compensation but the possibility of doing so without payment of compensation has not been foreseen. The problem with Article 7 appears to be that it was taken directly from the African Model Law and incorporated into the Ethiopian PBR Law without making it compatible with other laws of the country.

Another important issue that needs to be determined in the context of this paragraph is the relationship between competition and IPR (PBR). IPR holders could engage in anticompetitive practices which may result in short supply of goods and services or in the high prices of such products and services. The appropriate remedy in such cases is to look for a mechanism for more production and supply of the product or service in question, and the most appropriate tool to achieve this purpose is grant of a compulsory license. Indeed, one of the important purposes of compulsory licenses even in some of the developed countries is to remedy anticompetitive practices. For example, even if a compulsory license is not as such envisaged under the U.S. patent law, courts in that country have in several occasions granted compulsory licenses to remedy anti-competitive practices.[100] Even under the TRIPS Agreement anticompetitive practices of IPR holders have been taken as one ground for the grant of a compulsory license even without the need for prior negotiation with the patent

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[98]See for example W. Fugate, Foreign Commerce and Antitrust Laws, 4th ed. (Boston, Little Brown and Co. 1991). Article 31k of the TRIPS Agreement provides flexibility in relation to compulsory licenses on account of anticompetitive practices both in terms of the procedures and in fixing the amount of the remuneration.

[99]The TRIPS Agreement, Article 31k.

[100]See in general Motta M., Competition Policy: Theory and Practice (Cambridge 2005)

holder unlike in all other cases where prior negotiation is a prerequisite for a grant of a compulsory license.[101] However, the Ethiopian PBR Law's remedy in case of anticompetitive practices is 'restricting the exercise of the right of the breeder,' not a compulsory license (at least not so stated), which is a matter separately treated under Article 8 of the law. But what is the meaning and purpose of merely restricting the right of the breeder in such cases? It is not the purpose of IPR (PBR) law to regulate anticompetitive practices as such; nor is it the competence of the Ministry to restrict the right of the breeder as a punitive measure or as a penalty for anticompetitive practices. The only way to make some sense of this is to say that 'restricting the rights of the breeder' is a kind of compulsory license which could be granted without following the standard procedures for the grant of a compulsory license as prescribed under Article 8.

b) Food security, nutritional or health needs or biological diversity are adversely affected

Food security, nutrition, health, biological diversity or the environment in general are important public policy issues for any nation. Measures taken by governments to address these issues have always been taken as legitimate. Even under the WTO Agreements, measures intended to address issues such as nutrition, health or the environment could be justified even if such measures may ordinarily be against the rules of free trade.[102]

The Ethiopian PBR Law has taken these concerns not as grounds for the exclusion of varieties from PBR protection but for the restriction on the exercise of the rights of the breeder which have already been granted. Once a PBR (an IPR in general) is granted issues such as food security, nutrition, health, biodiversity could be taken care of by other laws such as the seed law or biosafety regulations. For example, in relation to GM crops which are generally viewed as having a potential adverse effect on health, biological diversity or the environment, the Biosafety Proclamation provides detailed rules on risk assessment on health, food security and biological diversity before approval is granted. In the case of non-GM seeds, the Seed Proclamation takes care of these issues. Furthermore, there are environmental impact assessment requirements for projects before their implementation.[103] These and other laws would address the concerns once PBRs are granted and measures could accordingly be taken in accordance with those laws even without payment of compensation. Resorting to restricting the exercise of the rights of the breeder which has already been granted with payment of compensation does not seem to be the

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[101]The TRIPS, supra note 99.

[102]See for example Article XX of GATT 1947.

[103]Proclamation No.299 of 2002, the Environmental Impact Assessment Proclamation, *Federal Negarit Gazeta*, 9th Year No.11 (December 2002) prohibits commencement of projects and approval of policy and legal instruments without obtaining authorization from the relevant environmental body upon undertaking environmental impact assessment (article 3.1). Any licensing agency is required, prior to issuing an investment permit or a trade or an operating license for any project, to ensure that authorization is secured from the relevant environmental agency (article 3.3).

appropriate mechanism to address the issues.

Interestingly, the PBR Law does not provide for rules on exclusion of varieties from PBR protection. Even if public order or morality as a ground for excluding varieties from PBR protection is not as such foreseen under the UPOV, several national PVP laws have already used public order or morality including nutrition, health, biological diversity or environmental concerns as a ground for exclusion of varieties from PBR protection. The Indonesian law,[104] for example, prohibits protection for varieties to be used for purposes conflicting with social order, ethics or morality, religious norms, health and the protection of the environment. Similarly, the Malaysian law[105] states that no PVP should be granted to varieties which may affect public order or morality or have an adverse impact on the environment. Unfortunately, the Ethiopian PBR Law has not made use of this option.

c) A High proportion of a protected variety offered for sale is being imported
Under Article 5 of the PBR Law the authorization of the breeder is not required for the importation of the protected variety into Ethiopia. Thus, the restriction in this paragraph could not obviously be on the breeder's right to authorize the importation of the variety since such a right does not exist in the first place.

However, this paragraph does not deal with the issue of importation and sale of the protected variety as such. Though not clearly stated, the paragraph seems to indirectly require the breeder to exploit the variety in Ethiopia (produce it locally) rather than importing it altogether. The Ethiopian PBR Law seeks to achieve this purpose by restricting the exercise of the rights of the breeder. Again, restricting the right of the breeder in such cases makes little sense because the problem could only be remedied by the local production of the variety. Restriction would give sense in this case only if it means the restriction of the right of the breeder to authorize the production or multiplication of the protected variety by allowing others to produce the variety locally under a compulsory license. A compulsory license in this case could be granted without the need to go through the procedures under Article 8.

Actually, under Article 10.1 of the PBR Law, the plant breeder is entitled to a plant breeder's right irrespective, among other things, of whether the variety is bred locally or abroad. It seems that there is no discrimination between varieties bred locally or outside the country for the purpose of PBR protection. But once PBRs are granted some of the rights of a breeder could be restricted if a high proportion of a protected variety offered for sale is imported, to ensure indirectly that the variety is locally produced. Requiring local exploitation of a patented invention has remained controversial under the TRIPS Agreement; however, such a requirement is absolutely possible in the more flexible *sui generis* system.

d) The Requirements of the farming community for propagating material of a particular protected variety are not met
Two possible scenarios could be envisaged as a ground for restricting the right of the

[104]The Plant Variety Protection Act of Indonesia, No.29 of 2000, Article 3.
[105]The Protection of New Plant Varieties Act of Malaysia 2004 (Act 634), Section 15.

breeder under this paragraph. The requirements of the farming community may not be satisfied in terms of quantity (below the amount needed by the farming community) or in terms of quality (below the quality required by the faming community).

If the problem is quantity, then the solution would not be the mere restriction of the right of the breeder but more production or reproduction of the variety, and that could be achieved through a compulsory license under Article 8. Actually, the same reason justifies a grant of a compulsory license under Article 8, but while under Article 7.1(d) the restriction is to be made because the requirements of "the farming community" are not met, in Article 8 it is because the requirements of the "general public" are not met. It appears that while the needs of the farming communities is taken more seriously and a compulsory license could be granted in order to meet their needs even without going through the ordinary procedures for the grant of a compulsory license, the normal procedure under Article 8 should be complied with in relation to a compulsory license for the purpose of meeting the needs of the general public other than the farming communities.

The second situation where this paragraph could possibly be invoked is when the requirement of the farming community is not met in terms of the quality of the propagating material. There may be a need to ensure that the propagating material possesses the necessary quality to the satisfaction of the farming community. While that is absolutely important, it is questionable that the PBR Law is the appropriate mechanism to achieve the purpose. Ensuring the quality of the seed or a propagating material is precisely what the purpose of the Seed Proclamation is, and it is to ensure the quality of the propagating material that the Seed Proclamation prescribes different rules on testing and certification of seeds. The issue of quality should thus be left for other pertinent laws than the PBR Law and payment of compensation for restricting the rights of the breeder in such cases is again not justified.

e) It is important to promote public interest for socioeconomic reason and for developing indigenous and other technologies

This is a very general ground for restricting the right of the breeder and it certainly is difficult to delimit its scope. In principle, any restriction on the rights of the breeder may be justified on socio-economic grounds and this may create uncertainty and unpredictability in the PVP system. Even if such a very broad and vague ground for restricting the right of the breeder were necessary, it is still questionable if the PBR Law (IPR) is the appropriate mechanism to achieve the objective. It is not clear, for example, how the objectives of promoting public interest for socioeconomic reasons and promoting indigenous and other technologies could be achieved by a mere restriction of the rights of the breeder.

In general Article 7 raises a plethora of issues and suffers form lack of clarity; some of the grounds for restriction could have been taken care of by other laws even without payment of compensation and the meaning and objective of some of the other grounds for restriction remain unclear.

It is to be noted that while the payment to be made in the case of a compulsory license under Article 8 is 'remuneration' the one for restriction of the right of the breeder under Article 7 even for reasons of anticompetitive practices of breeders is 'compensation', which should in principle be equal to the damage caused by or resulting from the restriction.

Article 7 states that a breeder, who is not satisfied with the amount of compensation fixed by the Ministry could lodge an appeal to the Federal High Court. It appears that appeal is possible only in relation to the amount of compensation and not on the decision to restrict the right of the breeder as such. On the other hand, Article 30 states that appeal to the Federal High Court is possible from a decision on the 'granting', 'refusal', 'revocation' or 'restriction' of a plant breeders' right. Under this Article appeal is possible even from a decision on restricting the breeder's right. There appears to be inconsistency between Article 7 which allows appeal only from a decision on the amount of compensation and Article 30 which allows appeal even in relation to the very decision to restrict the rights of the breeder. Article 30 deals specifically with appeal and thus should have precedence over Article 7 with the effect that appeal is possible both against the decision to restrict the rights of the plant breeder and the amount of compensation fixed by the Ministry.

The *sui generis* system should provide a property right to the plant breeder in the sense that it should allow the breeder to exclude third parties in relation to some acts or to claim compensation in the case of exploitation of the variety without his consent. To the extent that the Ethiopian PBR Law provide for the restriction of the rights of the breeder, albeit on vaguely stated grounds, only upon payment of compensation just like any other private property the amount of which is subject to judicial scrutiny, it would be difficult to challenge it as ineffective under Article 27.3(b) of the TRIPS Agreement?.

4.3.6. Compulsory license

A compulsory license is another arsenal at the hands of the Ministry to protect the "public interest." A compulsory license on account of "public interest" is a well-recognized principle in the IP laws of many jurisdictions and also under the UPOV Conventions. Under the Ethiopian PBR Law a compulsory license is granted by the Ministry on application of any interested party provided three cumulative conditions are met. First, the holder of the plant breeder right should not be producing and selling the propagating material of the protected variety in sufficient amount to meet the needs of the public. Second, the holder of the right should have refused to license others to produce and sell the protected variety (or not willing to do so). Third, there should exist no condition under which the right holder may be expected to give a permit for the use of the protected variety (such as when he unequivocally so stated). When these cumulative conditions are complied with the Ministry would determine the amount of remuneration to be paid to the right holder by the applicant for the license, the duration of the license (minimum three and maximum five years which could however be renewed if the conditions that warrant the compulsory license still exist), and other conditions as appropriate. A compulsory license does not provide an exclusive right for the licensee; nor does it

preclude the right holder from using the variety or from granting licenses to others.[106]

Article 8 does not state the possibility of taking an appeal from a decision granting a compulsory license or on the amount of remuneration fixed by the Ministry. Article 30 on the other hand states that appeal to the Federal High Court is possible from a decision on the 'granting', 'refusal', 'revocation' or 'restriction' of a plant breeder's right. One may argue that a compulsory license is in a way a 'restriction' of the right of the plant breeder and is thus covered by Article 30. However, the PBR Law has made different provisions in relation to restriction of the right of the breeder (Article 7) and a compulsory license (Article 8) and it could be said that a compulsory license being treated differently from restriction of the right of the breeder, 'restriction' under article 30 refers only to article 7. But why the law should allow appeals when the right of the breeder is restricted under Article 7, but not when the right of the breeder is restricted through a compulsory license under Article 8? It is submitted that a compulsory license being a restriction on the property right of the breeder, some judicial scrutiny at least in relation to the amount of remuneration should be possible and Article 30 needs to make a specific reference to grant of a compulsory license as one ground for appeal, at least on the amount of compensation fixed by the Ministry.

4.3.7. Farmers' rights

As noted, small farmers in Ethiopia are responsible for over 90 percent of crop production, largely using farmer-developed varieties exchanged in the informal seed market networks. The farmer-developed varieties and the informal seed system are therefore the foundation of agriculture in the country. Recognizing this and providing rules for its protection is only natural in the country's socio-economic context.

The Ethiopian PBR Law deals with farmers' rights in a separate part (Part Five). Consistent with the conceptualization of farmers' rights under the ITPGR and the African Model Law, the farmers' rights under the PBR Law emanate from the past, present and future contribution of local farmers for the conservation and sustainable use of plant genetic resources which is the basis of breeding for food and agricultural production.[107] This seems to suggest that the conceptualization of farmers' rights under the PBR Law is beyond the issue of use of plant varieties by farmers as it encompasses the broader elements of the right as enshrined under the ITPGR.

The PBR Law provides two categories of rights to farmers in relation to plant varieties. First, Article 28(1) (a) provides for the right of farmers to use, save, exchange and sell 'farmers' varieties.' These rights of farmer are not however defined in relation to the plant breeder or the protected plant variety as such. Rather, they relate to a "farmer variety" which is defined as "a plant variety having specific attributes and which has been discovered, bred, developed, nurtured by Ethiopian farming communities or a wild relative about which Ethiopian farming communities

[106]The PBR Law, Article 8.4 and 8.5.

[107]The PBR Law, Article 27.

have common knowledge."[108] However, the PBR Law has attempted to grant rights to farmers on "farmers' variety" without actually providing a system of protection for such varieties. One option should have been to provide PVP protection for such varieties. But as discussed earlier, the "farmers' varieties" may not satisfy the standard PVP protection criteria. Even if they do, given the tradition of free exchange and sharing of genetic resources among Ethiopian farmers, a property law approach towards "farmers' variety" would not obviously be an appropriate mechanism for the protection of such varieties. Even in India, the only country to provide PVP protection for farmers' varieties, the plausibility and implication of such an approach is being widely debated.[109] The Ethiopian law did not attempt to provide PVP protection for "farmers' varieties." In this light, the right of farmers in relation to "farmers' varieties" is not different from the right of communities to access and use GRs under the Access Law. The PBR Law should have envisaged a system of protection for "farmers' varieties," which may not necessarily take the form of a property right, so that they would be entitled to benefit (sharing) for use of their varieties by others. The African Model Law, for example, envisages the possibility of protection of intellectual property rights of farmers through a variety of certificates for plant varieties developed or identified by communities which may not necessarily satisfy the requirements of the standard PVP protection.[110] Once such a mechanism of protection is in place, a system of remuneration or fund could be created for the use of the varieties by someone other than the farmers themselves. The system could even allow farmers to prevent PBR protection of their varieties or even varieties essentially derived from the "farmers' varieties. The farmers right in relation to "farmers' varieties" as it stands now thus makes little sense.

Second, the PBR Law has also granted farmers some rights in relation to the breeder or the protected varieties. The first element of the farmers' right in relation to the protected varieties is the right to use such varieties to develop farmers' varieties.[111] Read together with Article 28.1(a), farmers have the right to use any protected variety to develop farmers' varieties, and then to save, use, and even sell farm-saved seed of such varieties. This is similar to the so-called the breeder' exception as known to the UPOV model PVP systems allowing use of protected varieties as an initial source to develop other varieties. But under the PBR Law, the beneficiaries are farmers and it is defined as a right rather than as an exception to the breeders' right. Actually as discussed earlier, it seems that such use of a protected variety falls outside the acts requiring the authorization of the breeder under Article 5. The second and most important element of the right of farmers in relation to the protected varieties is the right 'to save, use, multiply, process and sell farm-saved seed of protected variety.'[112] The only limitation on these rights of farmers is that

[108]Ibid, Article 2.8.

[109]Ramanna, A., 'India's Plant Variety and Farmers' Rights Legislation: Potential on Stakeholders Impact on Access to Genetic Resources', International Food Research Institute (Washington DC, 2003) 2.

[110]The African Model Law, Article 25.2.

[111]The PBR Law, Article 28.1(b).

[112]Ibid, Article 28.1(c).

they may not sell farm-saved seed of the protected variety 'in the seed industry as a certified seed.'[113] Consequently, saving, using, exchanging and selling farm-saved seeds of a protected variety are defined under the PBR Law as rights of farmers not merely as exceptions to the rights of the breeder.[114] This seems to suggest the idea that in Africa the 'breeders' right should be subjugated to farmer's right,' one of the fundamental ethos of the African Model Law.[115]

Part Five of the PBR Law dealing with farmers' rights, while apparently standing on the broader conception of farmers' right as enshrined under the ITPGR and the African Model Law, is actually limited to the issue of use of plant varieties by farmers. 'Farmers' right' under the ITPGR is a broad concept with a cluster of rights, the right in relation to use of plant varieties being just one element. For example, the PBR Law does not envisage a mechanism of benefit-sharing or participation of farmers in decision making in the PVP system while these are important elements of farmers' right under the ITPGR. In other words, the PBR Law defines the farmers' right only in relation to the plant breeder not in relation to the sate. The Access Law has already provided for the right of communities to benefit sharing from the use of their GRs and the great majority constituting communities in Ethiopia being farmers, one may argue that the latter's right to benefit sharing has already been recognized under the Access Law. Nonetheless, conceptually 'farmers' right' is a distinct right of its own which stems from the past, present and future contribution of farmers for the conservation and sustainable use of plant GRs and the PBR Law should have included the important elements of the right under the ITPGR.

The right applies to 'farmers,' a concept which is not defined by the PBR Law. Under the ITPGR the right specifically refers to 'local farmers' who have for long conserved and preserved GRs and continue to do so.[116] Article 27 of the PBR Law also states that "Farmers' Rights stem from the enormous contribution that local farmers have made..." suggesting that the right attaches to local farmers.

The right to sell seed of a protected variety is not limited to farmer-to-farmer sale, except that the seed should be farm-saved. The only limitation on the right is that farmers may not sell such seed in the seed industry as certified seed. On the other hand, the Seed Proclamation excludes from its application only farmer-to-farmer sale of seed.[117] This means that the sale of seeds by farmers to non-farmers is regulated by the Seed Law as certified seed trade. To the extent that the PBR Law prohibits the

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[113]Ibid, Article 28.2.

[114]But see also Article 6 which makes an exception to the right of the breeder in favor of farmers.

[115]See Twolde B. Gebre Egziabher, 'The African Model Law for the Protection of the Rights of Local communities, Farmers and Breeders and for the Regulation of Access to Biological Resources and International Law and Institutions, Ethio-Forum Conference, Ethiopian Social Rehabilitation and Development Fund (Addis Ababa, 2002) 19.

[116]Article 9.1 of the ITPGR uses the language "...enormous contributions that the local and indigenous communities and farmers..."

[117]The Seed Proclamation, Article 3.2.

sale of the protected variety by farmers in the formal seed market, the right is indirectly limited to farmer-to-farmer sale of the protected variety, otherwise it would become a commercial seed trade regulated by the Seed Proclamation which is excluded from the farmers' right provisions of the PBR Law.

Ethiopia has different rights and obligations arising from different international treaties to which it is a party, and there is an obvious need to ensure that the *sui generis* system accommodates these rights and obligations. From a broader policy perspective given agriculture is basically subsistence and seed saving and exchange is the basis for about 85 percent of the seed supply system in the country, strict limitations on farmers' practices of seed saving, use and exchange would naturally have a negative impact on the maintenance of the livelihood bases of the farming community as well as the agricultural system in general which is at the centre of socio-economic development in the country. Nonetheless, the broad definition of the farmers' rights under the PBR Law in relation to the protected varieties raises two important issues: first, whether or not such a broad definition of the farmers' rights affects in anyway the effectiveness of the PBR Law in the eyes of the TRIPS Agreement. Second, whether or not such an approach matches with the objectives of the PBR Law and the context in which it was envisaged. Both issues would be examined later in this article.

4.4. Enforcement of the breeder right and opposition

The PBR Law provides that acts done in relation to the protected varieties which require authorization of the breeder without securing such authorizations would constitute infringement of the right of the breeder.[118] An infringement of the rights of the breeder brings with it civil as well as criminal liabilities. As a civil remedy, the breeder can demand cessation of the act of infringement (injunction) and may also claim compensation.[119] The PBR Law also provides for a severe penalty for infringement of the rights of the breeder which ranges from confiscation of the seed or the propagating material which is the proceed of the infringement to a term of imprisonment up to three years, or a fine up to five thousand Birr, or both.[120] As noted earlier, availability of enforcement mechanisms for the rights of the breeder constitutes an important element in evaluating the effectiveness of the *sui generis* system and one may say that the PBR Law provides an effective enforcement mechanism.

The PBR Law provides that anyone can lodge opposition to an application for a plant breeder's right.[121] Accordingly, any person who believes that the granting of such a right will be contrary to public interest or that the variety does not fulfill the requirements of protection or that the applicant is not entitled to PBR, may lodge an opposition to the Ministry. There is no need to show a vested interest in the form of personal injury for lodging an opposition. The right to opposition under Article 13

[118]The PBR Law, Article 24.
[119]Ibid, Article 25.1.
[120]Ibid, Article 29.
[121]Ibid, Article 13.

could be a crucial arsenal at the hands of any interested party such as non-governmental organizations (NGOs) to check that farmers' varieties and other plant varieties in the public domain are not privatized without improvements being made by the breeder. The specific conditions and procedure are to be determined by regulations.[122] However, there should be clear guidelines on the implementation of this provision so that it will not create excessive and unnecessary burden on the breeder. Interestingly, one of the grounds for opposition under Article 13 is when the applicant "considers that the granting of the plant breeder's right will be contrary to public interest." This assumes that plant varieties could be excluded from PBR protection on account of public interest. But as discussed earlier, the PBR Law does not provide for provisions that exclude plant varieties from PBR protection; it only provides grounds on which an already granted PBR may be limited or restricted on account of public interest (Article 5). It is not thus clear how an opposition could be lodged on this ground as long as it is not specifically taken as a ground for excluding plant varieties from PBR protection. It is also to be noted that opposition under Article 13 is against the grant of a PVP; not to a right which has already been granted. While as a matter of logic there is no reason why the right to lodge an opposition should not extend to a PBR right which has been granted for public interest reasons, the PBR Law does not seem to have clearly foreseen that possibility.

4.5. Institutional framework

The implementation of the PBR Law is simply entrusted to the Ministry. However, issues involved in PVP transcend the knowledge and domain of one specific institution. Even though placing the PBR Law under the Ministry which after all deals with agriculture and potentially possess specialized skills and expertise in plant breeding (variety testing and related issues could be taken as a right approach), plant variety protection involves not only technical plant breeding but also other expertise in such diverse fields as IP, law, international trade. Thus, ideally, establishing an administrative structure comprising different technical and scientific domains would have been the best option. This could have been achieved by establishing an independent office for that purpose either outside or within the Ministry itself. The first option, though the best, should however be considered from the point of view of financial and technical feasibility. It could be possible to make the office financially self-sufficient but it is difficult to predict at this stage how far breeders will be interested in seeking PVP in Ethiopia and the financial challenge remains a possibility. The Ministry is a huge government organ which also administers different institutions under it. The Institute of Biodiversity Conservation and Research (IBCR) and EARO- the potential public plant breeders- are administered under the Ministry. The latter is thus a regulator, decision maker and breeder, and conflict of interests could be unavoidable unless the office is organized independently.

The PBR Law does not foresee the possibility of participation of different stakeholders in decision-making both from within the different government

[122]Ibid.

institutions and other stakeholders such as farmers since the entire decision-making power is centralized and given to a single government ministry. Even if the idea of establishing an independent organ will not be feasible in the short term for financial and technical reasons, a mechanism could be created within the existing structure allowing participation of different stakeholders in the decision making process.

4.6. Critical reflections on the PBR Law in the light of its objectives and the TRIPS Agreement

The rationale for the enactment of the PBR Law as encapsulated in the preamble is utilitarian. It is recognized that the development of plant breeding requires considerable efforts and investment and that it is necessary to recognize, encourage and provide an economic reward for such efforts and investments. It is considered that recognizing, encouraging and rewarding efforts in plant breeding would play a significant role in improving agricultural production and productivity-a priority policy agenda of the country which has for long been grappling with food insecurity. Furthermore, it was clearly stated in the Parliamentary Committee Report during the deliberation and adoption of the PBR Law in the House of Peoples' Representatives (HPRs) that: "The Proclamation [providing for the Plant Breeder's Right] would encourage investment and pave the way for the utilization of new plant varieties released abroad."[123]

Indeed, the two most important potential benefits of IPR protection for plant-related innovations defined in utilitarian terms are facilitating transfer of improved varieties from abroad and providing incentive for private investment in plant breeding.[124] The understanding is that only if an effective plant variety protection system is in place that breeders from abroad will be encouraged to make long term investments in a country.[125] It is asserted that breeders would not introduce their new varieties to countries where their interests are not secured and PBRs can provide the additional incentive necessary for foreign companies to introduce their varieties into a new market.[126] The investment could benefit the recipient country through access to varieties with superior characteristics that boost agricultural productivity. Similarly, it is generally considered that PBRs could encourage local innovation in plant breeding and the development of new varieties thereby benefiting the country that provides the protection.[127]

Nonetheless, whether these benefits would accrue from PBR protection *per se* remains an open question. Since PBRs could only be one among several factors that may have impacts on plant breeding, it is difficult to single out in precise terms their impact on plant breeding. Researches on the impact of PBRs on plant breeding remain inconclusive. A number of authors have attempted to assess the impact of

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[123]Report of the Rural Development, Natural Resources and Environmental Protection Standing Committee of the House of Peoples' Representatives *supra* note 79.

[124]C.S Srinivansen , 'The International Trends in Plant Variety Protection' (2005) 2 Journal of Agricultural and Development Economics, 82-220.

[125]van Wijk, *et al supra* note 1.

[126]Ibid.

[127]Ibid.

PBR on plant breeding[128] but failed to come up with a definitive conclusion. Studies on the impact of PBRs on plant breeding in the context of developing countries, particularly LDCs are even fewer. As noted earlier, few developing countries provided PBR before the coming into force of the TRIPS Agreement. Even after the coming into force of the TRIPS Agreement, developing countries and LDCs were given a transition period to implement their TRIPS obligations and while some of them have already enacted PBR laws it is difficult to analyze the impact of such laws at this early stage since plant breeding is a long time undertaking and its impact could only be assessed over time.

The often-quoted study made in the context of developing countries is the one by Jaffe and van Wijk.[129] The authors examined the impact of PVP on R&D in a few Latin American countries. While this study has in fact found that investment has increased between 1896 and 1992, it also indicated that the incentive to investment in plant-breeding came more from the economic reforms and liberalization of the market rather than from the introduction of PBRs. Furthermore, even if the study has indicated that the introduction of PBR has increased access to foreign varieties in those countries, the access was subject to restrictions in some cases such as on the export of the varieties. On the other hand, the study concluded that there was little evidence showing that the introduction of the PBR in those developing countries stimulated innovation in the local plant breeding industry. This research was conducted in the context of middle income developing countries with moderate private research and commercial breeding industry; it is thus difficult to draw conclusions from it for all the developing countries, particularly the LDCs.

Farmers are the major players in both plant breeding and the seed supply system in most developing countries including Ethiopia. Any study on the impact of PBR in the developing countries would not thus be complete without including the impact of PBR on the farmers, both in terms of availability of improved varieties and access as well as on their ability to save and use the protected varieties. Actually, another study by van Wijk concluded that there is little evidence suggesting that PBR has led to the availability improved varieties for farmers.[130] On the other hand, transfer of

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[128]See W.H. Lesser, 'Assessing the Implication of Intellectual Property Rights on Plant and Animal Agriculture' (1997) 78 American Journal of Agricultural Economics, 1584-1591; C.S. Srinvansen, ' Plant Variety Protection Innovation and Transferability: Some Empirical Evidence' (2004) 28 *Review of Agricultural Economics*, 445; D. Rangnekar 'Access to Genetic Resources, Gene-Based Inventions and Agriculture' (Commission on Intellectual Property Rights, Study Paper 3a, 2002); N.P. Louwaars, *et.al*, 'Impact of Strengthened Intellectual Property Rights on Plant Breeding Industry in Developing Countries', World Bank Report (Washington DC, 2005); T. Swanson, 'Property Rights Issues Involving Plant Genetic Resources: Implications for Ownership for Economic Efficiency', CSERGE Working Paper, 2003, 98-113.

[129]Jaffe and van Wijk, 'The Impact of Plant Breeders' Right in Developing Countries', Technical Paper of the Special program on Biotechnology and Development Cooperation (Ministry of Foreign Affairs of the Netherlands, 1995).

[130]J. van Wijk, 'How does stronger protection of intellectual property rights affect seed supply? Early evidence of impact,' 13 Natural Resources Perspectives, Overseas

varieties could only be effective in similar agro-climatic conditions. Even if it is assumed that the PBR encourages the introduction of varieties developed abroad, there still is another limitation. Plant varieties are highly location-specific in their agronomic performance and a variety developed for one environment is unlikely to perform well in another environment mainly owing to adaptations to agro-climatic conditions and to local pests and pathogens.[131] Transfer of varieties could only be effective in similar agro-climatic conditions and the use of foreign-bred varieties in Ethiopia would be minimal given the great variation in agro-ecology in the country. A more recent research has attempted to evaluate the impact of PBRs in breeding in five developing countries and concluded that:

> It is early to attempt a statistical or even a quantitative analysis of the impact of intellectual property rights on plant breeding and seed production in the developing countries. In most developing countries the introduction of IPRs for plant breeding is a recent event which coincides with serious of other matters that have been set in motion, including the liberalization of domestic agricultural markets, increased globalization and a reduction of public expenditure for agricultural research and seed production. All of these trends have a marked effect on the seed and plant breeding sectors.[132]

In the African context, a study in the horticulture industry in Kenya and Uganda shows that the role of PBRs in attracting investment is minimal.[133] While Kenya had a PBR law from as far back as 1975[134] Uganda saw a massive investment in the sector without PBR laws in place.[135] Even in Kenya, it appears that investors were not capitalizing on the PBRs. Ethiopia has also been witnessing significant increase in foreign investment in the horticulture sector in the last few years even before the country put in place a PBR law. In fact, investors have been moving to Ethiopia, to a country that until recently did not have a PBR law, from Kenya, one of the few African countries members to the UPOV and which has had a PBR law in place since 1975. The important reasons for the flow of investment in the area include: availability of cheap labor, weather condition, credit facility and better transport facility.[136]

Development Institute, November 1996; available at http://www.oneworld.org/odi/nrp/13.html (accessed 11 October 2010).

[131]R.E Evansen, Analyzing the Transfer of Agricultural Technology', in J.R Anderson (ed.) Agricultural Technology: Policy Issues for the International Community (CAB International, 1994).

[132]Louwaars *et al*, *supra* note 129.

[133]Id.

[134]The Seeds and Plant Varieties Act (Cap 236 of the Laws of Kenya).

[135]See P.K. Asea and D. Kaija, 'Impact of Flower Industry in Uganda' ILO Working Paper 148 (Geneva: Switzerland, 2000).

[136]See Ethiopia, 'Trade and Transformations: Diagnostic Trade Integration Study' Vol. I; available at http://www.integratedframework.org/files/ethiopia_dtis-vol1_july04.pdf (accessed 6 October 2010).

Most flower varieties in developing countries are imported from developed countries and are protected in the source countries. They are also protected indirectly by controlling the export market rather than through PBR. Such varieties are also usually protected by other IPRs such as trademarks. Needless to say, commercial flower production requires significant infrastructure (greenhouse, irrigation, etc) and is thus out of the reach of small-scale farmers and the local market for flowers in such countries is also very negligible. These and other reasons make PBR less significant for investors in those countries. The same could be said in relation to other high value export oriented varieties such as fruits and vegetables.

The role of the PBR Law to attract investment in food crops appears even slim. In a country where smallholding and resource-poor farmers constitute 85 percent of the population and commercial farming is limited, plant breeding is obviously commercially less attractive because, as the only private seed company in the country, Pioneer Hi-bred Ethiopia, has indicated, farmers will not be able to buy its seeds even once.[137] It is indeed unlikely that the resource-poor farmers in the country will become commercial customers for the commercial breeders. The domestic market potential is thus obviously not attractive for private investment and PBRs alone may not provide sufficient incentive for the commercial sector. Indeed, owing to lack of domestic market potential and the difficulty in enforcing IPRs, the private sector has shown little interest in the development of varieties in food crops in the developing countries. Even in Kenya where the breeder has stronger rights along the line of UPOV 1978 Act, commercial breeders focus on export sector varieties such as cut flowers, fruits, vegetables and tobacco.[138] In that country only one out of 136 plant variety protection applications was for food crops.[139] The head of the Kenyan Plant Variety Protection Office also disclosed that the greatest beneficiary of PBRs in Kenya has been the horticulture industry.[140]

Even if IPRs were to provide the necessary incentive, whether the Ethiopian PBR Law provides sufficient incentive is also questionable. The acts requiring authorization of the breeder are very limited and the limited rights of the breeder are further subjected to extensive and broadly stated limitations and exceptions. This is further compounded by the right of farmers to freely use, exchange and even sell any protected variety. Under such circumstances, it would certainly be difficult to make the conclusion that the PBR Law provides adequate incentive for investment in plant breeding in Ethiopia to the extent that PBRs are important for such investments. It thus appears unrealistic to expect PBR-induced flows of private investment in plant-breeding especially in relation to the food crops. In relation to such crops, it is very likely that the private sector will continue relying on hybrids

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[137]Shawn, M., 'Getting Genes: Rethinking Seed System analysis and reform for Sorghum in Ethiopia' unpublished PhD Thesis, Wageningen University (The Netherlands, 2005).

[138]D. Kuyek, 'Intellectual Property Rights in African Agriculture', available at http://www.grain.org (accessed on 8 October 2010).

[139]Ibid.

[140]E. Sikinyi, 'Experiences in Plant Variety Protection under the UPOV Convention', WIPO Document, WIPO-UPOV/SYM/03/9, of October 21, 2003.

which provide effective protection than PBRs in the Ethiopian context whereas varietal development in food crops in the country as 'public good' would remain to be the task of the public agricultural research institutes.

What is stated above shows one of the paradoxes of the PBR Law: informed by the tenets of the African Model Law, it tries to limit commercial control over seed in the country by restricting the rights of the breeder. It is reported by the drafters of the African Model Law that there was a specific request from the UPOV to include incentive for the breeder as one main objective in the Model Law, but it was not accepted.[141] Incentive for the breeder was not as such a fundamental objective of the African Model Law. The Ethiopian law is different in that respect as incentive is indeed its central objective.[142] The problem of the Ethiopian PBR Law thus emanates from the fact that it has taken most of the provisions of the African Model Law, which give little attention to incentive for the breeder, and try to apply them in Ethiopia where the main objective is providing incentive for breeders. The provisions of the African Model Law and its philosophy were brought to Ethiopia without being reconfigured in line with the policy objectives that informed the adoption of PBR Law. This seems to have created a tension between the objectives of the PBR Law and its provisions.

The role of the PBR Law to encourage the development of the domestic private breeding/seed sector is also questionable. To begin with, the PBR Law cannot encourage something which does not exist; it should seek to create it. Actually, researches conducted on the impact of PBR in developing countries show that the emergence and development of domestic seed sector owes little to PBR and the industry has generally emerged without such laws.[143] In other words, PBR laws have little influence for the emergence of the private sector though they may be of help to encourage an already existing one. Even if PBRs were important for the emergence of the domestic industry, it would be questionable again if the Ethiopian PBR Law, which as we saw provides limited rights with full of exceptions, and limitations, provides sufficient incentive for the emergence and development of the sector.

The Parliamentary Committee Report during the deliberation and adoption of the PBR Law stated above also asserts that the PBR Law will pave the way for the country's accession to the WTO. This calls for the determination of the issue as to whether the PBR Law is 'effective' *sui generis* system in the eyes of the TRIPS Agreement. As noted, there are so far no agreed standards set by the TRIPS Council or the dispute settlement body of the WTO to evaluate the effectiveness of the *sui generis* system. This article has outlined the minimum requirements that an effective *sui generis* system should comply with and the discussions in this article show that it would be difficult to consider the PBR Law as ineffective as long as it meets certain general conditions. In relation to national treatment and MFN, which are elements of

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[141]Tewolde *supra* note 115.

[142]Interestingly, the preamble does not mention anything about the need for protecting farmers despite the fact that the farmers' rights are dealt with in a separate part in the law.

[143]Louwaars *et al, supra* note 129.

the effective *sui generis* system, Article 10(1) of the PBR Law states that whether the breeder is an Ethiopian national or a foreigner, an Ethiopian resident or not, the variety was bred locally or abroad, he is entitled to plant breeder rights. This Article however, deals with the grant of the right of the breeder and does not, strictly speaking, state unequivocally that Ethiopians and foreigners would be treated in the same way or equally not only in relation to the grant of the right of the breeder but also in the exercise of the rights. There may be a need to make this point clear in the law. No provision in the PBR Law gives preferences or special advantages to nationals of a particular country and it is therefore consistent with the MFN rules. Does the Ethiopian PBR Law provide a property right for the breeder? The law defines its subject matter (a plant variety), delimits the subject of the right (propagating material), determines the acts requiring authorization of the breeder (sell and produce for sale), provides different civil and criminal remedies for infringement of the right of the breeder. It thus exhibits the basic elements of a property right and as argued earlier, in the absence of an agreed standard against which the *sui generis* system should be evaluated, a member could not be challenged because the subject matter or the scope of the right of the breeder is limited as long as it has provided a property right regime for the protection of plant varieties. As the analysis in this article shows, it would be difficult to challenge the PBR Law as incompatible with the TRIPS Agreement in many areas.

An issue may, however, arise in relation to the wide exceptions provided for by the law. Apart from other exceptions, farmers, who are the main or even the only potential consumers of the protected variety, are all allowed without exception not only to save and use but also to exchange and sell any protected variety. Is there any limitation to this right of farmers? It may, of course, be argued that the right of farmers in relation to a protected variety is limited in two ways. First, the right applies only to farm-saved seed of a protected variety. Second, even then farmers are prohibited from selling such seed in the seed industry as certified seed which ostensibly is meant to protect the commercial interest of the plant breeders. While the limits on the right will have little impact in practice because as noted earlier over 90 percent of the seed supply in the country is dependent upon informal networks, in law the right could be said to have been limited and this may be taken as a legitimate defense for any possible challenge on the effectiveness of the PBR Law in this regard. It could further be argued that the farmer right provisions are in line with the objectives of TRIPS as encapsulated under Article 7 which, *inter alia*, call for the 'mutual advantage of producers and sellers' and the 'balance of rights and obligations.' Given the extremely crucial role farmers play in plant breeding and the seed supply system in the country, providing for their protection is only natural. There is absolute need to ensure that farmers in Ethiopia continue to access improved varieties, breed new ones and maintain genetic diversity in their communities while at the same time providing protection for the commercial interests of the plant breeder. A further limit to address this potential challenge would have been to limit the farmer's right only to small or subsistence farmers as these are the group of farmers who have been customarily reusing farm-saved seed and lack the financial means to access new varieties on a year-by-year basis. This is

indeed an approach that would put a further legal limit to the exception but without significant practical impact in the Ethiopian context since 85 percent of the farmers are subsistence, anyway.

Apart from a potential question that may be raised on the effectiveness of the PBR Law in the country's accession to the WTO (a question which may be defended as outlined above), the scope of the rights of the farmer may also raise the issue as to whether the law provides sufficient incentive for the commercial breeder as stated in the preamble. If all the farmers, probably the only consumers of the seeds from protected varieties, are allowed without exception to save, use, exchange and sell seeds of any protected variety, who will be the customers for the commercial breeders? Where is the incentive?

One option to address this concern would have been to define the scope of the right of the farmers depending on the kind and importance of the particular variety for farmers. Accordingly, the right could include saving, using, exchanging and even selling in relation to food crops while limited to saving, using and exchanging in case of commercial varieties. This approach would have served both the objectives of protecting farmers and providing incentives for the breeders. In this way, while breeders will have limited influence in relation to food crops they would have stronger rights in relation to other varieties especially in the export sector. It should be noted that encouraging export is an important policy objective stated both in the Rural Development and Agricultural Research Policies of the country and one mechanism to translate this into reality is providing adequate incentive to export-oriented breeders and building a modern plant breeding industry aiming at the global market in addition to protecting the traditional sector with a local market focus.

Accommodating the different interests of the different stakeholders does not come in the way of the *sui generis* system envisaged by the TRIPS Agreement; in fact, it is why a *sui generis* system. But whether the Ethiopian law strikes the necessary balance among the different interests and stakeholders is questionable. As noted earlier, there is an absolute need to ensure that farmers in Ethiopia continue to access GRs, breed new varieties and maintain genetic diversity in their community through exchange of genetic resources. But there is also a need to maintain a balance between the rights of the breeder and those of the framers if the objectives of the law are to go by.

5. Conclusion

In general, the PBR Law is an important development towards recognizing the efforts of plant breeders and providing them some economic benefits thereby enhancing agricultural production and productivity. As a *sui generis* system, the PBR Law has attempted to create a balance of rights among the different stakeholders in plant breeding as well as to protect the public interest in general. As stated in the introduction part, this article sought to address two major issues: first, whether or not the PBR Law is true to its objectives and second, whether or not the law could be regarded as compatible with the provisions of TRIPS Agreement on the subject. In

relation to the first, the article, having analyzed the key provisions of the PBR Law, has concluded that in most cases the objectives have not been adequately reflected in the provisions of the law. In relation to the second, except in few cases where questions may be raised as to the effectiveness of the PBR Law, the main provisions of the PBR Law have been found to be consistent with the TRIPS Agreement. Even in relation to the few cases where there may be a potential challenge as to the effectiveness of the PBR Law, the article has attempted to suggest different arguments to address the challenges.

The analysis in this article has also shown that the PBR Law suffers from both conceptual/substantive and technical defects.

It is suggested that the law needs a revision with a view to addressing the shortcomings along the lines suggested in the article- to clarify conceptual confusions, inconsistencies and ensure coherence between its objectives and its provisions. Above all, the law will remain unenforceable until such time that the Ministry comes up with a list of species to be covered by the law. In the absence of such a list it is as if there is no law on the subject altogether. It is hoped that the on-going work on the development of a regulation with a list of species will be completed soon and the PBR Law will become enforceable.

Glossary of Acronyms

CBD: Convention on Biological Diversity

DSB: Dispute Settlement Body

DSU: Distinct, Stable and Uniform

GMO: Genetically Modified Organism

HPR: House of People's Representatives

IPR: Intellectual Property Right

ITPGR: International Treaty on Plant Genetic Resources

LDC: Least Developed Country

NSIP: National Seed Industry Policy

PBR: Plant Breeder's Right

PVP: Plant Variety Protection

TPCPP: Trade Practices and Consumer Protection Proclamation

TRIPS Agreement: Agreement on Trade-Related Aspects of Intellectual Property Rights

UPOV: International Convention for the Protection of New Plant Varieties

WTO: World Trade Organization

Glossary of technical terms

Asexually propagation (vegetative propagation): multiplication without passage through the seed cycle such as budding and grafting.

Biological diversity: totality of genes, species, and ecosystems of a particular region

Breeder: a person who breeds and develops a new plant variety

Plant breeder rights: legal rights accorded to a plant breeder

Plant variety: a group of plants that is distinguished from other groups by a specific characteristic or set of characteristics

Propagating material: any part or product from which another plant with the same essential characteristics can be produced

Sexual propagation: multiplication by seed

Sui generis: of its own kind or unique in its characteristics

Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education

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Introduction

Exceptions and limitations to copyright are legal restrictions on the exclusive right of owners not to be applicable on certain specified situations. Since copyright law governs the right of control and distribution of copyrighted works the owner gets complete monopoly right over the use of materials which would be prejudicial to the interest of users to have access to knowledge in the absence of the authorization of the owner. As a result of the existence of these two conflicting interests, viz. the right of the owner to have monopoly right over the work and the right of users to have access to knowledge through the free flow of information, the role of the appropriate copyright law is to strike the correct balance incorporating flexibilities in the protection and use of the works to accommodate these interests.

The purpose of providing exceptions and limitations to copyright is therefore to allow users to have lawful access, under certain conditions, to use a work without requiring authorization from the copyright holder but respecting the basic rights of the latter. The protection of exclusive copyright ownership in the absence of exceptions and limitations prohibits unauthorized access to copyrighted content and affects education in general and higher education in particular.

Particularly in the current situation where we are witnessing the development of stronger national as well as international copyright enforcement mechanisms, higher education establishments the mission of which is promoting human and economic development through dissemination of knowledge would be restricted from achieving their objectives due to lack of access to materials unless adequate exceptions and limitations, including limitation of the period of protection and permission for free use of protected works for educational and research purposes, are put in place. Most importantly, without exceptions and limitations the problem could be severe in developing countries like Ethiopia where universities and colleges are in the beginning phase with serious scarcity of materials and resources to secure the necessary collections through purchases.

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The main objective of this article is examining the Ethiopian legal regime governing exceptions and limitations to copyright in light of its adequacy to give access to materials for the achievement of the goal of higher education in the country. The article analyses the relevant provisions of the copyright law of the country, international instruments, and literature.

The article consists of three parts. The first part deals with the historical development of copyright regime and the fundamental features of copyright protections under the past copyright system of Ethiopia. The second part deals with exceptions and limitations as enshrined under the provisions of the current Ethiopian copyright law in light of its adequacy to strike the balance in protecting the rights of the copyright owner and providing access to knowledge to develop higher education. The third part provides the conclusion of the article setting out important findings including the gaps and weaknesses in the law, and the present status of universities in terms of access to materials. The third part also provides recommendations for improvement to benefit universities from exceptions and limitations.

Part I: Historical Development of Copyright Protection in Ethiopia

A. Pre-Civil Code Development

The need for the establishment of a copyright system in a certain jurisdiction is interrelated with the level of development of literature and education coupled with the founding of the printing press. This means the legal recognition of property rights in literary and artistic works in the modern sense presupposes a well developed society.

The history of literature in Ethiopia is believed to have strong linkage with the introduction in to the country and development of Orthodox Christianity in the fourth century. According to one writer, after the acceptance of Christianity even the fortune of kings was interwoven by historical association and mutual interest with those of the church.[1] Another authority argues that even though Ethiopia had its own Sabian scripts by which some engravings were made on stones, there are evidences that formal writing started after the acceptance of Christianity[2].

The main reason for such development of writing after this period may be attributed to the conviction of religious fathers of the role of religious writings to spread the religion in the country. Thus, the translation of the religious books into the language of the country was found to be necessary. Sources

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[1] Margery Perham, *The Government of Ethiopia* (Oxford: Oxford University Press, 1948) p. 104.

[2] Amsalu Aklilu, *A Short History of Ethiopian Literature* (Addis Ababa: Addis Ababa University, 1984).

assert that the New Testament and the Old Testament were translated consecutively from the Syrian language in to *Geez* Language which was the language of communication of the then government of the Axsumite Empire[3]. Since then, the Ethiopian literature became a literature of translation[4] and the engagement of writers almost fully into the activity of translation could have been one of the factors that undermined the emergence of the literature of national origin.

The unique characteristic of the then Ethiopian translators was the deliberate omission of their names from appearing in the translated work, probably an act of modesty.[5] Moreover, some present religious practices indicate that there was strong belief that translations or works done with the view of serving the religion were considered as public domain. This means the main objective of works of translation was to serve religious purposes. As a scholar observed, there is no country like Ethiopia where religion had put strong influence on literature.[6] The situation had given the freedom to subsequent translators and writers to use the anonymous works or works bearing the name of the author. As a result the indigenous concept of copyright could not easily develop for a long time.

Moreover, the fact that religious practices and ceremonies were conducted orally led to the development of the belief within the religious community that copying was not an act to be condemned. Therefore, one can argue that the initial stage of the development of literature, which was almost exclusively devoted to religious writings, particularly to translation, was not against copying from previous works since it was considered as an act of spreading the religion. In fact the copying of the scholarly works by others gave the author the feeling of being recognized and respected rather than that of an infringement of his right. The only customary obligation imposed on users of such works, particularly traditional church school students, was the responsibility of copying down without the slightest alteration, which could

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[3]Amsalu Aklilu, supra note 2, pp.31-32. According to Dr. Amsalu since the religion was imported from abroad (Middle East) the writings about the religion were also written outside Ethiopia in foreign language. He further argues that, as sources indicate, these books were translated into Geez by Syrian monks who fled to Ethiopia for fear of religious persecution.

[4] Amsalu Aklilu, *supra* note 2, p. 31.

[5] *Id*, p. 3.

[6] *Ibid.*

serve the purpose of passing down literary and artistic heritages to generations[7].

The ancient development of art in Ethiopia is also mainly attached to the paintings and drawings in churches and monasteries which were considered as public domain as soon as the completion of the work without giving any room for the emergence of the concept of the protection of the rights of the creator. Artists of religious works used to draw or paint as an aspect of their religious duty and to dedicate their works as the exclusive property of the church and the same is true for next drawers and painters who may even follow or copy the styles of previous creators but still dedicating the work for the service of the church. The striking similarity of the ancient church drawings and paintings that one can observe till present is probably the result of the free reproduction of previous works due to the absence of the prohibition of copying.

The other contributing factor for the absence of any restrictions on the use of literary and artistic works in ancient Ethiopia was the absence of economic value of the creations of the mind because of the non existence of the printing press and the low level of literacy of the society.

However, unlike the case of other literary creations and artistic works, the church requires the creation of *Quene*[8] to be absolutely original without any tolerance even to the smallest addition from previous works of others. Since each created *quene* is attributed to the name of the author and a title of distinction is designated to the creator, no body was allowed to make use of any expression or part of it.

Along with the development of *queen,* strong customary social sanction by the church community against users of the works of others developed making the act shameful and disgraceful.[9] The *quene* has been required to be created instantly at the time of the happening of a certain event and the practice of the creation of *quene* has been the exclusive domain of the Ethiopian Orthodox Christian Church for the last several years. The language used to create *quene* has been *Geez,* which was the language of ancient Ethiopia and which is currently used only as the liturgical language of the Ethiopian Orthodox

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[7] Seleshi Zeeyohannes, *The Ethiopian Law of Literary and Artistic Property,* Faculty of Law, Addis Ababa University (unpublished), 1983, pp. 1-2.

[8] *Quene* is a unique literary creation built of two or more semantic layers which as a unit conveys twofold meanings.

[9] Seleshi Zeyohannes, *supra* note 7, p. 3.

church.[10] The important point worth noting at this juncture is that even though the secular aspect of *quene* literature has developed in other Ethiopian languages through time, the religious instant creation of *quene* has not been inherited by other major Ethiopian languages.

The other important point in this connection is the uniqueness of the prohibition in the sense that it does not make distinctions between fair and unfair uses; and authorized and unauthorized users. In other words, authorized or fair practice, a term introduced under the Ethiopian Copyright Law of 2004, was not known in the domain of *quene*. This shows that the purpose of the customary prohibition against the use of the *quene* of another person was not the protection of the right of creator; it was rather to ensure the originality of the creation and to ensure that the creator qualifies to be designated as a *quene* creator. Thus, contrary to the case of translated or original works and paintings, the protection granted to queen creations in traditional Ethiopia was absolute without giving any room for the development of the concept of authorized use or fair practice based on which the later generation could build the knowledge from the previous achievements. However, there has not been clear customary prohibition of faithful reproduction of a *quene* by indicating the creator so long as it is not incorporated into a new work, and available sources also do not indicate that its translation into any other Ethiopian language was condemned.

The history of education in Ethiopia is as old as the introduction of Orthodox Christianity into the country. But for several hundred years, the education system was limited only to church education until the introduction of modern education system and the opening of the first school in the country in 1908.[11] History shows that the church developed an elementary system of education based on exclusively religious curriculum which served the needs of the

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[10]Sample text in Ge'ez in Ethiopian script reads as follows.
ቃለ በረከት ዘሄኖክ ዘከመ ባረከ ኅሩያነ ወጻድቃነ እለ ሀለው ይኩኑ በዕለተ ምንዳቤ ለአስሰሎ ኩሉ እኩያን ወረሲዓን።

Transliteration
Ḳalä bäräkät zä-Henok zäkämä barräkä ḫəruyanä wäṣadḳanä 'älä häläw yəkunu bä'əlätä məndabe lä'äśäślo kwilu 'əkuyan wäräśi'an
Translation: Word of blessing of Henok, wherewith he blessed the chosen and righteous who would be alive in the day of tribulation for the removal of all wrongdoers and backsliders. *(The first sentence of the Book of Enoch).* Available at <www.omniglot/writing ethiopic>.

[11]John. Markakis, *Ethiopia: Anatomy of a Traditional Polity* (Oxford: Oxford University Press 1974) p. 144.

church as well as the spiritual and secular needs of the society in general.[12] Since the church education was based solely on the religious books, the question of access to other materials for teaching and the problem of copyright protection were not relevant issues of the day.

Modern elementary education was introduced in 1908 and by 1950 there were about 500 elementary schools with 56 000 students.[13] The endeavor to establish modern elementary education had gradually led to the founding of the first secondary school in 1941.[14] Thus secondary education expanded only after 1941.[15] Since elementary and secondary education in the country was in the formative stage, the problem of access to materials and copyright protection was not a critical issue at the time. It should be underlined here that Ethiopia at this time was not a party to the Berne Convention. Moreover, there was no domestic legal instrument recognizing copyright protection.

Following the development of modern elementary and secondary education, higher education was introduced into the country in 1950 when the University College of Addis Ababa was founded.[16] This required the importation of foreign materials for teaching and research purposes. In addition the employment of expatriate staff who had the orientation about the concept of copyright protection lead to the appreciation of the need for the establishment of a copyright regime to govern the production and reproduction of relevant materials in sufficient quantity for use in the institutions for the purpose of dissemination of knowledge.

The other important factor which had contributed for the adoption of the copyright system in Ethiopia is the establishment of the printing press, a long time after the beginning of church education in the country. However, the introduction of the printing technology for the first time in 1906 could not have huge impact on the development of literary works in Ethiopia because the first machine introduced was not in such a level to be used for publishing books except small newspapers and government proclamations.[17] Nevertheless, the limited experience gained in using this technology had encouraged the

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[12] *Id*, p. 143.

[13] *Id*, p. 147.

[14] Ibid.

[15] *Bahru* Zewde, *Pioneers of Change in Ethiopia: The Reformist Intellectuals of the Early 20th Century* (Athens: Ohio University Press, 2002) p. 34.

[16] Markakis, *supra* note 11, p. 151.

[17] Mahtemeselassie Woldemeskel, *Zekre Neger*, 1950, p. 683.

government officials and as result a modern printing press, named *Berhanena Selam*, was established in 1921.[18]

The introduction and gradual expansion of this industry has proved to be useful in many respects, *inter alia*, in facilitating the publication of religious books translated into the language of the country, the expansion of literary horizon, and the extensive dissemination of knowledge in religious as well as secular life in the country. The status and conditions of literary and artistic works was determined by tradition until the passage of the law of the department of copiers in 1919.[19]

This new development and the increasing number of printing press as well as the production of newspapers led to the need to regulate their establishment and production.[20] It is also possible that a change of attitude came about as a result of increased contacts with the outside world during the nineteenth century.[21] A combination of these could obviously lead to the inception of the concept of copyright in the country that gradually developed into the recognition of the rights of authors by legislation.

From what has been discussed above we can understand that until early 1950s the concept of copyright was little understood in Ethiopia, let alone its exceptions and limitations.[22] But unlike this situation which hindered the development of indigenous copyright protection, *quene* creation obtained absolute protection as an exception due to the established prohibition within the learnt religious community of the use of a work by others including the creator himself.

In appreciation of the ancient protection granted to *queen*, one of the prominent religious scholars has stated that "had similar customary protection been

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[18] <www. bspe. com.et> accessed on 5th September 2009.

[19] Assefa Endeshaw, *Intellectual Property; Legal Development in Ethiopia: An Analysis Within the Framework of a Proposed Policy for Non-Industrial Countries*, Ph.D. Dissertation, Queen Mary and West Field College, University of London (1993), p. 320. According to Seleshi, *supra* note 7, p. 3, "The law required prior legal permit either to set up a printing press or publish newspapers or books. To hold liable for any injuries acts of authors and publishers, the law provided the necessity to put down the name of the author or news paper editor on every edition of a publication. Although the main purpose of this law was to control publications, it is believed that it could as well have developed into recognition of author's rights, had Ethiopia not decided to adopt ready-made laws from the west."

[20] Seleshi Zeyohannes, *supra* note 7, p. 2.

[21] Endeshaw, *supra* note 19, p. 316.

[22] Tamiru Wondimagen, *Some Aspects of the law of Literary and Artistic Property: An Inquiry into the Source and Scope of Protected Rights* (unpublished) Faculty of Law, Addis Ababa University, 1971.

extended to other types of literary and artistic works, higher cultural development than what we have achieved so far would have been possible"[23]. According to this scholar had the customary protection granted to *quene* been extended to other literary works a better indigenous copyright system could have developed to encourage more original works.

The basis for the development of the said free translation of works could be the assumption that religious works, whoever the translator might be, were deemed to be public domains as of their creation without the monopoly of anyone so that all the believers should have access. The content of *quene* creation on the other hand is not necessarily religious as it could be a praise or condemnation of something though the event in most cases could take place in relation to religious exercises so that the individual original creation must be protected in recognition of the creator and to encourage others to create absolutely original *quene* works. However, this approach of the ancient protection of *quene* works has not been transplanted into nor made any influence on the first modern copyright law of Ethiopia as it will be discussed in section B below.

Consequently, the long journey of underdevelopment in the area had ultimately led to the adoption of a copyright regime in the country. It is therefore necessary to briefly consider the development and salient features of the first copyright law of Ethiopia in the following section.

B. The Adoption of the Civil Code

Ethiopia had undertaken legal reform by adopting different substantive and procedural modern laws substantially imported from Europe in 1960s replacing the existing customary rules. The copyright law of the country was issued as an aspect of this reform and a component part of the country's Civil Code but limited only to 28 Articles. Therefore, it should be noted that the law of copyright appeared for the first time in the legal history of the country with the issuance of this Civil Code.

One of the fundamental features of this copyright law is its heavy dependence on foreign and more particularly, French legal concepts of the Law of March 11, 1957.[24] This copyright law, though incomprehensive, lays down the basic principles of copyright protection. More importantly, the law has provided about exceptions that restrict the rights of authors in favor of public interest. These limitations relate to, *inter alia*, the use of a work for education and

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[23] Aleka Ayalew Tamiru, as quoted by Selesh Zeyohannes, *supra* note 7, p. 4.

[24] Tsehai Wada, *Translation and Translators' Rights under Ethiopian Law*, Journal of Ethiopian Law, Vol. 19, 1999, p. 57.

research purposes, free performance of a work at family gatherings or schools, free reproduction of public speech but only for fifteen days, free reproduction in the mass media of articles of topical interest.[25]

However, this law has taken a unique position in denying the author the exclusive right of translating his work and preventing others from undertaking unauthorized translation by others. Thus, unlike copyright laws of many countries and major copyright conventions, the copyright law of Ethiopia of 1960 has denied authors of their rights to authorize the translation of their original literary works.[26] But there were only limited attempts during the period of the applicability of this civil code to translate foreign works in to an Ethiopian language which could benefit the public in general to have access to knowledge. Had this right of translating existing works without seeking the permission of the author provided under the 1960 civil code been maintained by the present Ethiopian law, several works could have been translated into different languages of nations and nationalities of Ethiopia which are currently used in secondary schools and in university level educational system to some extent to make scarce materials available and facilitate access to knowledge.

The important question in this connection relates to the source of this unique stand of the 1960 Ethiopian copyright law. Firstly, from the reading of the relevant provisions of the 1957 Copyright Law of France, which has heavily influenced other provisions of the Ethiopian law, we understand that it expressly grants authors the exclusive right to authorize translation of their works. Thus it may be concluded that the copyright law of France is not the source of the unique stand of the Ethiopian copy right law that denies authors the right of prohibiting unauthorized translation of their works.[27]

It is therefore possible to argue that one of the possible sources of this unique position of the civil code on the restriction of right of translation of the author is the influence of the practice in ancient Ethiopia which fully permitted the translation of religious or other anonymous works of either the drafter or the legislative organ of the time to deny the author to prohibit translation of his work. In addition to this it is also possible to argue that the denial of the exclusive right of the author to prohibit the translation of his work is an indigenous origin which was deliberately incorporated into the law by the drafter to give the people easy access to knowledge through translation with due consideration of the multi-lingual society of Ethiopia.[28] This conclusion is in line with Tsehai's argument that in determining the restriction of translation

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[25]Please see the provisions of Civil Code Articles 1656-1658, 1661-1662.

[26]Tsehai Wada, *supra* note 24, p. 58.

[27]Id, p. 59.

[28] Assefa, *supra* note 19, p. 336.

rights the legislature might have intended to enrich the literary culture of the nation by allowing translators to translate any work without the necessity of seeking authorization or formal licensing to make their works available to the general public.[29] However, in the absence of any dependable source, it is difficult to be certain to conclude as to which of these two possible sources influenced the Ethiopian civil code to adopt this unique position

It is under these circumstances that the internal and external dynamics including the development of literary works, expansion of the music industry, the introduction of the copying technology, the expansion of education, and Ethiopia's preparation to join the WTO necessitated the issuance of a more comprehensive copyright law in 2004. . Following, we shall analyze the exceptions and limitation that are enshrined in this law in light of their adequacy to access knowledge and contribute for the development of the higher education system in Ethiopia.

C. Developments since 2004

1. The 2004 Copyright and Neighboring Rights Proclamation

The period preceding the promulgation of the Ethiopian Copyright Law of 2004 was predominantly characterized by a growing gray business in the copyright industry of which the music industry (both audio and visual media) is the strongest. The music industry was not even within the reach of the law enforcement bodies and as a result of which infringement of copyright was widespread. In order to get the attention of the public in general and the law maker in particular, stakeholders in the copyright related industry led by those in the music industry even went to the extent of deciding not to publish their works. It was with this background that the lawmaker finally decided to enact the 2004 copyright law which is strongly shaped by considerations of the music industry.

Because of developments in the copyright related industry, especially in the area of the music industry,[30] the law maker issued Proclamation No. 410/2004, the Copyright and Neighboring Rights Proclamation referred to as 2004 copyright law or Ethiopian copyright law). The preamble of this legislation stipulates that the law acknowledges the fact that literary, artistic and similar creative works have a major role to enhance the cultural, social and technological development of the country. Further, the law stipulates that it

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[29] Tsehai, supra note 24, p.61

[30] The music industry we are talking about focuses on indigenous Ethiopian music. Before this period a new album used to generate the artist some where between birr ten and twenty thousand (four to eight thousand USD).

was also found necessary to protect works that make literary, artistic and similar creative works productive by recognizing neighboring rights by law.

The 2004 copyright law determines the scope of application and the subject matter not protected. The law acknowledges the protection of economic and moral rights of authors. According to Article 7 of the law, the author or owner of a work has the exclusive right to carry out or authorize the following acts in relation to the work: reproduction of the work; translation of the work; adaptation, arrangement or other transformation of the work; distribution of the original or a copy of the work to the public by sale or rental; importation of original or copies of the work; public display of the original or a copy of the work; performance of the work; broadcasting of the work; and other communication of the work to the public.

The 2004 copyright law has introduced originality and fixation as the two requirements for protection; stipulates what moral rights are[31]; lists down the limitation and exceptions to copyright; the manner of assignment and licensing of economic rights; governs neighboring rights; and how copyrights are enforced.

2. Criminal Sanctions

In relation to criminal sanctions, Article 36 of the 2004 copyright law provides that unless otherwise heavier penalty is provided for under the criminal law, whosoever intentionally violates a right protected under [the Copyright] law shall be punished with rigorous imprisonment of a term not less than five years and not more than ten years.[32] When the criminal act is attributable to gross negligence, the act is punishable with rigorous imprisonment of a term not less than one year and not more than five years.[33] In addition to the punishment of imprisonment, the seizure, forfeiture and destruction of the

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[31]To the catalogue of moral rights belong the following rights: to claim authorship of a work, except where the work is included, incidentally or accidentally, in reporting current events by means of broadcasting; to remain anonymous or to use a pseudonym; to object any distortion, mutilation or other alteration of his work, where such an act is or would be prejudicial to his honor or reputation, and to publish his work. These rights are not transmissible during the lifetime of the author. The author or his heirs or legatees may waive any of these rights in writing. Moral rights shall be enjoyed by heirs or legatees until the expiry of economic rights.

[32]Article 36(1) of the 2004 Copyright Law. The severe penalty is for cases which involve intention of violating a copyright and violating it in order to make financial gain. The law through this provision targets infringement in the music industry.

[33]Article 36(2) of the 2004 Copyright Law.

infringing goods and of any materials and implements used in the commission of the offence are part of the punishment.[34]

Following the promulgation of the 2004 copyright law, the Ethiopian Criminal Code Proclamation No. 414/2004 (criminal code) was issued. Title II of this criminal code deals with economic and commercial crimes. Chapter I of this title addresses crimes against intangibles which include trademarks infringements, declaration of origins, designs or models (Article 720) and infringement of rights relating to literary, artistic or creative works (Article 721). Sub-Article (1) of Article 721 of the criminal code on the other hand provides that "[w]hoever, apart from cases punishable more severely by another provision of this code, intentionally violates laws, regulations or rules issued in relation to rights on literary, artistic or creative works, is punishable with rigorous imprisonment not exceeding ten years. Sub-Article (2) of Article 721 provides that, [w]here, the act is committed negligently, the punishment shall be simple imprisonment not exceeding five years"[35].

D. Ethiopia's Accession to IP-Related International Treaties

Currently the Government of Ethiopia is making preparations to join the World Trade Organization (WTO). In order to undertake studies and facilitate accession to WTO, the pertinent ministry which auspices the accession process, i.e. the Ministry of Trade and Industry, has formed a technical committee and a steering committee. These committees, among other things, have in the past examined whether the IP legislations of the country are in line with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Sine the major laws on intellectual property issues are recently issued and drafting of these laws was done by consulting pertinent international instruments[36] as yardstick, the need to conduct a major revision, including the provisions on exceptions and limitations, in line with TRIPS Agreement might not be necessary. However, there is a need to conduct a systematic revision so that local laws won't grant more rights to authors than what is stipulated in international instruments as minimum rights.

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[34]Article 36(3) of the 2004 Copyright Law.

[35]The majority of cases pending with the Federal High Court, the court which has material jurisdiction on the matter, is on music and is of a criminal nature.

[36]The Inventions, Minor Inventions, and Industrial Designs Proclamation was issued in 1995 and regulates as the name indicates patents, utility models and industrial designs. Apart from the three, the law also governs what is called patent of introduction. The Copyright and Neighboring Rights Proclamation was issued in 2004.

Despite its readiness to join WTO, Ethiopia has not yet acceded to international instruments in the area of intellectual property in general and copyright in particular. Accession to these international treaties is under consideration by the Ethiopian Government. The Government is also studying the impact of those international treaties whose accession by the country is necessary for the compliance of the national intellectual property system with the TRIPS Agreement. One such instrument is the Berne Convention. TRIPS Agreement in Article 9 provides as follows: "Members shall comply with Article 1 through 21 Berne Convention (1971) and the Appendix thereto.

However, members shall not have rights or obligations under this agreement in respect of rights conferred under Article 6bis of that Convention or the rights derived therefrom." As a result, national copyright laws of Member Countries must comply with the substantive copyright law provisions of Berne Convention. This obligation applies also to Ethiopia[37] if it joins the WTO.. The following discussions on exceptions and limitations to copyright in Ethiopia are made in light of the applicability of the pertinent provisions of the TRIPS Agreement and the Berne Convention.

Part II: Exceptions and Limitations to Copyright

A. General Discussion

Besides the definition of terms, the rights copyright creates and the criminal sanctions it imposes, the 2004 copyright law also regulates the limitations and exceptions imposed on the rights of authors. The major limitations and exceptions are reproduction for the following purposes: reproduction for teaching;[38] reproduction by libraries, archives, and similar institutions;[39] quotation;[40] reproduction, broadcasting and other communication to the public for informatory purpose;[41] reproduction and adaptation of computer

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[37]The revision of the 2004 Copyright Law is the result of domestic pressure from right holders. This revision was conducted with the assistance WIPO and other donors from the north. Meaning this has given those interested to draft the revised copyright law compatible with internationally set standards.

[38]The teaching exception is dealt in Article 11 of Ethiopian Copyright Law and is the subject of discussion in this paper.

[39]This exception is dealt in Article 12 of Ethiopian Copyright Law and is the subject of discussion in this paper.

[40] This exception is dealt in Article 10 of Ethiopian Copyright Law and is the subject of discussion in this paper.

[41]According to Article 13 of Ethiopian Copyright Law, the owner of copyright cannot forbid the reproduction in a newspaper or periodical, the broadcasting or other communication to the public of an article published in a newspaper or periodical on

program;[42] importation for personal purposes[43]; reproduction for personal purposes[44]; and other reasons[45].

B. Nature and Extent of Copyright Exceptions and Limitations

1. Teaching Exceptions and Exceptions in favor of Libraries

a) Teaching Exceptions

i) Reproduction vs. Utilization

According to Article 11 of the Ethiopian copyright law, the owner of copyright cannot forbid without exceeding fair practice and the extent justified by the

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current economic, political, social or religious or similar topics unless the right or authorize reproduction broadcasting or the communication to the public is expressly reserved on the copies by the author or owner of copyright or in connection with broadcasting or other communication to the public of the work; reproduction and broadcasting or other communication to the public of short excerpts of a work seen or heard for the purpose of reporting current events; the reproduction in a newspaper or periodical, the broadcasting or other communication to the public of a political speech, lecture, address, sermon or other work of a similar nature delivered in public, or a speech delivered during legal proceedings, to the extent justified by the purpose of providing current information.

[42]As per Article 14 of Ethiopian Copyright Law copyright owner cannot forbid a single copy reproduction or adaptation of a computer program. Such exception is possible if it is found necessary to make use of a computer program with a computer for the purpose and extent for which the computer program has been obtained; a back up copy by a person having a right to use the computer program in so far as it is necessary to ensure future use, or adaptation that is indispensable for using the computer program in conjunction with a machine for the purpose, and to the extent of use for which the program has been lawfully obtained.

[43]The owner of copyright cannot forbid importation of a copy of a work by a physical person for his personal purposes (Article 15 of Ethiopian Copyright Law).

[44]Article 9 of Ethiopian copyright law allows the private reproduction of a published work in a single copy. Such copy could be made only by a physical person for his/her own purposes. However, this exception does not extend to reproduction: of a work of architecture in the form of a building or other construction; of musical work in the form of notation or of the original or a copy made and signed by the author of a work of fine art; of the whole or substantial part of a database in digital form; of a computer program except as provided in Article 14 of the same law which regulates reproduction and adaptation of computer programs, and which would conflict with or unreasonably harm the normal exploitation of the work or the legitimate interest of the author.

[45]Private performance free of charge (Article 16) and issuance of non-voluntary license (Article 17) are just two examples out of the list of limitations imposed upon copyright owners.

purpose a reproduction of a published work or sound recording for the purpose of teaching. Further, the law requires that a copy made for purposes of teaching shall indicate as far as practicable the sources of the work or sound recording reproduced and the name of the author. The corresponding Berne Convention provision is Article 10(2). According to this provision, it shall be a matter of legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sounds or visual recordings for teaching, provided such utilization is compatible with fair practice. This exception introduced by the Berne Convention has not been touched upon by subsequent international instruments.

With regard to the types and forms of utilization, both legal instruments use different terminologies. Article 10(2) of the Berne Convention uses a concept which allows broader interpretation. The key concept in this regard is the concept "utilization". Accordingly, reproduction, translation, adaptation of the work, and other related rights fall within the meaning of utilization used in this provision. Unfortunately, same is not true under Ethiopian Law. Here, as opposed to the Berne Convention, teaching exceptions apply to the reproduction of published works and sound recordings only.

This conclusion could be arrived at based on the definition of the term "reproduction" in the same law[46]. According to Article 2(25) of Ethiopian Copyright Law, "reproduction" means the making of one or more copies of a work or sound recording in any manner or form, including any permanent or temporary storage of work or sound recording in an electronic form. It could be argued that the pertinent provision under the Ethiopian Copyright Law limits the types and forms of utilization and does not cover, for example, the translation, and adaptation of a work. The result is that one can not invoke the teaching exception provision in order to translate copyrighted works.

ii) Amount to be reproduced

The teaching exception under the Ethiopian Copyright Law does not put any limitation with regard to the amount which can be reproduced from a given

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[46]Bereket Bashura, *Exception and Limitations to Copyright and Related Rights in Copyright and Neighboring Rights Protection Proclamation, Proclamation No. 410/2004 of Ethiopia,* uses the terms "reproduction" and "utilization" interchangeably and makes no distinction between the two. He writes: "In the Berne Convention, this is a matter left in the discretion of the national legislators to decide whether to make a **reproduction** for teaching purpose under the exceptions." In another place, he writes: "This clearly shows that it is a matter left to the countries to permit **utilization** of the work for teaching purpose" (emphasis the writers).

work. The absence of such restriction (so-called limitations on limitations) allows the possibility of reproducing the whole or substantial part of a copyrighted work. So long as the reproduction does not exceed "fair practice"[47] and so long as the extent of reproduction is justified by the purpose, reproduction of the whole or substantial part of a copyrighted work is allowed. There is also an opposing view which argues that reproduction of a whole or substantial part of a copyrighted work is not allowed[48].

iii) Teaching: conventional vs. other teachings

The other important point in this regard is the meaning attached to the word "teaching". As per Article 11 of the Ethiopian copyright law, the word "teaching" could be interpreted to cover both conventional face-to-face teachings and distance education. But according to the wording of Article 32(c) of the same law the rights of performers, producers of sound recordings, and broadcasting organizations does not cover, *inter alias*, the reproduction solely for the purpose of face-to-face teaching activities except for performances and sound recordings which have been published as teaching or instructional materials[49]. As a result, performances and sound recordings meant for distance education do not enjoy the teaching exceptions under Article 32(c).

Since it is not possible to depart by way of interpretation from the spirit of the law which is clearly formulated, we have to accept the rather restrictive limitation put on the rights of performers, producers of sound recordings, and broadcasting organizations. But one can legitimately ask why the legislator has not defined the term "teaching" in Article 11 of the copyright law. The writers argue that the absence of such definition like the one we have in Article 32(c)

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[47]Since the law is silent on the meaning of the term "fair practice", the term has to be defined by case law in the future.

[48]Yemane Gesesew (Commander), *The Defense Available for Alleged Violator under the Ethiopian Copyright Law*, at p. 3 argues that "when the whole or substantial part of the copyrighted work has been taken a defense under Article 11 of Proclamation 410/2004 is unlikely to succeed." Unfortunately, no reason was forwarded to substantiate such a position. The existence of opposing views does not mean that everyone has to fear the possibility of a jail sentence stipulated in the law. As discussed earlier, the law is strongly shaped by considerations of the music industry and the criminal sanctions apply more to infringements that happen in this industry.

[49]One can infer three major points from the wording of Article 32(c). 1. The teaching exception applies to those performances and sound recordings which are published for purposes other than teaching. 2. The exception applies only for "face-to-face teaching activities". Meaning one can not invoke this provision to use performances and sound recordings in the distance education. 3. This exception does not apply for performances and sound recordings which have been published as teaching or instructional materials.

should allow a broader interpretation to be accorded to the term "teaching" under Article 11. Accordingly, the exception under Article 11 could be enjoyed both by conventional face-to-face teaching and other modes of education, including distance education.[50]

iv) Number of copies

Surprisingly, neither the Ethiopian Copyright Law, nor the Berne Convention restricts the number of copies which could be made for the purpose of teaching[51]. It is possible to infer from this silence of the laws that so long as the copy is made for teaching purposes making as many copies as necessary for the purpose is governed under the exception.

b) Libraries, Archives and Similar Institutions

i) Open collection requirement

In line with the teaching exceptions, one has to raise the exception provided to the libraries, archives and similar institutions. This issue is governed under Article 12 of the Ethiopian Copyright Law. Accordingly, an owner of a copyright cannot forbid a reproduction of a work by a library, archive, memorial hall, museum or similar institutions whose activity directly or indirectly is not for gain. Such reproduction is allowed only of a published

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[50]According to Andinet Girma, *Copyright and its Relevance to the Right of Education in Ethiopia*, pp. 11 ff. "[s]o long as it does not exceed fair practice and is for the purpose of teaching, a reproduction of copyrightable material or sound recording is allowed. The phrase 'fair practice' and 'teaching purpose' are not defined in the proclamation. ... The proclamation seems to allow absolutely free any reproduction for teaching /educational/ purpose. But the use of the term fair practice as a condition implies that in addition to being for educational purpose the reproduction should not exceed fair practice. As to the second phrase used in the proclamation, i.e. 'teaching purpose' or 'educational purpose' it is defined as non-commercial instruction or curriculum based teaching by educators to students at non-profit educational institution, planned non-commercial study or investigation directed toward making a contribution to a field of knowledge or presentation of research finding at non-commercial peer conference. [...] But in our proclamation the use of the term 'teaching' instead of 'education' has made it as if, for example, presentation of research finding at non-commercial peer conference, workshops or seminars are not included. But given the close relationship between Articles 11 and 12 which is indicated by the use of the term 'educational institution' in Art. 12(2)(c), it does not seem that the phrase 'teaching purpose' excludes the above activities. Generally, in Ethiopia, so long as it does not exceed fair use as explained above, teachers have access to works beyond text books so that they enrich learning opportunities."

[51]Bereket, *supra* note 46, p. 18.

article, short work or short extract of a work to satisfy the request of a physical person.

Before libraries could grant permission the following conditions have to be met: that the library or archive has to be satisfied that the copy will be used solely for the purpose of study, scholarship or private research; the act or reproduction is an isolated case occurring, if repeated, on separate and unrelated occasion; and there is no available administrative organization which the education institution is aware of which can afford a collective license of reproduction.

For libraries to enjoy this exception, they have to be institutions which are not working for gain. Meaning these institutions must fulfill the "open collection" requirement. Such a limitation, if not properly applied, has the potential danger of negatively affecting the libraries of private educational institutions. Since these libraries are part of commercial institutions, the requirement of "working not for gain" could put a restriction to the application of this exception to such institutions. The writers argue that the libraries have to be seen as an extension of the teaching institutions which enjoy the teaching exception under Article 11. If one is allowed to meaningfully utilize the exception under Article 11, even libraries of private educational institutions should be allowed to enjoy the exception under Article 12.

ii) Purpose of the reproduction

The right of reproduction provided under Article 12 as exception to copyright protection is allowed only to preserve and, if necessary to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archive. Further, such reproduction is allowed where it is impossible to obtain a copy under reasonable condition, and the act of reproduction is an isolated occurring, and if repeated on separate and unrelated occasions. With regard to reproduction for another library or archive, there are practical problems the writers have discovered. Following the establishment of new law schools in the regions, lack of teaching and reference materials became acute. In order to address this problem, the new law schools had to deploy staff, both academic and administrative, in some cases, together with copy machines to Addis Ababa University School of Law, the oldest law school in the country, in order to make new copies of materials available at the later facilities.

These actions were not conducted to preserve or replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of the newly established law libraries. The new institutions which were involved in the reproduction of these materials are public institution and fulfill the "open collection" requirement discussed above. And the reproduced materials are

materials which cannot be obtained in any market[52]. Despite the fact that one of the requirements, i.e. impossibility of obtaining in the market, is met, the whole activity is even in light of the standards set in the Ethiopian Copyright Law illegal. Given the reality on the ground, the writers appeal for the relaxation of this exception.

iii) Supervised reproduction

Article 12 of the Ethiopian Copyright Law does not regulate the manner how supervised reproduction, i.e. reproduction by using copy machines of the libraries, archives, museums, etc, is to be made by users of these institutions. The writers contend that when these institutions make copy machines available, they have to display a notice to the effect that reproduction may be subject to copyright law. In these cases, meaning where such a display of copyright notice has been made, these institutions should not assume any liability for copyright violations[53].

2. Quotation Exceptions

The 2004 copyright law has introduced the quotation exception. Article 10 of this law provides that the owner of copyright cannot forbid the reproduction of a quotation of a published work. The quotation shall be compatible with fair practice and does not exceed the extent justified by the purpose. Source and name of the author shall be indicated. The corresponding Berne Convention provision is Article 10(1). According to this provision, it shall be permissible to make quotations from a work which has already been lawfully made available to the public[54] that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries. Like the issue of teaching exception discussed before, quotation exceptions under both legal instruments use different terminologies.

Under the 2004 copyright law, it is the reproduction of a quotation which falls within the exception clause. Under the Berne Convention it is the making of quotations which falls within the meaning of Article 10(1). Quotations could be

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[52]The materials are senior theses written by senior students as part of the requirement towards their law degree.

[53]This is a matter to be governed by subsequent legislations.

[54]The phrase "making available" refers to the making available of published works to the public in Ethiopia. The understanding in Ethiopia is such that as long as the country is not a member to any international instrument, utilization of published works which are made available to the public outside Ethiopia could be made. This of course will change once the country becomes signatory to such instruments. Same applies to translation of works made available to the public outside the country.

made at different occasions. They could be made in books, booklets, articles, newspapers, speeches, lectures, sermons, broadcasts, performance, etc. As a result of the variety of ways available to make quotations, there are various rights which could be affected by such an exception. It is as a result of this possibility that this provision of the Berne Convention uses the term "making", a term which has a broader meaning. Following the wording of Article 10 of the Ethiopian Copyright Law, it is only the reproduction right of copyright owners which is affected.

Quotations could be made only from a published work.[55] The corresponding provision of the Berne Convention allows the making of quotations from a work. Apart from the general requirement of fair practice and purpose, nothing has been regulated with regard to the size of the quotation and the purpose for which the quotation could be made.

3. Works of Oral Nature

Works of oral nature are those works like speeches (could be political speech and/or speech delivered in the course of legal proceedings), lectures, addresses, and sermons. Ethiopian Copyright Law, by virtue of Article 2(30)(b) in conjunction with Article 6, has defined oral works as works within the meaning of the 2004 copyright law. Hence, oral works enjoy copyright protection. The corresponding provision of the Berne Convention is Article 2(1) which defines lectures, addresses, sermons and other works of the same nature within the meaning of the expression "literary and artistic works". Further Article 2bis(1) of the Convention provides that members of the Union have the right to exclude, wholly or in part, political speeches and speeches delivered in

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[55]According to Article 2(22) of the Ethiopian Copyright Law, "published work" means a work or a sound recording, tangible copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending or for other transfer of the ownership or the possession of the copies, provided that, in the case of a work, the making available to the public took place with the consent of the author or other owner of copyright, and in the case of sound recording, with the consent of the producer of the sound recording. This definition should be seen in light of the fixation requirement introduced in Article 6. Personal materials are materials are those materials which are not made available to the public. Hence, quotations can not be made from these materials. The Berne Convention uses the phrase "make available to the public". *Cf.* According to Bereket Bashura, *supra* note 46, at p. 35, "the provision applies only to published works unlike the convention that covers a quotation from newspaper articles and periodicals in the form of press summaries. ... Hence in the absence of this mandatory requirement, any reproduction or use of the work by way of quotation will be infringement and may entail various kinds of liabilities."

the course of legal proceedings from the list of works which are considered oral work and enjoy protection.[56]

Unfortunately, the 2004 copyright law has defined the term "works of oral nature" so broadly so as to include political speeches and speeches delivered in the course of legal proceedings within the meaning of works of oral nature which enjoy copyright protection. The copyright law does not have a special provision which governs the manner limitations are imposed on works of oral nature. As a result, resort has to be made to the general exception clauses which apply to teaching, libraries, quotations, etc. Besides defining political speeches, lectures, sermons as works of oral nature, the law has provided the manner how such works could be enjoyed by the public without violating the right of the copyright holder. Accordingly, Article 13(3) of the Ethiopian Copyright Law allows the reproduction in a newspaper or periodical, the broadcasting or other communication to the public of a political speech, lecture, sermon, or other work of a similar nature so long as it is delivered in public. Such reproduction or broadcasting is allowed only to the extent justified by the purpose of providing current information. Such a limitation allows the mass of illiterate citizen living in rural Ethiopia to listen through radios[57] to political speeches they could not hear because of poor infrastructure.

4. The Requirement of Fixation

Article 6 of the 2004 copyright law lays down the requirements for copyright protection. Reading the first half of this provision, one may be tempted to conclude that the author of a work shall irrespective of the quality of the work and the purpose for which the work may have been created be entitled to protection for his work without any additional formality and upon creation. According to this part of the provision, creation of a work gives rise to protection. The implication of this is that a song sung, a speech delivered in public, etc. do give rise to protection immediately upon creation. Authors do not need to put their creation in any material form so as to get legal protection[58].

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[56]According to this provision, "[i]t shall be a matter for national legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings."

[57]Radio is by far the most widely used means to receive information in rural Ethiopia.

[58]Of course according the settled principle in order to get protection a work has to be original.

The second half of the same provision has introduced a new requirement besides the requirement of originality. Accordingly, in order to enjoy protection a work has to be both original, and fixed. The requirement of originality, being a widely accepted requirement for copyright protection, has been well received by a number of scholars in Ethiopia. The problem we have is with the requirement of fixation which is new to the Ethiopian Copyright Law[59]. The same law defines the term "fixation" to mean the embodiment of works or images or sounds, or of the representation thereof from which they can be perceived, reproduced or communicated through a device prepared for the purpose[60]. The definition has made it possible for any storage to be an appropriate storage.

The requirement of fixation considerably restricts the entitlement of creators to secure and enjoy copyright protection. On the other hand, it may be argued that this requirement benefits the expansion of education giving wider access to unfixed works. However, seen from the practice in Ethiopia, at least from the perspective of the music industry, the requirement of fixation has negative effects on the mass of people, who is illiterate, and does not have access to modern technology, but create copyrightable works.

Ethiopia is a country of diverse nations, nationalities, and people, where some 80 ethnic groups live together.[61] These groups speak their own language and have their own culture. The culture of these people has found expression through the copyright industry: books and articles, music albums, documentary films, etc. are written and produced based upon the culture of these groups. In recent years this has given a boom for the copyright industry.

Unfortunately, the majority of the creators is uneducated and has little or no access to technology or know-how as to how they can fix their works and ensure protection. As a result, those few who have the money go around the country and collect 'works" which are not yet fixed and get the economical benefit out of it.[62] As a result, the masses may be robbed off the economic

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[59]The position of the Berne Convention in this regard is stipulated under Article 2(2). According to this provision, it shall be a matter for legislation the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form. Meaning this provision makes the requirement of fixation to be optional.

[60]Article 2(11) Ethiopian Copyright Law.

[61]The Federal Constitution has introduced an ethnic federal system.

[62]These are not mere allegations. It is a known fact to those who understand the language and the traditions of the more than eighty ethnic groups in Ethiopia that much of the albums released recently not only make use of the traditional music in the countryside, but also are misappropriations of works created by illiterate people

benefits out of their creation. Besides, the real authors of these works may not be even recognized as authors of their creation since the requirement of fixation wouldn't allow protection before fixation. As a result of this requirement courts are not allowed to entertain a dispute involving unfixed works.

The implication of the introduction of the requirement of fixation is two-fold: negative and positive. On the one hand, such an introduction has limited the availability of copyright protection to the few literate and who have a better access to technology. This is more visible in the music industry. On the positive side, such an introduction has limited the availability of copyright protection to only works which have found embodiment from which they can be perceived. This allows accessibility of works which have not found embodiment from which they can be perceived to those who want to utilize such works without any restriction. This has a positive implication in ensuring access to knowledge which is vital in expanding education.

5. Parallel Imports

Discussing the issue of parallel imports, Jehoram[63] tries to give a working definition of the term parallel import. According to him, parallel import occurs when authentic - not counterfeited - products are imported cheaply, without the consent of the producer who has a trade mark, copyright, patent or other intellectual property right in these products, with the aim to compete with the producer's own products, which he himself had originally marketed abroad at a lower price. Jehoram further states that it now depends on the intellectual property laws of the county of import, whether such an import is an infringement of the rights of the producer[64]. If the intellectual property laws of the country of import follows the principle of national (or territorial) exhaustion[65], such an import violates the rights of the IP right holder. If the

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living in rural Ethiopia. As per the wording of the provision, Ethiopian courts when entertaining such cases are under obligation to look into the date such work was first fixed. Any other evidence from which it is evident that the work was already there long before it was fixed are as a result not admissible. The major reason for introducing the requirement of fixation, as clearly came out from discussion preceding the enactment of the bill into law, was the evidentiary value of fixation when disputes arise.

[63]Herman Cohen Jehoram, *Prohibition of Parallel Imports Through Intellectual Property Rights*, 1999 IIC 495, at 495.

[64] Ibid.

[65]Exhaustion ,which is also known as the first sale doctrine in copyright law, is an intellectual

property principle which limits the monopoly of the right owner to distribute or in the market of

intellectual property laws of the country of import follows the principle of international exhaustion, such an import will not violate the rights of the IP rights holder.

The position of international instruments on this issue is clear. TRIPS in Article 6 provides, *inter alias*, that "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights"[66]. Meaning Member States can decide for themselves which of the two principles they want to adopt. A country which adopts the principle of international exhaustion allows the importation of copyright works[67]. But if a country opts for the principle of national exhaustion importation will not be allowed unless authorization is given by the right owner. As a result, we can rightly say that parallel import can be an important tool for countries like Ethiopia to gain access to knowledge which is contained in copyrighted materials.

Unfortunately, the Ethiopian copyright law acknowledges importation of original or copies of the work as part of the bundle of rights granted to copyright owners. By doing so the law has adopted the principle of national exhaustion. According to the principle of national exhaustion, a book which is lawfully placed in the market in the US cannot be imported to Ethiopia subsequently by a trader[68] for sell without the permission of the copyright

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the goods once the IP protected particular goods have been put in the market by or with the

consent of the right owner. That is to say, since the rights are exhausted after first sale by the

right owner the latter may not assert its intellectual property rights to restrain the free transfer or

flow of those goods. For example, if X (the IPR owner) sells IP protected goods to Y; then Y can

resell them in the market freely (without restriction by X) even competing with X.

[66]For a brief introduction to the legislative history of Article 6 TRIPS, Herman Cohen Jehoram, *passim*. Article 6(2) of WIPO Copyright Treaty and Articles 8(2) and 12(2) of WIPO Performance and Phonograms Treaty have same wording as their TRIPS counterpart.

[67]According to Karnell, *Exhaustion of Copyright - Swedish Law in a European Setting*, 1999 IIC 654 at 656), [o]nce a copy has been transferred with the consent of the original right holder, wherever in the world, the distribution right relating to that copy will be exhausted. Verma, *Exhaustion of Intellectual Property Rights and Free Trade - Article 6 of the TRIPS Agreement*, 1998 IIC 534 at p. 566 argues that territorial exhaustion is manifestly incompatible with the new multilateral trading system.

[68]The Ethiopian copyright law in Article 15 allows the importation of a copy of a work by a **physical person for his own personal purpose** [emphasis by the writers]. This means that individuals traveling outside the country have the right to import books in their own luggage from places they are widely available and relatively cheap.

holder. Also the same book cannot be imported from elsewhere, where it is cheap, to Ethiopia, where the copyright holder has lawfully put the material in the market but is expensive, without the permission of the copyright holder. Such a restriction imposed by adopting the principle of national exhaustion will negatively affect access to knowledge.

Following the principle of international exhaustion allows the importation to Ethiopia of books from wherever they are lawfully placed in the market. The permission of the copyright holder is not important since the copyright holder is considered to have exhausted his right once the good is sold in the market. Given the fact that TRIPS does not oblige member States to adopt neither of the principles and the fact that Ethiopia has much to benefit from adopting the principle of international exhaustion, the writers recommend its adoption.

6. Non-Voluntary License for Reproduction, Translation and Broadcasting

Article 7(1) lit. (a), (b), (h) of the 2004 copyright law recognize reproduction, translation and broadcasting of work as part of the bundle of economic rights of authors. Despite the recognition of these rights as economic rights belonging to the author, Article 17(1) of the same law gives the Ethiopian Intellectual Property Office the right to grant, notwithstanding the opposition by the copyright owner, heir, or legatee, a license to authorize the reproduction, translation or broadcasting of a published work[69]. This provision, i.e. Article 17, appears to create a sweeping compulsory licensing authority. Because of such fear, the WTO Accession Committee had received a request from a Member State of the WTO for an elaboration on this point. The reply in part reads: "Article 17(1) of Proclamation No.410/2004 gives authority to the Ethiopian Intellectual Property Office [...] to grant a compulsory license to authorize the reproduction, translation or broadcasting of a published work.

Although it is in its early stage a regulation is under preparation as per Article 17(2) of Proclamation No.410/2004 to determine the conditions and forms for the issuance of a compulsory license. In the process of drafting the regulation consideration will be given to the three- step test prescribed in Article 13 of the TRIPS Agreement and they will address the special cases under which a compulsory license may be issued with in the meaning of this Article. The regulation is hoped to include the conditions of issuance of non-voluntary

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[69]According to Bereket Bashura, *supranote 46.* at p. 30, "this is understood as a limitation in the interest of the public; i.e. access to knowledge." The Berne Convention in its appendix contains provisions which allow developing countries two compulsory license options. The first one allows governments to issue a license to make translations. The other one allows governments to issue license to reproduce and publish.

license for the reproduction, translation or broadcasting of a published work subject to the payment of royalty. It is clear that Article 17 of the 2004 copyright is drafted in line with the appendix of the Berne Convention, which is incorporated in to the TRIPS Agreement."

Part III: Conclusion and Recommendations

The Ethiopian copyright law was promulgated in 2004. This law enshrined the criteria of fixation as a requirement to secure copyright protection on the one hand and introduced stronger rights to creators who satisfy the fixation requirement and has put in place a stronger enforcement mechanism on the other. The strength and weaknesses of the provisions of this law should be compared to the benefit the nation would get if these rights are relaxed. From our previous discussion we can understand that, in certain cases, there are imbalances between the rights of the creators and the interest of the public in using literary and artistic works without the authorization of the creator. Keeping this balance is necessary for the protection of the rights of creators and expansion of education. In order to achieve this, the Ethiopian Government should consider revision of the current copyright law.

The objective of such revision has to be to draft the pertinent provisions on exceptions and limitations in such a way that the country fulfills its obligations under international treaties thereby ensuring the rights of its citizens to access to knowledge which is vital in achieving the vision of the Ethiopian Government, which, *inter alia*, is to expand tertiary education to a significant portion of the population. Such a revision, however, should be conducted over a long period of time so that new developments could be considered in the revision process. Following are the major points suggested that such a revision should address.

- Despite the fact that Ethiopia is not yet a signatory to the major IP instruments, national IP laws are in line with the minimum standard set in these instruments. As part of the body of national IP laws, the Copyright Law in place in many instances exceeds minimum standards set under international instruments. In light of the current state of higher education in Ethiopia, the provisions on exceptions and limitations should be revised in such a way that allows minimum protection as stipulated in international instruments.
- The use of the term "reproduction" in Article 11 of the 2004 copyright law has to be replaced by the term "utilization", a term which is employed by the corresponding Berne Convention provision and has a broader meaning. If the later is adopted the translation and adaptation of a work for the purpose of teaching would be possible.

- Also the amount of work which could be reproduced, as per Article 11 2004 copyright law, should be made clear. Otherwise, the reading of this provision will allow the reproduction of the whole or substantial part of a work. Such a practice has the potential of killing the culture of writing which is right now at an infant stage.
- The distinction which Article 32(c) 2004 copyright law makes should give us also a reason of concern. This provision makes an indirect distinction between performances and sound recordings which have been published as teaching or instructional materials and those works which are not teaching or instructional materials. The distinction is that the exceptions and limitations are imposed on the later while the former products are not the subject of any exception and limitations. Such distinction is not fair and as a result has to be avoided. The writers argue that exceptions and limitations should be possible for both categories of products.
- The definition of those libraries which are "working not for gain" has to be expanded so as to benefit those libraries which are run by private colleges. These libraries should be considered as part of the educational institutions which enjoy the benefit of teaching exceptions stipulated by the 2004 copyright law.
- The exception stipulated under Article 12 of the 2004 copyright law is something which could be enjoyed only by libraries, archives, and similar institutions. The reality on the ground is such that education institutions establish libraries after producing copies from the collection of existing libraries. In order to accommodate this reality, education institutions should be allowed to enjoy the exception provided under this Article.
- The requirement of fixation introduced by the 2004 copyright law has to be abandoned. The introduction of this requirement addresses the difficulties which courts used to face in determining infringing products. This, however, should not be achieved by robbing innocent and illiterate people their right on works created by them. The existing practice goes against the policy the Ethiopian Government is currently working on, viz. poverty reduction.
- In line with granting minimum rights, revision should also address the issue of which of the two principles, i.e. national or international exhaustion principles, should be introduced by the 2004 copyright law.

Reflections

Seeking Compliance with Labour Standards through Trade Sanctions: A Disguised Protectionism or Anything More?

Belachew Mekuria

Introduction

The debate as to whether or not exploitative labour practices be sanctioned through trade restrictions has been on the agenda for several years within the World Trade Organisation. Doumbia-Henry and Gravel trace the origins of this debate as far back as the periods of the industrial revolution stating that in those days 'the charitable urge to impose constraints on appalling working conditions was set against a preoccupation that was economic in nature.'[1] Though initially it emerged in the form of a charitable urge, in the contemporary world those urges are enunciated as claims of minimum labour standards and human rights. Thus, the increasing interest to see a world where the minimum labour rights guarantees are fully respected, on the one hand, and on the other the urge to ensure a fair trade relations have remained on a constant collision course.[2] Arguments abound, both in support and against, on the tenability of using trade sanctions for the purpose of securing compliance with human rights and labour standards by trading partners.

Where particularly countries engage in unilateral or bilateral measures with an attempt to put on task their fellow trading partner countries towards complying human rights and labour standards through trade restrictions, the complication and intensity multiplies. For instance, if state X were to be allowed to integrate trade, investment and labour rights or generally human rights, the mechanism of such connection would assume basically two shapes: sanctioning its investors with foreign operations where they engage in abusive labour practices in their host states;[3] or it could be through banning imports from the country which engages in labour practices that are illegal in its own jurisdiction.[4] The latter may be done as a

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[1]See Doubbia-Henry, Cleopatra & Gravel, Eric, (2006), 'Free Trade Agreements and Labour Rights: Recent Developments,' *International Labour Review*, Vol. 145, pp 185-206, at 185

[2]See generally Trade and Labour Standards: Subject of Intense Debate, available at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm last visited on 22 July 2011

[3]An example of this sort can be the U.S. practices where its tax law, which provides benefits to U.S. corporations in the form of credits on foreign taxes against U.S. tax liability, has been used to penalise corporations doing business in disfavoured countries. Foreign tax benefits were withheld from U.S. corporations on income earned in South Africa during the anti-apartheid era. See Diller, Janelle M., & Levy, David A., (1997), 'Child Labour, Trade and Investment: Toward the Harmonisation of International Law,' *The American Journal of International Law*, Vol. 19, No 2, pp. 663-696, at 693

[4]This might be done, for instance, by invoking the GATT Article XX exceptions (see *infra* note 5) to the MFN (Article I), national treatment obligations (Article III) and limitations on quantitative restrictions (Article XI). Some of the possible candidates from Article XX could

matter of sovereign right[5] so long as it is applied in a non-discriminatory manner and not as a disguised restriction on international trade.[6] These being generally the possible course of actions those countries may follow, this contribution rather examines the arguments forwarded for and against such sanctions that are aimed at compelling a country to respect labour and other human rights standards in engaging in international trade relations. While the first part is devoted to the arguments for and against labour rights-related sanctions, the second part compares the General Agreement on Tariffs and Trade (GATT) rules with that of Generalised System of Preference (GSP) schemes when used as mechanisms to sanction human rights violations of an exporting country. The contribution closes by highlighting on some critical observations on those arguments examined in its first and second parts. As Ethiopia is in the accession process to join the WTO, it is believed that the trade-related issues discussed in this contribution have both currency and relevance.

I. Enforcing labour rights through trade conditionalities?

The dominant trends in the areas of trade conditionalities as means of enforcing labour rights reveal that those who argue in favour of such measures are from the economically affluent global north while those who disagree are from the economic south.[7] In tandem with those contradictory positions, labour standards that obtained a higher level of recognition as being 'core' ones continue to develop. In other words, rather than insisting on the full lists of those heterogeneous labour standards, as described by Philip Alston, 'a new normative hierarchy has been established.'[8] These core labour standards particularly popular within the WTO Member States relate to the two ILO Conventions on freedom of association and the right to organise and bargain collectively,[9] the two Conventions on forced labour,[10] the Convention on child labour that focuses on the minimum age for work,[11] the non-discrimination

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[5] See WTO Appellate Body Report, May 20, 1996, 35 ILM 603, 621; See also supra note 2, p. 682

[6] See General Agreement on Tariffs and Trade, TIAS No. 1700, 55 UNTS 194, Oct. 30, 1947 (henceforth referred as the GATT), Article XX, the Chapeau

[7] See the WTO, 'Labour Standards: Consensus, Coherence and Controversy,' available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm last visited on 22 July 2011

[8] See Alston, Philip, (2004), 'Core labour standards' and the transformation of the international labour rights regime,' *European Journal of International Law*, Vol. 15, No. 3, pp 457-521, at 458

[9] See ILO, Freedom of Association and Protection of the Right to Organise Convention, adopted Sept. 7, 1948, 68 U.N.T.S. 17 (No. 87)

[10] See ILO, Forced Labour Convention, adopted June 28, 1930, 39 U.N.T.S. 291 (No.29); Abolition of Forced Labour Convention, adopted June 25, 1957, 320 U.N.T.S. (No.105)

[11] See ILO, Minimum Age Convention, adopted June 26, 1973, 1015 U.N.T.S. 297 (No.138); With regard to Child Labour, the new convention is also worth mentioning here, ILO, Worst Forms of Child Labour Convention, 1999

Convention,[12] and an equal pay for work of equal value Convention.[13] It is interesting to note here that, of these so called 'core' labour standard Conventions, the US-the prime advocate of trade-labour rights linkage-has ratified only the two of them, i.e., the Convention on forced labour and the Convention on worst forms of child labour.[14] Nonetheless, the ILO Declaration on Fundamental Principles and Rights at Work that was duly adopted by its 86th General Conference makes it a duty of 'all Members even if they have not ratified the Conventions in question...to respect, to promote and to realise' those rights.[15] Still, there exist schisms on whether or not implementation of labour standards does make a condition in trade relations. This section first discusses those arguments that are in favour and then proceeds to examine those points posed against such restrictive measures to enforce labour rights through trade and investment sanctions.

1.1. Arguments in favour

The first argument propounded by those who favour the use of trade and investment sanctions to enforce labour rights is based on socio-economic ground, which is technically called social dumping.[16] This is one of the GATT underpinning principles whereby it is asserted that 'markets should not be distorted by goods 'dumped' in an importing market at prices below those for like goods in the domestic market of the exporting country or in third-country.'[17] In other words, this is meant that countries that do not guarantee basic labour rights will have lower labour costs thereby reducing their production cost and consequently the price of their products. Blackett puts the consequence of this condition as follows:

> Capital, which is mobile, shops for low cost labour, which enables it to produce, if not more efficiently, at a lower overall cost per unit. Labour is not similarly mobile. To compete with low labour cost countries of the

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[12] See ILO, Discrimination (Employment and Occupation) Convention, adopted June 25, 1958, 362 U.N.T.S. 31 (No.111)

[13] See ILO, Equal Remuneration Convention, adopted June 29, 1951, 165 U.N.T.S. 303 (No.100); and See also generally Blackett, Adelle, (1999), 'Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation, *Columbia Human Rights Law Reveiw*, Vol. 31, pp 1-80

[14] See the ILO ratification information page, available at http://www.ilo.org/ilolex/english/newratframeE.htm last visited on 22 July 2011; the US' refusal to acknowledge binding global standards can be observed from the ILO statistics on ratification of its Conventions that puts it as one of the four Member States that has ratified fewer Conventions. See Alston, *op.cit.*, at 467

[15] See ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, Eighty Sixth Session, Geneva, 18 June 1998, available at http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm last visited 24 July 2011

[16] This is 'a practice of exploiting prison or sweated labour to enable a product to be sold at a price lower than it would command in accordance with a regulated wage structure.' See Diller & Levy, *op.cit.*, at 680

[17] See Diller & Levy, *op.cit.*, at 680

South, where the labour supply is plentiful, states must decrease their labour costs by decreasing labour standards, or harmonising 'down.' This is, simply put, the concern about a race to the bottom.[18]

While stating this same fact, Bhagwati had written that 'if trade shifts activity to where the costs are lower because of lower standards, and if additionally capital and jobs move away to exploit lower standards abroad, then the countries with higher standards may be forced to lower their own.'[19] Whether low wage alone leads to lower production cost and consequently implicates on price is an argument that is open to suspect. Even if one may have a reason to believe that labour is cheaper in the economic south, it does not automatically create the presumption that they produce with lower production cost. This is also proved to be an empirical fallacy because in many occasions, higher labour standards may increase competitiveness and productivity rather than necessarily to low labour costs.[20]

Accordingly, this argument is met with fierce critique on various grounds, some of which shall be raised later while discussing the other side of the contention. In any event, the social-dumping argument tells us that it is legitimate to sanction such acts through the GATT principles as stipulated under its Article VI[21], even though the requirement to show injury to a domestic industry in the territory of the importing Contracting Party might be a hurdle sometimes impossible to overcome.

The second argument in favour is based on subsidies as one form of non-tariff barriers to trade. 'Non-tariff barriers are broadly understood to include anything from quantitative restrictions on the import of certain products to domestic subsidies or "distortions" that enable an exporter to decrease the cost of production, and therefore the export price.'[22] As is the case with the 'social-dumping' argument, here too, 'the requirement to show injury to domestic industry as a consequence of imports [of commodities produced through abusive labour practices] may present a significant limitation in many cases.'[23] Both 'social-dumping' and subsidies are arguments that advocate abusive labour practices as against the principles of fair trade and relate more to the economic aspects of the argument in favour. This second

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[18] See Blackett, *op.cit.*, at 48-49

[19] See Bhagwati, J., *'Trade Liberalization and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues,'* Blackwell Publishers, (1995), p.746

[20] See Blackett, *op.ct.*, at 49

[21] Article VI of the GATT provides for the right of Contracting Parties to apply measures against imports of a product at an export price below its 'normal value (usually the price of the product in the domestic market of the exporting country).

[22] See Blackett, *op.cit.*, at 52

[23] See Diller & Levy, *op.cit.*,, at 681

argument is grounded on the idea of regarding labour deregulation as an act of subsidy and thus a distortion of trade.[24]

The third argument is grounded on a moral reason. It goes on to say that 'a country that adheres to higher labour standards within its national boundaries has the moral right to suspend trade with another country that does not adhere to equally higher labour standards.[25] For instance, if the US considers itself to have subscribed to values that do not admit child labour and has itself outlawed the practice, it should also have the right to suspend imports made by child labour in other countries. Why should US citizens have to compromise their values to accommodate the imports from abroad?'[26] It is claimed also that 'if labour standards elsewhere are different and unacceptable morally, then the resulting competition is morally illegitimate and 'unfair'.'[27]

Even if this point, too, faces a critique basically on the grounds of cultural relativism,[28] it remains to be one of the appealing arguments in favor of trade and investment sanctions for the enforcement of 'core' labour standards. However, insisting cultural reciprocity is, no doubt, too protectionist when applied in the realms of trade relations. Saying these basic arguments in favor from the moral as well as economic points of views, now we resort to the arguments against the use of trade and investment sanctions to enforce labour rights.

1.2. Arguments Against

One fundamental argument that resists the measures of trade sanctions as a means of enforcing labour standards relates to the principle of comparative advantage. This argument is succinctly described by Blackett as follows:

> The first premise of trade theory is that states should be permitted to rely on the source of that comparative advantage to exchange what they produce efficiently for what others produce efficiently. Trade would

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[24]See generally Barenberg, Mark, 'Federalism and American labour law: Toward a critical mapping of the 'social damping' question,' in Pernice, Ingolf, (Ed.), (1996), *Harmonisation of legislation in federal systems*, (USA: JURIS Publishing, Inc)

[25]See Panagariya, A., Trade-Labour Link: A Post-Seattle Analysis,' available at http://www.columbia.edu/~ap2231/Policy%20Papers/zdenek-PANAGARYAYA%20(Chapter%203.doc).pdf last visited on 22nd July 2011

[26]See Panagariya, *op.cit.*

[27]See Bhagwati, *op.cit.*, at 753

[28]This is usually considered as a disguised attempt to impose the western values on the other parts of the world, and blamed for going against the theories of cultural pluralism. For instance, Bhagwati has written 'diversity of labour practice and standards is widespread and reflects, not necessarily venality and wickedness, but rather diversity of cultural values, economic conditions and analytical beliefs and theories concerning the economic (and therefore moral) consequences of specific labour standards. See Bhagwati, *op.cit*, at 754

enable parties to maximize their returns by using their advantages efficiently.[29]

It is a direct attack on the argument of 'social dumping' in the sense that it rejects the proposal for harmonization of labour standards internationally. The argument goes, 'international differences in wages and social conditions reflect differences in productivity and social preferences.'[30] And any attempt to harmonize such labour standards internationally would 'artificially eliminate' the comparative advantages reflected in the cost of production and, 'hence, reduce international trade opportunities'[31] as the latter is basically dependent upon trading countries' comparative advantages.

The Singapore Ministerial Declaration seems to partially reflect this issue especially from the perspective of 'low-wage developing countries.' In Paragraph 4 it is stated as follows:

> We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. *We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question...*[32](emphasis supplied.)

According to this Declaration, therefore, countries must operate in trade matters in such a way that they exploit their comparative advantages. One area where countries of the South claim to have uncontested advantage being low-wage-paying conditions of labour, the Declaration rejects any unilateral or bilateral invocation of labour standards in this regard as protectionist. Again the fact that there is lower wage must not be conflated with low labour standards. Generally, as an aspect of social protection, equalisation of wages may not be considered as an end in itself when social clauses like labour standards are discussed. Rather, as pointed out in the ILO Governing Body report, any social protection 'should as far as possible reflect

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[29]See Blackett, op.cit., at 50

[30]See Sapir, A., *'The Interaction Between Labour Standards and International Trade,'* Blackwell Publishers, 1995, p.792

[31]Ibid

[32] 1996 Singapore Ministerial Declaration, available at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#core_labour_standards last visited on 22nd July 2011

the free choice of the social partners rather than the 'diktat', however well intentioned, of the international community.'[33]

The second argument is rather pragmatic in the sense that it says linking trade with labour will have a negative effect rather than a win-win end as advocated by those who argue in favor of such a link. If we consider, for instance, child labour and where, as is often true than not, countries will fail to meet the required standard as might be set by trading-partners, it will lead inevitably to trade sanctions. 'If so, no improvement in labour standards will be achieved and [at the same time] the gains from trade will be reduced.'[34] This also turns out to be an ethical question in the sense that children of the impoverished South need world community's unfettered attention and it is difficult to understand how advocating the labour standards through trade restrictions, rather than improved market access, would help. Again I quote Bhagwati here in support of this point:

> 'Whether child labour[35] should be altogether prohibited in a poor country is a matter on which views legitimately differ. Many feel that children's work is unavoidable in the face of poverty and that the alternative to it is starvation which is a greater calamity, and that eliminating child labour would then be like voting to eliminate abortion without worrying about the needs of the children that are then born.'[36]

The third and the final point is institutional, and in a way a continuation of the second argument in a different tone. This is best explained by Panagariya as follows:

> What the trade-labour link tries to accomplish is to kill two birds with one stone: use the WTO to achieve both free trade and higher labour standards. In technical terms, the link seeks to hit two targets with one instrument. But...in order to be successful, one would normally require at least as many instruments as he/she would targets. [Thus], the best course to promote labour standards is to pursue them through an alternative institution, the ILO, and leave [for] the WTO the task to promote free trade. This is also consistent with the Singapore Declaration.[37]

The above quote from the 1996 Ministerial Conference has a clear message as far as this point is concerned and to strengthen this line of argument. The then Trade and Industry Minister of Singapore, Mr. Yeo Cheow Tong, who also presided over that meeting said in his concluding speech, 'some delegations had expressed the concern

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[33]See ILO, Governing Body, *The social dimension of the liberalisation of world trade*, Nov 1994, cited in Blackett, *op.cit.* 50

[34]See Panagariya, *op.cit.*, at 9

[35]Bhagwati uses 'child labour' just as an example to demonstrate most of the 'core' labour standards by taking what he considers as most condemned.

[36]Bhagwati, supra note 15, p.755

[37]Panagariya, supra note 20, 10

that this text may lead the WTO to acquire a competence to undertake further work in the relationship between trade and core labour standards...I want to assure these delegations that this text will not permit such a development.'[38]

Thus, it remains to be a moot question as to whether trade and investment sanctions be used to enforce labour standards with the ultimate aim of harmonization together with trade liberalization. On balance, however, one could have a reasonable doubt on the tenability of the arguments favouring sanctions as a stick to obtain a dividend of the carrot that the international commerce provides.

II. GATT and GSP compared when used to sanction human rights violations

There are provisions in the GATT that aim to balance free trade needs and non-trade interests of the Contracting Parties such as the respect for human rights. GATT Article XX provides that nothing in the GATT 'shall be construed to prevent the adoption or enforcement by any Contracting Party of measures, *inter alia*, 'necessary to protect public morals,' necessary to protect human, animal or plant life or health,' 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption,' essential to the acquisition of or distribution of products in general or local short supply' and relating to the products of prison labour.'[39] In such circumstances 'a Member State could allege that the maintenance of trade relations with a nation which flagrantly violates certain fundamental rights (e.g., the practice of slavery, child labour, generalized violation of the right of physical and mental integrity) attacks its concept of 'public morals,' or that the adoption of trade restrictions seeks to protect 'human life or health' of people, etc.'[40]

The GSP, the legal basis of which is the 'Enabling Clause'[41] which was adopted under the GATT in 1979, on the other hand, allows 'developed countries to offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries.'[42] It was a decision primarily aimed at articulating the role of developed countries in the economic progress of developing

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[38]Quoted in Panagariya, Ibid

[39]See also generally Howse, Robert, & Mutua, Makau, 'Protecting Human Rights in a Global Economy: Challenegs for the World Trade Organisation,' in Tostensen, Anne & Stokke, Hugo, (Eds), (2001), *Human rights in development: The millennium edition*, (University of Buffalo Law School), pp 53-82.

[40]See Nogueras, Diego J., & Martinez, Luis M., (2001), 'Human Rights Conditionality in External Trade of the European Union: Legal and Legitimacy Problems,' *Columbia Journal of European Law*, Vol. 7, pp 307-336, p.328.

[41]The Enabling Clause is officially called the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.' See infra note 35

[42] See 'Enabling Clause' for Developing Countries, available at http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm last visited on 25 July 2011

countries.[43] The decision provides that contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.[44] The extent to which developed countries may condition the granting of a preference on the developing country's attainment of certain non-trade related goals, such as human rights, is an issue that undoubtedly remains controversial.[45]

Generally, therefore, the GATT and GSP regimes are gateways to integrate non-trade related interests into the international trade policies. Even if they might be used for this similar end, they have many distinguishing features on which this part of the essay is supposed to briefly elaborate. On the basis of some four points of comparison, the later part of this section discusses the features of the two regimes by which a state may prohibit imports due to human rights violations.

2.1. The GATT Article XX exceptions and the GSP

2.1.1. Clarity of contents

The prime candidate under the GATT Article XX for import restriction on the grounds of human rights abuses is section (a), which provides the moral exception to free trade. Charnovitz poses series of questions about the vagueness of this provision:

> First, what type of behaviours implicates public morals...Can public morals differ from country to country or is there a uniform international standard? Second, whose morals can be protected...Can a trade measure be used to protect morals elsewhere? For example, would an import ban against goods made by indentured children be GATT-legal?[46]

He succinctly posits the difficulty of having uniform interpretation of this provision on the basis of theoretical analysis supported by empirical case studies.[47] The same can be said for the GSP scheme, especially considering its being voluntary and based on unilateral decisions of the developed countries. According to Paragraph 3(a) and

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[43] See Stamberger, Jennifer L., (2001), 'The legality of conditional preferences to developing countries under the GATT Enabling Clause,' *Chicago Journal of International Law*, Vol. 4, No 1, pp 607-618, at 608

[44] Ibid

[45] See Stamberger, *op.cit.*

[46] Charnovitz, Steve, (1998), 'The Moral Exception in Trade Policy,' *Virginia Journal of International Law*, Vol. 38, pp 689-746, at 689

[47] A WTO Panel as well as the Appellate Body had affirmed the vagueness of the enabling clause especially in relation to identifying the beneficiary countries as well as the extent to which developed countries can fix conditions for the grant of preferences. See The Panel's decision European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, December 1, 2003; and the Appellate Body's decision European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, April 7, 2004

(c) of the Enabling Clause, 'any differential and more favourable treatment provided under this clause . . . shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.'[48] And preferences granted under this clause shall 'be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.'[49] Although the GSP was supposed to represent these purposes, preference granters 'continued to create and operate distinct preferential regimes...[and] these special preference schemes have also been subject to increasing conditions.'[50] The GSP remains in practice to be too subjective to deserve the name 'generalised.' For instance, the African Caribbean and Pacific (ACP) countries have been considered for preferential access to European Union markets based on the Cotonou Agreement. However, the Agreement under Article 96 stipulates for the possibility of suspending that benefit because of the failure by the beneficiary to comply with principles of 'human rights, processes of democratisation, consolidation of the rule of law, and good governance.'[51] A country's failure or compliance to those standards of human rights, and democracy is to a large extent a matter to be determined by the subjective whims of those affluent countries. Thus, both the GATT Article XX as well as the GSP schemes have this problem of vagueness in scope and content.

2.1.2. The Chapeau in Article XX

The existence of the Chapeau in Article XX of the GATT can be taken as one point of comparison as we do not find its counterpart in the Enabling Clause. The invocation of human rights violations for restricting import from that violating state to be successful, it has to pass through 'the filter of the Chapeau of Article XX, which does not allow a measure to "constitute a means of arbitrary or unjustifiable discrimination...or a disguised restriction" on international trade.'[52] Thus, 'measures are considered incompatible with this Chapeau if they are only effective when [They] force the exporting country to change its policy, or when they make the GATT advantages depend on the exporting country adopting a national policy essentially similar in content to one imposed unilaterally by the importing country.'[53]

When we look into the GSP, developed countries would argue that the Enabling Clause permits them to condition promise of preferential market access on domestic standards of developing countries, such as their human rights records, without such

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[48] See Para 3(a) of the Enabling Clause, *op.cit.*

[49] See Para 3(c) of the Enabling Clause, *op.cit.*

[50] See Shaffer, Gregory & Apea, Yvenne, (2005), 'Institutional Choice in the Generalized System of Preferences case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights,' *Journal of World Trade*, Vol. 36, No. 6, pp 977-1008, at 982

[51] See the Cotonou Agreement, cited in Shaffer & Apea, *op.cit.* at 983; included in the African Caribbean and Pacific countries are former European countries' colonies.

[52] See Nogueras & Martinez, *op.cit.*, at 329

[53] Ibid

constraint as it exists in the Chapeau of Article XX.[54] Thus, 'proponents of conditional preferences argue that the special nature of the preferential GSP scheme does allow for such conditionality as would otherwise be prohibited by GATT.'[55]

a) Positive/Negative conditionality

When we speak of conditionalities in external trade on various grounds such as human rights, first we refer to the measures of commercial liberalization that are offered to those countries who commit themselves to respect specific fundamental rights, [called positive conditionality].[56] This typically defines the GSP scheme since it grants preferential market access and other concessions to those countries that are considered to have fulfilled the required conditions as might have been provided in the scheme.[57] However, it is not to mean that the GSP cannot be used also negatively. For instance, the U.S. GSP 'primarily employs negative conditionality; instead of granting additional preferences to specific developing countries, it withdraws GSP preferences from countries that do not meet certain conditions which can be classed into three overarching categories: (1) political conditions,[58] (2) human rights conditions,[59] and (3) conditions related to U.S. economic interests.'[60] By negative conditionality we generally refer to conditions that provide for 'withdrawal of unilateral trade concessions, non-compliance of treaty obligations, economic countermeasures and trade sanctions carried out as a reaction to the violation of human rights in a third country.'[61]

By Article XX of the GATT a Contracting Party may adopt or enforce trade restrictive measures that are 'necessary to protect public morals...human, animal or plant life or health...relating to the products of prison labor, etc'[62] which, otherwise, would have made them fall foul of the MFN obligation stipulated under Article I. Thus, in a way this is a negative conditionality as it justifies restrictions on those grounds while the GSP can be applied for both negative as well as positive conditionality.

b) Discretionariness

The GSP system allows granting countries enormous discretion in both the scope and design of preferences. Since the extension of preferential treatment is voluntary

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[54] See Stamberger, *op.cit.*, at 609

[55] Ibid

[56] See Nogueras & Martinez, op.cit., at 309

[57] Ibid, at 323

[58] Political conditions prohibit granting of GSP treatment to countries that are communist, belong to a commodity cartel, or aid terrorists or fail to support U.S. efforts to combat terrorism.

[59] The human rights conditions exclusively concern labour standards

[60] A country's failure to protect the economic interests of U.S. exporters or investors may trigger mandatory or discretionary withdrawal of GSP benefits. See Mason, Amy M., (2004), 'The De-generalization of the Generalized System of Preferences (GSP): Questioning the Legitimacy of the U.S. GSP,' *Duke Law Journal*, Vol. 54, No 2, pp 513-547, at 524

[61] See also generally Nogueras & Martinez, *op.cit.*

[62] See Article XX(a), (b) and (e) of the GATT

and entirely within the discretion of the developed nation (that allows access to its markets), such commitments depend largely on political considerations.[63] It is true that the GSP mechanism is primarily meant as a scheme of development cooperation, and 'the country that adopts the system has great freedom in its design, usually establishing differences according to distinct criteria (the competitiveness of the products, relative development level of the beneficiaries, etc).'[64] Such discretionary right is somehow invisible, though not totally ruled out, when it comes to justifying trade restrictions based on the general exceptions of GATT Article XX. Specifically the 'moral exception' in the GATT[65] is at best unclear as well as subject to varied interpretations. Moreover, it is unfortunate that 'other than noting Article XX(a) might be applicable to alcohol, the negotiating history from 1945-48 does not provide a clear answer to what morality and whose morality is covered.'[66] However, the level and the nature of discretion in the two obviously do not match.

c) Exception to the GATT?

A side issue to this investigation is also whether the GSP is an exception to the GATT regime or its integral element. This has been enunciated by the Appellate Body's Report in concurrence with the Panel in the India-EC dispute in the following terms:

> Paragraph 1 thus excepts members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an 'exception to Article 1:1.[67]

This, in other words, provides a defence for a state implementing preferential access based on the Enabling Clause against a claim by another state to be accorded the same advantage 'unconditionally' to its like products originating in its territories as the one benefiting from the Enabling Clause. And the Appellate Body, being lenient to request the granting state to prove the contents and features of the treatments under the Enabling Clause indirectly encourages the wider use of such measures.[68]

Conclusion

Whether or not labour rights be subjects of conditionalities in bilateral trade relations is a topic highly charged with controversy and largely political. Such rights both as elements of the broader human rights subject and specifically as developed by the

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[63] See Bagwell, Kyle, Mavroidis, Petros C., & Staiger, Robert W., (2002), 'It is a Question of Market Access,' American Journal of International Law, Vol. 96, No. 1, pp 56-76, at 71

[64] See Nogueras & Martinez, *op.cit.*, at 331

[65] By 'moral exception' I am referring to Article XX(a) of the GATT

[66] See Charnovitz, op.cit., at 705

[67] Appellate Body Report, Para 90, quoted in Mathis, James H., (2004), 'Benign Discrimination and the GSP:WTO-Report of the Appellate Body, 7 April 2004,' *Legal Issues of Economic Integration*, Vol. 34, No 4, pp 289-304, at 291

[68] Appellate Body Report, Para 115, in Mathis, *op.cit.*, 292

works of the ILO, are key subjects that to a great extent depend on countries' economic wellbeing. Most of those rights are also aspirations towards which countries would have to progress over time. Claiming that 'sub-standards' in labour conditions constitute social dumping and subsidization of local industries of an exporting country falls short of acknowledging that progressivism. For countries to reach a level that we consider acceptable standard of labour, there is a need for levelling the playing field, part of which is to allow them access the international market.

Moreover, the nexus between lower wages with low cost of production and thus lower price of goods as discussed above is both wrong and unhelpful. Those arguments listed above relating to the comparative advantages in trade relations, pragmatic choices of norms and institutions rather inform the overall discourse to be more of the developed countries' protectionist agenda than genuine concern for standardisation of healthy labour conditions.

The two mechanisms discussed in the second part of this contribution whereby non-trade interests such as human rights could be integrated into trade policies have their own distinct features even if they might be utilized for similar ends. The 'twin pillars' on which the GATT framework was founded, non-discrimination[69] and reciprocity, can be circumvented through the operation of the general exception provisions of Article XX of the GATT as well as the GSP schemes. While the latter has the features, *inter alia*, of discretionary nature and the absence of hurdles such as the one enunciated in the *Chapeau*, the former does not equally share these features.

The GSP system allows granting countries enormous discretion in both the scope and design of preferences. Because the extension of preferential treatment is voluntary and entirely within the discretion of the developed markets, such commitments depend largely on political considerations thereby resulting in high level of subjectivity, arbitrariness and thus reasonably tagged by developing countries as being disguised protectionism than anything more.

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[69]The tenet of non-discrimination is grounded on the Most Favoured-Nation(MFN) clau - of Article I;1 of the GATT which mandates that all advantages granted to one country be accorded immediately and unconditionally to like products from other countries.

Book review

Heinrich Scholler, Ethiopian Constitutional and Legal Development: Essays on Constitutional Development, Volume I & II, (Rudiger Koppe Verlag, Koln, Germany 2005)

Reviewed by Getahun Kassa

The book provides an overview into wider topics on the legal and constitutional developments in Ethiopia. The author was a professor at the Law Faculty of Law at Addis Ababa University and has the exposure to a range of issues related to the subject discussed in the book. In addition to his teaching term at the Faculty of Law, the author was involved in research undertakings relevant to the subject. The author was also continuously engaged in the training programs organized for judges by the Federal Supreme Court and the Frederich Ebert Foundation.

The book is organized in two volumes. Volume one of the book deals with Constitutional Development in Ethiopia while the second volume focus on the Legal developments in Ethiopia discussing mainly the Ethiopian court system. This writing reviews volume one of the book. In the preface of volume one, the author has noted that the book is written with the intention of providing law students and the wider public an overview on the modern law of Ethiopia. The book contains the author's independent works as well as his joint works with fellow academics. Moreover, independent works of other authors which are deemed to be relevant to the subject area are also included in the book.

Volume one of the book consists of twelve different topics. In discussing the sources of Ethiopian Law, the first topic of volume one refers back to the 13th century and covers the present time. It described and analyzed the constitutional and legal developments that took place in different times and mainly since the adoption of the first Constitution in 1931. The 1955, 1974 (draft), and 1987 Constitutions; the Transitional Charter and the 1995 Constitution; religious sources; and proclamations and legal codes adopted during the era of Emperor Menilik and the 1960's are discussed by pointing out their distinctive features.

The author has divided the sources of Ethiopian Law it into two main categories as legal and non-legal sources. These sources, he pointed, refer to statutes, legislative enactments, treaties, custom and religious sources. He has attempted to show that custom continues to be enforceable in a number of in stances. He has discussed the history of Ethiopian law by classifying it in to four periods as the pre-Menilik era (starting from the 13th century); the Menilik era; the pre Italian-Ethiopian war era; and the contemporary period. In this part of the book, the author noted the changes that took through these periods

in terms of statutory enactments and the attention given to issues of separation of powers and human rights. In discussing the issue of separation of powers and protection of human rights, the author pointed out that each regime was following principles quite different from the other.

Under the second part of Volume I, the author has attempted to compare and analyze the role and scope of power of the legislative, executive and judiciary during the constitutional regimes from the first Constitution of 1931 up to the 1995 Constitution. The work has shown what was peculiar for each regime in terms of separation of powers. It has noted the concentration of power in the Emperor in the 1931 and 1955 Constitutions; the several changes that were proposed under the 1974 draft Constitution; the vast powers of the President in the 1987 Constitution; and the powers of the Prime Minister and the Council of Ministers in the 1995 Constitution. The different approaches to constitutional interpretation adopted by the Constitutions are also discussed in this part. The structure and power of the courts under the different Constitutions is another topic discussed in this part of the book. The author pointed out that the book has no interest in discussing the kebele/social courts despite the place they have in the actual practice of adjudication. A general description is also provided in this part of the book about the place of human rights in these Constitutions.

The third topic of volume one, *Evolution of the Ethiopian Public Law and of the Empire and Beginning of Revolutionary Change* , characterized the style of Ethiopian public law as involving broad discretion to the executive. Under this topic, the author noted that separation of powers exists only nominally under the 1955 Constitution. The author also discussed about the legal developments that took place with the enactment of legislations by the Provisional Military Administration Council (PMAC), and how the military regime with the enactment of various legislations has gradually taken over all power beginning with the suspension of the 1955 Constitution.

The fourth topic on *Constitutional Law from Tradition to the 20th Century* discussed the Constitutions that Ethiopia has lived through and raised the issue of influence of different Constitutional systems around the world. It has been pointed out that Ethiopian Constitutions have been influenced by the Japanese Meiji Constitution, Anglo-American system of Constitution and Socialist constitutions. This part also discussed to some detail the 1931 and 1955 Constitutions noting their similarity in protecting the vast powers of the Emperor. The discussion here noted that compared to the Constitutions which replaced them, the Solomonic Legend and the strong state-church relation is peculiar feature of these two Constitutions. This part has pointed out how this has been radically changed with deposition of the Emperor, the coming in to

power of the military and its enactment of Proclamations 1 and 2 of 1974. Following the promulgation of these two proclamations, another important legal development noted by the author is the enactment of the 1975 Labor Proclamation, which has imported socialist principles into labor relations. This part has also described the main features and fundamental principles of the 1994 Constitution. It accordingly pointed the following features are the ones which make it different from the preceding Constitutions: separation of state and religion; decentralization of power by adopting a federal state structure; creation of a two chamber parliament; and much broader recognition to human rights.

Law and Politics in Revolutionary Ethiopia is the fifth topic of volume one. The discussion under this topic has attempted to provide account of the political climate and the changes that led to the 1974 revolution. It tried to show how this in turn has influenced the legal developments in its own way such as through the suspension of the constitution; execution of public and military officials of the former regime in the absence of any trial process; the adoption of the special penal code with the intention of imposing heavier penalties and ensuring easy conviction of suspects and the creation of new institution for its enforcement etc. It has also noted that judicial and legal guarantees of rights were impeded by its enactment making infringement of fair trial guarantees and impartiality inevitable. The author has interestingly pointed out this period as a period of sharp contrast between the western legal values such as rule of law and principle of legality and the place of law in a revolutionary situation. The discussion under this topic has attempted to show how law was used as a political weapon to further the military's motto of *Ethiopia Tikdem*.

Ethiopian Constitutional Development since 1991 is the sixth topic of volume one. The topic begins with the description of the events that led to the adoption of the 1995 Constitution and the role of the Transitional Period Charter of Ethiopia. It pointed out that the Charter served as Supreme law of the land for the duration of the Transitional Period even though it does not have all the contents of a constitution. The author asserted that the fact that the Charter was intended to serve for a period not more than two years gives it character of a statute. The author pointed out the basic features of the Charter such as the right to self-determination; the incorporation of the UDHR; and the incorporation of democratic and human rights. This part of the book has repeated elements of comparison between the 1995 Constitution and the previous Ethiopian Constitutions. What is peculiar about this part is its relatively detailed analytic description of the 1995 Constitution. It describes the content and structure of the 1995 Constitution covering in a very general way all the eleven chapters of its contents. Moreover, this part focused on the human rights section of the 1995 Constitution. The author has put a table

showing the list of rights protected by the 1995 Constitution and similar rights protected under the International Covenant on Civil and Political Rights. This part of the book also discusses the issue of constitutional control and the role of courts under the current constitutional system.

Federalism is the seventh topic of volume one where the author has provided the description of the current federal structure in Ethiopia and the power and responsibilities of the federal government and member states of the federal system. This part has also discussed the powers and responsibilities of the federal institutions i.e. the two houses of the federal parliament; the Prime Minister and Council of Ministers; and the Court. Dealing with the Federal Court System separately, it has attempted to examine the jurisdiction of courts and the institution for the administration of the judiciary. The author has also discussed the historical background of the Ethiopian judicial systems and the varied structure of the court system under the regimes preceding the present constitutional system.

The eighth topic of volume one, *Establishment of Ethiopian Federalism,* describes essentially what has been discussed under the preceding topic. The ninth topic of the volume, *Germany Federalism,* provides a summary of the principles of German Federalism focusing on the role of exclusive legislative power; limits of federal and state government power; and issues of fiscal and revenue autonomy between the *Bund* and the *Land.* It also informs about the structure of the legislative, executive and judiciary in Germany at the Federal and state levels.

The New Ethiopian Constitution and the Ethiopian Legal Order is the tenth topic of volume one of the book. This part covers a handful of issues beginning with the explanation that the 1995 Constitution has a chapter on human rights and freedoms. This part provides a list and discussion of principles of interpretation of constitutional rights. The author mentions the principle of broad interpretation; the principle of predominance of freedom rights; and the principle of friendly interpretation among others. It also raised the different approaches followed in different legal systems on the issue of constitutional interpretation. The author also discusses the system of constitutional interpretation in Ethiopia by looking into the establishment of the Council of Constitutional Inquiry, the composition of its members and a brief introduction of its working procedure. Independence of the judiciary is discussed in this part by looking into the issues of administration of the courts and appointment of judges. This part also includes discussion on issues of *Habeas Corpus.*

Human Rights in a Developed Democracy - The Germany Experience is the title of the eleventh part of volume one. This part highlights the major features and development of human rights in the German constitutional system; the list of

rights provided under the German Basic law; and the different levels of guarantees for the protection of human rights. This part also raised the important role of the European Court of Human Rights to the German legal system. This part further discussed the jurisdiction of the German Constitutional Court, its working procedures and the challenges faced by the Court. The last part of the book is entitled *Notes on Constitutional Interpretation in Ethiopia.* This part of the book attempted to provide an overview of the current system of Constitutional Interpretation in Ethiopia. This part briefly discusses the relevant constitutional provisions that deal with the role of the Council of Constitutional Inquiry and the House of Federation in the interpretation of the constitution. It further went on discussing different theories and methods of legal and constitutional interpretation.

The first part of volume two of the book is entitled *Ser' ata Mangest - An Early Ethiopian Constitution.* The discussion in this part refers to an early Ethiopian Constitution that was written to determine and regulate ceremonial, administrative and judicial activities. The issues and activities regulated include royal succession; state-church relationship; and the judicial power of the king. The second part of Volume II discusses diplomatic relation between the Ethiopian Emperors Yohannes IV and Menilik II on the one hand and the German Emperors Wilhelm I, Wilhelm II and von Bismarck. This part of the book analyses the letters exchanged between the emperors from 1872 up to 1908. The author attempted to provide an analysis of how the geo-political realities of the time have affected the communication between the emperors.

The third part of volume two of the book discusses the Special Courts of Ethiopia from 1922 up to 1936. This part, *inter alia,* explores the political background that led to the establishment of the establishment of the mixed court system and its contribution to the modernization of the Ethiopian legal system and challenges encountered in the execution of the mixed court jurisdiction. The fourth part discusses the reflection of the *Ethiopian Open Air Courts in Popular Paintings.* In this part the author pointed out that popular paintings in Ethiopia reflect contemporary history as well as social and legal anthropology. The fifth part is entitled *History, Theory and System of Human Rights as Universal Right.* While the topics are quite important issues in the discussion of the subject of human rights, the analysis is shallow and does provide the reader with a discussion to the level expected. The sixth part of the book discusses notions of *Human Rights and the Independence of the Judiciary in the New Ethiopian Constitution.* This part provides brief discussion on the process towards the making of the 1995 FDRE Constitution. The author has also attempted to provide a comparative analysis of the FDRE Constitution with the German system of constitutional interpretation. This part, as is the case with other parts, suffers from repetitive discussion of issues. *The Modern*

Codification of Private Law in Ethiopia is the title of the seventh part of volume two of the book. This part provides useful information on the process of codification of the Ethiopian Private Law. It describes how the codification process was initiated, the influence of different legal systems on the final content of the Codes, the internal and external factors that has driven the initiation of the codification process and the challenges encountered during the process of drafting and promulgation.

The eighth part of volume two is *entitled Strengthening and Capacity Building of the Regional Judiciary in Ethiopia.* This part discusses the initiation and implementation of the joint project of the Friedrich Ebert Foundation and the Federal and State Supreme Courts of Ethiopia for the strengthening of capacity of the Ethiopian Judiciary. This part provides information on the structure and number of regional and federal courts, describes the overall situation of courts in terms of availability of necessary material facilities (such as office furniture and law books), the number, educational status and gender composition of judges, the number of trainings conducted and subjects covered by the trainings and the participation state and federal courts in the initiation and implementation of the project.

Part nine is entitled *Principles of Law giving in Ethiopia* and discusses the principle of law giving in Ethiopia. In this regard the author explains that Ethiopia was confronted in the 20th century with the need to adopt modern laws that addresses the demands that emanate from the growing international diplomatic and commercial relations as well as internal developments. *Central Elements of the Constitution in Comparative way* is the title of the tenth part of volume two. This part provides comparative perspective of the Ethiopian Constitutions. As an extension to this the discussion also paid brief coverage on the 1974 draft Constitution, proclamations 1/1974 and 2/1974 of the military regime and the 1991 Transition Period Charter. The last part of volume 2 focused on the German -Ethiopian Diplomatic Relation mainly discussing the history of the diplomatic relations between Ethiopia and Germany.

This book has explored into plenty of topics that are relevant and informative for the study of constitutional law and legal history in Ethiopia. Its reference to various works and relevant legislative sources is the strong side of the book. Nonetheless, the book has serious shortcomings. For instance one can point out the following under volume one of the book. First, mistaken use of some terms is observed repeatedly in different parts of the volume. The following are some examples: using the expression Federal Council for House of Federation; Council of Peoples Representatives for House of Peoples Representatives; causation for cassation; the Convention on Cultural, Political and Economic Rights for the Covenant on Economic Social and Cultural Rights; Central

Courts for Federal Courts, etc. These are few examples of the errors that need to be rectified. Second, too many abbreviations are used in the absence of sufficient reference to clarify them. Third, many ideas and themes in the volume are discussed repeatedly in different parts. This problem has seriously compromised the academic quality of the volume. Fourth, some topics and sub-topics whose importance demands an in depth examination are addressed briefly. Fifth, important legal developments directly relevant to the topics covered by the book have taken place before the publication of the book. For instance the discussion on jurisdiction of courts and delegation of federal jurisdiction to state courts is not informed about the recent establishment of federal high courts in some regions. Moreover the volume does not address the impact of the 1995 Constitution prohibiting the establishment of special courts on the application or implementation of the special penal code. Sixth, there is a serious problem of title-content mismatch in the volume. For instance pages 188-190 of the volume are entitled *Court organization under Proclamation 40/1993* but the content discusses about the organization of the Council of Constitutional Inquiry. Such facts imply that the information provided and discussions made on some of the topics covered by the volume are outdated. Seventh, the fact that the parts in the volume are stuffed with a number of general topics and sub-topics made it incoherent. The volume needs to be revised to address the above serious shortcomings in order to be a good reference work on Ethiopian constitutional law.

Volume two of the book also exhibits serious errors with a negative impact on the quality of the book. For instance some subjects in the book are discussed repeatedly in the different parts of the book. For example what is discussed in pages 117-118 is repeated on page 171 and the content of pages 145-149 is identical with the content of pages 126-129. Some parts of the volume contain too many topics and sub topics but the discussion with shallow analysis. For instance, on page 106 the controversial issue of the status of international legal documents is discussed only in a very small paragraph. The volume is also full of wrong references. A good example is the reference to the Universal Declaration of Human Rights on pages 84 and 86 as *the Universal Declaration of Human Rights of 26 August 1789.*