የኢትዮጵያ ሕግ መጽሄት
JOURNAL OF ETHIOPIAN LAW

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የፍርድ ጉሳኔዎች
Case Reports

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የኢትዮጵያ ሕግ መጽሔት

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

ሕግ ነክ የምርምር ጽሁፎችን፣ የመጽሐፍ ትችቶችን፣ እንዲሁም በፍርዶችና በሕጎች ላይ የተደረጉ ትችቶችን ብትልኩልን በደስታ እንቀበላለን። በተጨማሪም በኢትዮጵያ ሕግ መጽሔት ባለፈው ዓመት ታትመው የወጡ የምርምር ጽሁፎችን፣ የመጽሐፍ፣ የፍርድ ወይም የሕግ ትችቶችን በሚመለከት አስተያየትን ትጋብዛለች። በዚሁ መሠረት የሚቀርብ አስተያየት በግምት ከ5 ገጽ መብለጥ የለበትም። የተመረጡ አስተያየቶች በአስተያየቱ አዘጋጅ ትብብር አርትኦት ከተደረገባቸው በኋላ በመጽሔቱ ላይ ይታተማሉ።

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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

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ውሣኔ ከሥራ የተሰናበቱ በመሆናቸው የአስተዳደር ፍ/ቤቱ ጉዲዩን አከራክሮ ለመወሰን ሥልጣን የለውም በማለት ክሱን ሳይቀበል ቀርቷል፡፡

የአሁን አመልካችም በክልሉ የመንግስት ሰራተኞች አስተዳደር ፍ/ቤት በተሰጠ ብይን ቅር በመሰኘት ይግባኝ ለክልሉ ጠ/ፍ/ቤት ያቀረቡ ቢሆንም የክልሉ ጠ/ፍ/ቤት ይግባኝ ሰሚ ችሎትም መልስ ሰጪውን መጥራት ሳይስፈልግ በፍ/ሥ/ሥ/ሕ/ቁ 337 መሠረት የይግባኙን መዝገብ በመዝጋት ይግባኝ ባዩን አሰናብቷል፡፡ የአሁኑ አመልካችም በሥር የአስተዳደር ፍ/ቤትም ሆነ በይግባኝ ሰሚው ችሎት ብይን ላይ መሠረታዊ የሆነ የሕግ ስህተት ተፈጽሟል በማለት የሰበር አቤቱታቸውን ለሥር የክልሉ ጠ/ፍ/ቤት ሰበር ሰሚ ችልት ያቀረቡ ቢሆንም የክልሉ ሰበር ፍ/ቤትም የተፈፀመ የሕግ ስህተት የለም በማለት የሥር ፍ/ቤቶችን ብይን አጽንቷል፡፡

አመልካች የሰበር አቤታቸውን ለዚህ ችሎት ያቀረቡት በሥር የአስተዳደር ፍ/ቤትና በክልሉ ጠ/ፍ/ቤት ይግባኝ ሰሚ ችሎት ብይንና በክልሉ ጠ/ፍ/ቤት ይግባኝ ሰሚ ችልት ፍርድ ላይ መሠረታዊ የሆነ የሕግ ስህተት ተፈፅሟል በሚል ሲሆን በዋናነት የጠቀሱትም የቅሬታ ነጥብ፣ ተጠሪው አመልካችን ከሥራ አግዶ ካቆየ በኋላ ማሰናበቱ አግባብ ባለመሆኑ ጉዳዩን አከራክሮ እንዲወስኑ በሚል ለአስተዳደር ፍ/ቤትም ሆነ መደበኛ ፍ/ቤቶች ክስ ባቀርብም አለመቀበላቸው አመልካች ፍትሕ እንዳላገኝ የሚያደርግ በመሆኑ ተቀባይነት የለውም የሚል ነው፡፡

ተጠሪው በበኩሉ በሰጠው መልስ አመልካች የክልሉ የፋይናንስ ቢሮ ኃላፊ ሆነው በሹመት በሚሰሩበት ወቅት በታማኝነት ማገልገል ሲገባቸው በፀረ ልማትና አፍራሽ በሆኑ ተግባራት ላይ ተሰማርተው በመገኘታቸው በተሰጠው የፖለቲካና የአስተዳደር ውሣኔ ከሥራቸው እንዲሰናበቱ የተደረገው በአግባቡ ነው በማለት የሥር ፍ/ቤቶች ውሣኔ ላይ የተፈፀመ መሠረታዊ የሆነ የሕግ ስህተት የለም ሲል ተከራክሯል፡፡

ከሥር ጀምሮ የተደረገው ክርክር ከዚህ በሊይ እንደተጠቀሰው አጥሮ የቀረበ ሲሆን እኛም በሥር የአስተዳደር ፍ/ቤት ብይንም ሆነ በየደረጃው ባለ የክልሉ ፍ/ቤቶች ብይንና ፍርድ ላይ የተፈፀመ መሠረታዊ የሆነ የሕግ ስህተት አለ ወይስ የለም የሚለውን ጭብጥ ይዘን ክርክሩን እንደሚከተለው መርምረናል፡፡

ከቀረበው ክርክር መገንዘብ እንደሚቻለው አመልካች ቀደም ሲል የመንግስት ሠራተኛ በመሆናቸው በክልሉ የመንግስት ሠራተኞች አዋጅ መሠረት የሚተዳደሩ ቢሆንም የክልሉ መስተዳደር ም/ቤት ተመርጠው በተሰጣቸው ሹመት መሠረት የክልሉ የፊይናንስ ቢሮ ኃላፊ በመሆን

እየሰሩ ፈጽመዋል በተባለት ፀረ ልማትና ኤፍራሽ ተልዕኮ ከሥልጣናቸው ወይም ከሹመታቸው የሸሟቸው አካል አንስቶአቸዋል።

ይህ በመሆኑ ቀደም ሲል ሲሰሩበት ከነበረው የመንግስት መ/ቤት ለቀው በተሰጣቸው ሹመት ላይ እያለ በተወሰደባቸው የፖለቲካ እርምጃና የአስተዳደር ውሣኔ ከሥራቸው በመነሳታቸው ጉዳይ በክልሉ የመንግስት ሠራተኞች አዋጅ መሠረት ሊታይ የሚገባ መሆን አለመሆኑን መመርመር ተገቢ ይሆናል።

በክልሉ የመንግስት ሰራተኞች አዋጅ መሠረት ለአስተዳደር ፍ/ቤት በይግባኝ የሚቀርበው ጉዳይ አስቀድሞ መታየት ያለበት ሰራተኛው በሚሰራበት የመንግስት መ/ቤት ውስጥ በተቋቋመው የዲስፕሊን ኮሚቴ ነው። አመልካች ግን ከፍ ተብሎ እንደተገለፀው የፋይናንስ ቢሮ ኃላፊ በመሆናቸው በሥራቸው ያሉ የመንግስት ሠራተኞች የዲስፕሊን ግድፈት ሲፈጽሙ የመ/ቤቱ የዲስፕሊን ኮሚቴ ውሣኔን ሊያፀድቁ ሊያሻሽሉ ወይም ውድቅ በማድረግ እንደገና እንዲታይ የማድረግ ሥልጣን ያላቸው ናቸው። በመሆኑም ራሳቸውን እንደ ሠራተኛ በመቁጠር የፖለቲካ ውሣኔን ለአስተዳደር ፍ/ቤት የሚያቀርቡበትና ጉዳያቸውን በክልሉ የመንግስት ሠራተኞች አስተዳደር አዋጅ እንዲታይ የሚጠይቁበት ሁኔታ የለም።

በሌላ በኩል ተጠያቂነት አንዱ የመልካም አስተዳደር ማዕቀፍ ሲሆን በኢ/ፌ/ዲ/ሪ/ሕገ መንግስት አንቀፅ 12/2/ ማንኛውም ኃላፊና የሕዝብ ተመራጭ ኃላፊነቱን ሲያጓድል ተጠያቂ እንደሚሆን በግልጽ የተደነገገ ሲሆን ተጠያቂነቱ ለሕግ እና ለመረጠው ሕዝብ ጭምር ሊሆን ይችላል። በዚህ በተያዘውም ጉዳይ አመልካች የቢሮው ኃላፊ በነበሩበት ወቅት ፈጽመዋል ለተባሉት ድርጊቶች የሕዝብ ውክልና ያለው የክልሉ ም/ቤት ከሥልጣናቸው ወይም ከሹመታቸው አንስቷል። ይህን የፖለቲካ ውሣኔ አመልካች በፍ/ቤት ለማስለወጥ ማቅረባቸው ያለአግባብ ሲሆን የፖለቲካ ውሣኔዎችን /political actions/ ፍ/ቤቶች ተቀብለው አከራክረው ተገቢውን ፍርድ ለመስጠት የዳኝነት ሥልጣንም አይኖራቸውም።

በመሆኑም የሥር ፍ/ቤቶች ጉዳዩን አከራክሮ ለመወሰን የሥረ ነገር የዳኝነት ሥልጣን የለንም ሲሉ በሰጡት ብይንም ሆነ ፍርድ ላይ የተፈፀመ መሠረታዊ የሆነ የሕግ ስህተት አላገኘንም።

ውሣኔ

1. የክልሉ የአስተዳደር ፍ/ቤት በይ/መ/ቁ/አስ/ፍ/ቤት 17/02/2001 በቀን 30/04/2001 ዓ.ም የሰጠው ብይን፣ የክልሉ ጠ/ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ/ቁ 01721 በቀን 19/05/2001 ዓ.ም የሰጠው ትዕዛዝና የክልሉ ሰበር ሰሚ ችሎት በመ/ቁ 01732 በቀን 30/03/2003 ዓ/ም የሰጠው ፍርድ በፍሥ/ሥ/ሕ/ቁ 348/1/ መሠረት ፀንተዋል፡፡
2. የሥር ፍ/ቤቶች አመልካች ያቀረቡትን ክስ ለማየት የዳኝነት ሥልጣን የለንም ሲሉ የወሰኑት በአግባቡ ነው ብለናል፡፡
3. የዚህን ፍ/ቤት ወጪና ኪሣራ የግራ ቀኙ ተከራካሪዎች የየራሣቸውን ይቻሉ፡፡
4. መዝገቡ የተዘጋ ስለሆነ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዲኞች ፉርማ አለበት፡፡

Teizazu Argaw v Benshangul/Gumuz State Council

Cassation File No. 63417

Hamle 15, 2003 E.C

Judges:

Hagos Woldu

Almaw Wele

Ali Mohammed

Nega Dufasa

Adane Nigussie

Petitioner: Mr. Teizazu Argaw (Present)

Respondent: Benshangul/Gumuz State Council (Absent)

Judgment

The petitioner requested the Asosa Zone High Court to order the respondent (then defendant) to pay him 114,788 Birr of wage arrears for unlawfully suspension from his job. The respondent submitted two main objections: the Court had no material jurisdiction to entertain the case; and that the petitioner's claim had been barred by period of limitation.

After examining the objections of the respondent, the Court below held that it had no jurisdiction because the claim should have been submitted to an Administrative Tribunal according to Article 71 of the State Civil Servant Proclamation No. 29/95 as the petitioner was a civil servant.

The petitioner submitted his claim to the Civil Servant Administrative Tribunal. The Administrative Tribunal explained that it only considered appeals from disciplinary committee decisions that were confirmed by a head of a concerned office. The Tribunal held that it had no jurisdiction over the matter since the petitioner had not followed this procedural. The petitioner

presented decision of dismissal from job made by third party (State Council) in the absence of any decision made by disciplinary committee.

The petitioner submitted his appeal to the State Supreme Court against the decision of the Administrative Tribunal. The State Supreme Court dismissed the appeal according to Article 337 of the Civil Procedure Code without need to call the petitioner. The petitioner then requested Cassation Bench of the State Supreme Court to review orders given by the Administrative Tribunal and Appellate Division of the State Supreme Court for basic error of law. The Cassation Bench held that there had been no basic error of law and confirmed the decrees given by the Appellate Bench and the Administrative Tribunal.

In his application to the Cassation Bench, the petitioner submitted that the decrees of the Administrative Tribunal and the Appellate Division of the State Supreme Court contain basic error of law. His main argument was that the refusal of the Administrative Tribunal and the ordinary courts to hear and determine his case despite his submission that his suspension and dismissal by the respondent was inappropriate was a denial of justice.

In its reply the respondent argued that the administrative and political decision to dismiss the petitioner was appropriate since he was found engaging in negative and anti-development activities instead of providing honest services during his terms of appointment as the head of the State Finance Bureau. The judgments of the lower courts, it argued, had no basic error of law.

While the above summary represents arguments made from the beginning, we have examined the matter by framing the following issue: Is there any basic error of law in decrees and judgments of the Administrative Tribunals and courts of the State? As it can be understood from summary of arguments presented above, although the petitioner had been civil servant and governed by the Civil Servant Proclamation of the State, he was selected by the respondent and appointed as the head of the State Finance Bureau. The State Council removed him from his position for his negative and anti-development activities.

The petitioner left his former public institution in which he used to work due to his appointment. Since he was removed from his position according to

political measures and administrative decisions, it is appropriate to examine whether his case is governed by Civil Service Law of the State.

According to the Civil Service Proclamation of the State, appeal that should be submitted to the Administrative Tribunal must be considered first by a disciplinary committee established in a public institution in which a civil servant works. As discussed above, since the petitioner had been the head of the Finance Bureau, he had the power to revise, confirm, or require reconsideration of disciplinary committee's decisions when civil servants under his supervision had committed misconducts. Therefore, there is no way he can consider himself civil servant and thereby submit political decisions to Administrative Tribunal and expect to be governed by the Civil Service Proclamation of the State.

Accountability is one aspect of good governance. While Article 12(2) of the Constitution of the Federal Democratic Republic of Ethiopia clearly provides that any public official or an elected representative is accountable for any failure in official duties, accountability could be to the law and to the people who elected him or her. In the case at hand, the petitioner was removed from his position for acts that he committed when he was the head of the Bureau by the representatives of the people, the State Council. The petitioner's action of requesting the courts to reverse this political decision is inappropriate. Courts do not have jurisdiction to receive and examine political decisions (political actions) and render proper judgment.

Therefore, we have not found any basic error of law said to have been committed in decrees and judgments of courts that they did not have jurisdiction to receive and examine the matters.

Decision

1. The decrees of the State Administrative Tribunal and the State Supreme Court Appellate Division, and the judgment of the State Supreme Court Cassation Bench have been confirmed according to Article 384(1) of the Civil Procedure Code.

2. The decisions of the lower courts that they do not have material jurisdiction are correct.

3. Each side should bear its cost. 4. The file is closed; return the file to the Registrar

ዳኞች፡- ዳኜ መላኩ
በላቸው አንሺሶ
ሺመክት አሰፋ

ይግባኝ ባይ፡- አቶ አየለ ደበላ ከጠበቆቻቸው ከእነ አቶ ታመሩ ወ/አገኝ ጋር ቀረቡ
መልስ ሰጪ፡- የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን ዐቃቤ ሕግ እነ አቶ ተስፋማርያም ገ/ትንሳኤ ቀረቡ

በዚህ መዝገብ መልስ ሰጭ የሆነው ዐቃቤ ሕግ በበኩሉ ያስከፈተውና ለብቻ ክርክር የተሰማበት የወ/ይ/መ/ቁ.60793 ከዚህ መዝገብ ጋር እንዲጣመር ተደርጎ ሁለቱ መዝገቦች በአንድነት ተመርምረው የሚከተለው ፍርድ ተሰጥቷል

ክፍል 2

ፍርድ

በዚህ መዝገብ ይግባኝ ባይ የሆኑት አቶ አየለ ደበላ የወንጀሉን ክሶችና ክርክሮች በወ/መ/ቁ. 82604 በመጀመሪያ ደረጃ ያየው የፌዴራል ከፍተኛ ፍ/ቤት ግንቦት 3 ቀን 2002 ዓ.ም መርምሮ የሰጠውን የጥፋተኝነት ፍርድ ቀጥሎም ሐምሌ 13 ቀን 2002 ዓ.ም መርምሮ የሰጠውን የቅጣት ውሳኔ ሙሉ በሙሉ በመቃወም ይግባኛቸውን አቅርበዋል፡፡

...

ቀጥሎ የሉት አራት ክሶች ደግሞ አቶ አየለ ደበላ የአራጣ ወንጀሎች ስለመፈጸማቸው የመዘረዝሩ ናቸው፡፡ ከእነዚህ ክሶች መካከል በ3ኛው እና 5ኛው ክሶች በ1949 ዓ.ም የወጣው የቀድሞው የወንጀለኛ መቅጫ ሕግ ቁጥር 670/ሐ/ እና 667/1/ የተጠቀሱ ሲሆን በ4ኛው እና በ6ኛው ክስ ደግሞ በ1997 ዓ.ም የወጣው አዲሱ የወንጀል ሕግ አንቀጽ 715 /ሐ/ እና 712/1/ሀ/ ተጠቅሰዋል፡፡ በእነዚህ የአራጣ ወንጀል በሚመለከቱት ክሶች አቶ አየለ ደበላ ለስድስት የተለያዩ ግለሰቦች እና ሁለት ድርጅቶች በተለያዩ ጊዜያቶች በወር ከ7 በመቶ እስከ 20 በመቶ በሚደርስ ወለድ በመቶ ሺህዎችና በሚሊዮን

የሚቆጠር ገንዘብ ያበደሩ ስለመሆናቸውና በአንዳንዶቹ ተበዳሪዎች ላይ የሀብት ማራቆት እንደደረሰባቸው ተዘርዝሮ ቀርቧል። ቀሪዎቹ ሶስት ክሶች የገቢ ግብር እና የተጨማሪ እሴት ታክስ አሳውቆ አለመክፈል እና ወደግብር ሰብሳቢው መ/ቤት አሳሳች መረጃ ስለመስጠት ወንጀሎች የሚመለከቱ ናቸው። በእነዚህ ክሶች ላይ አቶ አየለ ደበላ ላልፈዋል ተብለው የተጠቀሰባቸው የገቢ ግብር አዋጅ ቁጥር 286/94 አንቀጽ 96ና 97/3/ እና የተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/94 አንቀጽ 49 ሲሆኑ አቶ አየለ ደበላ አሳውቀው አልከፈሉም የተባለው የግብር እና ተጨማሪ እሴት ታክስ መጠቀም በየክሶቹ ላይ ተገልጾ ቀርቧል።

የመጨረሻ የሆነው 10ኛው ክስ አቶ አየለ ደበላ በወንጀል ሕግ አንቀጽ 684/1/ እና /2/ ላይ የተመለከተውን በመተላለፍ በወንጀል ድርጊት የተገኘው ገንዘብ ሕጋዊ አስመስሎ የማቅረብ ወንጀል ፈጽመዋል በሚል የቀረበ ነው። በዚህ ክስ ወንጀል ድርጊት የተገኘን ገንዘብ ሕጋዊ አስመስለው አቅርበዋል የተባለው በ4ኛውና በ6ኛው ክስ ላይ በተገለጹት ሁለት የአራጣ ወንጀሎች እና በ7ኛው እና በ9ኛው ክሶች በተገለጹት የገቢ ግብር እና የተጨማሪ እሴት ታክስ አሳውቆ አለመክፈል ወንጀሎች አማካኝነት በጠቅላላው ብር 89,783,020.63 አግኝተዋል የሚለውን ነው።

አቶ አየለ ደበላ ሁሉን ክሶች በመካድ ተከራክረዋል። የፌደራል ከፍተኛ ፍ/ቤት በዐቃቤ ሕግ በኩል የተቆጠሩትን በርካታ ማስረጃዎች ከሰማ በኋላ ተመስክሮባቸዋል ብሎ አቶ አየለ ደበላ ሁሉንም ክሶች በሚመለከት እንዲከላከሉ አዟል። በዚህም መሠረት አቶ አየለ ደበላ በበኩላቸው በርካታ የሰውና የሰነድ መከላከያ ማስረጃዎች በመቁጠር አቅርበው አሰምተዋል። የፌዴራል ከፍተኛ ፍ/ቤት የግራቀኙን ክርክሮችና ማስረጃዎች በመስማት የክርክሩ ሂደት እንዲጠናቀቅ ካደረገ በኋላ በመጨረሻ ፍ/ቤት የግራ ቀኙን ክርክሮችና ማስረጃዎች በመስማት የክርክሩ ሂደት እንዲጠናቀቅ ካደረገ በኃላ በመጨረሻ መርምሮ በሰጠው ፍርድ አቶ አየለ ደበላ የተከሰሱባቸውን አሥሩንም ወንጀሎች መፈፀማማቸው ተረጋግጧል በማለት በየክሶቹ ላይ በተጠቀሱባቸው የሕግ አንቀጾች መሰረት ትፋተኛ አድርጓቸዋል። ቅጣቱን

በተመለከተ የ22 አመት ጽኑ እሥራት እና የገንዘብ መቀጮ ብር 308.000 የወሰነባቸው ከመሆኑም በተጨማሪም በባንክ ተመምጠ ተገኝቷል የተባለ ብር 12,000,000 /አሥራ ሁለት ሚሊዩን ብር/ አንድ ቤት እና ሁለት መኪናዎች እንዲወረሱ ወስኗል።

አቶ አየለ ደበላ ጠበቆች ሐምሌ 15 ቀን 2002 በተፃፈ የይግባኝ ማመልከቻ የፌዴራል ከፍተኛ ፍ/ቤት የሰጠውን የጥፋተኛነትም ሆነ የቅጣት ውሣኔ የሚቃወሙባቸውንና ሊሻር ይገባል የሚሉባቸውን በርካታ ምክንያቶች ዘርዝረው አቅርበዋል። በሌላም በኩል በዚህ መዝገብ መልስ ሰጭ የሆነው ዐቃቤ ሕግ በበኩሉ የፌዴራል ከፍተኛ ፍ/ቤት በአቶ አየለ ደበላ ላይ በሰጠው የቅጣት ውሳኔ በከፊል ቅሬታ በማሣደር ከዚህ መዝገብ ጋር እንዲጣመር በተደረገው የወ/ይ/መ/ቁ. 60793 ይግባኙን አቅርቧል። ዐቃቤ ሕግ ነሀሴ 14 ቀን 2002 ዓ.ም ተጽፎ እንዲቀርብ ባደረገው የይግባኝ ማመልከቻ በቅጣት ውሳኔው ላይ ያሉት የቅሬታ ነጥቦች ስድስት መሆናቸውን ዘርዝሮ አቅርቧል። የቅሬታ ነጥቦቹ በዋናነት የእስራት ቅጣትና የገንዘብ መቀጮው ስለማነስና በወንጀሎቹ የተገኙ ናቸው የተባሉ ሌሎች በርካታ ንብረቶች እና ገንዘብ እንዲወረሱ ስላለመደረጉ የሚገልጹ ናቸው።

በሁለቱም የይግባኝ መዝገቦች ግራቀኙ እንዲቀርቡ ተደርጎ በወ/መ/ሕ/ሥ/ሥ/ቁ. 192 መሰረት ክርክሮቹ ተሰምተዋል። ክርክሮቹም በየመዝገቦቹ ለየብቻ የተሰሙ ናቸው። በመጀመሪያ የአቶ አየለ ደበላ የይግባኝ መዝገብ ይግባኙ ሲሰማ ጠበቃቸው ሰፊ የፍሬ ነገር የማስረጃ እና የሕግ ክርክች በማንሳት የይግባኝ ቅሬታቸውን በዝርዝር አስረድተዋል። በዐቃቤ ሕግ የይግባኝ መዝገብም በተመሳሳይ መንገድ በሁለቱ ተከራካሪ ቀገኖች መካከል ሰፊ ክርክሮች ተደርገዋል። በሁለቱም የይግባኝ መዝገቦች በርካታ ክርክሮች እና የተለያዩ ጥያቄዎች ስለተነሱ ቀጥሎ ከየጉዳዮቹ ጋር በተያያዘ በዝርዝር የሚታዩና የሚመረመሩ ናቸው።

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2. ይግባኝ ባዩ አቶ አየለ ደበላ የአራጣ ወንጀሎች ፈጽመዋል ተብለው የቀረበባቸውን 3ኛ 4ኛ 5ኛ እና 6ኛ ክሶች በተመለከተም፡-

የይግባኝ ባይ ጠበቃ ከእነዚህ ክሶች መካከል በ3ኛው ክስ በአራጣ ገንዘብ ተበድረዋል የተባሉት 4 ግለሰቦች ራሳቸው መስካሪ ከመሆን በቀረ በሌላ ገለልተኛ ምስክር ለሰዎች አራጣ ተሰጠ ስለመሆኑ አልተመሰከረም፤ መሰክሪዎቹ ገለልተኛ ምስክር ደግፎ ባልመሰከረበት ሁኔታ ጥፋተኛ ሊባሉ አይገባም፤ እነዚህ የግል ተበዳዮች የተባሉት ሰዎች ራሳቸው በአራጣው ምክያት ስለመደህየታቸውና ሀብታቸው ስለመራቆቱ አላስረዱም። እንዲያውም እስካሁን ድረስ በንግድ ዓለም ተሰማርተው በጥሩ ሁኔታ ላይ እንደሚገኙ በወሰዱት ብድር መበልጸጋቸውንና መጠቀማቸውን የመሰከሩ እንጅ ስለመጉዳታቸው የተናገሩት ነገር የልም፤ ኪሳራም የደረሰባቸው ስለመሆኑ የሚያስረዳ ማስረጃ አልቀረበም፤ በመከላከያ ማስረጃ በቀረቡት ውሎች ላይ አራጣ የሚል ቃል የለበትም፤ውሎቹ ብድር ስለመሆኑ ብቻ የሚያመለክቱ ናቸው፤ብድር ደግሞ ህጋዊ ነው፤ በብድሮቹ ጉዳይ ቀላል ወይም ከባድ አራጣ የሚያሰኙ ምክንያቶች ስለሌሉ ይግባኝ ባይ ክስ ሊባሉ አይገባም የሚሉ ክርክሮች ያቀረቡ ሲሆን ይህ ፍ/ቤትም መዝገቡን መርምሮ የግል ተበዳዮች የተባሉት ሰዎች የዐቃቤ ሕግ ምስክር ሆነው የመሰከሩባቸው መሆኑን አረጋግጧል። ምስክሮቹም ራሳቸው ተበዳሪዎች እንጂ ሌላ ገለልተኛ ምስክር አይደሉም በሌላ ገለልተኛ ምስክር መደገፍ አለበት ለሚሉት የግል ተበዳይ የተባለው ሰው ምስክር እንዳይሆን የሚከለክል ሕግ የለም።

በእንዲህ አይነቱ የብድር ጉዳይ ስለተፈጸመው ነገር እና ከብድሩ ጀርባ ስላለው የወንጀል ሁኔታ በሚገባ የሚያውቀው ራሱ ተበዳሪው ስለሆነ ከእርሱ በላይ ሌላ መስካሪ ካቀረበ አይታመን የሚባል ነገር አይኖርም። መመዘን ያለበት የግል ተበዳዩ የሰጠው የምስክርነት ቃል ምን ያህል እውነትና አስተማማኝ ነው የሚለው ብቻ ነው። የግል ተበዳዩ ዋሽቷል በሀሰት ነው የመሰከረው የሚል ከሆነ ይህንን በመከላከያ ማስረጃ በማስረዳት ማፍረስ ያለበት ተከሳሹ ወገን ነው ይግባኝ ባይ ይህንን ያስረዱበት መንገድ ሳይኖር ምስክሮቹ ገለልተኛ አይደሉም በሚል ብቻ የሚያቀርቡት ክርክር ተቀባይነት የለውም። የዐቃቤ ሕግ ምስክሮች ክሱ ላይ በተገለጸው አኳኋን መስክረዋል። በምስክሮቹ የተሰጠው ቃል ብድሮቹ በአራጣ ላይ የተመሰረቱ

ስለመሆናቸው አንዳንዶቹም በብድር የወሰዱት ገንዘብ አነስተኛ ሆኖ በወለዱ ምክንያት ዕዳው ከፍተኛ ደረጃ ደርሶ ብዙ ገንዘብ ለመክፈል መገደዳቸውንና ንብረቶች መሸጣቸውን የሚያስረዳ ነው። ከአራቱ ተበዳሪዎች መካከል አቶ ሳሙኤል ታደሰ የተባሉት በአቶ አየለ ደበላ ላይ በፈጸሙት የግድያ ሙከራ ወንጀል በ20 ዓመት ጽኑ እስራት እንዲቀጡ የተወሰነባቸው ፍርደኛ ስለሆኑ ሊመሰክሩ አይገባም የሚል ተቃዉሞ ቢቀርብም በፍርዱ ላይ በወንጀል ሕግ አንቀጽ 123/ሀ/ መሰረት ምስር ከመሆን በግልጽ የተሸሩ ባለመሆኑና የወንጀል ሕግ አንቀጽ 124 እና 125 ከመብት መሻር ጋር በተያያዘ የሚገልጸአቸው ነገሮች ፍ/ቤት ከመብት መሻር ውሳኔ እንደሚሰጥ የሚጠቁመ ሆነው ስለተገኙ ግለሰቡ ምስር ከመሆን የሚከለክል አይደለም። ይህ ምስክር ከአቶ አየለ ደበላ ላይ አንድ ጊዜ ብር 275,000 ሌላ ጊዜ ደግሞ ብር 400,000 በወር 10% ወለድ ተበድሯል የተባለ ነው። ንብረቶቹ በዕዳው ምክንያት የተሸጠ መሆኑ በሌላ ምስክር ተመስክሯል። አቶ አየለ ደበላ ከተበዳሪዎቹ ጋር የዕቅብ ግንኙነት ነበራቸው፤ በፍርድ ቤትም የገንዘብ ክስ አቅርበውባቸው አስወስነዋል በሚል የቀረበው ክርክር በአራጣ ገንዘብ አበድረዋል ተብለው በወንጀል የተከሰሱትን ጉዳይ የሚያስቀር ባለመሆኑ ዋጋ የሚሰጠው አይደለም።

ከተሰጠው የምስክርነት ቃል በአንዳንዶቹ የግን ተበዳይ ላይ የሀብት መራቆት መድረሱን ለመረዳት ተችሏል። ወ/ሮ ፋጠማ ሙርሰላ የተባሉት የግል ተበዳይ የዐቃቤ ሕግ ምስክር ሆነው ቀርበው ሊመሰክሩ ከአቶ አየለ ደበላ በአጠቃላይ የተበደርኩት ገንዘብ ሁለት ሚሊዮን አራት መቶ ሺህ ነው በአራጣ በወር 20% ወለድ አድርጎ ለመመለስ በካህ አስራ ስድስት ሚሊዮን ከምናምን ይሆናል የከፈሉት ትልቅ ድርጅት ነበረኝ ያስያዝኩት ብዙ ቼኮች ናቸው። በደረቅ ቼክ ክሶኝ ታሰርኩ ድርጅቱን ሸጠ፤ ሱቅ ተሸጠ ገንዘብ ስበደር የነበረው ከ1991-1993 ዓ.ም ድረስ ነው ያሉት ሲታይ በአራጣው ምን ያህል እንደተበዘበዙና እንዴት የሀብት መራቆት እንደደረሰባቸው የሚያረጋግጥ ስለሆነ የሌሎቹም ተበዳሪዎች ተጠቃሎ አቶ አየለ ደበላ በ3ኛ ው ክስ በቀድሞው የወንጀለኛ መቅጫ ሕግ ቁጥር 670/ሐ/ መሰረት ጥፋተኛ መባላቸው ተቀባይነት የሚሰጠው ነው።

በአራተኛው ክስ ከአጀ ኢንተርናሽናል ለተባለ ድርጅት በ6 የብድር ውሎች በወር 7፤ ወለድ የሚታሰብ ብር 6,500,000 ብድር በመስጠት ከባድ የአራጣ

ወንጀል ተፈጽሟል በሚል የቀረበውን በተመለከተም የይግባኝ ባይ ጠበቃ በሰነዶቹ ላይ ይግባኝ ባይ አልፈረሙባቸውም እንደ ብቁ ማስረጃ ተደርጎ ሊወሰድ አይገባም የሚል ክርክር ያነሱ ቢሆንም በማስረጃነት የቀረቡባቸው የጽሑፍ ማስረጃዎች ብቻ ሳይሆኑ ተበዳሪው ድርጅት ከአጆ ኢንተርናሽናል ባለቤት የሆኑት አቶ ከሊፋ አባጀርጋ እና ባለቤታቸው ወ/ሮ ዘቤዳ ከድር መሀመድ የተባሉት የዐቃቤ ሕግ ምስር ሆነው በመቅረብ መስክረዋል። አራጣ ስለመሆኑም የሚያስረዱት ምስክሮች እንጅ የሰነድ ማስረጃ የተባሉት አይደሉም። ወ/ሮ ዘቤዳ ከድር ተበዳሪ ድርጅት የራሳቸው ሆኖ በዚህ ድርጅት ውስጥ የዕቃ ግዥ ሠራተኛ ሆነው እንደሚሰሩና ለድርጅቱ የሚሰጥ ብድርም በመክታተል እንዲያስፈጽሙ፤ አቶ አየለ ደበላ አራጣ አበዳሪ ስለመሆናቸው እንደሚያውቁ ፤ በድርጅቱ ስራ ላይ የገንዘብ ጉድለት ማለትም እጥረት ገጥሟቸው ከአቶ አየለ ደበላ ገንዘብ መበደራቸውን ለአንድ ቀን ብር 1500000 ተበድረው ብር 30000 ወለድ መክፈላቸውን፤በመጀመሪያ ብር 2970000 ሲበደሩ ወለድ ብር 300000 እንዲከፍሉ፤በተለያዩ ጊዜያቶች ስለወሰዷቸው ብድሮች የአስር ግልባጭ መኪናዎች ሊብሬ ማስያዛቸውን፤ የተበደሩትን ገንዘብ ከነአራጣው ከፍለው የመጨረሳቸውን ያስረዱ ሲሆን አቶ ከሊፋ አባጀርጋ በበኩላቸው በ1999 ዓ.ም ከአቶ አየለ ደበላ አንድ ነጥብ አምስት ሚሊዮን ብር ወስደው ለ2 ወር ተጠቅመውበት አንድ ነጥብ ስምንት ሚሊን አድርገው መልሰው መክፈላቸውን በመግለጽ መስክረዋል። የእነዚህ ምስክሮች አመሰካከር አቶ አየለ ደበላ የአራጣ ወንጀል መፈጸማቸውን የሚያረጋግጥ ነው። በስራ ላይ ድርጅቱ ባጋጠመው የገንዘብ እጥረት ምክንያት ገንዘብ ለመበደር የነበረውን ከፍተኛ ፍላጎት በመረዳት በሕግ ከተወሰነው የወለድ መጠን በላይ ከፍተኛ ወለድ በማሰብ ድርጅቱን በአራጣ በዝብዘዋል። ለብር 1500000 ብድር ለአንድ ቀን ብቻ ብረ 30000 ወለድ ማስከፈል ማለት የገንዘብ ማራቆት ማድረስ ከማለት ውጭ ሌላ ትርጉም የሚሰጠው አይደለም። ስለሆነም ይግባኝ ባይ በአራተኛው ክስ በወንጀል ሕግ አንቀጽ 715/ሐ/መሰረት ጥፋተኛ መባላቸው የሚነቀፍበት ሕግ ምክንያት ስለሌለ ሊጸና የሚገባው ነው።

በ5ኛው ክስ ከተከሰሱባቸው ሁለት የብድር ጉዳዮች መካከል አቶ አየለ ሲዳሞ ተራ የተባለው አካባቢ ሕንጻ ለመስራት የተደራጀው ማህበር ብር 10000000

በወር 15% በሚታሰብ ወለድ አበድረዋል የተባለውን በሚመለከት አቶ አየለ ደበላም የዚህ አክሲዮን ማሸበር አባል ሆነው ሕንጻውን ለመገንባት የሚያስፈልገውን መሬት /ቦታ/ ከክፍለ ከተማው አስተዳደር ለመረከብ በማህበሩ ስም በተከፈተ የባንክ ሂሳብ ውስጥ ብር 10000000 መታየት አለበት በመባሉና የማሸበሩ አባሎችም በጊዜው ገንዘብ ባለማዋጣታቸው ማህበሩ በቂ ገንዘብ ስላልነበረው የማህበሩ አመራሮች በማህበሩ ስም አቶ አየለ ደበላ ገንዘቡን እንዲያበድሯቸው ጠይቀው ብር 10000000 ያበደሯቸው መሆኑ ይህንን ገንዘብ ለማበደር ኮሚሽን ብር 150000 ይከፈለኝ ብለው ጠይቀው የማህበሩ አመራሮች ይህንኑ ገንዘብ ለአቶ አየለ ደበላ መክፈላቸው ብድሩ የተጠየቀው ወዲያውኑ በማህበሩ የባንክ አካውንት ውስጥ አሳይቶ በአምስት ወይም በስምንት ቀን ውስጥ ለመመለስ ታስቦ እንደነበር ተመስክሯል፡፤ አቶ አየለ ደበላ ብር 150000 ተከፈላቸው የተባለው ኮሚሽን እንጂ ወለድ እንዳልሆነ አድርገው ክርክር ቢያቀርቡም በሕጉም ሆነ በአሠራር በብድር መስጠት ጉዳይ የሚታወቀው ወለድ እንጂ ኮሚሽን የሚባል ነገር የለም፡፡ አንድ አበዳሪ ለተበዳሪ ገንዘብ በብድር ሲሰጥ የሚጠይቀውም ሆነ የውል ስምምነት የሚያደርገው ስለሚከፈለው ወለድ ነው፡፡ አቶ አየለ ደበላ በዚህ የገንዘብ ብድር ጉዳይ ወለድ የሚለውን ቃል መጠቀም ትተው ኮሚሽን የሚል ስያሜ ቢሰጡትም ከውሉ ጉዳይ አንጻር ስንመለከተው ወለድ የሚል ትርጉም የሚሰጠው ነው፡፡ የገንዘብ ብድር ነመስጠት የሚጠየቀው ጥቅም ወለድ ስለሆነ አቶ አየለ ደበላ ብር 10000000 ለማህበሩ ለ5 ወይም ለ8 ቀናት በሚቆይ ሲያበድሩ ኮሚሽን በሚል ብር 150000 እንዲከፈላቸው ጠይቀው እንዲከፈላቸው የተደረገው ወለድ ተብሎ የሚወሰድ ነው፡፡ ከዚህም አራጣ መሆኑን መረዳት ስለሚቻል ይግባኝ ባይ በዚህ የብድር ጉዳይ የተፈጸመ የአራጣ ወንጀል የለም በሚል የሚያቀርቡት ክርክር ተቀባይነት የለውም፡፡ በዚህ በ5ኛው ክስ ወ/ሮ አለምጸሐይ ለተባሉት የግል ተበዳይ በብር 365000 በወር 5.4% ወለድ ሂሳብ በብድር ተሰጥቷል ወደ ተባለው ጉዳይ መሄድ ሳስፈልግ የመጀመሪያው የብድር 10000000 የአራጣ ድርጊት ብቻ በክሱ ላይ ተላልፈዋል ተብሎ በተጠቀሰው የወንጀለኛ መቅጫ ሕግ ቁጥር 667/1/ መሰረት ጥፋተኛ ለማድረግ በቂ ሆኖ ስለተገኘ በስር ፍ/ቤት በዚህ ረገድ የተሰጠው የጥፋተኝነት ውሳኔ ጸንቷል፡፡

በ6ኛው ክስ አቶ አየለ ደበላ የግል ተበዳይ የአቶ መሸሻ ይፍሩን የገንዘብ ችግር መሰረት በማድረግ ብር 1000000 /አንድ ሚሊዮን/ በብር ሲሰጣቸው ለአንድ ወር 7% ወለድ ብር 70,000 በማስከፈል የአራጣ ወንጀል ፈጽመዋል ተብለው የተከሰሱትን ጉዳይ በተመለከተ ምስክሩ የሰጡት የምስክርነት ቃል ከመዝገቡ ሲታይ የአራጣ ወንጀል መፈጸማቸው የሚረጋግጥ ሆኖ ስለተገኘ ይግባኝ ባይ ከዚህ ክስ ጋር በተያያዘ ያቀረቡት ይግባኝ

1ኛ በ1995 ዓ.ም ካደረጓቸው የንግድ እንቅስቃሴዎች ያገኙት አጠቃላይ ገቢ ብር 51,615,456.98 ሆኖ ሳለ ለግብር አስገቢው ባለስልጣን ሳያውቁት ብር 79,242 ብቻ እንደሆነ፣

2ኛ በ1996 ዓ.ም ካደረጓቸው የንግድ እንቅስቃሴዎች ያገኙት ገቢ ብር 46619377.79 ሆኖ ሳለ ለግብር አስገቢው ባለስልጣን ያሳወቁት ብር 194,477 ብቻ መሆኑ፣

3ኛ በ1997 ዓ.ም ካደረጓቸው የንግድ እንቅስቃሴዎች ያገኙት አጠቃላይ ገቢ 82,359,844.38 ሆኖ ሳለ ለግብር አስገቢው ባለስልጣን ያሳወቁት ብር 345,825 ብቻ ስለመሆኑ፣

4ኛ በ1998 ዓ.ም ካደረጓቸው የንግድ እንቅስቃሴዎች ያገኙት አጠቃላይ ገቢ ብር 63,707,899.80 ሆኖ ሳለ ለግብር አስገቢው ባለስልጣን ያሳወቁት ብር 345,825 ብቻ እንደሆነ፣

5ኛ በ1999 ዓ.ም ካደረጓቸው የንግድ እንቅስቃሴዎች ያገኙት አጠቃላይ ገቢ ብር 105,931,758.77 ሆኖ ሳለ ለግብር አስገቢው ባስልጣን ያሳወቁት ብር 439,425 ብቻ መሆኑና፣

6ኛ በ2000 ዓ.ም ካደረጓቸው የንግድ እቅስቃሴዎች ያገኙት አጠቃላይ ገቢ ብር 64,649,294.15 ሆኖ ሳለ ለግብር አስገቢው ባለስልጣን ያሳወቁት ብር 618,225 ብቻ ሆኖ መገኘቱ ተዘርዝሮ ቀርቧል።

በ9ኛ ክስ በተጨማሪ እሴት ታክስ ጉዳይ አቶ አየለ ደበላ ብር 66,524,894.50 የተጨማሪ እሴት ታክስ አሳውቀው ያልከፈሉ መሆኑ ተገልጾል።

አቶ አየለ ደበላ በክሶቹ ላይ በተጠቀሱት የግብር ዘመናት በንግድ ስራ ላይ ተሰማርተው የቆዩና በግብር ከፋይነት ተመዝግበው የሚታወቁ መሆኑ የሚያከራክር ጉዳይ አይደለም።

በጽሑፍ ከተቀረበው የይግባኝ ማመልከቻ እና በዚህ መዝገብ በቃል ከተደረገው ክርክር ለመመልከት እንደተቻለው ከእነዚህ የንግድ ትርፍ ግብር እና የተጨማሪ እሴት ታክስ የወንጀል ክስ ጉዳዮች ጋር በተያያዘ በአቶ አየለ ደበላ በኩል በርካታ የማስረጃ እና የሕግ ክርክሮች ተነስተዋል።
በቅድሚያ በሕጉ በኩል ያለው ሲታይ፦

<u>የገቢ ግብር አዋጅ ቁጥር 286/94</u>
<u>አንቀጽ 4፦</u>

ማናቸውም በዚህ ሕግ የሚሸፈን ገቢ ያገኘ ሰው በአዋጁ በተደነገገው መሰረት ግብር የመክፈል ግዴታ ያለው ስለመሆኑ ሲደነግግ
<u>አንቀጽ 66</u> ደግሞ ገቢን ስለማሳወቅ ግዴታ ይደነግጋል።
ስለገቢ ትርጉም የሚያብራራው አንቀጽ 10 ሲሆን አንቀጽ ገቢ ማለት ማናቸውም የኢኮኖሚ ጥቅም ስለመሆኑ ከገለጸ በኋላ ቀጥሎም ይህንኑ ሲያብራራ በመደበኛነት የተገኘ ባይሆንም ከማናቸውም ምንጭ በጥሬ ገንዘብ ወይም በአይነት በማናቸውም መልክ ለግብር ከፋዩ የተከፈለው በስሙ የተያዘለትን ወይም የተቀበለውን ጥቅም ሁሉ እንዲጨምር ያስረዳል።
የዚሁ አዋጅ <u>አንቀጽ 6</u> የገቢ ምንጭ የሚባሉትን የሚዘረዝር ነው የገቢ ምንጭ ከሚባሉት መካከል የንግድ ሥራ ግንባር ቀደም ተብሎ የሚጠቀስ ነው።
በአዋጁ ክፍል ዘጠኝ ስር ከአንቀጽ 95 ጀምሮ ባሉት ድንጋጌዎች በግብር ላይ የሚፈጸሙ የወንጀል አይነቶች ተዘርዝረው ይገኛሉ።
ከእነዚህ መካከል አንቀጽ 96 ሕግን በመጣስ ግብር ስላለመክፈል ወንጀል የሚደነግገው ይገኝበታል።
ይህ አንቀጽ ማኛውም ግብር ከፋይ ሕግን በመጣስ ገቢውን ያላሳወቀ ወይም የሚፈለግበትን ግብር ያልከፈለ እንደሆነ ወንጀል እንደፈጸመ እንደሚቆጠርና ቅጣቱም በዚሁ አዋጅ አንቀጽ 86 ላይ በተገለጸው መሰረት ገቢውን አሳንሶ በማስታወቁ ምክንያት ከሚጣልበት መቀጮ በተጨማሪ ጥፋተኛ መሆኑ በፍ/ቤት ሲረጋገጥ ከ5 ዓመት በማያንስ እስራት እንደሚቀጣ ይደነግጋል።
ከዚህ ቀጥሎ ያለው አንቀጽ 97 ግብር ከፋዩ ለግብር ሰብሳቢው /አስገቢው/ ባለስልጣን የሚያቀርበው የሀሰት ወይም አሳሳች መረጃ የማያስቀጣ የወንጀል

ድርጊት ስለመሆኑ የሚደነግግ ነው፡፡ የሀሰት ይም አሳሳች መረጃ ማቅረብ ከሚለው አንደኛው ማናቸው የግብር ከፋይ ለግብር አስገቢው ባለስልጣን ሰራተኛ አንድን ነጥብ በተመለከተ የሀሰት ወይም አሳሳች መረጃ ስለማቅረብ የሚገልጽ ሲሆን ሁለተኛው ደግሞ ለግብር አስገቢው ባለስልጣን ሰራተኛ ሊቀርብ ከሚገባው መግለጫ ውስጥ መግለጫውን አሳሳች ሊያደርግ በሚችል አኳኋን መካተት የሚገባቸውን ነጥቦች ማስቀረት የሚለው ነው፡፡
በዚህ አንቀጽ ግብር ከፋዩ አንሶ እንዲከፈል ካደረገው የግብር መጠን አንጻር የመኒወሰነው ቅጣት እንደሚለያይ ተገልጸ በየደረጃው ተለይቶ ተቀምጧል፡፡
በዚህ ጉዳይ ግብር ከፋይ መሆናቸው የተረጋገጠው አቶ አየለ ደበላ በክሶቹ ላይ በተጠቀሰት የግብር ዘመናት ውስጥ ሲያደርጓቸው በነበሩት የንግድ እንቅስቃሴዎች ያገኙትን ገቢ በትክክል ለግብር አስገቢው ባለስልጣን በማሳወቅ በአግባቡ ግብር ከፍለዋል ወይንስ አልከፈሉም?ለግብር አስገቢው ባስልጣን አሳሳች መረጃ ሰጥዋል ለማለት የሚያስችል ምክያት ወይንስ የለም? የቀረቡት ማስጃዎች የግብር ስወራ ድርጊት መፈጸሙን የሚያረጋግጡ ናቸው ወይንስ አይደሉም? የሚሉትን ጥያቄዎች በማንሳት ከሕገ ጋር በማገናዘብ ስንመረምራቸው፤
ግብር ከፋዩ ፈጽሟል የሚባለው የግብር ስወራ ጉዳይ እንደሌሎች ወንጀሎች በሌላ ተራ ምስር ወይም ከግብር ከፋይ ወይም ከሌላ ሰው እጅ በሚገኝ ቀጥታ የጽሑፍ ማስረጃ የሚረጋገጥ ሳይሆን በግብር ሕግ ላይ በተገለጹት መንገዶች የግብር አስገቢው ባስልጣን መ/ቤት ባሙያዎች መድበ መረጃዎች በመሰብሰብ በሚደረገው ምርመራ የሚረጋገጥ ነው፡፡ የአንቀጽ 38 የግብር አስገቢው ባለስልጣን ግብር ከፋዩን በሚመለከት የተለያዩ መረጃዎችን የመጠየቅና የመሰብሰብ እንዲሁም የመመርመር ሰፊ ስልጣን ያለው ስለመሆኑ ያስረዳል፡፡
በተያዘው የግብር ጉዳይም በግብር አስገቢው ባለስልጣን መ/ቤት የተመደቡት ሙያና ልምዱ ያላቸው ኦዲተሮች ምርመራ አድርገው ባቀረቡት የኦዲት ሪፖርት አቶ አየለ ደበላ ከ1995 ዓ.ም ጀምሮ እስከ 2001 ዓ.ም ድረስ ባለው በእያንዳንዱ የግብር ዘመን በብዙ ሚሊዮን የሚቆጠር ገቢ አግኝተው እያለ ለግብር አስገቢው ባለስልጣን እያሳወቁ ግብር ሲከፍሉበት የቆዩት እጅግ አነስተኛ እንደሆነ አረጋግጠዋል፡፡
በተለያዩ ባንኮች ካስከፈቷቸው የባንክ ሂሳቦች በተገኙ መረጃዎች፡-

1ኛ በ1995 ዓ.ም ብር 51,436,032

2ኛ በ1996 ዓ.ም ብር 48,424,860.79

3ኛ በ1997 ዓ.ም ብር 82,014,019

4ኛ በ1998 ዓ.ም ብር 63,362,074.80

5ኛ በ1999 ዓ.ም ብር 105,495,363.77

6ኛ በ2000 ዓ.ም ብር 64,016,069.15

7ኛ በ2001 ዓ.ም ብር 70,411,368.90

በድምሩ 485,171,559 ከ77

ወደ ባን ሂሳቦቻቸው ገቢ መደረጉን አዲተሩ ገልጸዋል።

አቶ አየለ ደበላ የተሰማሩባቸው የንግድ ስራዎች፡-

1ኛ/ የጣፋጭ ምግቦች መሸጥ፣

2ኛ/ የብትን ጨርቃ ጨርቅ መሸጥ፣

3ኛ/ የፋብሪካ ውጤቶች የሕንጻ መሳሪያዎች መሸጥ፣

4ኛ/ ልዩ ልዩ የተሸከርካሪዎች መለዋወጫ ዕቃዎችን መሸጥ፣

5ኛ/ የወጥ ቤት ዕቃዎች መሸጥ፣

6ኛ/ የመኪና ጌጣጌጥ መሸጥ፣

7ኛ/ የሆቴልና የመኝታ ፔንሲዮን አገልግሎት መሆናቸው ተገልል።

በእነዚህ የንግድ ሥራዎች ላይ ተሰማርተው

1ኛ/ በ1995 ዓ.ም ያሳወቁት ብር 179,404

2ኛ በ1996 ዓ.ም ብር 190,477

3ኛ/ በ1997 ዓ.ም ብር 348,850

4ኛ/ በ1998 ዓ.ም ብር 345,825

5ኛ/ በ1999 ዓ.ም ብር 438,425

6ኛ/ በ2000 ዓ.ም ብር 618,255

7ኛ/ በ2001 ዓ.ም ብር 700,225

የ7 ዓመት ጠቅላላ ድምር ብር 2,843,126 ብቻ እንዳሳወቁ አዲተሩ አስረድተዋል።

ከዚህ ሌላ በአንዱ አዲተር እንደተገጸው አቶ አየለ ደበላ በ2000 ዓ.ም የቀን ገቢ ብለው ያሳወቁት

ከጨርቃጨርቅ ብር 500

የወጥ ቤት ዕቃ ብር 400
የህንጻ መሳሪወያ ብር 4,000
ከምግብ ብር 5
ከመኝታ ብር 100
ከተሽከርካሪ መኪናዎች መለዋወጫ ብር 125 ነው።

የእነዚህ ድምር በቀን ብር 1,580 ይሆናል።

አቶ አየለ ደበላ በሰባት ዓመት ውስጥ ከተሰማሩባቸው የንግድ ስራዎች ገቢ አገኘሁ ብለው ለግብር አስገቢው ባለስልጣን ያሳወቁት ብር 2,832,126 ብቻ ሆኖ እያለ በ1995 ዓ.ም ብቻ ወደ ባንክ አስገብተዋል የተባው ብር 51,436,032 ሲሆን ከዚህ ቀጥሎ ያው የ1966 ዓ.ም ከመጀመሪያው ቢቀንስም ከ1997 ዓ.ም ጀምሮ ያለው እየጨመረ ሄዷል።
በኦዲተሮች የተረጋገጠው አቶ አየለ ደበላ በትክክል ገቢያቸውን የማያሳውቁና ግብር የማይከፍሉ እና ገቢያቸውን አሳንሰው በማሳወቅ አሳሳች መረጃ የሚሰጡ መሆኑ ነው። ሳይከፍሉ የቀሩት የንግድ ትርፍ ግብር ብር 22,058,126.13 መሆኑ በኦዲት ሪፖርት ላይ ተገልጾል።
ይግባኝ ባይ ወደ ባንኮች ያስገቡት ገንዘብ በየጊዜው እየወጣ ተመላልሶ የገባ ነው ካሉ ይህንኑ በመከላከያ ማስረጃ ሲገባቸው አላስረዱም። ከባንክ እስቴትመንት ብቻ የተገኘው ገቢ ሊባል አይችልም በሚል የሚያቀርቡት ክርክር ተቀባይነት የለውም። ወደ ባንኮች ያስገቡትና በባንኮች ውስጥ ሲያዘዋውሩ የነበረው በብዙ ሚሊዮን የሚቆጠር ገንዘብ የሰወሩት ገቢ መኖሩን የሚያሳይ ነው።
ይግባኝ ባይ ንግድ ፈቃዳቸውን ሳይመልሱ የተወሰኑት የንግድ ስራዎች ተዘግተው ነበር፣
አይሰሩም የሚል የሚያቀርቡት ክርክርም ተቀባይነት ያለው ሆኖ አልተገኘ ም።
ይግባኝ ባይ አቅርቤአለሁ የሚሏቸው መከላከያ ማስረጃዎች በግብር አስገቢው ባለስልጣን ባለሙያዎች በተደረገ የኦዲት ምርመራ የተረጋገጠውን የግብር ስወራ የሚያስተባብሉ ሆነው አልተገኙም።
በመሆኑም ይግባኝ ባዩ አቶ አየለ ደበላ በ7ኛ እና በ8ኛ ክሶች ጥፋተኛ በመባላቸው የሚነቅፍ ሆኖ ስለተገኘ ጸንቷል።

በ9ኛው ክስ የተከሰሱበት የተጨማሪ እሴት ታክስ አሳውቆ አለመክፈል ጉዳዩ በተመለከተም ይግባኝ ባዩ በየግብር ዘመኑ ወደ ባንኮች ከሚያስገቡት በብዙ ሚሊዮን ከሚቆጠር ገንዘብ አንጻር በዓመት የሚያደርጉት ግብይት ከ500,000 ብር በላይ እንደሆነ ስለሚያሳይ ለተጨማሪ እሴት ታክስ የመመዝገብ ግዴታ እንደነበረባቸው ኦዲተሮች አስረድተዋል። አንድ ግብር ከፋይ በዓመት የሚያስመዘግበው ግብይት ከብር 500,000 በላይ ሆኖ ከተገኘ ለተጨማሪ እሴት ታክስ የመመዝገብ ግዴታ ያለበት መሆኑ በሕጉ ተደንግጓል። ሕጉ ግብር ከፋይ ለተጨማሪ እሴት ታክስ መመዝገብ ይገባው ከነበረበት ጊዜ ጀምሮ ግብር ከፋይ እንደሚሆን ይገልጻል። ከተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/94 አጠቃላይ ይዘትና መንፈስ ለመገንዘብ እንደተቻለው ግብር ከፋዩ በሕጉ ለተጨማሪ እሴት ታክስ የመመዝገብ ግዴታ ያለበት ሆኖ ሳይመዘገብ ከቀረ ከህዝቡ በተጨማሪ እሴት ታክስ የሰበሰበው ገንዘብ ኖረም አልኖረም ለተጨማሪ እሴት ታክስ መመዝገብ ይገባው ከነበረበት ጊዜ ጀምሮ እንደተጨማሪ እሴት ታክስ ከፋይ ተቆጥሮ ግብር መክፈል አለበት። በ9ኛ ክስ ላይ የተጠቀሰው አዋጅ ቁጥር 285/94 አንቀጽ 49 ከህዝብ የሰበሰበውን ገንዘብ ያላሳወቀ ወይም መክፈል የሚገባውን ግብር ያልከፈለ የሚለው ሁለተኛው አረፍተ ነገር ይህንን የሚያካትት ነው ለማለት ስለተቻለ ይግባኝ ባዩ በዚህም ክስ ጥፋተኛ መደረጋቸው ተቀባይነት የሚሰጠው ነው። ሌላው አቶ አየለ ደበላ በ10ኛው ክስ በወንጀል ሕግ አንቀጽ 684/1/ እና 2/ ላይ የተመለከተውን በመተላለፍ በከባድ የወንጀል ድርጊቶች የተገኘውን ገንዘብ ሕጋዊ አስመስሎ የማቅረብ ወንጀል ፈጽመዋል ተብለው የተከሰሱባቸውን ምክንያቶች በተመለከተም፡-

በዚህ ክስ ብር 89,783,020.63 ተገኝቷል የተባሉባቸው ወንጀሎች በ4ኛ፣6ኛ ፣እና 9ኛ ክሶች ላይ የተገለጹት ናቸው።

በወንጀል ሕግ አንቀጽ 684 ላይ በወንጀል ድርጊት የተገኘን ገንዘብ ወይ ንብረት ሕጋዊ አስመስሎ ማቅረብ እና በወንጀሉ መርዳት (በእንግሊዝኛ ው«Money Laundering and Aiding» በሚል የተገለጸው በኢትዮጵያ የወንጀል ሕግ አዲስ ሐሳብ ሲሆን ይህ ወንጀል ለብቻው የሚቆም ሳይሆን የሌላ ወንጀል መፈጸሙን የሚጠይቅ ወይ በሌላ ወንጀል መፈጸም ላይ የተመረኮዘ ነው። ሕጉ በሌሎች ወንጀሎች መፈጸም ምክንያት በሕገወጥ መንገድ የተገኘ ውን ገንዘብና ንብረት ሕገወጥ አመጣጥ በመሰወር በጥቅም ወይም በስራ

ላይ በማዋል በማዘዋወር ወይም በማስተላለፍ ሕጋዊ አስመስሎ ማቅረብ ወንጀል በማድረግ የሚቀጣ ነው፡፡ በዚህ አንቀጽ በወንጀል ድርጊት የተገኘ ገንዘብ ወይም ንብረግ የሚባው ከየትኞቹ ወንጀሎች ጋር ረተያያዘ ወይም የትኞቹ ወንጀሎች ውጤት እንደሆነ ተዘርዝረዋል፡፡ ከነዚህ መካከል የሙስና የአደንዛዥ ዕጽ ወይም የመድሐኒት ዝውውርና የጦር መሳሪያ ንግድ ወንጀሎች የሚገኝበት ከመሆኑም በላይ ሌሎች የተዘረዘሩና ከባድ ወንጀሎች የተባሉም አለ፡፡

ከባድ ወንጀል የሚለው የወንጀሉ አስር ዓመት ጽኑ እስራት ወይም ከዚህ በላይ ሊያስቀጣ የሚችል ሲሆን ወይም በወንጀሉ አማካኝነት የተገኘው የገንዘብ መጠን ወይም የንብረቱ ዋጋ ቢያንስ ሀምሳ ሺህ ብር ሲሆን እንደሆነ የዚሁ አንቀጽ ንዑስ አንቀጽ 7 ይገልጻል፡፡

ዐቃቤ ሕግ በ10ኛ ክስ የወንጀል ሕግ አንቀጽ 684/1 ና 2/ ጠቅሶ ባቀረበው ክስ ለተገኘው ገንዘብ መነሻ ያደረጋቸው በ4ኛ፣ 6ኛ፣ 7ኛ፣ እና 9ኛ ክሶች ላይ የተገለጹት ወንጀሎች ከላይ ከተጠቀሰው አንቀጽ አገላለጽ አንጻር ሲታይ ከባድ የሚባሉ ስለሆኑ ክሱ ስለወንጀሉ ሁኔታ ሕጉ የሚጠይቀውን ቅድመ ሁኔታ የሚያሟላ ነው፡፡

አቶ አየለ ደበላ በአራጣው ወንጀል ያገኙትን ገንዘብና ግብር በመሰወርና ባለመክፈል ያከማቹትን ገንዘብ ሕገወጥ አመጣጥ በመሰወር በተለያዩ ባንኮች በማስገባትና በማዘዋወር ሕጋዊ አስመስሎ የማቅረብ ወንጀል ስለመፈጸማቸው ከቀረቡት ማስረጃዎች ለመረዳት ስለተቻለ በ10ኛው ክስ ጥፋተኛ መባላቸውም ትክክል መሆኑ ስለታመነበት ጸንቷል፡፡

አቶ አየለ ደበላ ከ1ኛ እስከ 2ኛ ክሶች በዚህ መዝገብ በተሰጠው ፍርድ በነጻ እንዲሰናበቱ የተወሰነ ቢሆንም በቀሪዎቹ ስምንት ክሶች ጥፋተኛ በተባሉባቸው ወንጀሎች ብቻ በሕጉና በቅጣት አወሳሰን መምሪያው መሰረት ሊወሰንባቸው የሚገባው የቅጣት መጠን ከፍተኛ በመሆኑና ዐቃቤ ሕግም ባቀረበው ይግባኝ የወንጀሎቹ ደረጃ ከባድ ተብሎ ቅጣቱ በስር ፍ/ቤት ከተወሰነው በላይ ከፍ ብሎ እንዲወሰን የጠየቀ ሆኖ በመገኘቱ በአቶ አየለ ደበላ በኩል በቅጣት ረገድ የቀረበው ክርክርና ጥያቄ ተቀባይነት አላገኘም፡፡

ቀጥሎ የኢትጵያ ገቢዎች ጉምሩክ ባለስልጣን ዐቃቤ ሕግ ባስከፈተው የወ/ይ/መ/ቁ. 60793 ከገንዘብና ንብረቶች መወረስ ከእስራት ቅጣት እና ከገንዘብ መቀጮ ጋር በተያያዘ ያነሳቸው ጥያቄዎች እና ክርክሮች

ሲመረምሩ፡- ከእነዚህ ጥያቄዎች መካከል አንደኛው አቶ አየለ ደበላ በስር ፍ/ቤት ጥፋተኛ ተብለው በነበረበት የገንዘብና የባንክ አዋጅ ቁጥር 83/86 አንቀጽ 59/1/ሺ/ እና "2"መሰረት ለወንጀሉ መሳሪያ የሆነው ብር 130,170,410.94 እና በንብረት ዝርዝር ውስጥ የተጠቀሱት ከዚህ ወንጀል ጋር ግንኙነት ያላቸው ንብረቶች እንዲሪሱ ይወስንልን በሚል የቀረበውን ጥያቄ በሚመለከት ይህ ፍ/ቤት በዚህ መዝገብ በሰጠው ፍርድ አቶ አየለ ደበላን ከገንዘብና የባንክ አዋጅ ጋር ተያይዞ ከቀረበው ከ1ኛው ክስ በነጻ እንዲሰናበቱ ስለወሰነ ወደ አንደኛው ጥያቄ ገብቶ መመርመር ሳያስፈልግ ታልፏል፡፡

<u>በ4ኛው ታራ ቁጥር</u>፡- አቶ አየለ ደበላ በስር ፍ/ቤት ጥፋተኛ በተባሉበት የባንክ ስራ አዋጅ ቁጥር 592/2000 አንቀጽ 58/1/ መሰረት የገንዘቡ ቅጣት ከፍ ብሎ ብር 1,840,000 እንዲቀጡ በሚል የቀረበው ጥያቄም በተመሳሳይ መንገድ ይህ ፍ/ቤት በዚህ መዝገብ በሰጠው ፍርድ ከ2ኛው ክስ አቶ አየለ ደበላ በነጻ እዲሰናበቱ የተወሰነ በመሆኑ ማየት የሚያስፈልገው ሆኖ አልተገኘም፡፡

<u>በ3ኛው ተራ ቁጥር</u>፡- አቶ አየለ ደበላ ጥፋተኛ በተባሉበት ግብር አዋጅ ቁጥር 286/94 አንቀጽ 96 እና በተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/94 አንቀጽ 49 መሰረት ከተወሰነባቸው የእስራት ቅጣት በተጨማሪ መቀጮ በድምሩ ብር 136,845.843ከ44 ሳንቲም ሊከፍሉ ይገባል ተብሎ መወሰን በሚል የቀረበውን ጥያቄ በተመለከተ፡-

አቶ አየለ ደበላ በገቢ ግብር አዋጅ ቁጥር 286/94 አንቀጽ መሰረት ጥፋተኛ ተብለው ስለመቀጮ በመጥቀስ ወደ አንቀጽ 86 የሚመራውም ሆነ በተጨማሪ እሰነት ታክስ ባለመክፈል በአዋጅ ቁጥር 285/94 አንቀጽ 49 መሰረት ጥፋተኛ የተባሉበትና መቀጮ ተጠቅሶ ወደ አዋጁ ክፍል 11 የሚመራው የግብር አስገቢው ባለስልጣን የግብር ከፋዩ ላይ ስለሚወሰደው አስተዳደራዊ እርምጃ የሚያመለክት እና በወንጀሉ የሚሰወነው የእስራት ቅጣት በአስተዳደር የሚጣልበትን የገንዘብ መቀጮ የሚያስቀረው ስለመሆኑ የሚጠቀም እንጅ ፍ/ቤቱ በወንጀሉ ጉዳይ ከእስራት ቅጣት በተጨማሪ የሚወሰነው ቅጣት ሆኖ ስላልተገኘ ውድቅ ተደርጓል፡፡

በ2ኛው ተራ ቁጥር አቶ አየለ ደበላ ከተወሰነባቸው የእስራትና የገንዘብ መቀጮ በተጨማሪ ወንጀል የተሰራበት ሀብትና ጥቅም መወረስ ስለሚገባው

በአስሩም ክሶች በቀጥታ የተገኘው ጥቅም በድምሩ ብር 182,289,241.26 እንዲሁም በንብረት ዝርዝሩ የቀረቡት የወንጀሉ ጥቅም ንረቶች ሊወረሱ ይገባል ተብሎ የቀረበውን ጥያቄ በሚመለከት፡- ከፍ ሲል እንደተገለጸው ይግባኝ ሰሚው ፍ/ቤት በዚህ መዝገብ በሰጠው ፍርድ አቶ አየለ ደበላ በስር ፍ/ቤት ጥፋተኛ ከተባሉባቸው አስር ክሶች መካከል 1ኛ እና 2ኛ ክሶች ተቀባይነት የሌላቸው ሆነው በመገኘታቸው ከሁለቱ ክሶች በነጻ እንዲሰናበቱ ስለተደረገ በ2ኛው ተራ ቁጥር በአስሩ ወንጀሎች የተገኘው የገንዘብ ጥቅም እና ንብረቶች አንዲወረሱ በሚል በጥቅል የቀረበው ጥያቄ እነዚህን በይግባኝ በተሰጠው ውሳኔ ውድቅ የተደረጉትን ሁለት ክሶች ጭምር ስለሚያካትትና በእያንዳንዱ ወንጀል ተገኝቷል የተባው የገንዘብ ጥቅምም ሆነ ንብረት በይግባኙ ማመለክቻ ተለይቶና ተዘርዝሮ ያልቀረበ ሆኖ በመገኘቱ ለመወሰን አስቸጋሪ ሆኗል።

በይግባኙ ማመልከቻ ላይ የትኛው ገንዘብ እና ንብረት በየትኛው ወንጀል አማካኝነት እንደተገኘ ተለይቶና ተብራርቶ ያልቀረበና የተረጋገጠበት ማስረጃ እንዴት እንደሆነ ያልተገለጸ መሆኑ ብቻ ሳይሆን ዐቃቤ ሕግ ሊወረሱ ስለሚገባቸው ንብረቶች ለስፍተኛው ፍ/ቤት አቅርበናል እያለ የሚጠቀሰው የንብረቶች ዝርዝር ራሱ ከመዝገቡ ሲታይ የጥፋተኝነት ፍርድ ግንቦት 3 ቀን 2002 ዓ.ም ከተሰጠ በኋላ በ10/9/2002 ዓ.ም በተጻፈ ማመልከቻ ሊወረሱ የሚገባቸውን ንብረቶች ዝርዝር እንድናቀርብና እግድ እንዲሰጥልን እንጠይቃለን ብሎ ከዚሁ ማመልከቻ ጋር ስለንብረቶቹ ከ1 እስከ 45 የሚዘረዝር 3 ገጽ የጽሑፍ መግለጫ አያይዞ ያቀረበ ቢሆንም እነዚህ በርካታ የሚንቀሳቀሱና ንብረቶች አቶ አየለ ደበላ ጥፋተኛ ከተባሉባቸው የወንጀል ድርጊቶች መካከል በየትኛው የወንጀል ድርጊት አማካኝነት እንደተገኙ በጽሑፍ ላይ በግልጽ ተለይቶና ተብራርቶ አልቀረበም። ለአብነት ያህል በጽሑፍ ላይ ከተራ ቁጥር 2 እስከ ታራ ቁጥር 8 ድረስ የተዘረዘሩትን መኖሪያ ቤቶችና ህንጻዎች እንዲሁም ከተራ ቁጥር 23 ጀምሮ እስከ ተራ ቁጥር 31 ድረስ በተለያዩ ቦታዎች ይግባኝ ተብለው የተዘረዘሩትን መኖሪያ ቤቶች ብንመለከት በቀጥታም ሆነ በተዘዋዋሪ በየትኛው ድርጊት አማካኝነት እንደተገኙ ያልተገለጸ ከመሆኑም በተጨማሪ ማስረጃዎቹም ምን እንደሆኑና እንዴት እንደተረጋገጠም የሚታወቅ ነገር የለም። ሁለተኛ ተከሳሽ በነበረችው በመቅደስ አየለ ላይ ቀርቦ ክስ መቋረጡንና በእርሷ ላይ የተሰጠ የጥፋተኝነት

ውሣኔ አለመኖሩን መዝገቡ በእርሷ ስም ተመዝግበው ይገኛሉ የተባሉ ሁለት መኖሪያ ቤቶች ጭምር እንዲወረሱ የተጠየቀበት ምክንያት ራሱ ግልጽ አይደለም። የግል ተበዳዮች ናቸው በተባሉት ተበዳሪዎች ስም ሁሉ ተመዝግበው ይገኛሉ የተባሉትን ንብረቶች እንዲወረሱ ሲጠየቅ በሕገ የሚወረሰበበት ምክንያት ምን እንደሆነ ተገልጾና በማስረጃም ተደግፎ መቅረብ ይኖርበታል። በ4ኛው ክስ ላይ በተገለጸው ከባድ የአራጣ ወንጀል የግል ተበዳይ ነው የተባለው የከአጀ ኢንተርናሽናል ንብረቶች ናቸው የተባሉት 9 መኪናዎች አቶ አየለ ደበላ ለብድሩ መያዣ ያደረጓቸው ናቸው እየተባለና እነዚህ መኪናዎች ወደ አበዳሪው ስም ተዛውረዋል ሳይባል ይወረሱ ተብሎ የሚጠየቅበት ምክንያት ምንድነው? ዐቃቤ ሕግ በተበዳሪዎች ስም ያሉ ንብረቶች ሊወረሱ ይገባል የሚል አቋም ካለው የሕግ ምክንያቱን ገልጾ ማስረዳት አለበት። በዚህ መዝገብ በተሰጠው ፍርድ ጥፋተኛ በተባሉባቸው ስምንት ክሶች ላይ በተገለጹት የወንጀል ድርጊቶች አማካኝነት የተገኙ ንብረቶች እና ገንዘብ አለ ከተባለ ዐቃቤ ሕግ ንብረቶቹም ሆኑ ገንዘቡ በቀጥታም ሆነ በተዘዋዋሪ በየትኞቹ ወንጀሎች እንደተገኙ ለይቶ በመግለጽና በማስረጃም እንዴት እንደተረጋገጠ ጠቅሶና አበራርቶ በማቅረብ ለአቶ አየለ ደበላም ደርሷቸው መልስ እንዲሰጡበት መደረግ አለበት። ከላይ በተገለጹት ምክንያቶች ዐቃቤ ሕግ በይግባኙ ማመልከቻ በ2ኛ ተራቁጥር ላይ ያነሣው የንብረቶችና የገንዘብ ይወረስ ጥያቄ ገና ጥሬ ጉዳይ ተብራርተው ቀርበው ሊጣሩ የማገባቸው በርካታ ነገሮች ያሉበት ሆኖ ስለተገኘ ይህ ጉዳይ ወደ ፌዴራል ከፍተኛ ፍ/ቤት ተመልሶ እንደገና ታይቶ ተጣርቶ መወሰን የሚያስፈልገው ነው።

በ5ኛ ተራ ቁጥር የፌዴራል ከፍተኛ ፍ/ቤት ከወንጀሉ ጋር በቀጥታ የተያያዙት የተወሰኑ ንብረቶች እንዲወረሱ በሰጠው ትዕዛዝ ላይ የ3ኛ ወገን መብት ተጠብቆ ያለው በአግባቡ አይደለም። ንብረቶቹ ያለ ቅድመ ሁኔታ እንዲወረሱ መወሰን አለበት በሚል የቀረበውን ጥያቄ በተመለከተም ከፍተኛው ፍ/ቤት ቁጥሩ 499 የሆነው መኖሪያ ቤት፣ የሰሌዳ ቁጥሩ 2-68201 የሆነ ቢኤም ደብሊው መኪና እና የሰሌዳ ቁጥሩ 2-70808 የሆነው መኪና የ3ኛ ወገን መብት ተጠብቆ ይወረሱ ያለበት ምክንያት ዐቃቤ ሕግ ራሱ ባቀረበው የንብረት ዝርዝር ጽሑፍ ላይ ቁጥሩ የተጠቀሰው መኖሪያ ቤት በአቶ በፍቃዱ አበበ ስም ተመዝግቦ የነበረ ስለመሆኑ እና ሁለቱ መኪናዎችም

በ3ኛው ክስ ላይ የግል ተበዳዩ ናቸው በተባሉት በአቶ ሳሙኤል ታደሰ ስም ተመዝግበው የነበሩ ስለመሆናቸው በመግለጹ ጥርጣሬ በማሳደር መሆኑን በቀላሉ ለመረዳት ይቻላል። እስካሁን ድረስ መኖሪያ ቤቱም ሆነ ሁለቱ መኪናዎች በአቶ አየለ ደበላ ስም ተዛውረዋል ተብሎ የተነገረ ነገር የለም። ይህንን መለወጥ የሚያስፈልግ ሆኖ ስላልተገኘ ታልፏል።

የወንጀሎቹ ደረጃ መካከለኛ የተባለው ትክክለ አይደለም፣ ከባድ ተብሎ የእስራት ቅጣቱና የገንዘብ መቀጮው ከፍ ብሎ መወሰን አለበት በሚል የቀረበው የመጨረሻውን ጥያቄ በሚመለከት፡-

አቶ አየለ ደበላ በይግባኝ ነፃ ከተባሉባቸው ሁለቱ ክሶች ውጭ ባሉት በስምንቱ ክሶች ላይ የተገለጹት ወንጀሎች በቅጣት አወሳሰን መመሪያው መሠረት ቅጣታቸው ሲወሰን የእያንዳንዳቸው የወንጀል ደረጃ ከባድ ተብሎ ሊመደብ የሚገባው ነው ወይንስ ከፍተኛው ፍ/ቤት እንዳለው መካከለኛ የሚባል ነው? የሚለው ሲታይ ውስብስብና በሚሊዮን የሚቆጠር ገንዘብ ያለባቸው ስለሆኑ የወንጀል ደረጃቸው ከባድ ሊባል የሚገባው ነው። የወንጀል ደረጃቸው ከባድ የሚባል ሆኖ ከተገኘ ደግሞ በቅጣት አወሳሰን መመሪያው መሠረት የእያንዳንዳቸው የቅጣት መነሻው ከፍ ይላል። የፌዴራል ከፍተኛ ፍ/ቤት የወንጀሎቹን ደረጃ መካከለኛ ብሎ ወስዶ ለእነዚህ ለ8ቱ ወንጀሎች ለእያንዳንዳቸው የወሰነው ቅጣት ሲደመር ወደ ሃምሳ አመት አካባቢ ይሆናል። የወንጀሎቹ ደረጃ ከባድ ሲባል ደግሞ የቅጣቱ ድምር ከዚህ በእጅጉ ከፍ የሚል ነው። የወንጀሎቹ ቅጣት ሲደመር መጠኑ ከፍተኛ ቢሆንመ በሕጉ ሀያ አመት ላይ ስለሚያቆም ተፈፃሚ የሚሆነው የሃያ አምስት አመት እሥራት ነው።

ይህ ፍ/ቤትም የወንጀሎቹ ደረጃ ከባድ ተብሎ አቶ አየለ ሊቀጡ የሚገባው የ25 ዓመት ጽኑ እሥራት ሆኖ አግኝቶታል።

የገንዘብ መቀጮውን በሚመለከት የወንጀሎቹ ደረጃ ከባድ ቢባል አቶ አየለ ደበላ ከ1ኛና ከ2ኛ ክሶች በነፃ ስለተሰናበቱ በሥር ፍ/ቤት በተወሰነው የገንዘብ መቀጮ ላይ ለመጨመር የሚያስችል ምክንያት ባለመኖሩ የገንዘብ መቀጮውም እንዲጨምር በሚል የቀረበው ጥያቄ ተቀባይነት አላገኘም።

ሲጠቃለል ከዚህ በላይ በተገለጹት የሕግ ምክንያቶች በዚህ ጉዳይ የፌዴራል ከፍተኛ ፍ/ቤት የሰጠው የጥፋተኝነት ፍርድ እና የቅጣት ውሣኔ በከፊል ሊለወጥና ሊሻሻል የሚገባው ሆኖ ስለተገኘ የሚከተለው ተወስኗል።

ውሣኔ

1ኛ/ የፌዴራል ከፍተኛ ፍ/ቤት በወ/መ/ቁ. 82604 ግንቦት 3 ቀን 2002 ዓ.ም 1ኛ እና 2ኛ ክሶችን በሚመለከት በአቶ አየለ ደበላ ላይ የሰጠው የጥፋተኛነት ፍርድ በወ/መ/ሕ/ሥ/ሥ/ቁ. 195/2/ለ/1/ መሠረት ተሰርሶ ከ1ኛ እና ከ2ኛ ክሶች በነፃ እንዲሰናበቱ ሲወሰን

2ኛ/ በቀሪዎቹ 3ኛ፣ 4ኛ፣ 5ኛ፣ 6ኛ፣ 7ኛ፣ 8ኛ፣ 9ኛ፣ እና 10ኛ ክሶች አቶ አየለ ደበላ ጥፋተኛ መባላቸው እንዳለ ፀንቶ ቅጣትን በተመለከተ ዐቃቤ ሕግ ባቀረበው ይግባኝ መነሻ የእሥራቱ ቅጣት እንዲጨመር ተደርጎ አቶ አየለ ደበላ እስካሁን ድረስ ታሥረው የቆዩበት ጊዜ የሚታሰብላቸው ሆኖ በ25 (በሃያ አምስት አመት) ጽኑ እሥራት እንዲቀጡ ተወስኗል።

3ኛ/ በሥር ፍ/ቤት በተወሰነው የገንዘብ መቀጮ አልተነካም።

4ኛ/ በአቶ አየለ ደበላ የባንክ ሂሣብ ውስጥ የተገኘው አሥራ ሁለት ሚሊዮን በር እንዲወረስ የተወሰነው ፀንቷል።

5ኛ/ አቶ አየለ ደበላ ጥፋተኛ ከተባሉባቸው ስምንት ክሶች ጋር በተያያዘው ዐቃቤ ሕግ ሊወረሱ ይገባል ያላቸውን ንብረቶች እንዲሁም ገንዘብ በተመለከተ በፍርድ ላይ በዝርዝር በተገለፀው መሠረት እንደገና ታይቶና ተጣርቶ እንዲወሰን ጉዳዩ ወደ ፌዴራል ከፍተኛ ፍ/ቤት ተመልሷል።

6ኛ/የአዲስ አበባ ማረሚያ ቤት በዚህ መዝገብ በተሰጠው ፍርድ መሠረት በአቶ አየለ ደበላ ላይ የተወሰነውን ቅጣት ተቆጣጥሮ ያስፈጽም ብለናል።

7ኛ/ የዚህ ፍርድ ትክክለኛ ግልባጭ ይተላለፍ።

8ኛ/ በዚህ መዝገብ የተሰጠው ፍርድ ግልባጭ ከወ/ይ/መ/ቁ. 60793 ጋር ይያያዝ።

9ኛ/ የሥርመዝገቡ ከነሙሉ ማስረጃዎቹ ለፌዴራል ከፍተኛ ፍ/ቤት ይመለስ።

መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ።

የማይነበብ የሁለት ዳኞች ፊርማ አለበት።

Miazia 3, 2004 (E.C.)

Federal Supreme Court

Judges:
Dagne Melaku
Belachew Anshiso
Shimekit Assefa

Appellant – Ato Ayele Debella – Appeared with his Defense Attorney Ato Tamrou W/Agegnehu.

Respondent – The Ethiopian Revenue and Customs Authority, represented by Prosecutor Ato Tesfa Mariam G/ Tensa'e.

Judgment - Part II[1]

This appeal is filled against the decisions of the High Court rendered on Ginbot 3, and Hamle 3, 2002 (E.C.) in which the appellant was convicted and sentenced for committing the following crimes:

- Counts No.3 & 5 – under Arts.670(c) and 667(1) of the Penal Code;[2]
- Count No.4 & 6 – under Arts.715(c) and 712(1)(a) of the Criminal Code;[3]

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[1] This is a sequel to the case report published in JEL, Vol.XXV, No.2, September, 2012. This part contains the judgment of the Court on all other charges pressed against the appellant at the lower Court.

[2] [Usury] –Art 667(1) reads as follows, " Whosoever, by exploiting a person's reduced circumstances or dependency , material difficulties, or carelessness, inexperience , weak character or mind:

(a) Lends him money at a rate exceeding the official rate, or

(b) Obtains a promise or assignment of benefits in property in exchange for pecuniary or other considerations, which is in evident disproportion, is punishable with simple imprisonment or, according to the gravity of the case, with rigorous imprisonment not exceeding five years, and fine.

Art 670(c) – Aggravated cases – The punishment shall be rigorous imprisonment not exceeding ten years and the fine shall not exceed ten thousand dollars, where a person accused of usury,....having foreseen, has induced his victim to ruin or suicide by his acts of their repetition.

[3] Arts 712 (1)(a)& 715(c) of the Criminal Codeare verbatim copies of Arts 667(1), & 670(c) of the repealed Penal Code, excerpted above.

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- Count No.7 & 9 – under Arts. 49 of Proclamation No.285/94 (2002) and 96 & 97/3 of Proclamation No.289/94 (2002);[4] and
- Count No.10 – under Art.684 (1) & (2) of the Criminal Code.[5]

Under those charges that pertain to usury, the prosecution has submitted detailed evidences to prove that the appellant has lent Millions of Birr to six individuals and two organizations at different times at the rate of 7 -10% interest per month and that his action caused the ruin of some of the debtors. Under those charges that pertain to tax evasion, the prosecution has submitted the amount of money evaded by the appellant. The former has also submitted that the appellant has acquired a total of Birr, 89, 783,020.63 out of the usury and tax evasion crimes committed by him.

The High Court has convicted the appellant on all charges and sentenced him to 22 years of imprisonment, a fine of 308,000 Birr and ordered the

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[4] Art 49 of Proclamation No. 285/2002, Value Added Tax Proclamation – Tax evasion, "A person who evades the declaration or payment of tax, or a person who, with the intention to defraud the government, applies for a refund he is not entitled to, commits an offence and, in addition to any penalty under Section 11, may be prosecuted and, on conviction, be subjected to a term of imprisonment of not less than five (5) years.

Art.96 of Proclamation No. 286/2002, Income Tax Proclamation, - Tax Evasion – A Taxpayer who evades the declaration or payment of tax commits an offense and, in addition to the penalty for the understatement of income referred to in Article 86 may be prosecuted and, on conviction, be subject to imprisonment for a term of not less than five (5) years per additional TIN obtained.

Article 97(3) – Making False or Misleading statements – (3) – where the statement or omission is made knowingly or recklessly,

(a) And if the inaccuracy of the statement undetected may result in an underpayment of tax by an amount not exceeding 1,000 Birr, to a fine of not less than 50,000 Birr and not more than100,000 Birr, or imprisonment for a term of not less than five (5) years and not more than ten (10) years; and

(b) If the underpayment of tax is in an amount exceeding Birr 1,000, to a fine of not less 75,000 Birr and not more than 200,000 Birr, or imprisonment for a term of not less than ten (10) years and not more than fifteen (15) years.

[5] Art 684 of the Criminal Code – Money Laundering and Aiding:

(1) Whoever launders money or property, derived from corruption, drug trafficking, illegal arms dealings or crimes indicated under Articles 243(2) or (3), Article 262 (1) or (2), Article 455(2), Article 506(3) or (4), Articles 507-509, Article 510(2), Article 511(2) or (3) or (5), or Article 512, or any similar serious crime, by disguising its source through investment, transfer or remission, is punishable with rigorous imprisonment for five years to fifteen years, and fine not exceeding one hundred thousand Birr.

(2) Whoever, knowingly alters, remits, receives, possesses or makes use of money or property obtained through one of the crimes specified under Sub-article (1), is liable to the penalty under sub-article (1).

confiscation of Birr 12,000,000 deposited in his bank accounts, one house and two cars, all belonging to him.

Regarding Counts No.3, 4, 5 & 6:

The attorney for the appellant has argued that: under Count No. 3, the witnesses who testified at court were four individuals who have allegedly borrowed money from the appellant and this point is not proved through the testimony of neutral witnesses and the witnesses have failed to prove that they are ruined as a result of the usury, rather they have testified that they have enriched themselves by the money that they borrowed as a result of which they are still engaged in profitable businesses; no evidence is submitted to prove that they have suffered economic loss; the term 'usury' is not indicated in those documents that were submitted to prove usury, they rather indicate that these are contracts of loan and that loan is a lawful business; as regards contracts of loan, there is no such thing known as simple or big loan; and the appellant should not have been convicted on this charge.

The Court while examining this file has proved that those victims of the usury, who were called as prosecution witnesses, have testified against the appellant. Regarding appellant's contention that the witnesses are debtors of the appellant but not neutral witnesses and that the point should have been proved by the testimony of neutral witnesses, is dismissed on the ground that there is no law that prohibits victims of crimes from testifying. In cases of loan contracts that amount to usury, it is the debtor who knows the crime behind the contracts. Therefore the appellant's contention that such motives cannot be proved by the testimony of victims alone is unacceptable. Such testimonies should be weighed in light of their veracity and dependability alone. It is the defendant's duty to rebut such testimonies by submitting evidence to this effect. Given the appellant's failure to discharge this duty, his contention that the witnesses are not neutral is unfounded.

Prosecution witnesses have testified against the appellant. According to their testimonies, the contracts of loan, in which they were parties, were based on usury. The witnesses testified that they were forced to sell their properties to pay back the loan for the interest rate was exorbitant. The appellant has objected the capacity of Ato Samuel Tadesse, who was one of his debtors, to

testify at a court of law for he has been sentenced to twenty years of imprisonment for attempting to kill the appellant. However, the judgment that condemned Ato Samuel to imprisonment says nothing about his deprivation to serve as a witness as provided under Arts.123 & 124 of the Criminal Code. This witness has borrowed Birr 275, 000 and 400, 000 on two occasions with 10% interest. Other witnesses have testified that his properties were sold to cover these debts. The appellant's contentions that: he was a member of Ikubs [self-help associations] together with the debtors, and that he had secured favorable decisions in those civil suits that he lodged against them cannot help him to avoid the charges brought against him.

It has been proved through the testimonies of some of the witnesses that they have been induced to ruin. One of them is Wro. Fatuma Moursella, who testified that she had borrowed 2,400,000 Birr from the appellant with 20% interest per month and paid back somewhat above 16,000,000 Birr. As she had issued false checks in favor of the appellant to secure the debt, the latter brought a criminal action against her as a result of which she was imprisoned and her properties were sold to settle the debt. This amply proves the magnitude of the ruin occasioned by the usury. Accordingly, the conviction of the appellant on the charge of usury –under Art.670(c) -Count 3 - perpetrated against all victims is confirmed.

The Court has also confirmed the conviction of the appellant on Counts No.4, 5 and 6 on charges brought against him under Arts.715(c), 667(1) and 712(1)(a).[6] The summary of the Court's decisions are presented below:

- Count 4 pertains to a contract of loan concluded between the appellant and Ajo International, in which the latter borrowed Birr 6,500,000 with 7% interest per month, another loan contract for 1,500,000 with 30,000 Birr interest for a day as well as other similar contracts at different days. Though the appellant contended that he has not signed on the documents that were submitted as evidence and that they should not be relied upon, the point is proved by the testimonies of the debtors, namely, AtoKeliffa AbaJirga, who is the owner of the organization and his wife Wro. ZubeidaKedir Mohammed. Thus, taking into account the fact that an issue of usury

[6] Translator's Note – Details of these decisions are omitted due to space limitation.

is proved by the testimony of witnesses but not written evidences, this court has dismissed appellant's contention. [.....]

- Count 5 pertains to a loan advanced to an Association that was established to construct a building at 'Sidamo Terra' [Merkato]. The appellant loaned Birr 10,000,000 to the Association, in which he is also a member with a 15% interest per month. He had also requested to be paid Birr 150,000 as a commission. The appellant contended that the commission is not an interest but this is unfounded for in a contract of loan it is the interest that is mentioned but not the commission. Thus, the apparent absence of the term interest from the document and its replacement by the term commission is nothing but a proof of usury. Thus, the contention is dismissed.
- Count 6 pertains to a loan advanced to Ato MesheshaYifrou. The latter borrowed Birr 1,000.000 with 7% interest per month from the appellant and he paid Birr 70,000 as interest. This point was proved by the testimony of the borrower and proves the appellant's guilt.

Regarding Count No.7, 8, & 9 in which the appellant was charged for tax evasion as well as making false or misleading statements:

- The appellant is alleged to have evaded the payment of Birr 22,858.126.13 out of his business transactions between 1995-2001 E.C.
- Under Count 8, in which the appellant is accused of making misleading statements, it is submitted that the appellant has declared a much lesser amount of income than what he had actually earned.[7]
- Under Count 9, the appellant is alleged to have evaded the payment of a total of Birr 66,524,894.50, which he should have paid as Value Added Tax.

The fact that the appellant was an active businessman and a registered taxpayer during those years, in which he is alleged to have committed the above crimes, is not disputable. This Court has noted that many contentions pertaining to evidences and points of law are submitted on behalf of the appellant.

With regard to the contention on points of law, first we need to look at the following:

[7] These are in tens and millions of Birr per year. Details are omitted due to space limitation.

Art.4 of Proclamation No.286/94 provides that "every person having income as defined herein shall pay income tax in accordance with this Proclamation." Article 66 provides for the duty to declare income. While Article 10[8][2(10)] provides that income shall mean every sort of economic benefit including nonrecurring gains in cash or in kind, from whatever source derived and in whatever form paid or received." Article 6 of the Proclamation lists the sources of income and income from business activities is one of these. Section IX of the Proclamation lists down criminal offences under Articles 95 and the following and one of these is Article 96 that defines the crime of tax evasion. Article 97 defines the crime of making false or misleading statements.[9]

This Court has examined whether the appellant has paid correct tax on income gained from his business activities during the years mentioned in the charge and whether he has declared misleading statements to the Tax Authority as well as whether the evidence submitted can prove guilt in the case at bar.

An issue of tax evasion is proved through the investigation of cases by professionals assigned by the tax collecting authority, but not through the testimonies of ordinary witnesses or evidences found from the taxpayer or other individuals. Article 38 of the Proclamation provides that the Tax Authority has broad powers to order the production of different evidences, collect and investigate the same.

In the case at bar, the auditors assigned by the Tax Authority, who have the requisite expertise and practice, have submitted an audit report that proved that the appellant having gained millions of Birr from his business transactions had declared a much lesser amount to the Tax Authority during the years mentioned in the charge.

The auditor has testified that a total of Birr 485,171,559.77 had been deposited in the appellant's bank accounts in the relevant years.[10] The

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[8] There appears to be an error of the pen here, for it is Article 2(10) that defines the term, 'income.'

[9] See Footnote 4, above.

[10] Details are omitted.

appellant is engaged in a total of seven different types of businesses.[11] Nonetheless, he had declared only Birr 2,834,126 as income during the relevant seven years.[12]

While the income declared by the appellant for the seven years amounts to Birr 2,834,128 only, the amount that he deposited in his bank accounts in the year 1995 E.C. alone totals to Birr 51,436,032 and this has increased as of 1997, though his deposit in the year 1996 has decreased.

The auditors' reports proved that the appellant did not properly declare his income and the money that he evaded amounts to Birr 22,058,126.13. If the appellant is alleging that these sums were withdrawn at different times and again deposited in the bank accounts, he has the duty to prove it. But he has failed to do so. The Appelant's allegation that income derived from deposit and found in bank statements cannot be taken as income is unfounded. The fact that he was circulating millions of Birr in his accounts proves that he had income that he has hidden.

The Appelant's allegation that some of his businesses were closed and their licenses had been returned is also unfounded. The appellant's evidence submitted to the Court is found to be incapable of disproving the audit reports of the professionals assigned by the Tax Authority. Accordingly, the conviction of the appellant on Count No.7 & 8 are confirmed.

With regard to Count No.9, in which the appellant was charged for tax evasion under the Value Added Tax Proclamation, the auditors have shown that given the fact that he was depositing millions of Birr every tax year in his bank accounts, his yearly income is more than Birr 500, 000 as a result of which he has the duty to register as a taxpayer for the purpose of this particular tax. [....] As can be gathered from the general spirit of Proclamation No.285/94, a taxpayer has the duty to pay the tax as of the date of registration. Article 49 of the Proclamation provides that failure to declare money collected from the public or tax evasion [is a

[11] Details are omitted.

[12] An incident of tax evasion the income for the year 2000 E.C. is omitted, for it involves a comparatively small sum.

crime] and this covers the issues contained in Count No.9. The conviction of the appellant on this count is thus confirmed.

As regards Count No. 10, in which the appellant was charged under Article 684(1)&(2) for money laundering,the instances in which the appellant was said to have acquired a total of Birr 89,783.020.63 are those mentioned in Count No.4-9. The crime of money laundering and aiding is not an independent crime but one that requires the commission of other crimes. Article 684 has listed those crimes which include serious offenses that are required to be committed for this purpose. According to sub-article 7 of this article,

....Crime is serious:

a) Where the crime is punishable with rigorous imprisonment for ten years or more, and
b) Where the amount of money or the value of property involved in the crime is at least fifty thousand Birr.

As the prosecution's charges under Count No. 4-9 are based on the incomes acquired by these crimes, they meet the standard of 'seriousness' of the relevant article. Accordingly, the appellant's conviction on Count No.10 is confirmed.

Though the appellant is acquitted from Count No.1 & 2, the sentences that should have been passed on him on the other eight counts according to the law and the Sentencing Guideline, should have been [severe]. The prosecution has appealed from the [leniency shown by the lower court.] Accordingly, the appellant's plea regarding [the reduction of] the sentence is dismissed.

The Court has examined the grounds of appeal submitted by the prosecution in Criminal Appeal File No. 60793 that pertain to the sentences passed on the confiscation of the appellant's properties and the amount of fine. One of the grounds prays for the confiscation of Birr 130,170,410.94 acquired through the violation of Proclamation 83/86. Nonetheless, as the appellant is acquitted from Count No. 1& 2, the prosecution's request for the confiscation of money is dismissed.[13] The

[13] See Part I of this case report.

prosecutor's plea that this Court shall punish the appellant with a fine of Birr 1,840,000 under Count No.4 for violating Proclamation No.592/2000 is dismissed for the same reason stated above.

The prosecution's third ground prays for a sentence of payment of fine to the amount of Birr 136,845,843.44 in addition to imprisonment. Articles 86 and 96 of Proclamation No. 286/94 and Article 49 of Proclamation No. 285/94 under which the appellant was convicted provide for administrative measures to be taken by the Tax Authority and that the sentence of imprisonment to be passed by a court for the crime committed does not prevent the Authority from passing a sentence of payment of fine. The prayer is dismissed on the ground that this is not a sentence that the Court should pass in addition to the sentence of imprisonment.

Regarding the prosecution's second plea that in addition to the sentence of imprisonment and payment of fine, a total of Birr 182,289,241.26 that the appellant acquired by perpetrating all the ten crimes should be confiscated, the Court has found it difficult to pass a judgment on this point for the Court has acquitted him on two counts. Moreover the prosecution has failed to show the amount of money acquired under each crime. Though the prosecution has stated that it has submitted a list of 45 properties in its 3 pages application to the lower Court [almost a month after] the Court's conviction of the appellant and has requested attachment of these properties, it has failed to show which of these movable and immovable properties were acquired through the perpetration crime.The fact that the prosecution has failed to show directly or indirectly how the residential houses and buildings mentioned in No.2-8 and other residential houses that are located at different places and listed under No.23-31 are acquired through perpetration of individual crimes as well as its failure to show the evidence that can prove its allegations can be cited as examples.

Furthermore, given the fact that Mekdes Ayele Debella was accused as defendant No.2 and acquitted through time, it is not clear why the prosecution sought the confiscation of two houses that belong to her. When a request to confiscate properties belonging to victims is submitted, the legal ground should be shown and the request should be

supported by evidence. Given the fact that 9 cars that belong to Ajo International were given to the appellant as pledges, what is the reason that compelled the prosecution to confiscate these properties while it is not proved that their ownership is transferred to the latter? [....] For these reasons, the issue demands further treatment by the Federal High Court.

The prosecution has pleaded in No.5 of its prayer that the lower Court's order to confiscate the appellant's properties subject to the interests of third parties is improper, that the qualifier 'subject to third parties interest' should be removed and that the properties should be confiscated unconditionally. It can be observed that the lower Court's conditional order was given due to the fact that House No.499 is registered under the name of Ato Befikadou Abebe and two cars [their plate numbers are omitted] are registered under the name of Ato Samuel Tadesse, who is listed as one of the victims in Count 2. These facts have put the Court in doubt. Nothing is shown to prove the fact that the ownership of these properties has been transferred to the appellant. Since there is nothing that compels it to change this situation, the Court has preferred not to rule on this issue.

Regarding the prosecution's prayer that the crimes should not have been classified as medium and that the sentence of imprisonment and payment of fine should be aggravated, the Court has framed the issue as whether the eight crimes for which the appellant was convicted should be classified as serious or medium. Given the complexity of the crimes as well as the fact that they involve millions in money, they should be classified as serious. If they can be classified so, the threshold punishments should also be higher. The High Court taking its classification of the eight crimes has given an aggregate sentence of imprisonment for fifty years. Accordingly, when their classification is changed to serious the aggregate sentence has to increase. Though this aggregate sentence can be much higher, it cannot be for more than twenty five years. This Court has thus found that the appellant should be sentenced to twenty five years of imprisonment.

As regards the sentence of payment of fine, though the crimes are classified as serious, the Court found no reason to increase the amount of fine decided by the lower Court as the appellant has been acquitted of

two of the crimes. Thus, the prosecution's prayer on this point is dismissed.

By way of conclusion, the lower Court's rulings on conviction and sentencing are varied in part and this Court has given the following judgment:

Judgment

1. The Federal High Court's judgment [....] that convicted the appellant on Count No. 1 & 2 are reversed and he is acquitted on these charges as per Art.195(2)(b)(1) of the Criminal Procedure Code;
2. The High Court's conviction of the appellant on the other eight counts is confirmed. Nonetheless, this Court has increased the threshold sentence of the crimes. Thus, this Court has passed a sentence of twenty years. The appellant's period of imprisonment sstarting from the date of his arrest should be taken into account;
3. The sentence of payment of fine is confirmed;
4. The sentence of confiscation of Birr 12,000,000 found in the appellant's bank accounts is confirmed;
5. The issue of confiscation of other properties and money is remanded to the lower Court so that these should be verified against the list of properties submitted by the prosecution;
6. The Addis Ababa Prison Administration is hereby ordered to execute this judgment;
7. The copy of this judgment should be given [to the parties.];
8. Let the copy of this judgment be attached with Criminal Appeal File No.60793;
9. Let the file together with its full list of evidence be sent to the Federal High Court.

The file is closed and it shall be returned to the archive.

Ineligible signatures of two judges.

The Legal Basis for Self-Rule in Ethiopian Cities

Tamerat Delelegne*

Introduction

Cities[1] have distinctive qualities that entitle them to special attention. For in them dwell a relatively huge concentration of people and wealth. It is also widely accepted that infrastructures are relatively better developed in cities. As well, higher learning institutions and high level health services are concentrated in cities. Cities are home for innovation and creativity. Moreover, they are often centers for trade, commerce and industry. And by some estimates, they contribute an average of 60% of the GDP.[2] They are also seats for governments and international and local organizations. There is a general consensus that the growth and development of cities is a *sine qua non* for the growth and development of rural areas.[3]

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*LL.B. (HSIU), LL.M. (McGill University). I would like to thank Prof. Darge Wole for the very helpful comments he gave and the thought-provoking questions he raised on the original draft of this paper.

[1]The term "City" is defined by various city laws in Ethiopia as comprising of the following essential elements:

a) The community must have a population of 2,000 or more; b) The majority of the population must engage in industrial, commercial or service activities; and c) The community must have the capacity to generate revenue enough to cover its operational costs. See for example: The Revised Southern Nations, Nationalities and Peoples Regional State City Administration Proclamation, 2006, Proc. No. No.103. (Year & No. not provided), art. 8/2; The Urban Local Government Proclamation of the Oromia National Regional State, 2003, Proc. No.65, MEGELETA OROMIA, year 9,No.12 arts. 2, 4 &6; The Tigray National Regional State City Organization, Definition of Powers and Responsibilities Proclamation , 2006, Proc. No. 107, Tigray Negarit Gazette, Year 14, No.14, arts. 2, 6 & 9.

[2] Ministry of Works and Urban Development, Basic Concepts and Approach In Urban Development Management- Module A (July, 2008, Unpublished, Ministry of Works and Urban Development) P. 8

[3] Ministry of Federal Affairs, National Urban Development Policy (Approved by the Council of Ministers) (March, 2005, Unpublished, Ministry of Federal Affairs) P. 9.

Another factor that adds to the current importance of cities is the rate of urbanization that prevails in all parts of the world. This is well illustrated in a recent study conducted by the Economist:[4]

> In 1800, only 3% of the world's population lived in cities, a figure that has risen to 47% by the end of the twentieth century. In 1950, there were 83 cities with populations exceeding one million; by 2007, this number had risen to 468. If the trend continues, the world's urban population will double every 38 years. The UN forecasts that today's urban population of 3.2 billion will rise to nearly 5 billion by 2030, when three out of five people will live in cities. This increase will be most dramatic on the least-urbanized continents, Asia and Africa. Surveys and projections indicate that all urban growth over the next 25 years will be in developing countries.

The current level and the projected level of urbanization for Ethiopia are lower than what is said above. Thus, the level of urbanization that was about 13% in 1994[5] rose to only 16 % in 2007.[6] The projection for 2030 is that the level would rise to 23%.[7] However, although there is a noticeable gap between the projection for the world at large and that for Ethiopia, the indications are that the rate of urbanization in Ethiopia has already become high enough to generate particular interest in the governance of cities.

There is a general agreement that given the importance of the role cities play in the provision of services and in enhancing local development,

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[4] Wikipedia: Megacity-Global/Warming Art(http://www.economist.com/surveys/displaystory.cfm?story-id=9070726,p.1). Accessed June, 2011.

[5] FDRE Office of Population and Housing Census Commission, Central Statistical Authority, 'The 1994 Population &Housing Census of Ethiopia Results at Country Level, Analytical Report' (June, 1999, Addis Ababa), Vol. II, Table 2.1, p.8.

[6] FDRE Population Census Commission, Central Statistical Agency, 'The 2007 Population and Housing Census of Ethiopia, Results for Country Level, Statistical Report',(August, 2010, Addis Ababa), Table 2.1, P. 8.

[7] FDRE Office of Population and Housing Census Commission, Central Statistical Authority, supra note 5, Table 7.3A, p 315.

governments responsible for city affairs must put in place a legal framework that enables cities to prepare themselves for the challenges that a high rate of urbanization might engender. But unfortunately, that does not happen all the time.

In Ethiopia, there is a consensus that city laws enacted during the reign of the Emperor and the military government did not enable cities improve the wellbeing of their residents. As we shall see shortly, cities of those days remained under the full control of the central governments. They exercised very limited powers. They had no constitutional protection. They were severely under-resourced. Genuine popular participation remained unknown. As a result, the large majority of cities remained under-developed. Services were poor. And the quality of life of the large majority of urban residents remained low.[8]

To enable cities address such problems effectively and efficiently, many propose that cities be accorded the legal power to govern themselves subject to law. For instance, the Nigerian Government which initiated local government reform scheme in 1976 made a strong argument for local government:[9]

> The Federal Military Government believes that it is only through an Effective Local Government System that the human and material resources could be mobilized for local development. Such mobilization implies more intimate communication between the governed and the governor. But above all, these reforms are intended to entrust political responsibility to where it is most crucial and most beneficial, that is, to the people.

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[8] Ministry of Federal Affairs, *The National Urban Development Policy*, supra note 3, pp 2-5.

[9] Federal Republic of Nigeria, 'Guidelines for Local Government Reform' (1976, Lagos) P. iii.

Indeed, self-rule is one of the main foundations of any democratic regime.[10] And the principle of self-rule is as applicable to cities as to rural areas.[11] Indian and South African Constitutions[12] accord an express recognition and protection to the right of city residents to self-rule. It is important to add here that the European Charter of Local Self-government, as well, guarantees the right of all local authorities to self-government.[13]

It is against the above background that this article seeks to review the state of constitutions and city laws in Ethiopia in relation to the right of city residents to self-rule. The principal objective here of this article is to find out whether laws in Ethiopia including Federal and State Constitutions and City laws recognize and protect the right of city residents to self-rule and to propose ways of filling the gaps that may be identified.

To that end, the article raises the following specific questions: Does the Federal Constitution recognize and protect the right of city residents to self-rule? Should it have laid down the standards that Regional States shall follow in crafting city laws? Do State Constitutions provide adequate recognition and protection to the right? How has the National Urban Development Policy helped enhance this fundamental right? Without regard to the Constitutions, are state-enacted city laws good enough to serve as vehicles for self-rule?

The significance of this article lies in the intense interest and heated discussions that it seeks to generate on the subject of self-rule in cities. It is also hoped that by identifying gaps in both the Federal and State

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[10] Council of Europe, The European Charter of Local Self-government, (15.x.1985,Strasbourg) p.1.

[11] Id, p. 3

[12] The Constitution of India (Seventy-Fourth Amendment) Act, 1992; The Constitution of the Republic of South Africa, 1996 Chapter 7.

[13] Council of Europe, supra note 10.

Constitutions, it would inspire law makers to reassess the need for the revision of pertinent laws. The article is also hoped to serve as a starting point for further research on the matter of self-rule in cities.

The Article is organized as follows: Section 1 summarizes the essential elements of self-rule. The self-rule-friendliness of city-related laws will be tested against the criteria laid down in this section. Section 2 briefly reviews the state of city laws prior to the promulgation of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution). Under this section, pertinent laws during the reign of Emperor Haile Selassie and the Dergue regime will be briefly reviewed. Section 3 examines the place of cities in the FDRE Constitution. The section asks whether the Constitution expressly or impliedly recognizes and protects the right of city dwellers to self-rule. Section 4 focuses on the contributions of the National Urban Development Policy towards enhancing the right of city residents to self-rule. Section 5 briefly reviews the place of cities in regional constitutions. The focus here is on examining the adequacy of the regional constitutional stipulations on the subject. Section 6 assesses the extent to which Federal and State city laws meet accepted standards for self-rule. Section 7 summarizes preceding discussions and offers concluding remarks.

1. Elements of Self-rule

There appears to be a broad agreement among renowned legal documents on the elements of "self-rule."[14] But for convenience, this article adopts the more specific definition given to the term by the Council of Europe in its

[14] The Constitution of India (Seventy-Fourth Amendment) Act, 1992;the Constitution of the Republic of South Africa, 1996, cited above at note 12; Council of Europe, cited above at note 10.

Charter of Local Self-Government.[15] Those elements have been summarized as follows:

First, the term denotes the right of city residents to regulate and manage a substantial share of public affairs. That right must be exercised by a popularly elected council.

Second, the power must be clearly defined by law. The Council shall have all power allowed or not disallowed by law. That power shall be implemented by units that are close to the people. In the Ethiopian context, this includes chiefly the executive unit of the city administration. Pertinent sections of the municipality and Kebeles are specific units that engage in the implementation of the powers of the Council.

Third, the city shall have the authority to determine its own internal administrative structure and the working conditions of its employees. Fourth, Administrative supervision by higher authorities shall be in accordance with the law and its aim shall be to ensure compliance with the law and the basic principles of the constitution.

Fifth, a city shall have its own source of revenue. That revenue shall in as much as possible be commensurate with its responsibilities. To that end, a city shall have the authority to levy and collect taxes and charges. Furthermore, it shall be entitled to receive grants in a manner that does not diminish its power to exercise policy discretion.

Sixth, a city shall have the right to join local and international city associations. Seventh, a city shall have the right to recourse to legal remedies

[15] Council of Europe, supra note 10.

to secure free exercise of powers and respect for the principles enshrined in the constitution or other domestic laws.

The question now is: Do laws in Ethiopia including Federal and Regional Constitutions bestow such powers upon cities? It would now be in order to review all pertinent laws in light of the above question.

2. City Laws under the Preceding Two Governments

2.1. City Laws during the Reign of Emperor Haile Selassie

Ethiopian cities had, during the reign of Emperor Haile Selassie, been under the tight control of the central government. No law ever made any attempt to hide this state of relation between the central government and urban administrations. The first law ever to make any reference to the administration of cities, the Administrative Regulations, Decree No. 1 of 1942[16], is a good indication of the extent to which the central government griped the administration of urban centers. The Decree which had 11 articles consecrated one of them (Article 9) to the affairs of urban centers. Sub-article 71 of this article gave the Emperor full authority to appoint, on the recommendation of the Minister of Interior, a Kentiba (Mayor) each for the cities of Addis Ababa and Gondar and a Town Officer for every other town. In this connection, one needs to note that the power of the Kentiba was not limited to the ordinary executive functions of a Mayor. The Kentiba was also the chairperson of the municipal council and he received his instructions directly from either the Minister of Interior if he was the Kentiba of Addis Ababa or from the Governor General of the pertinent Province if he was the Kentiba of Gonder or the town officer of another town (Sub-articles 72 and

[16] Administrative Regulations Decree, 1942, Decree No.1, Negarit Gazeta, Year 1, No.6.

73). Since the power of the Kentiba was derived form the Emperor himself and since the municipal council was essentially advisory, one could argue that in effect, the central government itself governed urban centers.

The composition of the municipal council is another illustration of the extent of power the central government exercised over the administration of urban centers. Thus sub-article 73 provides: "The Councilors shall be the representatives in the cities and towns of the various ministries and 7 Ethiopian residents elected yearly from amongst property owners and principal merchants and known by their works and good conduct." Obviously, representatives of the ministries represent the interests of the central government. Equally clear is the fact that the property owners and the principal merchants had more in common with the Central Government than with the ordinary city residents. For as it is a common knowledge, this section of the community made up the core of the central government. And the main priority of the government could not have been anything other than the protection of the wealthy and its property. There is no indication that the empowerment of city residents figured among their major priorities. This then was the time when urban residents as the rest of the people looked up to the Emperor and proxies for guidance and leadership. There was no provision whereby the people could take part in the governance of their cities. And above all, cities remained without constitutional recognition and protection.

In 1945, the Government issued a new proclamation: Municipalities' Proclamation no. 74/1945[17]-A Proclamation to Provide for the Control of Municipalities and Townships. As the title of the proclamation itself

[17] Municipalities proclamation-A Proclamation to Provide for the Control of Municipalities and Townships, 1945, Proc. No. 74, Negarit Gazeta, Year 4, No. 7.

indicates, the objective of the proclamation was to tighten Government control over municipalities and townships and not to relax the grip.

The Mayor/Town Officer who was directly accountable to the central government continued to be responsible for the "control, management and good government of municipalities" (Article 7). Similarly, in essence, the manner of representation in the Council remained unchanged. Thus, the Council continued to comprise of representatives of Government Ministries and 7 resident members elected by owners of immovable property in the town. One may note that previously, the 7 members had to be property owners themselves. This time, the property owners designated the Councilors. One wonders if this slight change in the manner of representation made any substantive difference in terms of enhancing public participation. For the landed gentry would still vote for another land lord thereby ensuring the protection of his wealth. The above two pieces of legislation clearly indicate that in those times the central government and not local governments managed even the day-to-day affairs of the urban centers.

Nine years later, the Imperial Government issued a relatively more progressive law: General Notice No. 172 of 1954-Charter of the City of Addis Ababa.[18] This Charter confirmed the right of the city residents (see the preamble to the Charter) to self-administration. For the first time in the development of municipal law, this Charter affirmed the right of city residents to elect their representatives to the city council. Under the Charter, Neither candidates nor electors were required to own property. The Charter provided that the council shall comprise of a total of 28 members out of whom 20 would be elected by the residents and the other 8 would be officials

[18] Charter of the City of Addis Ababa, 1954, General Notice No. 172, Negarit Gazeta, Year 13, No. 10.

from the different Government Administration. This was a significant change in the manner of representation of city residents. Furthermore, the inhabitants of the city were declared to be "a municipal body politic and corporate in perpetuity" (Article 1 of the Charter) and all legislative powers and the determination of policy was vested in the Council of the city administration (Article 15). Accordingly, in the Council rested the power to levy taxes, rates and fees, adopt budget, authorize the issuance of bonds, decide on the sale of own property and purchase of land for its various purposes.

One other power assigned to Addis Ababa then but which some Regions[19] even at present have not bestowed upon their cities is the power to make local laws. Thus, Article15/g of the Charter provided as follows: "The Council shall have power to adopt and amend local laws in relation to the property affairs or government of the city, the conduct of its inhabitants and the protection of their property, safety and health."

It is also interesting to note that technically the city administration budget did not need to be approved by the imperial government. All the government had power to do was check the legality of the budget (see Article 59/a). Thus, legally, the imperial government did not have the power to tell the city administration which project to execute or which not to. However, it could check whether the activities planned to be carried out were consistent with the law, whether the sources of finance referred to in the budget were legal etc.

[19] The Tigray National Regional State Organization and Definition of Powers and Responsibilities of Cities,2006, art.13, Proc. No. 107, Tigray Negarit Gazeta, year 14, No. 14. As Amended.

The General Notice also regulated the relationship between the Government and the City Administration. Thus, article 59 stipulated that the state may intervene in the operation of the city only when the city failed to discharge its responsibilities under the law. In the event the city got dissatisfied with the measures taken by the Minister of Interior, it had the right to appeal to the Emperor.

There is no question that the broad powers assigned to the city of Addis Ababa signified a big change in the development of self-rule in cities. However, the fact that the Emperor continued to retain some key powers severely compromised the latitude of freedom that seemed to have been opened to the city. Thus, the Charter empowered the Emperor to appoint the Kentiba who was not only the Chief Executive Officer of the city but also the president of the council. As well, the Emperor retained the power to appoint the Secretary General and the Director Generals of the various departments of the Municipal Authority. Furthermore, the Charter stipulated that even the Kentiba may not take disciplinary measures against those municipal officials appointed by the Emperor without his prior agreement.

The significance of the above may be stated as follows:

1. Although the Addis Ababa city residents were empowered to elect the majority of the council members, the council was likely to be dominated by government representatives who were likely to be better educated, better informed and more persuasive than the ordinary council members. Moreover, the ordinary council members might, for fear of being marked and derided by Government representatives, not freely express their views. In such circumstances, the likelihood was for the council to play the role of a rubber stamp.
2. The fact that the Emperor retained the power to appoint and relieve the Kentiba who was not only the chief executive but also the

president of the Council also meant an additional clout for the Emperor to control the city administration.

3. By assigning to the Emperor the power to appoint and discipline the Secretary General and the Director Generals of the various Departments, the law further deepened the centralization drive of the Government.

The right to self-administration that the Charter purported to guarantee was therefore subject to the broad powers vested in the Emperor.

2. 2 City Laws under the Military Government

The seventeen years of rule by the Military Government (1974-1991) did not bring any meaningful change to the scope of power of city administrations. No constitutional recognition and protection was granted to cities during that time. Nor was there enacted any comprehensive city legislation. Whatever was enacted that pertained to cities only politicized their administration.

The first relevant legislation was the Government Ownership of Urban Lands and Extra Houses Proclamation No. 47/1975.[20] This Proclamation nationalized all urban lands and all urban extra houses. The implementation of the proclamation necessitated the establishment and definition of the powers of the following institutions:

1. Cooperative Societies of Urban Dwellers which included:
   - Cooperative Societies of Urban Dwellers (Lower level, later named as "Kebele")
   - Higher Cooperative Societies of Urban Dwellers
   - Central Cooperative Societies of Urban Dwellers
2. Judicial Tribunals
3. The Ministry of Public Works and Housing

[20] Government Ownership of Urban Lands and Extra Houses Proclamation, 1975, Proc. No 47, Negarit Gazeta, Year 34, No. 41.

The lower level of the Cooperative Society was established in each unit of urban area as determined by the Ministry. In those urban areas where there were more than one lower level of cooperative societies, a Higher Cooperative Society was formed; and where there were more than one Higher Cooperative Societies, a Central Cooperative Society was established.

The Cooperative Societies at all levels had their own juridical personality and were empowered to "set up, with the cooperation of the Government, educational, health, market, road and similar services necessary for the area"(Article 24/3).

The judicial tribunals, on the other hand, were empowered to resolve disputes involving urban land or houses; and the Minister was given the duty to ensure the establishment of the cooperative Societies and to consult them. However, the law failed to clearly define the structure of the societies, the role of the residents in the management of the urban centers and whether the Societies had the authority to administer the urban centers. Issues pertaining to the power of the urban centers to hire, manage and fire their employees, the power to prepare and approve their plans[21] and the power over finances remained unaddressed. No less vague was the relationship between the Government and the cooperative societies.

Subsequent proclamations threw light on some of the unanswered questions. One such proclamation was the Urban Dwellers' Associations Consolidation and Municipalities Proclamation No. 104/1976.[22] This Proclamation sought to strengthen the organizational set-up of the mass organizations created by

[21] Urban Dwellers Associations Consolidation and Municipalities Proclamation, 1976, Proc. No. 104, Negarit Gazeta, Year 36, No. 5.

[22] Urban Dwellers Associations and Urban Administration Proclamation, 1981, Proc. 206, Negarit Gazeta, Year 40, No. 15.

Proclamation No. 47/1974 through the provision of "proper revolutionary guidance to the mass organizations which the revolution has already created or will create by coordinating their activities and organization" (Paragraph 2 of the preamble). The principal aim of the Associations was stated to be the realization of the goal of the revolution and not of the principle of self-rule. It might be proper to note here that article 6/1 of the Proclamation stipulated that one of the primary tasks of the Associations was to "enable the broad masses of urban dwellers to administer their own affairs." However, the law that article 40/2 envisaged to be enacted "...to enable self-administration to municipalities in non-chartered urban centers..." was never enacted. As a consequence, municipalities remained without acquiring the right to administer their local affairs.

The focus of the Military Government continued to be what Article 6/2 stipulated in the clearest of terms: To develop the ideology of the broad masses in line with the philosophy *Hebretteşebawinet* with a view to enablingthem to struggle against feudalism, imperialism and bureaucratic capitalism and their influence.

Addis Ababa, the only chartered city, maintained the status it acquired during the time of the Emperor (article 40/2). It continued to be a chartered city. Like in previous times, the city had broad powers; but the power to designate the mayor who was not only the chief executive of the city but also the chair person of the City Congress remained with the central government. To have a complete picture of the situation, one needs to add to this the fact that the City Council members themselves had to be "...of the broad masses who accept the Ethiopian National Democratic Revolution Program", another way of saying 'strong supporters of the Government.' If the Executive and the Legislative were under the full control of the government, as they were, then

the Council and the Mayor were simply rubber stamps as they were during the reign of the Emperor.

Some four and half year later, the Military Administrative Council issued the Urban Dwellers' Associations and Urban Administration Proclamation No. 206/1981[23], a proclamation that sought to further consolidate the "gains of the revolution." A reading of the following provisions testifies to that effect: Article 6/2 reads: "Every Urban Dwellers' Association formed at every level shall have the following purposes: ...2. to enable the broad masses of Urban Dwellers to be armed with Marxism-Leninism and contribute their due shares in the struggle to liquidate from the land of Ethiopia feudalism, imperialism and bureaucratic capitalism".

This was further strengthened by article 9/2 of the proclamation which defined the powers and duties of Urban Dwellers' Associations (UDAs) at all levels in line with the above.

To effectively realize the above, the Proclamation stipulated that only those who were the allies of the broad masses and had accepted the National Democratic Revolution Program of Ethiopia were eligible to be elected as members of the UDA Organs (Article 8 /1/b). Article 19/1 was a further illustration of the extent to which the Government sought to politicize the operation of urban centers. That provision which dealt with one of the leading organs of the UDAs i.e., the Revolution Defense Committee, stipulated the following to be one of the primary functions of the Committee:

[23] Urban Dwellers Associations and Urban Administration Proclamation, 1981, Proc. 206, Negarit Gazeta, Year 40, No.15.

> Follow up and notify the executive committee of any conspiracies plotted against the revolution, unity and independence of Ethiopia; where he finds a person in *flagrante delicto* in connection with such offence or where he has satisfactory reason to believe that an offender of such an offence is likely to disappear or to tamper with such evidence or is likely to commit further offence, arrest such offender and hand him over to the nearest police station and forthwith notify the executive committee of same.

This was a clear indication that the proclamation placed emphasis not so much on enabling municipalities to exercise self-rule and to ensure the provision of services to the residents as to strengthen the revolution, something that was neither sufficiently clear nor tangible. The importance given to the idea of enhancing the revolution was so big that the municipal functions given to the UDAs by article 39 of the Proclamation remained totally engulfed in the overarching purpose of strengthening "the gains of the revolution." It is also important to add here that as both the chartered and the un-chartered cities were supervised and directed by the government (articles 70 and 71), self-rule, in its true sense, could not have been realized.

It was against this background that the Social changes of 1991 took place. The year 1991 marked the start of a transitional period of four years. In July of this year, the Peaceful and Democratic Transitional Conference of Ethiopia issued the Transitional Period Charter of Ethiopia.[24] That Charter laid down the rules and principles that governed the Transitional Period. One of those principles which was stated under article 2 of the Charter affirmed the right of Nations, Nationalities and Peoples to self-determination. This included the right to administer their own affairs. However, there is no language in the Charter that suggests that such right has also been guaranteed

[24] The Transitional Period Charter of Ethiopia Proclamation, 1991, Proc. No. 1, Negarit Gazeta, Year 50, No. 1.

to urban centers. The question whether the terms "Nations, Nationalities and Peoples" include cities will be discussed under the following section.

It would now be in order to examine current laws dealing with the right of cities to self-rule. A review of the state of such laws in the FDRE must start with a brief review of the relevant sections of the Constitution of the country.

3. The FDRE Constitution[25]

The FDRE Constitution introduced a swift change to the long standing center-city relationship. For as of the coming into effect of the Constitution (August 21, 1995), the ultimate authority over city affairs which includes the authority to make city laws shifted from the center to State Governments. The authority to make city laws no longer falls under the jurisdiction of the central government but under that of the regional governments. (Note that article 51 of the FDRE Constitution which lists the powers and functions of the Federal Government does not include city affairs therein; and in accordance with article 52/1 of the FDRE Constitution any power that has not been expressly given to the Federal Government is reserved to the States). This is without prejudice to the authority of the Federal Government to issue standards and laws that have country-wide significance (article 51). In view of this, it appears that the Federal Constitution has not opted to incorporate any express provision on the cities of Ethiopia. It does not extend express recognition and protection to the right of the residents of cities to self-government. Nor does it lay down principles and standards that State constitutions and city laws should observe in order to be valid.

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[25] Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc. No. 1, Federal Negarit Gazeta, Year 1, No. 1.

It would now be proper to ask if the FDRE Constitution, by implication, provides recognition and protection to city residents. This question is prompted by the reading of the following three constitutional articles: Article 88/1 which defines the national political objective, Article 52/1/a which stipulates the primary function of the Regional State; i.e. "to establish a state administration that best advances self-government ..." and article 39 which, among other things, defines the term "people". Sub-article 1 of article 88 which stipulates the national political objectives provides as follows: "Guided by democratic principles, Government shall promote and support the people's self-rule at all levels."

A simple reading of the above seems to suggest that city residents being "people" in the conventional sense of the term, the Government's duty to promote and support self-rule extends to city residents as well. See, for instance, the definition that the Random House Dictionary of the English Language (College Edition, 1968) gives to the term "people": "The persons of any particular group or area". But the FDRE Constitution has opted to give its own definition to the term. And what makes this particular definition interesting is that the term is defined along with "Nations and Nationalities". This means that the elements of the definition that constitute "Nations and Nationalities" would be equally required for the definition of the term "people". A brief look at article 39/5 of the FDRE Constitution makes this clear:

> A Nation, Nationality or People" for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up and who inhabit an identifiable, predominantly contiguous territory.

Note that this definition is not for the purpose of this article alone; but for the whole Constitution. What this means is that the definition applies equally to the term "people" in article 88/1. And the question that arises is whether the term as defined in article 39/5 includes also the community of city residents.

This makes it incumbent upon one to review the essential elements of the definition and the implications of being covered by the definition.

- **People must share a large measure of common culture or similar customs**. It is certain that city dwellers have many things in common. They work together, share streets, shops, markets, cinema and theatre halls, stadiums, cafes etc. But people of different nationalities keep their own cultures and customs. They wear their own traditional clothes, dance their own dances, speak their own languages and at least on holidays they eat their own way. This diversity makes it difficult for one to understand city residents as "people".
- **People must have mutual intelligibility of language**. If one takes Addis Ababa as an example. Amharic is the working language of the city government; however, peoples of different nationalities use languages of their nationalities to communicate among themselves. The diversity of the language in the city makes it difficult to understand Addis Ababa as a "people" in the context of Article 39/5.
- **People must believe in a common or related identity**. By its nature which emerges from the diversity of its inhabitants, a city cannot have one identity. Its residents therefore, tend to identify themselves with their ethnic groupings. This hampers one from identifying a city as a "people".
- **People must have a common psychological make-up.** City. residents who do not share a common identity can not be understood to entertain a common psychological make-up.

- **People must inhabit a contiguous territory.** This is the one criterion that city residents meet; but the criteria listed above are cumulative.

It is therefore not possible to argue that city residents are "people" in the context of article 39/5. This, in turn, means that they are not people under Article 88/1. The way the term "people" is used in other parts of the FDRE Constitution also suggests that the term was not intended to include city residents. Consider Article 47/ 1/9 that defines the Hararis as a "people". For ethno-linguistic purposes, Hararis are considered to be one people. The people share same history, same language, same religion, same identity and live knotted in a very small space. In a similar fashion, sub-article 8 of the same article describes Gambella as "the state of the Gambella Peoples". The plural form must have been used here to signify the diversity of the ethnic groupings that inhabit the region. The five ethnic groups that live in the region namely, Anywaa, Nuer, Majangir, Opo and Komo make up only a total population of 228,000.[26] Nations like Amhara, Tigray and Oromo have much larger populations. This seems to suggest that while the smallness of the population size may distinguish "people" from "Nations and Nationalities", the strength of the tie among the ethno-linguistic group (people) is such that its definition cannot include city residents.

It is also here argued that the right to "self-administration including the right to secession" that article 39/1 bestows upon Nations, Nationalities and Peoples could not have been intended to apply to cities as well. It would be absurd to think that the legislature intended to authorize the hundreds of cities in the country to enjoy the right to secession.

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[26] Dereje Feyissa, 'The Experience of Gambella Regional State' in David Turton (Ed), *Ethnic Federalism, The Ethiopian Experience in Comparative Perspective* (A.A.U Press, 2006) p. 209.

The above makes it clear that the term "people" under article 88/1 could not have been intended to include city residents. The FDRE Constitution does not therefore guarantee the right of city residents to self-rule. The review of the above two provisions indicates the close relationship between the term "people" and "self-rule". But there is article 52/2/a that requires States to establish administration "...that best advances self-government..." This stipulation does not expressly relate self-government to people. One question that becomes inevitable is therefore: Whose right to self-rule? One of the basic rules of interpretation of laws requires that their provisions be interpreted through one another so that each provision is given the meaning that the whole requires. This means that article 52/2/a would get its proper meaning only if it is read along with, among others, articles 88/1 and 39. But we have seen already that the later provisions restrict the application of the right to self-rule to "people" and that the term "people" does not include the community of city residents. It would therefore be logical to argue that the "self-government" that article 52/2/a refers to too applies to "people" and not to city residents.

Some might entertain the view that the language of article 50/4 of the FDRE Constitution implies the recognition to the right of city residents to self-rule. This writer differs. A brief look at the provision would make the point of difference clearer:

> State government shall be established at state and other administrative levels that they find necessary. Adequate power shall be granted to the lowest units of government to enable the people to participate directly in the administration of such units.

This Constitutional provision, no doubt, extends express recognition to the State and the "administrative levels" under it. But the question is: are cities one of the state administrative levels that article 50/4 envisages? It is here argued that they are not. In the first place, the law maker itself does not recognize cities as one of the administrative levels of States. In the brief explanatory note that the House of People's Representatives endorsed regarding Article 50/4, it is stated as follows: [27]

> The provision stipulates three fundamental principles:
> 1. Regional States shall be established at State and Woreda levels.
> 2. Where found necessary, they (States) may establish a third administrative level(e.g.–Zone) between the State level and the Woreda level. And,
> 3. The Woreda people shall participate fully and democratically in the administration of the Woreda.
>
> (The Amharic text has been translated into English by this author.)

Secondly, Regional State Constitutions do not recognize cities as one of the administrative levels of the regional administrations. See for instance, art. 45 of the Amhara Constitution, article 45 of the Oromia Revised Constitution and article 45 of the Revised Constitution of the Southern Nations, Nationalities and Peoples Regional State (SNNPRS). They recognize Zones, Woredas and kebeles as State administrative levels; but not cities.

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[27] አንቀጽ 50 (4) ላይ የተሰጠ ማብራሪያ
"ድንጋጌው ሦስት መሠረታዊ መርሆችን ይደነግጋል"፡-
1. ክልሎች በክልል መስተዳድርና በወረዳ መዋቅር እንዳለባቸው
2. ክልሎች የሚያስፈልጋቸው ከሆነ በክልል መስተዳድርና በወረዳ መሃከል ሦስተኛ የሥልጣን እርከን (ለምሳሌ ዞን) ሊያዋቅሩ እንደሚችሉ እና
3. የወረዳ ሕዝብ በወረዳው አስተዳደር ውስጥ የተሟላ ዲሞክራሲያዊ ተሳትፎ እንዲያደርግ
ከድንጋጌው ለማየት እንደሚቻለው ከፍተኛ ትኩረት የተሰጠው ሕዝቡ በዝቅተኛ የአስተዳደር እርከኖች ለሚኖረው ቀጥተኛ ተሳትፎ ነው፡፡ የዲሞክራሲ መሠረቱ ይኸው በመሆኑ የሕዝቡ ተሳትፎ በዝቅተኛው የስልጣን እርከን ውስን ከሆነ የተሟላ ዲሞክራሲያዊ ሥርዓት ሊሰፍን አይችልም፡፡"
የኢፌዲሪ የሕዝብ ተወካዮች ም/ቤት፡- <u>በኢፌዲሪ የሕዝብ ተወካዮች ም/ቤት የፀደቀው ሕገ-መንግስት ረቂቅ አጭር ማብራሪያ</u> (አዲስ አበባ፣ ጥቅምት 18/1987 ያልታተመ በፓርላማ ቤተመጻሕፍት የሚገኝ) ገጽ 102

Such being the case, it is difficult to argue that article 50/4 recognizes the right of cities to self-rule. The above leads one to conclude that the Federal Constitution does not recognize either expressly or impliedly the right of city residents to self-rule.

The city of Addis Ababa is the only exception. Addis Ababa being the capital city of Ethiopia, the seat of the Federal Government and home for a host of international organizations finds its legal basis in the FDRE Constitution (see article 49). Thus, article 49/2 stipulates that the residents of Addis Ababa shall have a full measure of self-government. To realize this constitutional provision, the Federal Government enacted the Addis Ababa City Government Revised Charter Proclamation No.361/2003.[28]

Dire Dawa, the other city that has been made directly accountable to the Federal Government since 1993, as well, received its Charter[29] from the Federal Government. This status of Dire Dawa city is likely to last only until such time the Oromia and Somalia Regional States resolve the issues of claims over the city.

It is not uncommon for Federal constitutions not to incorporate express provisions recognizing the right of municipalities to self-government. The Constitution of the United States of America is a good example. But American cities have for long been enjoying the right to self-rule even in the absence of a clear constitutional provision recognizing the right. In countries where they have a rich tradition of local self-government, the threat of interference from Federal and State officials in the operation of local

[28] The Addis Ababa City Government Revised Charter Proclamation, 2003, Proc. No. 361, Federal Negarit Gazeta, Year 9, No. 86.

[29] The Diredawa Administration Charter Proclamation, 2004, Proc. No. 416, Federal Negarit Gazeta, Year 10, No. 60.

government units can only be rare if ever. In countries where the right to self-rule has never been exercised and the tradition had for long been for government officials to administer urban centers as they pleased, the incorporation in the constitution of an express provision recognizing and protecting municipal self-government would signify a break from the unacceptable tradition of wrong practices. It is in view of this that one asks whether the FDRE Constitution should not have incorporated an express provision that guarantees and protects the right of city residents to manage their local affairs. It is submitted that even if the power to enact detailed city laws has been left to Regional States alone, there is no ground to deny the Federal Constitution the authority to extend broad recognition to the right of cities to self- rule.

It is also further argued that the Federal Constitution alone may lay down the standards and principles that Regional States shall observe in crafting their Constitutions and city laws. It is only such stipulations that could provide cities with effective shield against possible encroachments by Federal and Regional authorities.

To state as some do that article 50/4 lays down such principles and standards is to read too much into the provision. First of all, as noted above, this provision does not apply to cities. Secondly, it is difficult to read the provision as laying down principles and standards. A statement of principles and standards would have sought answers to such questions as: what constitutes "adequate power"? How is that power exercised? By whom? etc. There is no strong language that suggests that the provision was intended to lay down detailed principles and standards that guide the drafting of city laws. What one can rightly call a statement of principles and standards is best exemplified in the Constitutions of South Africa and India.

The 1996 Constitution of the Republic of South Africa and the Indian Constitution as amended in 1992, justify the above line of thinking. The South African Constitution devotes one whole chapter (Chapter 7) comprising of 14 articles to municipal affairs. The constitution incorporates express provisions which not only expressly recognize the right of residents of municipalities to manage their local affairs (article 151(2) & (3)) but also make it unconstitutional for both the Federal and Provincial Governments to compromise or impede the right of municipalities to exercise their powers and carry out their functions (Article 151(4)). The national constitution incorporates the above-cited provisions with the full realization that provinces may promulgate constitutions and enact laws that detail the right of municipalities to self-government. So when the drafters of the South African Constitution decided to incorporate Chapter 7 into their National Constitution, they meant to lay down the principles and standards regarding municipal self-government that any national or provincial law including Provincial Constitutions must observe at the risk of being null and void.

India, a federal state, has similar stipulations in its national constitution. The Constitution (Seventy-Fourth Amendment) Act, 1992 which devotes 17 articles to matters pertaining to municipal self-government not only recognizes the right of municipal residents to manage their local affairs but also lays down the principles that State laws pertaining to municipal self-government should respect (Part IXA). There are other federal constitutions that extend, albeit briefly, express recognition to the right of city residents to manage their local affairs.[30]

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[30] See, for instance, the Basic Law for the Federal Republic of Germany, 1949, art. 28/2, Federal Law Gazette.

To sum up: considering the long tradition of unsatisfactory management of urban centers by central officials and the need to put an end to any form of encroachment by Federal and Regional officials in the exercise by city residents of their right to self government and the need further to state the standards and principles that Federal and Regional laws pertaining to municipalities should observe, it is here argued that the FDRE Constitution should incorporate clear provisions that recognize and protect the right of cities to self-government.

4. The National Urban Development Policy

As if to fill the gap in the FDRE Constitution, the Federal Government issued in March, 2005 the National Urban Development Policy (NUDP)[31] which extends an express recognition to the right of city residents to manage their local affairs. The Policy also states the principles that Regional constitutions and city laws shall incorporate. Thus, Article 5.1 of the NUDP stipulates as follows:

> The broad power and the corresponding responsibility of City administrations to manage their local affairs shall be expressly confirmed by law. Especially Regional Constitutions shall expressly recognize their right to self-rule; and laws shall be enacted to provide the details. Accordingly, cities shall have their own sources of revenues, the right to receive budgetary supplements from the Government; to have their own popularly-elected councils, to establish city courts; to have the right to issue subsidiary laws.

Although the preceding provision could have been drafted in such a manner as to bring forth the essence of self-rule in a more developed form, the very fact that the essential elements of self-rule have been named properly

[31] Ministry of Federal Affairs, cited above at note 3.

provides a good guide for Regional States in crafting their laws. However, as we shall see shortly, Regional Constitutions fall very far short of expectations.

5. State Constitutions and the Right to Self-rule

Regional Constitutions incorporate an almost identical provision on municipalities; but that provision does not guarantee the right of city dwellers to self-rule. The following is a typical provision: "Towns in the State shall have their own administration. Particulars shall be determined by law." (Article 45/3 of the Revised Constitution, 2001 of the Southern Nations, Nationalities and Peoples' Regional State Proclamation No. 35/2001.)

Article 45/4 of the "Benishangul Gumuz Regional State Revised Constitution[32] is equally ambiguous. It stipulates: "Cities of the Regional State shall have their own administration which promotes their development. Particulars shall be determined by law." What both constitutions fail to make clear is the scope of the term "administration". It is not clear whether this provision constitutes recognition of the right of urban dwellers to self-rule. Do those provisions entitle city residents to have their own councils? Do residents elect their own councilors? Or would the Regional Government designate the councilors for them? Would cities have their own sources of revenue? Would they have the power to manage those revenues? Would they have the power to manage their employees? Or would they simply manage employees hired and sent to them by the Regional Government? And most importantly, what would be the nature of the relationship between cities and the government? The above cited constitutional provisions do not give

[32] The Benishangul Gumuz Regional State Revised Constitution Approval Proclamation, 2002, art. 45/4, Proc. No. 31, Lissane Hig Gazeta, Year 8, No.4.

answers to these questions. The term "own administration" is at best ambiguous.

The Amhara Constitution, as well, is open to similar questions. It provides as follows:

> ... urban centers within the Regional State may have their own councils
> with the view to enhancing their development. Particulars shall be determined
> by law." (Article 45/4 of the "Revised Amhara National Regional Constitution Approval Proclamation No. 59/2001)

Why only Council? What type of Council? How is it constituted? With what powers? The other questions raised earlier would be equally valid here too. It is interesting to note that there are also State constitutions that fail to incorporate even such ambiguous provisions. This is thus the case with the "Revised Constitution of the Tigray National Regional State Approval Proclamation no. 45/2001" and the Proclamation to Enforce the Oromia Regional State Revised Constitution of 2001, No. 46/2001." These constitutions remain silent on the issue of the right of cities to self-rule.

What is even more proper to note here is that at least in Tigray there seems to prevail among law makers the position that the Regional Constitution as it stands today provides recognition and protection to the right of cities to self-rule. In a discussion with the representatives of the Tigray Regional Council, with regard to regional laws and decentralization in Ethiopia,[33] the representatives asserted in unison that the absence of an express provision on

[33] The discussion was held in Mekelle, on January 20-22, 2009, between Ms. Anja Kiesling and this writer on one hand and the representatives of the Tigray Regional Council on the other.

cities cannot affect cities negatively because they are protected by Article 45/1 of the Regional Constitution. That article provides as follows:

> The Regional State shall be organized in State, Woredas and Kebeles. However, the Regional Council, where it deems necessary, may establish other administrative hierarchies and define their powers and responsibilities.

Their argument was, and presumably is, that although there is no express provision, cities being hierarchies like woredas and Kebeles they benefit from the protection extended by the above provision.[34] That argument is not valid for the following reasons:

1. Additional hierarchies here are meant to refer to such hierarchies as Zones and Special Woredas (as is the case in Oromia and the SNNPRS) and not to cities. Cities are different in their composition, nature of settlement, size of investment and the role they play in the economic dynamics of the country. That is why they are governed by special laws.
2. The NUDP recognizes them as different and distinct entities which require and deserve to be managed in a manner that suits their special characteristics. That is why the NUDP requires[35] Regional States to

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[34] Anja Kiesling &Tamerat Delelegne, The Legal Framework for Local Governance-Decentralization in Ethiopia (February, 2009, unpublished, available with the GTZ, Addis Ababa) PP. 20-21.

[35] One may be tempted to ask if the Federal Government could, by means of a policy, require Regional Governments to incorporate in their Constitutions detailed provisions on self-rule. It is here argued it can. This position is justified by art. 51 of the FDRE Constitution. Art. 51/2 bestows upon the Federal Government the authority to issue policies in respect of overall economic, social and development matters. Urban development being one form of development, it is an area over which the Federal government could issue policies. But policies are issued so that they may be implemented by either the Federal government or the Regional government or by both levels of government as the case may be. Since urban affairs fall under the jurisdiction of the Regional government, it was legal and logical for the National Urban Development Policy to require Regional Governments to incorporate in their constitutions the principles of city self-government.

incorporate in their constitutions express provisions that recognize and protect the right of city residents to self-rule.

Now that it has become clear that even the Regional Constitutions do not confirm unambiguously the right of city dwellers to manage their local affairs one asks whether it would not have been appropriate for the constitutions to have done so. As the Federal Constitution has left the matter to be addressed by the Regional Constitutions, they should have addressed the issue squarely. In addition; the NUDP clearly requires[36]regional constitutions to expressly recognize the right of city residents to self-rule. It would also be appropriate to add that while a lot of space has been devoted to "the Kebele"[37], which is the lowest unit of Government, as it is of the city administration, not even a single adequately articulated provision has been allocated to cities. On average, 11 constitutional articles have been devoted to the Kebele which is a subsidiary of the city administration while not one clear provision has been devoted to the more important entity- the city.

Constitutional guarantees are being strongly argued for here because they provide a stronger shield against possible encroachments by regional and even federal officials. Constitutional provisions provide stronger protections because they are very difficult to tamper with. Amendments thereof too are difficult and closely scrutinized. It takes 50%+1 of the simple majority of the Regional Council members to amend a city law (See for instance article 54/2

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[36] Ministry of Federal Affairs, supra note 3, p. 26.

[37] See for instance: A Proclamation Issued to Provide for the Approval of the 2001-Revised Constitution of the Amhara National Regional State, 2001, Chapter 10, Proc. No. 59, Zikre Hig, Year 7 No. 2; A Proclamation to Enforce the Oromia Regional State Revised Constitution, 2001, Chapter 10, Proc.No.46, Megeleta Oromia. (Year & No. not provided), Revised Constitution, 2001, of the Southern Nations, Nationalities and Peoples Regional State, 2001, Chapter 10, Proc. No.35, (Gazette Name, Year & No. not Provided.), The Benishangul Gumuz Regional State Revised Constitution Approval Proclamation, 2002, Chapter 10, Proc. No. 31,Lissane Hig Gazetta, year 8, No.2.

of the Revised Constitution of the ANRS). Compare this to what it takes to amend the Constitution. A Regional Constitution can only be amended if: 1st, half of all the Woreda Councils approve the proposed amendment; 2nd two-thirds of the members of one of the Nationality Councils approve it and 3rd three-fourths of the members of the Regional Council approve it (See for instance art. 118 of the Revised Constitution of the ANRS). So incorporation in the constitution of provisions that guarantee the right to self-rule would make it difficult to amend the city laws in a manner that negatively affects the right of cities to self-rule.

Following the conclusion that the FDRE Constitution does neither expressly nor impliedly extend recognition to the right of city residents to self-rule and that regional constitutions incorporate only inadequate and highly ambiguous provisions in this regard, one would be tempted to ask whether there is any protection against state measures that chop off city right to self-rule. This question becomes even more disturbing when one realizes that the city proclamations do not define the procedure by which cities dissatisfied with the decision of regional governments could take their case to court. This is one issue that city laws should consider to address.

Nonetheless, it is consoling to note that in spite of this state of less than satisfactory constitutional situation, a new generation of progressive city laws has evolved.

6. City Laws and Self-Rule

The city laws of Ethiopia may be classified into two broad categories: category one comprises of the City Charters of Addis Ababa and Diredawa; while the second category comprises of city proclamations issued by Regional States. The essential difference between the two categories lies in

their accountability and the scope of power that is assigned to each of them. Thus, Addis Ababa and Diredawa both being federal cities their administrations are accountable to the Federal Government.[38] Cities established in accordance with regional laws are accountable to Regional Government organs.[39]

Consistent with the level of the government to which the two categories of cities are accountable, there is a significant difference in the scope of power assigned to each category. Thus, Addis Ababa and Diredawa are assigned the power of a Regional State.[40] Regional cities being under the jurisdiction of Regional States cannot have the same scope of power as federal cities.
Subject to the above, there is a similarity among all city laws of Ethiopia. In the following lines, an attempt will be made to see whether the Ethiopian city laws meet the widely accepted criteria for self-rule:

A. Legal Personality

All cities in Ethiopia established in accordance with Federal or Regional laws have legal personality and name and thereby have the legal capacity to exercise their powers and discharge their responsibilities and carry out other acts allowed by law. This includes the authority to enter into contracts, own property and sue and be sued. This status is given to both the Federal and

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[38] The Constitution of the Federal Democratic Republic of Ethiopia, 1995, art.49/3, Proc. No. 1, Federal Negarit Gazeta, Year 1, No.1; The Addis Ababa City Government Revised Charter, 2003, arts. 17/1.& 21/1 Proc. No. 361, Federal Negarit Gazeta, Year 9 No. 86; The Diredawa Administration Charter, 2004, arts. 15/1 & 20/1, Proc. No. 416. Federal Negarit Gazeta, Year 10, No. 60.

[39] See for instance: The Amhara National Region Urban Centers Establishment, Organization and Definition of their Powers and Duties Revised Proclamation , 2003, art. 44/4, Proc. No. 91, Zikere Hig, Year 9, No.2.

[40] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, 2005, art. 2, Proc. No.471, Federal Negarit Gazeta, Year 12, No.1.

Regional cities.[41] Exercising the right to self-rule would be inconceivable without securing this status.

B. Popularly Elected Councils

All city laws agree that all powers of a city shall vest in a popularly elected council and that it shall be for the Council to provide for the implementation of those powers. The City Proclamations are abundantly clear that council elections shall be held every 5 years in a free, direct and secret ballot.

In principle, all councilors are to be elected by the residents; however, some regions opt to reserve seats for certain minorities. The city proclamations of Oromia, the South, Jijiga and Benishangul-Gumuz stipulate that a certain percent of the council seats may be reserved to indigenous populations where such populations are in the minority. In Oromia, the maximum percentage of seats to be reserved to such minorities stood at 30% until the enactment of Proclamation No. 116 of 2006[42] which raised the percentage rate to 50%. This change has been stipulated by article 13/3 of the proclamation which provides as follows:

> When the number of Oromo residents in 1st and 2nd grade city is found minor or undersized, the Administrative Council of the National Regional Government may notice the number of Oromo people against other peopleand reserve 50% of the seats in the City

[41] The Addis Ababa City Government Revised Charter, supra note 28, art. 3, Diredawa Administration Charter, cited above at note 29, art. 3; Amhara National Region Urban Centers Establishment, Organization and Definition of their Powers and Duties Revised Proclamation, supra note 39,art.5; Jig-Jiga Municipality Proclamation , 1998, Proc. No. 55, Dhool Gazeta, Somali Regional State (Year & No. not provided) Art. 4.

[42] Proclamation No.116 of 2006 Issued to Amend Proclamation No. 65of 2003, the Urban Local Government Proclamation of Oromia National Regional State, 2006, Proc No. 116, Megeleta Oromia, Year 14, No.12/2006, art. 2/2/4. See also The Benishangul Gumuz Regional State Urban Centers Establishment, Organization and Definition of their Powers and Duties Proc., 2008, Proc. No 69, Lissane Hig Gazetta, Year 13, No.69 art. 10.

Council. The provision is also applicable to the Council of the city 'Ganda'

This is very similar to the Benishangul Gumuz City law that reserves 55% of the Council seats to the aborigines. In the same manner, art. 13/4 of the Oromia Proclamation No. 116 of 2006 raised the percentage of seats in the city council to be reserved to the residents of the rural areas that surround the city. That percentage which used to be 5% under the Urban Local Government Proc. No. 65/2003 has been raised to 20% under Proclamation No. 116/2006. What this means is that a total of 70% of the seats in the City Council is to be reserved to the local population when they are in the minority. Besides, the local population will compete for the remaining 30% of the seats. This, obviously, seriously affects the right of the majority to participate in the management of the city.

By contrast, the South seems to have opted to strike a balance between protecting the right of the minority to representation and the right of the majority to take part in the management of the city. Thus, article 16/3/1 of the Revised Southern Nations, Nationalities and People's Regional State City Administration Proclamation No. 103/2006 maintains the stipulation of article 15/1/a/iii of the City Administration Proclamation of the Southern Nations, Nationalities and Peoples Regional State No. 51/2002 that only up-to 30% of the City Council seats shall be reserved to the indigenous population of the city when they are in the minority.

The Somali Proclamation for the city of Jig-Jiga concurs in principle with the idea of reserving seats to the indigenous minority in the city but opts to leave it to the Regional Cabinet to determine the size of the seats to be reserved to the various clans.[43] In this connection, one needs to note that while it might

[43] Jig-jiga Municipality Proclamation, supra note41, art. 9/2.

be understandable to put in place mechanisms that help enhance the participation of all sectors of the community, it is no less important to ensure the proper protection of the basic rights of the majority.

As regards the manner of determining the size of council membership, there are some variations among the city proclamations. Thus, while article 12/2 of the Charter of Addis Ababa, article 11/2 of the Charter of Diredawa and article 14/2 of the Tigray city proclamation stipulate that the size of their Councils shall be determined according to the Electoral law, article 10 of the Amhara city proclamation provides that the number of council members shall be determined by State Council Regulations and that the number shall not be less than 11. On the other hand, article 18/2 of the Oromia City Proclamation sought it proper to determine both the minimum and maximum size for council membership. Accordingly, 15 has been made the minimum and 81 the maximum.

Two important factors appear to have been taken into account in determining the size of the Council: The interest in ensuring proper representation on one hand and ensuring the efficiency of the council on the other. This means that the size of the Council must neither be too small so as not to undermine the adequate representation of the constituency, nor too big so as not to render the council inefficient. The unavailability of local media via which councilors may easily access their constituency may tilt the balance towards a bigger council.

C. Powers and Duties

In terms of the extent of power vested in cities, one could think of two broad categories: Addis Ababa and Dire Dawa, the only two cities directly accountable to the Federal Government constitute the first category. Under

the second category fall all regional cities. As noted earlier, Addis Ababa and Dire Dawa, for all practical purposes, assume the powers and responsibilities of Regional States. The Charters of both cities confer on them legislative and judicial powers over matters specified in their respective charters. Moreover, the charters vest in the cities all executive power that has not been conferred on the Federal Government. This signifies that all residual executive power, as well, resides in the two cities.

In regions, powers and functions are conferred on cities by general legislation. There are no chartered cities in Regional States. But it is interesting to note that even the general legislation confers *general competence* on cities. The rule of general competence signifies that subject to law cities shall have all the power they need to manage their local affairs. Article 8/1 of the Amhara City Proclamation is a good example of such a rule. For it indicates the broadness of the power that the law seeks to vest in cities:

> A City Administration established at any level shall have the power to issue local policies and regulations and the executive and judicial powers it needs to administer the city in accordance with the National Regional Constitution and other laws. This shall include powers given by the Constitution and powers not plainly prohibited by such laws. All city administrations shall have all such powers as fully and completely as though they were specifically enumerated in this proclamation and no enumeration of powers herein shall be deemed exclusive or restrictive thereof.

This general statement of the power of cities has been further supplemented by a specific enumeration of powers and functions. This specific enumeration of powers and functions has no restrictive effect on the broad power assigned to cities. This is obvious from the above. What the enumeration does is instruct cities about the type and nature of powers and functions they have. It

also instructs the Regional Government of the powers and functions that exclusively belong to cities. The *ultra vires rule* which enumerates specific powers and prohibits cities from carrying out activities outside the list has not been found to be suitable to the Ethiopian situation.

D. Municipal Revenues

There can be no meaningful decentralization and *a fortiori* no self- rule for cities unless and until the power to mobilize and allocate resources has been transferred to them. Indeed, fiscal decentralization is at the heart of any serious decentralization program. Professor Olowu described the role of fiscal decentralization as follows: "While other elements-political, legal and organizational- are important, fiscal decentralization is regarded as the litmus test of genuine decentralization."[44]

The National Urban Development Policy of Ethiopia as well recognizes the importance of fiscal decentralization. Thus, it stipulates as follows: "... Cities shall have their own distinct revenue sources and shall at the same time be entitled to receive budgetary subsidies from the government...." [45]

A review of city laws indicates, among other things, that the law makers in the regions under study have clearly stipulated the revenue sources of cities.[46] Besides, the city laws expressly recognize the right of cities to allocate their resources as they see fit. City Councils have the final authority to approve the

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[44] Dele Olowu, 'Comments on A Study on the Legal Status, Role, Responsibilities and Relationships of Municipalities in the Amhara National Regional State' (Netherlands, 1998, unpublished available with the gtz), P.9.

[45] Ministry of Federal Affairs, supra note 3, p. 26.

[46] Amhara National Region Urban Centers Establishment, Organization and Definition of their Powers and Duties Revised Proclamation, supra note 39, art.49; Tigray National Regional State Urban Finance System and Administration Regulation, 2008, arts. 5 & 6, Proc. No. 50, Tigray Negarit Gazeta, Year 16, No.4

budget of the city. No Federal or Regional Government organ has the authority to reverse the decision of the City Council except in those cases where the legality of the budget is in question.[47]

City laws also clearly specify the sources of revenue of city administrations. These include: property tax, service charges and block grants from the government. Many agree that land rentals and incomes from land lease could constitute good and reliable income for a city. The following is an indication of the degree of importance some attach to property tax: [48]

> In respect of local resources, the only one which can be made to yield really large sums is property rating, the use of which should be extended to all Local Governments progressively, beginning with the urban areas.

However, it is important to note that in order for property tax collection to be effective, property valuation systems and mechanisms need to be put in place.[49] This means among other things: determining the criteria for valuation, determining the period for valuation, computerizing valuation and having a trained manpower.[50] There is no indication that cities in Ethiopia periodically valuate immovable property within their geographic boundaries. Not at least in such a comprehensive manner as to impact their revenue. But nonetheless, there is no question that property tax constitutes an important source of revenue for a city and therefore, the fact that it is designated as one of the sources of revenues of the city contributes to the financial independence of the city and hence to confirming the right of its residents to self-rule.

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[47] See for instance Amhara National Region Urban Centers establishment, Organization and Definition of their Powers and Duties Revised Proclamation, supra note 39,art. 48.

[48] Federal Republic of Nigeria, 'Guidelines for Local Government Reform' (Lagos, 1976), P.13.

[49] ibid

[50] ibid

Other sources of revenue including service charges have also been recognized to fall within the power of the city. Block grant is yet the other important source of revenue for the city. Regional Governments allocate block grants both to the Woredas and cities to enable them render basic services to their residents. Regional Governments allocate block grants on the basis of the following principles:

- Support cities financially so that they acquire the capacity to finance basic expenditure needs;
- Encourage and reward effectiveness and effort making;
- Ensure that grants allocated to lower administrative hierarchies are reliable and ever increasing;
- Budget allocation shall be equitable and shall focus on low income earners but with relatively higher revenue needs;

- Ensure that transparency prevails and that the specific purpose of the grant is clearly defined.
- Extend the grant in block.[51]

Budget proclamations and working documents show that block grants allocated to cities by far exceed the revenues raised by the cities themselves.[52]In Tigray, the draft budget proclamation for the Ethiopian Fiscal year 2000 indicates that out of the Region's annual budget of Birr 1.4 billion, Birr 872 million was obtained from the Federal Government and only Birr 300 million has been raised from within the Region. Out of this, about Birr 186 million has been allocated to cities.

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[51]ANRS, the Bureau of Finance and Economic Development, EFY 1999 Woredas and Cities Budget Allocation Formula and Budget Ceiling, (Bahr Dar, June, 2006) pp 8-9

[52] See art.2 (a)&(b) of the Tigray National Regional State draft budget proclamation for the FY 2000EC, art. 2/a&b. Note that revenue collected by the Region from internal sources (including cities) was only Birr 300,000, 000.00 while subsidy received from the Federal Government was very close to Birr 872, 000,000.

The Amhara draft budget document is even more illustrative. It gives details regarding the proportion between budgetary subsidies given to cities and revenues raised from within the cities. Thus, out of the total annual budget of Birr 1,346, 542, 162 for a total of 103 Woredas and Cities for the Ethiopian Fiscal Year 1999 (2006-2007) only Birr 210, 222, 454 was to be raised from within the Woreda or city administration. The remaining Birr 1,136, 319,709 was to be supplied by the Regional Government in the form of budgetary supplement. The difference in size between the two elements of the budget is immense. Regional government contribution is more than four times bigger than the revenue raised by the Woreda or city administration.[53] This gives rise to the question whether the relative hugeness of the subsidy does not make cities dependent on the Regional Government for their revenues and whether as a result, cities would not be obliged to be accountable to the Government rather than to the electorate. While this may be a legitimate fear, it is not something that cannot be avoided. The problem can be minimized or even avoided by putting in place a system that defines the conditions, manner and timing of payment of subsidies. The Development Administration Group of the School of Public Policy of the University of Birmingham seems to support this line of thinking. Thus it argues: "Dependence on the center for revenue, as long as it is allocated on a rational and systematic basis, does not seem to be necessarily a recipe for local government weakness." [54]

Developing such a system calls for an understanding of the interests of cities and that of the Government. Obviously, cities are in a difficult position. They are required by law to provide services to their residents; and in order to do that they need finances. But as noted earlier, the size of revenue they could raise internally has not been able to match their expenditure need. This forces

[53] ANRS, the Bureau of Finance and Economic Development, supra note 51, pp 43-54.
[54] The Development Administration Group of the School of Public Policy of the University of Birmingham, Other People's Local government (Nov. 1996) p. 12.

them to seek government support. And they want that support to be consistent and reliable for only then can they prepare long term plans. At the same time, they do not wish to compromise their right to determine and prioritize their needs. On the other hand, the Government wishes to grant the supplement in a manner that discourages misappropriation and wastefulness. The Government also wishes to encourage and enhance competition among cities themselves. It is also important that the grant is provided in such a manner as to encourage cities to exert greater efforts and to be more innovative in generating resources from internal sources.

The system that governs the management of subsidies should take the above factors into account and should be put into law so that cities would know what to do in order to receive the grants. It is also important to note that as cities are bound by the law, the Regional Government itself should strictly adhere to its stipulations. Allocation that is governed by such clearly defined systems should enable cities to count on, expect and receive government grants without having to go to Regional Government offices with a hat in hand.

What needs to be emphasized is that the city should be entitled to retain the authority to set priorities in the allocation of funds. The Regional Government may advise; but the authority to make the final decision should rest with the City. Thus, the Regional Government may not withhold subsidies in full or in part where a difference arises between the Regional Government and the city government over priorities in the allocation of funds. For instance, if the city government determines that the priority need of the residents of the city is the construction of a certain road, while on the other hand, the regional government thinks that the construction of a stadium deserves an urgent consideration, the Regional Government shall not be

entitled to withhold the block grant in full or in part should the city decide to go ahead with the construction of the road. This is not to say that there would not be instances where the Regional Government would have a say in setting priorities. Yes there are. The government could determine the use of a specific-purpose grant. A fund allocated by the Regional Government for the construction of a high school cannot be used for the construction of a park. The city which accepts the responsibility to implement a specific-purpose grant must implement same in accordance with the understanding. It shall also be obliged to write reports periodically and at the conclusion of the program.

One should also note that the fact that the city is responsible to the Regional Government for all money received there-from does not necessarily absolve it from being accountable to its residents. Indeed, the city government has the responsibility to periodically organize public forums and present, among other things, financial and audit reports to the residents of the city.[55] City residents, on their part, have the right and duty to discuss such reports and act thereon. It must be remembered that all power rests with the residents to call back councilors who fail to discharge their responsibilities properly. The above indicates that the requirements of Self-rule as regards revenues and public accountability, as well, have been met by the city laws of Ethiopia.

E. Internal Administrative Structures and Personnel Administration

As may be gathered from above, the authority to determine the internal administrative structure of the city government is an essential element of self-rule. And this is guaranteed by the city laws in Ethiopia. The city laws

[55] See for instance The Urban Local Government Proclamation of the Oromia National Regional State, supra note 1 art. 32/1; The Revised Tigray National Regional State Organization and Definition of Powers and Responsibilities of Cities Proclamation, supra note 19, art.56/1.

clearly stipulate that a city may organize its executive organs and determine their powers and responsibilities. Similarly, cities may establish Kebeles and determine their duties and responsibilities.[56]

The right to hire, manage, discipline, determine the emoluments of and relieve its employees is the other essential component of the right of cities to self-rule. No city could claim to enjoy the right to self-rule if the Region manipulates the placement, pay, management or discipline of its employees. With this realization, all city laws expressly confirm the right of cities to manage their employees. However, there are two points that need to be noted in this regard.

First, a city must determine the salaries and emoluments of its employees in line with the available budget. Second, the city shall manage its employees in accordance with the stipulations of the Personnel Regulation to be issued by the Regional Administrative Council. It is important to add here, however, that such Regulation cannot restrict the right of cities to manage their employees.

It can only lay down subsidiary rules that need to be observed in exercising the right to self-rule. This has been underlined by the city proclamations of Amhara, Oromia and the SNNPRS.[57] Tigray, as well, has by and large

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[56] The Revised Tigray National Regional State Organization and Definition of Powers and Responsibilities of Cities Proclamation, supra note 1, art. 13/2; The Jig-Jiga Municipality Proclamation, supra note 41, art. 7/4 ; Amhara National Region Urban Centers Establishment, Orgnization and Definition of Their Powers and Duties Revised Proclamation, supra note 39, art.8/2/e; The Urban Local Government Proclamation of the Oromia National Regional State, cited above at note 1, arts. 14 & 33; The Revised Southern Nations, Nationalities and Peoples Regional State City Administration Proclamation , 2006, arts. 17.2.5 & 27, Proc. No. No.103. (Year & No. not provided)

[57] The Amhara National Regional State Urban Centers Establishment, Organization and Definition of their Powers and Duties Revised Proclamation, supra note 39, arts. 52&53;The Urban Local Government Proclamation of the Oromo National

similar stipulations. However, as concerns allowances and benefits, article 51/4 of the Tigray City Proclamation stipulates that the city administration may only conduct studies and submit its proposals to the Regional Government and that it may implement same only when approved by the Regional Government. This appears to restrict the scope of liberty of the city government; but the city is still free to hire, manage, discipline and determine the salaries of its employees.

In this mode of city government, the Council is the major decision-maker and the Mayor, the chief executive. The Council sets the policy direction of the city, issues ordinances, adopts budget, approves city plan and makes other major decisions. Accordingly all the major power of the city administration resides in the Council and it is the Council that provides for the implementation of those policies and decisions. The Council gets its policies and major decisions executed through the Mayor that it selects from among its members. The Mayor is the chief executive officer in this city governance system. He discharges his executive responsibilities with the assistance of the Mayoral Council. The Mayoral Council is to the city government as the Council of Ministers is to the national government.

In this arrangement, the mayor is equally a very strong figure. He is a lot stronger than an executive officer hired from the market. For in him resides executive power as well as political power combined. The political power emanates from him having been elected by his constituency as member of the Council; and the executive power, as noted earlier from his mayoral position. What needs to be noted in this regard is that the appointment of the mayor,

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Regional State, supra note 1, arts 43 & 44; The Revised Southern Nations, Nationalities and Peoples Regional State City Administration Proclamation supra note 1, arts. 46 & 47.

except the appointment of the mayors of Grades 1 & 2 cities of Oromia, does not require the approval of the Federal or Regional Government. This gives him the clout to make important executive decisions without having to seek the consent of any other power. This is one major difference from the previous city laws. However, it is equally important to note that the mayor does not chair Council meetings and therefore has no way to control the operation of the council. This is true for all cities. This is the other point of difference from the previous laws.

At this juncture, it would be proper to briefly review the significance of the changes introduced by Proclamation No. 106/2006 of Oromia to the manner of designation of the mayors of Grades 1& 2 cities. Previously, under Proclamation No. 65/2003, the mayor used to be elected by the members of the Council from among themselves.[58] And logically enough, the mayor was made directly accountable to the Council. This was as it should be if cities were to exercise their right to self-rule. Now, a shift has been made away from this position. Art. 2/6 of Proclamation No. 106/2006 which repeals and replaces articles 14/g and 19/1 of Proclamation No. 65/2003 stipulates as follows: "The mayor and deputy mayor of the 1st and 2nd grade city shallbe appointed by the president of the National Regional Government."

It follows for Article 2/7 of the Proclamation to stipulate that the mayor shall be accountable to the president although he shall also present his plans and reports to the Council. The provision does not say whether the mayor is to be appointed from among the Council members. There is nothing that prevents one from arguing that the president could appoint the mayor from outside the Council members. It is important to note that the Council can not exercise

[58] - The Urban Local Government Proclamation of the Oromia National Regional State, supra note 1, art.18/1.

any power over the mayor. The Council cannot fire him if it gets dissatisfied with his performance. This could stifle the operation of the Council. This is not in-keeping with the right of cities to manage their internal affairs.

As the mayor is responsible for the proper enforcement of Federal and Regional laws, implementation of government and city council policies and decisions, needless to say, it is essential that the mayor possesses the managerial and professional competence that the post requires. This, in turn, requires that each political party should, in fielding its candidates, seriously consider how it would fill the post of the mayor in the event it emerges the victor. The list of the party candidates should always include persons who possess the qualification that the post of the mayor requires.

Precautions have also been taken by the city proclamations to make sure that the management of the day-to-day operations is not damaged in the event the mayor does not prove to possess the desired degree of competence. Thus, all City Proclamations provide for the post of the manager of city services. The Manager of city services, assisted by the municipal staff, ensures the provision of municipal services and the implementation of laws, policies and directives (see, for instance, Articles 24-26 of the Amhara City Proclamation). The manager is hired from the market; and his appointment is based on his professional competence and the accumulated experience he possesses. He is accountable to the mayor. This is also the prevailing practice in the major cities throughout the country.

This mode of city governance which is also in line with the parliamentary system of government is now being exercised in all the cities of the country. Only time can show how suitable the system will be to different cities in the country. But since cities still retain full power over their internal

administration and the employment and working conditions of their employees, the fact that their choice over governance model is restricted to the Council-mayor model cannot be understood to narrow the scope of the right of city residents to self-rule.

F. Planning

Both economic planning and physical planning are often mentioned as necessary and essential elements of self-rule. Paragraph 3/g of the Indian Constitution (Seventy Fourth Amendment) Act, 1992 which states the rationale for the introduction of the Amendment to the Constitution, provides that municipalities cannot function as institutions of self-government if the State does not devolve upon them the powers and responsibilities to prepare plans for economic development and social justice and to implement development schemes.[59]

Ethiopian city proclamations guarantee such powers to cities. Thus, as regards the power to prepare and execute plans for economic development, article 8/2/b of the Amhara City Proclamation empowers cities to "issue policies, formulate and execute plan of actions that help direct, execute and support the urban development."

Similarly, article 8/2/b of the Oromia City Proclamation empowers "Urban Local Governments" "to initiate, adopt and execute the economic and social development plan and budget of the city." Tigray and SNNPRS City Proclamations, as well, devolve upon their respective cities the power to prepare and execute development plans.[60] The space given to the power of

[59] The Constitution of India (Seventy-Fourth Amendment) Act, supra note 12. See also The Constitution of the Republic of South Africa, 1996, supra note 12, art. 153/a.

[60] The Revised Southern Nations, Nationalities and Peoples Regional State City Administration Proclamation supra note 1, art. 49; The Revised Tigray National

cities to prepare, approve and execute master and detailed plans is even broader. All city proclamations consecrate either a whole chapter or a good article for city planning.[61]

It is also important to note that even at the federal level, the Government expressly confirms the authority of cities to prepare, approve and execute city plans. But for obvious reasons cities which desire to prepare physical plans are required to observe national and regional planning standards.[62] One needs to remember that the right to self-rule is always exercised within a legally defined framework.

The above clearly indicates that by vesting the power to prepare and execute both economic and physical plans on cities city proclamations have been made to meet one of the other essential elements of self-rule.

G. Inter-Government Relations

The nature of relationship that exists between the Government and cities reflects the degree of independence that cities enjoy. A relationship that is based on mutual respect for law, genuine cooperation and understanding and the determination on the part of the government to build the capacity of cities and on the part of cities to discharge their legal responsibilities according to law will no doubt enhance the right of cities to self-rule.

Regional State Organization and Definition of Powers and Responsibilities of Cities Proclamation, supra note 1, art.13/2/b.

[61] The Amhara National Regional State Urban Centers Establishment, Organization and Definition of their Powers and Duties Revised Proclamation, supra note 39,Chapter 9; The Revised Tigray National Regional State Organization and Definition of Powers and Responsibilities of Cities Proclamation, supra note 1, Chapter 12; The Urban Local Government Proclamation of the Oromia National Regional State, supra note 1,Chapter 11; The Revised Southern Nations, Nationalities and Peoples Regional State City Administration Proclamation, supra note 1, Chapter ten.

[62] Urban Planning Proclamation, 2008, Proc. No. 574, Federal Negarit Gazeta, Year 14, No. 29, arts. 14,16, 20 & 22.

How then do city laws in Ethiopia define the relationship between cities and the government?

The city laws of Oromia and the SNNPRS make it abundantly clear that in principle, the relationship between cities and the government is based on "cooperation, partnership, support and rule of law".[63] The Tigray City Proclamation, while not being expressive about the afore-mentioned basis of city-government relationship, stipulates that the relationship between the government and the city administrations shall be based on understanding the responsibilities of the Regional Government (article 53/1). Article 53/2, which elaborates the preceding paragraph, provides: "The City Administration shall be accountable to the Regional Government for matters pertaining to security policies and observance of laws and standards." Sub-article 3 further requires City Administrations to write periodic reports to the Regional Government on funds received from the government and on the general state of the city.

As noted earlier, respect for the law is one of the corner stones for the relationship between the Regional Government and cities. And laws that govern the operation of cities are enacted by regions. However, while it is clear that the Regional Government has the authority to enact laws that govern the organizational structuring and functioning of cities, it is here understood that the government would not pass laws that would contravene the overall spirit of the Federal and Regional Constitutions. The power to

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[63] Urban Local Government Proclamation of the Oromo National Regional States, supra note 1, art.24/1; The Revised Southern Nations, Nationalities and Peoples Regional State City Administration Proclamation, supra note 1, art. 31/1. C.f. The Amhara National Regional State Urban Centers Establishment, Organization and Definition of their Powers and Duties Revised Proclamation, supra note 39, art. 44; The Revised Tigray National Regional State Organization and Definition of Powers and Responsibilities of Cities Proclamation, supra note 1,art. 53.

make laws should not entitle Regional Governments to enact laws that hamper the operation of cities. Incorporating in the Federal and Regional Constitutions an article similar to article 151/4 of the South African Constitution would have helped avoid any ambiguity in this regard. The provision in the South African constitution provides as follows: "The National or Provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

There is no indication in any of the wording of the city proclamations that imply that cities need to make constant references to the Regional Governments in order to carry out their day-to-day activities. The government simply issues broad framework within which the cities operate and in the process, it supports them by building their capacities and by providing them with finances; but it is always for the cities themselves to identify and prioritize their needs, prepare their plan of action, prepare, approve and administer their own budget and their primary accountability is to their electors. And this is the essence of self-rule.

It would now be in order to briefly look at the instances when the Regional Government may intervene in the operation of cities. The question is: Are the relevant provisions such as to allow the Regional Government to disband city governments for less than good reasons? A review of the city proclamations of the Amhara, Tigray, Oromia and the SNNPRS indicates that Regional Government intervenes in the operation of municipalities only in those cases that have been stipulated by the law. All the Proclamations agree that the Regional Council may intervene in city operations or may even dissolve the city Council if one of the following occurs:

1. When the City Council or the City Administration commits an act that endangers the Constitutional order;

2. When it commits an act that disturbs the peace and security of the residents of the city or other peoples or where it fails to arrest a deteriorating security situation;
3. When the city commits an act that violates the human and constitutional rights of citizens or when it fails to put such violations under control.[64]

These are also the conditions for the intervention of the Federal Government in the operation of Regional Governments.[65] Considering the highly elevated place of the Regional States in the Federal arrangement, one should not be surprised to note that the Regional Government may intervene in the operation of cities under circumstances stated above.

Phrases such as "endangering the constitutional order", "disturbing peace and security" or "violating human and constitutional rights" may sometimes prove to be controversial; but it is here suggested that the above-listed circumstances provide a broad framework within which the acts of the Regional Government could be judged. Furthermore, it should be noted that city councils may be dissolved only after the city residents have been consulted and even then they may be dissolved only by the decision of the Regional Council and not by the Executive. These are very important protections against unnecessary interventions by the Executive. Moreover, the intervention may not last any longer than 6 months. Tigray allows the

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[64] The Amhara National Regional State Urban Centers Establishment, Organization and Definition of their Powers and Duties Revised Proclamation, supra note 39, arts. 30; The Revised Tigray National Regional State Organization and Definition of Powers and Responsibilities of Cities Proclamation, supra note 1, art.18; Urban Local Government Proclamation of the Oromo National Regional States, cited above at note 1 art. 30; The Revised Southern Nations, Nationalities and Peoples Regional State City Administration Proclamation, supra note 1, art.19.

[65] System for the Intervention of the Federal Government in the Regions Proclamation, 2003, Parts 2,3&4, Proc. No. 359, Federal Negarit Gazeta, Year 9, No. 80.

duration to last for up-to a year. And that is subject to extension for further 6 months.[66]

The above may be summed up as follows:

1. City Councils may be dissolved only by the Regional Council and by no other official or executive office;
2. The Regional Council may not dissolve City Councils except in those cases which have been defined by law;
3. Furthermore, City Councils may be dissolved only after city residents have been consulted;
4. And then the dissolution may last only for a period of 6 months in most regions and for 12-18 months in Tigray.
5. And one needs to take note that under the circumstances reiterated above, even Regional Councils may be dissolved by the Federal Government.

From the above, it is possible to argue that the grounds for dissolution being so narrow and highly regulated by law, Regional city laws do meet this criteria for self-rule. The situation in Addis Ababa and Diredawa is not different. In both cities, the Federal Government may dissolve the city administration only in those instances specified by their charters.[67] And the conditions for dissolution are similar to those mentioned earlier.

The Tigray City Proclamation also lists other grounds for dissolution: Corruption on the part of the City Council or the City Administration, failure to call the periodic Council meetings or failure on the part of the city

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[66] The Revised Tigray National Regional State Organization and Definition of Powers and Responsibilities of Cities Proclamation, supra note 1,art.18/6.

[67] Addis Ababa City Government Revised Charter Proclamation, 2003, Proc. No. 361, Federal Negarit Gazeta, Year 9, No. 86 art. 61; The Diredawa Administration Charter Proclamation, 2004, , Proc. No. 416, Federal Negarit Gazeta, Year 10, No. 60, art.15/3.

administration to discharge its responsibilities have been mentioned as additional grounds for City Council dissolution.(See article 18/3/e,f,g).

It is not easy to see how some of these additional factors could constitute grounds for the dissolution of city councils. In the first place, how could the Council or even the Executive collectively commit the crime of corruption or breach of trust? This is very unlikely. Individual members could; but there is no reason why the Council should be dissolved simply because some individual members commit a crime. Secondly, the duty to convene Council meetings is assigned to clearly identified individuals. If those individuals fail to discharge their responsibilities properly then they will be held liable for the same. Their failure cannot, however, constitute good cause for council dissolution.

However, failure on the part of the Executive to perform legal duties could result in the dissolution of the Executive and possibly in the dissolution of the Council when it failed to discharge its responsibility to oversee the operation of the Executive. In any case, these additional factors for council dissolution cannot be taken to restrict the right of city residents to self-rule. Nonetheless, what one must be certain about is that it is the malfunctioning city government that is being dissolved: and not the basic right of city residents to self-rule that is being subjected to questions.

One further point that needs to be raised in this connection is the right of cities to recourse to legal remedies. Where can cities go if they are aggrieved by the decision of the Regional Council to dissolve their councils? There is no city law that answers this question. A provision should probably have been incorporated in the proclamations that would entitle cities to take their case to court in the event they are dissatisfied with the decision of the

Council. In the absence of such a provision, one could possibly argue that as the dissolution of the City Council directly or indirectly involves the interpretation of the Regional Constitution, an aggrieved city should be able to lodge its appeal with the Constitutional Interpretation Commission. In this connection, it would be proper to note that Regional Constitutions have all established such a Commission.[68] From the above, one could conclude that the city laws of Ethiopia do meet the essential elements of the principles of self-rule.

7. Summary and Conclusion

The right of city residents to self-rule was never recognized during the days of Emperor Haile Selassie and the military regime. Neither the constitutions of the times nor the city-related legislation made any space for the right of cities to self-rule. All power to govern cities remained concentrated in the hands of the central government. Addis Ababa was the only exception; for its 1954 Charter gave it the right to self-administration. But even then, that was no more than a showcase because the Emperor opted to have full power over the mayor, who was the Chief Executive of the city and the chairperson of the City Council. The Emperor also retained the power to appoint and remove the heads of departments. Self-rule could not have existed under such circumstances. Laws enacted during the Military Regime politicized the operation of cities without improving their status.

The FDRE Constitution marked a significant departure from the past as it allocated the power to make city laws to the Regional States. The Regional States have enacted city laws that by and large meet the requirements of self-

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[68] Example- Benishangul Gumuz Regional State Revised Constitution Approval Proclamation, 2002, Proc. No. 31, Lissane Hig Gazeta, Year 8, No.4, arts. 71-73; The Revised Amhara National Regional Constitution, 2001, Zikre Hig, Year 7, No.2, arts. 70-72.

rule. And the Charters of the Federal cities of Addis Ababa and Diredawa guarantee the right of their residents to self-government.

What is lacking today is the constitutional recognition and protection to the right to self-rule. The FDRE Constitution does not recognize, either expressly or impliedly, the right of city residents to self-rule. Like the constitutions of India and South Africa, it should at least have incorporated the principles and standards that state constitutions and subsidiary laws should observe. The Federal Government has issued a National Urban Development Policy in order to make up for the gap; but since the policy has not been enacted as law, its enforceability in court is debatable. Eight years have passed since the issuance of the policy; but Regional States have not yet adequately incorporated in their constitutions the principles laid down by the Policy.

The invariably single provision on cities that every Regional Constitution incorporates is neither sufficiently clear nor adequate in scope. Moreover, Regional Constitutions fail to state the principles and standards that Regional city laws must observe. The danger in the absence of such a constitutional provision lies in the relative ease with which Regional Governments could tamper with the city laws that guarantee the right to self-rule. It is here strongly suggested that both the Federal and Regional Constitutions be amended so that they incorporate the principles and standards that city laws should observe and that they recognize and protect the right to self-rule. Especially Regional States should, without further delay, realize the stipulations of the National Urban Development Policy. In the meantime, Regional States should, following the spirit of the Federal policy and the city laws, continue to assist cities in their effort to realize their objectives.

Safeguards of the Right to Privacy in Ethiopia: A Critique of Laws and Practices

Kinfe Micheal Yilma* and Alebachew Birhanu **

"Without Privacy, we lose our very integrity as persons"

Charles Fried, Privacy, 77 Yale L. J. 475, 1968

Introduction

Privacy as a modern concept is largely a recent phenomenon dating back to a seminal law review article authored by Samuel Warren and Louis Brandeis in 1890. Claims for privacy nevertheless are essentially part of our human desire to seek seclusion with regard to a range of individual, family and community activities. Sociologists and anthropologists have also read claims of privacy into numerous primitive societies. Modern societies embody more refined and broader privacy demands and trends. The surge of new technologies and, very recently, the digital revolution have presented both challenges and opportunities to privacy claims of individuals, family and the community at large. With ever increasing capacity of digital storage and retrieval, individuals and organizations are increasingly losing control of their private and intimate information. Indeed, technology has equally enhanced the capacity of individuals to remain anonymous in their digital persona.

Ethiopia has recognized right to privacy throughout its brief constitutional history, albeit to a different degree. The first written constitution of 1931 explicitly recognized the right of Ethiopian subjects not to be subjected to domiciliary searches and the right to confidentiality of correspondences

except in cases provided by law.[1] These rights were also incorporated with more amplified tone in the revised constitution of 1955.[2] The 1987 Constitution did guarantee Ethiopians the right to the inviolability of their persons and home along with secrecy of correspondences.[3] The Transitional Government Charter didn't make a specific reference to privacy safeguards; but it did state that all rights provided for under the Universal Declaration of Human Rights (UDHR) shall be fully respected, and without any limitation whatsoever.[4] A more comprehensive privacy safeguard is introduced by the 1995 Federal Democratic Republic of Ethiopia Constitution (FDRE constitution) which protects privacy of persons, their home and correspondences. The privacy provision of the FDRE Constitution is apparently informed by the privacy provisions of the UDHR and the International Covenant on Civil Political Rights (ICCPR) to which Ethiopia is a party.

Yet, despite relatively longer constitutional recognition of the right to privacy, little has been written to illuminate the scope and the extent of the right. This article has two main aims. First, it aims at lessening this gap by presenting a firsthand critique on the privacy implication of laws enacted in the aftermath of the FDRE Constitution, and certain practices with potential

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[1] The Ethiopian Constitution of 1931, Established in the Reign of His Majesty Haile Sillassie I, 1th July 1931, Arts 25 and 26.

[2] The Revised Constitution of the Empire of Ethiopia of 1955, Established in the Reign of His Majesty Haile Sillassie I, 4th November 1955, Arts 42 and 61.

[3] The Constitution of the People's Democratic Republic of Ethiopia, Proclamation No. 1, Negarit Gazetta, Vol. 47, No. 1, 12 September 1987, Arts 43 and 49.

[4] The Transition Period Charter of Ethiopia, No. 1, Negarit Gazeta, 50th Year, No. 1, 22nd July 1991, Art 1.

privacy ramification. A closer scrutiny of these legislations throws light on the scope of the right to privacy under the FDRE constitution. Legislators and executive authorities might also draw relevant insight in understanding the impacts of their proposals against privacy rights. The second and related aim is to set a research agenda for further extensive studies on the subject.

The article is organized as follows. The first section deals with background issues on privacy such as its origin, its place in primitive and modern societies, and the various conceptualization of privacy. The second section presents privacy as human right. In so doing, it describes privacy provisions of major international human rights instruments along with relevant case law. The privacy provision of the FRDE Constitution is also described. The third section is devoted to examine the privacy implications of various laws and practices ranging from tax seizure rules, new telecom fraud offenses law, anti-terrorism and anti-corruption proclamations and rules on unsolicited communications to evolving privacy invasive media practices. Ongoing legislative initiatives are also addressed in passing. Finally, conclusions and suggestions are offered.

1. Conceptual Background of Claims to Privacy[5]

1.1 Privacy in Primitive Societies

The claims for privacy had long been regarded as the value of the modern world absent from the social fabric of primitive societies of the past and present. Nevertheless, anthropological and sociological studies conducted decades back revealed that needs for privacy for individuals and groups are present in virtually every society. And, privacy norms for a society are

[5] Discussions under section 1.1-1.3 are partly adapted from A. Westin's, *Privacy and Freedom* (Atheneum: New York, 1967).

established at the levels of individuals, family as well as the community as a whole. According to these studies, individuals in virtually every society engage in a continuous personal process by which s/he seeks privacy at some times and disclosure or companionship at other times.[6] The reason for the universality of this process is that individuals have conflicting roles to play in any society; to play these different roles with different persons, the individual must present a different self at various times.

The claims to individual privacy gave rise to some other limits on inter-personal disclosure. The individual's moments of birth, illness and death are considered taboo and are secluded from the general view in many societies. Needs for privacy do appear in the intimacy of sexual relations, the par-territory as some call it. Norms of privacy are also to be found in the family-household settings of primitive life. Whether the household is nuclear or extended, most societies have rules limiting free entry into the house by non-residents, as well as rules governing the outsider's conduct once s/he enters. Even in those societies where entry is fairly free, there will usually be rules limiting what a person may touch or where s/he may go within the house. There will also be norms limiting family conversations or acts performed while outsiders are present.

Privacy for certain group ceremonies is another characteristic of primitive societies. One major example involves the rites of passage, by which girls and boys, as they come of age, are withdrawn from the whole group, go into seclusion, participate in special ceremonies, and then reenter as 'adults'. Universality of privacy claims is also manifested during times of spiritual connection with gods. Whatever the manner in which the individual

[6] Ibid, p. 13.

establishes initial contact with the spirits or gods, s/he will seek privacy in order to communicate with his/her guardian spirits. When man/woman seeks to reach his/her guardian spirit, s/he seeks privacy-usually by physical solitude in a deserted place or church but also by psychological isolation through self-induced trance or reverie if the individual cannot escape the physical presence of others.

1.2. Privacy in Modern Societies

There are variations on the attitude towards privacy and freedom in modern societies. This is basically reflected in the political ideology and systems that a society adopts or is ruled by. Westin eloquently compares the privacy tendencies of modern democratic and totalitarian systems as: [7]

> Totalitarian states rely on secrecy for the regime, but high surveillance and disclosure for all other groups. With their demand for a complete commitment of loyalties to the regime, the literature of both fascism and communism traditionally attacks the idea of privacy as 'immoral', 'antisocial', and part of the cult of individualism.
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> ....
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> Liberal democratic theory assumes that a good life for the individual must have substantial areas of interest apart from political participation. Personal retreats for securing perspective and critical judgment are also significant for democratic life.

Nevertheless, the explosion of information and communication technologies and the ensuing comprehensive digital storage present privacy concerns to all political systems. In the face of the ever increasing capacity of digital storage and retrieval, online activities mainly through social networking sites are

[7] Ibid, p. 24.

easily recorded and hence become publicly available. Crawling search engines index the World Wide Web, making information accessible to all of us by merely typing a word or two into a search field.[8] Already a number of cell phones sport GPS receivers making it possible to locate us and take our movements with precision.[9] In line with these developments, various regulatory measures have so far been adopted both by public authorities and the private sector. The recently proposed right to be forgotten in the European Union by which individuals could seek deletion of personal data in the hands of data controllers is a good case in point.[10] The private sector is also piggybacking such legislative measures with technical means of enabling individuals to gain control of their personal information.[11]

1.3. Conceptualizations of Privacy

Privacy as a concept is regarded as a slippery notion, one that is often and easily used but with imprecise meaning.[12] The difficulty in defining privacy lies in it being a value so complex, so entangled in competing and

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[8] V.Mayer-Schonberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009), p. 6.

[9] Ibid, p. 9.

[10] Regulation of the European Union Parliament and of the Council on the Protection of Individuals with regards to the Processing of Personal Data and on the Movement of Such Data, COM (2012) 11 final, Art 17.

[11] A software called *"X-Pire"* which enables social networking site users to set expiry dates to data (be photos, status updates or comments) they put online. TigerText, named after the Tiger Woods SMS scandals, is also another example by which one can fix expiry dates to SMS and MMS that s/he sends out. See, J. Rosen, ''Free Speech, Privacy, And The Web That Never Forgets (Keynote Address)'', *Journal on Telecommunication and High Technology Law*, Vol. 9, 2011, p.353. While this article is in the process of publication, the State of California has passed a law that gives a right to under 18 internet users the right to delete their internet contents such as facebook status updates, comments, posts, tweets etc from social networking sites also called web 2.0 platforms. See, Californian Law Gives Teens Right to Delete Web Posts, BBC News, Technology, 24 September 2013. Available at <http://www.bbc.co.uk/news/technology-24227095> [Accessed on September 27/2013]

[12] B. Koops and R. Leenes, "Code and the Slow Erosion of Privacy", *Mich. Telecomm. Tech. L. Rev.*, Vol. 12, 2005, p. 123.

contradictory dimensions, so engorged with various and distinct meanings.[13]As Judith Thomson writes, 'nobody seems to have a clear idea of what it is'.[14] Despite the uncertainty on the exact meaning of the value-laden concepts of privacy, privacy experts proffered varying explanations within the ambit of their discussions in particular contexts.

In discussing values and interests safeguarded by data protection law, Lee Bygrave identifies four major conceptualizations of privacy. Privacy as non-interference as advanced by Samuel Warren and Louise Brandeis is the first conception of privacy. According to Warren and Brandeis, the right to privacy forms part of right to be let alone such as the right not be photographed without one's will. [15] Clinton Rossiter's description of privacy as a 'special kind of independence that seeks to erect an unreachable wall of dignity and reserve against the entire world' also squarely falls in this category.[16] The second category describes privacy as inaccessibility in terms of informational secrecy, physical solitude and anonymity in the crowd.[17]

Westin's informational control definition of privacy as: 'the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others'

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[13] R. Post, "Three Concepts of Privacy", *The Georgetown Law Journal*, Vol. 89, 2001, p. 2087. Post writes elsewhere that 'privacy is a value asserted by individuals against the demand of a curious and intrusive society'. See, R. Post, "The Social Foundations of Privacy: Community and Self in Common Law Tort", California Law Review, Vol. 77, No. 5, 1989, p. 958.

[14] J. Thomson, "The Right to Privacy" in F. Schoeman (ed.), *Philosophical Dimension of Privacy: An Anthology* (Cambridge University Press1984), pp. 272, 286.

[15] L. Bygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits* (Kluwer Law International, 2002), pp. 128-131.

[16] C. Rossiter, "The Pattern of Liberty", in M. Konvitz and C. Rossiter (eds.), *Aspects of Liberty: Essays Presented to Robert Cushman,* (Cornel University Press, 1958), pp. 15-17.

[17] In describing privacy as a limitation of other's access to an individual, Ruth Gavison gave an influential and popular definition representing the second category. See, R. Gavison, "Privacy and the Limits of Law", Yale Law Journal, Vol. 89, No. 3, 1980, p. 428.

represents the third group.[18] James Rachel and Lawrence Lessig's definitions of privacy as 'the control we have over information about ourselves'[19] and 'our ability to control'[20] respectively fall within this category. The fourth category relates privacy exclusively to those aspects of person's lives that are 'intimate' and/or 'sensitive'.[21] According to this view, a loss of privacy occurs only when sensitive and/or intimate personal information is disclosed.[22]

Jeffery Rosen identifies three distinct concepts of privacy: privacy as knowledge, privacy as dignity and privacy as freedom.[23] In the first case, privacy blocks flow of information that would otherwise create misconception or misrepresentation by the public.[24] It helps to clog creation of superficial public knowledge about oneself that would create misrepresentation and distress to the individual. In so doing, privacy prevents disclosure of the kind of information that cannot be adequately understood in the absence of special circumstances like intimacy.[25] Hence, it protects the right to define oneself as something more than stereotype. This conception of privacy is however criticized as the public defines persons for its own purposes and in its own ways, and these public definitions almost always constitute stereotypes and generalizations. [26]

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[18] Westin, supra note 5, p. 7.
[19] J. Rachels, ''Why Privacy Is Important'', *Philosophy and Public Affairs*, Vol. 4, No. 4, 1975, p. 323 *et seq.*
[20] L. Lessig, *Code Version 2.0* (Basic Books, 2002), p. 200 *et seq.*
[21] Bygrave, supra note 15, p. 129, citing JC Inness, *Privacy, Intimacy, and Isolation* (Oxford University Press, 1997), p. 140.
[22] Ibid.
[23] J. Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (Random House, 2000), p. 8 *et seq.*
[24] Ibid, p. 10.
[25] Ibid.
[26] Post, supra note 13, p. 2090.

Privacy as a safeguard of dignity is the second privacy notion identified by Jeffery Rosen. According to him, invasion of privacy can constitute an intrinsic offense against individual dignity, and such offenses cause harms irrespective of contingent consequences such as public misconceptions.[27] The third concept of privacy identified by Jeffery Rosen defines privacy as freedom. According to this view, privacy protects a space for negotiating legitimately different views of good life, freeing themselves from the constant burden of justifying their differences.[28] Privacy as freedom carves out a space in which individuals can be allowed to define themselves.[29] Privacy interjects in preserving private spaces for those activities about which there are legitimately varying views, activities no one in a civilized society should be forced to submit similarly.

As can easily be gleaned from the foregoing, privacy is apparently value-laden concept and therefore any effort to give a single comprehensive definition is bound to cause contextual incongruity. Nevertheless, for the purpose of this article privacy is meant to represent the syndicate of the four variants of definitions noted at the outset. Depending on the circumstances of a case, privacy includes the right to be let alone from interference, the right to control flow of one personal information, the right to keep the level of accessibility to ones domains and the right to decide who has access to ones intimate spheres. Besides this, the article doesn't make a distinction between privacy and personal data protection and both are used interchangeably as the case may be.[30]

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[27] Rosen, supra note 23, p. 19.
[28] Ibid, p. 24.
[29] Ibid, p. 233.
[30] Indeed, as shall be noted later in this article, the right to privacy under Art 26(1) of FDRE Constitution is stipulated broadly, and illustratively so as to allow one to invoke

2. Right to Privacy Safeguards in International, Regional and National Instruments

This section presents the right to privacy as envisaged in major international and regional instruments along with a discussion on the nature and scope of right to privacy under the FDRE Constitution.

2.1 International Human Rights Instruments

In foregoing discussion, we have shown the definitional problem of privacy. Irrespective of the definitional hassle, the quest and need of privacy is a natural and imperative one. This being so, privacy is listed in the catalogue of human rights. At the international level, privacy is explicitly recognized as a fundamental right under the Universal Declaration of Human Rights, the International Covenant on Civil and political Rights, the Convention on Migrant Workers, and the Convention on the Protection of the Child.[31] The right to privacy forms the foundations of various rights espoused throughout human rights treaties.[32] These rights may, for example, include the privilege against self-incrimination, the right to remain silent upon arrest and the right to be free from unreasonable search and seizure.

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protection of personal data, a protection elsewhere granted to personal data of persons under data protection law.

[31] The Universal Declaration of Human Rights, GA Res. 217A (III), 10 Dec. 1948, Art 12; the International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 Dec. 1966, Art 17; The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res.45/158, 18 Dec. 1990, Art 14; and the Convention on the Rights of the Child, GA Res. 44/252, 20 November 1989, Art 16.

[32] A. Conte and R. Burchill (2nd ed.), *Defining Civil and Political Rights: The Jurisprudence of Human Rights Committee* (Ashgate, 2009), p. 201, see further D. Solove and M. Rotenberg, *Information Privacy Law* (Aspen Publishers: New York, 2003), p. 40, where privacy is considered as a cluster of other rights such as the right to liberty, property right, and the right not to be injured. The 'right to privacy' is everywhere overlapped by other rights.

The ICCPR guarantees privacy as a right, the scope of which is detailed under the Article 17 of the Covenant as follows:

> Article 17(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.

Article 17 imposes on states parties an obligation to respect (not to interfere), and an obligation to protect. In this regard, the Human Rights Committee, in its General Comment No. 16, specified that the right to privacy must be guaranteed against all arbitrary or unlawful interferences and attacks, whether they emanate from state authorities or from natural person or legal person.[33] Moreover, states parties have an obligation to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as for the protection of this right.[34] Therefore, the nature of state obligation towards the right to privacy under Article 17 is both positive and negative kind.

Article 17 of the ICCPR provides for the protection of a wide range of rights. The rights – the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation – embrace a variety of matters , some of which are connected with one another, some of which overlap with others. None of the rights referred to under Article 17 is entirely self-explanatory in meaning. In effect, a question of what is the scope of the protected right (e.g. what is privacy of the person or home) may be raised in the course of the application of the provision in a case. Since

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[33] The Human Rights Committee General Comment No.16 (1988), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, UN Doc. HRC/08/04/88, Para. 1.

[34] Ibid.

Article 17 protects the right to respect for privacy of a person, family, home and correspondence, it is necessary to first determine the content of each right.

A) Privacy of a Person

According to Article 17(1) of the ICCPR, the first category of prohibited unlawful or arbitrary interference is that of one's 'privacy', the privacy of a person. Privacy of a person relates to various aspects of one's private life: from one's personal and sexual identity, to one's freedom from personal search or the collection of personal information.[35] Private life of an individual includes autonomy, physical and moral integrity, the right to determine personal identity (including sexual identity) and sexual orientation and relations.[36]

The fundamental interest within the sphere of private life is the capacity of the individual to determine his identity: to decide and then to be what he wants to be, to have his choice of name, his mode of dress, his sexual identity, and to choose how he is to be regarded by the state and how to present himself to others.[37]

In *Toonen v Australia*[38], the UN Human Rights Committee gave some guidance as to the meaning or ambit of 'private life' and other aspects of it. In *Toonen v Australia*, the author challenges the Tasmanian (one of

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[35] Conte and Burchill, supra note 32, p.205.

[36] M. Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary* (N.P. Engel, Kehl: Strasbourg, Arlington, 1993), pp. 294-98. See also P. Leach, *Taking a Case to the European Court of Human Rights* (Blackstone Press Limited, 2001), p.150.

[37] D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), p. 305.

[38] *Toonen v Australia*, UN Human Rights Committee Communication No. 488/1992, UN Doc CCPR/C/50/D/488, (1994), para 6.5.

Australia's constitutive states) Criminal Code which criminalizes various forms of sexual contacts between men, including all forms of sexual contacts between consenting adult homosexual men in private. Mr. Toonen argued that the criminalization of homosexuality in private is breach of Article 17 (1) of the ICCPR: unlawful interference with one's privacy. In determining whether Mr Toonen has been a victim of an unlawful or arbitrary interference with his private life contrary to Article 17 of the ICCPR, the Human Rights Committee noted that it was undisputed that adult consensual sexual activity in private is covered by the concept of '*privacy*'. This implies that private life embraces not only individuals, personal choices but choices about relationships with others. Thus one's sexual relations fall within the sphere of private life.

Personal information such as fingerprints, medical records, photography is also within the orbit of privacy of person. The collection of such information by officials of states without the consent of the individual will interfere with his privacy. States parties to the ICCPR are obliged to regulate, by law, the gathering and holding of personal information on computers such as data banks and other devices, by public authorities or private individuals or bodies.[39] They must also take effective measures to ensure that information concerning a person's private life does not reach the hands of unauthorized persons, and to ensure that personal information is never used for purposes incompatible with the ICCPR.[40] Protection of one's private life requires an individual to have the ability to ascertain whether, and if so what, personal data is stored about him or her and for what purpose, with a right to request

[39] The Human Rights Committee General Comment No.16, supra note 33, para 10.
[40] Ibid.

rectification or elimination of information that the individual believes is incorrect.[41]

B) Family

Article 17 of the ICCPR prohibits unlawful or arbitrary interference with one's 'family', but does not define what the term 'family' constitutes. The understanding of what constitutes a family ranges from monogamous marriage and the traditional nuclear family to polygamous marriage and extended family units.[42] In its General Comment No.16 paragraph 5, the Human Rights Committee has noted that the objectives of the ICCPR require a broad interpretation of the family in the sense of the respective cultural understanding of the various state parties. In *Ngambi v France*[43], the Human Rights Committee has stressed:

> [T]he term 'family', for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned. The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect.

According to the Human Rights Committee, family life is understood as extending beyond formal relationships and legitimate arrangements.

C) **Home**

Freedom from arbitrary or unlawful interference with one's home is one further aspect of the right to privacy as enshrined under Article 17 of the ICCPR. In general, 'home' is understood to indicate the place where a person

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[41] Ibid.

[42] A. Conte and R. Burchill, supra note 32, p.222.

[43] *Ngambi v France*, Communication 1179/2003, UN Doc CCPR/C/81/D/1179/2003 (2004), Para 6.4.

resides or lives on a settled basis. The Human Rights Committee has noted that home is a place where a person resides or carries out his usual occupation.[44]

It may be the case that not all living places are 'home'.[45] In *Stewart v Canada*[46], the author argued that the term 'home' should be interpreted even more broadly to encompass the entire community of which an individual is a part. The author claimed that his 'home' was Canada and that it was therefore

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[44] The Human Rights Committee General Comment No.16, supra note 33, Para. 5. See also *Société Colas Est and Others v. France* (Decision of 16 July 2002), the Court stated that: "building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises".

[45] *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986) as cited in G. Arco, "United States v. Ruckman: The Scope of the Fourth Amendment When a Man's Cave is Not His Castle", J. Marshall L. Rev., Vol. 20, 1986/87. In the Ruchman case, the United States Court of Appeals for the Tenth Circuit noted 'home' does not include a cave. Frank Ruckman had been living in a natural cave on government land for approximately eight months. After the government issued a warrant for his arrest in 1985, six local police officers proceeded to the cave site. At the cave site the officers found a closed, but unlocked, door at the entrance of the cave. Ruckman was not in the vicinity. The officers entered the cave without a search warrant and seized several weapons. Upon his arrival at the cave, the police arrested and jailed Ruckman. Ruckman was subsequently charged with possession of an unregistered firearm. Before trial, the defendant moved to suppress the evidence seized in the warrantless search of his 'home'. The trial court denied the motion and Ruckman was convicted of the charge. The Appellate Court affirmed the conviction. In its analysis of whether the government-owned cave fell within the ambit of the fourth amendment's protections against unreasonable searches and seizures, the court refused to consider the cave a 'home' for purposes of protection under the fourth amendment. Rather, the court focused its attention on Ruckman's status as a trespasser and on the government's regulatory power over its land. Because Ruckman's living arrangements were tentative, and because the government had the power to oust Ruckman at any time, the court concluded that Ruckman did not have a reasonable expectation of privacy. See also the fourth amendment: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.'

[46] *Stewart v Canada*, Communication 538/1993, UN Doc. CCPR/C/58/D/538/1993, (1996), Para. 3.3.

an interference with his home for Canadian authorities to deport him. The Human Rights Committee did not address that submission.

D) Correspondence

Freedom from arbitrary or unlawful interference with one's correspondence is a right to uninterrupted and uncensored communications with others. Within the framework of Article 17, correspondence covers a wide range of communications including post, telephone, telex, fax, and email. The Human Rights Committee explained this as follows:[47]

> Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed de jure and de facto. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited.

It seems to follow that the writer of a letter does not retain the right to non-interference with his correspondence once the letter is in the hands of the addressee.

2.2 Regional Human Rights Instruments

At regional level, the right to privacy is expressly recognized as one of the fundamental rights under the European Convention on Human Rights, and the American Convention on Human Rights.[48] Although the African Charter on Human and Peoples' Rights (hereinafter the African Charter) does not explicitly say anything about the right to privacy, one may argue that some

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[47] The Human Rights Committee General Comment No.16, supra note 33, Para. 8.

[48] The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, Art 8; The American Convention on Human Rights, San Jose, 22 November 1969, Art 11.

aspect of privacy is impliedly enshrined in it when the Charter stipulates that:[49]

> Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel and inhuman or degrading punishment and treatment shall be prohibited.

The African Charter guarantees the respect of dignity of human beings and freedom from all forms of exploitation and degradation, including torture. The respect one's dignity and the freedom from torture carry protection of one's autonomy, physical and moral integrity. As pointed out earlier, a private life of a person includes, among others, his autonomy, physical and moral integrity. And hence, such aspect of privacy can be inferred from the African Charter.

There is little development towards privacy laws in Africa, despite the fact that almost all African countries have ratified the ICCPR. The possible reason may relate to the lack of technological advancements, political and cultural differences. The absence of express stipulation about the right to privacy in the African Charter might also be another reason. Some people might think of privacy as no more than a luxury for the better-off in developed countries.

In the Inter-American human rights system, the right to privacy has been embodied in the 1948 American Declaration of the Rights and Duties of Man. This regional declaration has been reinforced by the American Convention on Human Rights of 1969(American Convention). Article 11 of the American Convention envisages:

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[49] The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev.5, 27 June 1981, Art 5.

> (1) Everyone has the right to have his honor respected and his dignity recognized. (2) No one may be the subject of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. (3)Everyone has the right to protection of the law against such interference or attacks.

The American Convention on Human Rights sets out the right to privacy in similar terms to the ICCPR. Article 11 of the American Convention prohibits all arbitrary or abusive interference in the private life of individuals, the privacy of their families, their home or their correspondence. In this regard, the Inter-American Court of Human Rights has stated that "the sphere of privacy is characterized by being exempt and immune from abusive and arbitrary invasion by third parties or public authorities."[50]

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) has also enshrined the right to privacy in different formulation and content as compared to the above discussed human rights instruments. The difference lies on the qualifications made in sub article 2 of article 8 of the Convention. Article 8 of this Convention reads:

> (1)Everyone has the right to respect for his private life and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.

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[50] Case of *Escher et al. v. Brazil*, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 6, 2009, Series C No. 158, para 113; Case of the *Ituango Massacres v. Colombia*, Preliminary objection, merits, reparations and costs, Judgment of July 1, 2006, Series C No. 148, para. 194; Case of *Escué Zapata v. Colombia*, Merits, reparations and costs, Judgment of July 4, 2007, Series C No. 165, para. 95; and Case of *Tristán Donoso v. Panama*, Preliminary Objection, Merits, Reparations and Costs, Judgment of January 27, 2009, Series C No. 193, para. 55.

Like the ICCPR, the above article protects four different interests: private life, family life, home and correspondence. Article 8(1) of the European Convention outlines protected interests without determining their scope. The jurisprudence of the European Court of Human Rights guides to ascertain the scope of those interests. For instance, in relation to the scope of 'private life', the Court held that: [51]

> ...it would be too restrictive to limit the notion of private life to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings

The European Court extended the concept of private life beyond the narrower confines on secrecy of personal information and seclusion without giving an exhaustive definition of private life, or even to isolate the values it protects. The European Court also extended the notion of 'home' to cover some business premises when it decided that home may extend, for example, to a professional person's office.[52]

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[51] *Niemietz v Germany,* A 251-B, (1992), para 29; see also *Peck v UK* where the Court stressed that private life is a broad term not susceptible to exhaustive definition. The Court held that elements such as gender identification, name, sexual orientation and sexual life, identity and personal development, establishing and developing relationships with other human being and the outside world are important elements of the personal sphere protected by article 8 of the European human rights convention. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life.'

[52] Ibid; the Court held 'home' includes business premises, since this was consonant with the object of Article 8 to protect against arbitrary interference by the authorities. Because 'activities which are related to a profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises, it may not always be possible to draw precise distinction.'

Article 8(2) of the European Convention lays down the condition upon which a state might legitimately interfere with the enjoyment of the right. In other words, the European Convention expressly stipulates the competing interests protected and limitations. So far we have seen the content of the right to privacy as embodied in the international and regional human rights instruments. Like most human rights, the right to privacy is not an absolute one. It has its own limitations. The next section is devoted to discuss these limitations.

2.3 Limitations on the Right to Privacy

According to international human rights law, the guarantee of rights and freedoms incorporates a level of flexibility. This allows States to give effect to those rights and freedoms, while at the same time pursue important democratic objectives designed to protect society (such as national security) and to maintain a balance between conflicting rights (such as freedom of expression, balanced against privacy or the right to a fair hearing).[53] A restriction of rights is stipulated in human rights documents in order to strike a balance between competing interests/values. This accommodation is effected through limitations which are permitted by virtue of the particular expression of the right or freedom.

As discussed above, the right to privacy is guaranteed in the UDHR, ICCPR, and the American and European human rights instruments. Of these human rights instruments, the European Convention on Human Rights has explicitly provided an exception to the right to privacy. To the contrary, Article 17 of the ICCPR does not contain an express legal proviso allowing for restriction

[53] A. Conte and R. Burchill, supra note 32, p. 39.

on the right to privacy. Nonetheless, one can logically infer the existence of permissible interference with privacy from the phrases "arbitrary or unlawful interference." However, the terms 'arbitrary' and 'unlawful' need clarification.

According to the Human Rights Committee, the term 'unlawful' means no interference except in cases envisaged by law, and the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances.[54] The converse reading of Article 17(1) of the ICCPR reveals that interference with privacy, family, home and correspondence is permissible so long as the interference is neither unlawful nor arbitrary. The essence of restriction of the right to privacy is that the interest of the society as a whole overrides the interest of individuals.

Like the ICCPR, the American Convention does not explicitly stipulate limitations on the right to privacy. Nevertheless, as the converse reading of Article 11(2) of the American Convention makes clear, the right to privacy is not an absolute right and can be restricted by the states parties, provided interference is not abusive or arbitrary. An interference with one's private life, his family, home or correspondence is permissible so long as it is not abusive or arbitrary. To this end, the interference must be established by law, pursue a legitimate purpose and be necessary in a democratic society.[55]

[54] The Human Rights Committee General Comment No.16, supra note 33, para 3-4.
[55] Case of *Escher et al. v. Brazil*, supra note 50, para 116.

By the same token, under the European Convention, the right to privacy can be limited where certain qualifying conditions are satisfied. Those conditions (under which limitations are permissible) are clearly envisaged under article 8 (2) of the Convention. As per paragraph 2 of Article 8 of the Convention, limitations are allowed if they are in accordance with the law and are necessary in a democratic society for the protection of one of objectives set out therein. In order to strike a balance between human rights enshrined in Article 8-11 of the Convention and their respective limitations, the European Court of Human Rights has used the same criteria: whether the interference is prescribed by the law, whether the interference pursues a legitimate aim, and whether the interference is necessary in a democratic society and proportionate to the legitimate aim pursued.[56] These criteria have been advanced and made clear by decisions of the Court.[57]

The European Court of Human Rights has been using the 'balancing test'[58] based on the above criteria to justify the limitations on the right of privacy. The Court had to balance the interest of the right holder, and the interest of

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[56] F. Jacobs and R. White (4th ed.), *The European Convention on Human Rights* (Oxford University press, 2006), pp. 223-40.

[57] See *Malone v. United Kingdom* (1984) 7 EHRR 14, *Silver et.al. v United Kingdom* (1983) 5EHRR 347, and *Salov v. Ukraine*, European Court of Human Rights, Strasbourg, (2005).

[58] In the U.S context, the test of "reasonable expectation of privacy" has been introduced in case law to canvass whether there is a breach of privacy. Actually, the transatlantic difference regarding privacy is not only limited to using different parameters to offset other values against privacy, but there is also a divergence of view on value protected by privacy: liberty or dignity? The cleavage between 'libertarian' and 'dignitarian' is considered as a reflection of the underlying neo-liberal and social democratic theories of human rights. *See also*, J. Whiteman, "The Two Western Cultures of Privacy: Dignity versus Liberty", Yale Law Journal, Vol.113, 2004, p.1151; Privacy protections in Europe are, at their core, a form of protection of a right to respect and personal dignity. By contrast, America, in this as in so many things, is much more oriented toward values of liberty, and especially liberty against the state. At its conceptual core, the American right to privacy still takes much the form that it took in the eighteenth century: it is the right to freedom from intrusions by the state, especially in one's own home.

the public or other individuals. The right holder has an interest to control a state's capacity to interfere in central matters of interpersonal relationships, including consensual sexual activities, parent-child relations, and conversation while a state is required to protect individuals from harm inflicted by others such as exploitive sexual conduct, abuse of children by parents, and communications which harass the recipient.[59]

2.4 The FDRE Constitution

Article 26 of the FDRE Constitution guarantees the right to privacy in the following terms:

> (1)Everyone has the right to privacy. This right shall include the right not to be subjected to searches of his home, person or property, or the seizure of any property under his personal possession. (2)Everyone has the right to inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices. (3)Public officials shall respect and protect these rights. No restrictions may be placed on the enjoyment of such rights except in compelling circumstances and in accordance with specific laws whose purposes shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others.

The first sentence of Article 26(1) of the Constitution recognizes the right to privacy in general terms. Article 26 sub-article (1) in its second sentence and sub-article (2) further defined the right to privacy in terms of one's person, home, property, correspondence and communication. However, it is good to note that the list of protected interests under Article 26 sub-article (1) second sentence and sub-article (2) is just illustrative.[60] This is to say that the right to

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[59] Harris, O'Boyle and Warbrick, supra note 37, p.353.

[60] Since that the right is so broadly and illustratively defined, it may legitimately be extended to protect data privacy, or data protection right as it is called in European law. As a result, the right to privacy can be understood to embrace the right not to be

privacy is broad enough to include other interests, including non-interference with one's family. As a rule, the FDRE Constitution prohibits the search of an individual's home, person (giving individuals a sphere of personal autonomy), seizure of property, and interception of individual's correspondence. Yet again, it must be noted that privacy protection under the FDRE Constitution is not limited to the prohibition of searches of one's home, person or property, seizure of one's property, and interception of one's correspondence, but rather includes the prohibition of unlawful or arbitrary interference with any of the protected interests.[61]

The FDRE Constitution requires public officials not only to refrain from interferences with individual privacy, but also to prevent private persons or entities that would impair the right. However, the right to privacy is not absolute. The FDRE Constitution under Article 26(3) puts a limitation clause on the right to privacy. Limitation on the right to privacy is allowed only when three important elements are satisfied together: (1) there must be

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subjected to storage, processing and disclosure of personal details or data without express consent save limitations set out under Art 26(3) of the constitution. Accordingly, discussions in the third section assess some laws in light of this sense of the scope of right to privacy.

[61] A question might arise whether the right to privacy as regulated Art 26 applies to legal or juridical persons. While one might plausibly argue that right to privacy is an individual human right and hence excluding legal persons, there appears to be a convincing reason to stretch the applicability of the right to legal persons. Similarly with individuals, legal persons do have values that the right to privacy aims to protect. One example in this regard is that searches and seizures could be made against the business premises of corporations and unless such acts are conducted in line with legally set requirements, they may cause non-negligible damage to the entity and its human members as well. In other words, intrusions into the confidential sphere of companies would no less intrusion against the right to privacy of its members. To be added to this is that despite the general heading of Part One of the Constitution (Human Rights), Art 26 on its own right is broader and is likely to protect entities in addition to individual persons. In *Société Colas Est and Others v. France* (decision of 16 July 2002) case, the European Court of Human Rights held that warrantless entry into business premises of a corporation violates Art 8 of the European Convention on Human Rights (ECHRt), a provision that regulates right to privacy.

compelling circumstances; (2) restriction must be in accordance with specific laws; and (3) there must be legitimate aim.

Under Article 26(3) of the FDRE Constitution, six legitimate objectives are enumerated: national security, public peace, the prevention of crimes, the protection of health, public morality, and the rights and freedoms of others. But what constitutes violation of legitimate objectives such as 'public morality' or 'the rights and freedoms of others'? National security is an amorphous concept at the core of which lies the survival of the state, whereas public safety, the prevention of crime, the protection of health, and public morality reflect society's interest from different angles.[62]

The standards set to limit privacy right under the FDRE Constitution are more or less similar to the requirements stipulated under the European Convention on Human Rights. The difference is that the FDRE Constitution puts the requirement of "compelling circumstances" in lieu of the requirement of "necessary in the democratic society" under the European Convention on Human Rights.[63] The test of "compelling circumstances" may be difficult to define in the abstract. In any event, the prevailing situation should appear compelling to a reasonable degree to interfere with the right to privacy. It is also important to consider to what extent the compelling situation requires limitation on the right. The limitation should also be made by a specific law[64] which can be laid down for the purpose of safeguarding

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[62] F. Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Red Sea Press, 1997), p. 124.

[63] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Negarit Gazeta, 1st Year, No. 1, Art 26(3), and the European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 51, Art 8(2).

[64] The Human Rights Committee, in its General Comment 16 (supra note 33), para 8 stated that no interference can take place except in cases envisaged by specific law which

national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others. In such situations, the privacy right may be overridden by other values/ public interests.

Succinctly, interference with privacy right is permissible under the FDRE Constitution upon the fulfillment of the aforementioned requirements. Any limitation other than the constitutionally stipulated ones is not permissible, and is tantamount to a violation of the constitution.

3. Laws and Practices in Ethiopia with implications on the Right to Privacy

This section closely examines some of the major laws and practices which are likely to pose threat to the constitutional right to privacy.

3.1 Criminal Procedure Laws and the Right to Privacy

As we have previously underlined in the discussion of the FDRE Constitution, privacy can only be limited under compelling circumstances in accordance with specific laws and in pursuit of legitimate aims. Crime prevention and national security are, as per Article 26 (3) of the FDRE Constitution, some of the legitimate aims which enable the law enforcer to lawfully interfere with the privacy of individuals in accordance with specific laws. In the Ethiopian legal system, we have some laws including the Criminal Procedure Code, the Anti-Corruption Proclamation and the Anti-Terrorism Proclamation that impose restriction on the right to privacy.

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in turn specify in detail the precise circumstances in which interference is permitted and must designate an authority, on case by case basis, to determine such authorizations.

The 1957 Criminal Procedure Code of Ethiopia provides protection to body, premises and property of a person against arbitrary searches and seizures respectively.[65] The protection of the individual's person is one of the fundamental aspects of privacy, without which there would be threats of physical violence. As a rule, neither the body of a person nor the premises may be searched. However, this rule may be derogated when the exceptional conditions stated under Article 32 (1) and (2) of the Criminal Procedure Code are met. For example, an arrested person can be searched when there is a 'reasonable suspicion'[66] that he possesses any articles serving as a material evidence for the offence he is suspected to have committed. Here the difficulty lies on deciding whether all facts and circumstances that are known to the police officer establish a 'reasonable suspicion.' Premises can also be searched with a search warrant. Of course, there are circumstances where premises can be searched without even a search warrant. Such is the case when an offender is followed in hot pursuit and enters premises or disposes of articles, and a police officer is informed and reasonably suspects that the articles serving as material evidence are concealed or lodged in a place and

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[65] Article 32 of the Criminal Procedure Code provides: "Any investigating police officer or member of the police may make searches or seizures in accordance with the provisions which follow: (1) No arrested person shall be searched except where it is reasonably suspected that he has about his person any articles which may be material as evidence in respect of the offence with which he is accused or is suspected to have committed. A search shall be made by a person of the same sex as the arrested person. (2) No premises may be searched unless the police officer or member of the police is in possession of a search warrant in the form prescribed in the Third Schedule to this Code except where: (a) an offender is followed in hot pursuit and enters premises or disposes of articles the subject matter of an offence in premises ;(b) information is given to an investigating police officer or member of the police that there is reasonable cause for suspecting that articles which may be material as evidence in respect of an offence in respect of which an accusation or complaint has been made under Art. 14 of this Code and the offence is punishable with more than three years imprisonment, are concealed or lodged in any place and he has good grounds for believing that by reason of the delay in obtaining a search warrant such articles are likely to be removed".

[66] The term reasonable suspicion is incorporated in our legal system without any definition, and may open a room for abuses of individuals' rights.

he has good grounds to believe that delay in obtaining a search warrant will lead to the articles to be removed.

The Anti-Terrorism Proclamation[67] (hereinafter ATP) provides limitations on the constitutional right to privacy in order to prevent crimes of terrorism and maintain national security. The ATP expands both police and prosecution powers in significant ways. The ATP under Article 14 gives powers to the National Intelligence and Security Service (hereinafter NISS) to intercept or conduct electronic surveillance of telecommunications including Internet communications so as to prevent and control a terrorist act. The power to gather information through surveillance for the same purpose is also granted under sub-article 4 of Article 14 of the ATP. An interception or surveillance on the communications privacy under Article 14 of the ATP is to be made only with court warrant. However, it is not clear whether the court has the power to reject an application for a warrant.

The ATP outlines two types of searches: covert search under Article 17 and sudden search under Article 16. A covert search requires a court-approved search warrant if a police officer has reasonable grounds to believe that a terrorist act has been or is likely to be committed or that a resident or a possessor of a house to be searched has made preparations or plans to commit a terrorist act.[68] As per Article 17 of the ATP, the fulfillment of two conditions is sought for a covert search. First, a police officer must have a reasonable ground to believe that a terrorist act has been or is likely to be committed, or that a resident to be searched has made a plan to commit a terrorist act. Second, the officer must have reasonable grounds to believe that

[67] A Proclamation on Anti-Terrorism, Proclamation No.652/2009, Federal Negarit Gazeta, 15th year, No. 57.
[68] Ibid, Art 17.

covert search is essential to prevent or to take action against a terrorist act or suspected terrorist activity.[69] As opposed to Article 14 of the ATP (a court warrant for interception or conducting electronic surveillance by NISS), the court may either deny or grant a warrant to conduct covert search based on the information presented to it by having into account the nature or gravity of the terrorist act or suspected terrorist act, and the importance of the warrant in preventing the act of terrorism.[70]

However, a sudden search of body and property can be conducted by a police officer with authorization of the director general of the Federal Police or his designee, without judicial oversight, if a police officer has reasonable suspicion that a terrorist act will be committed and deems it necessary to make a sudden search.[71] To conduct a sudden search, a police officer is required to have a reasonable suspicion that a terrorist act will be committed and to believe that a sudden search prevents the act. Article 16 of the ATP, grants the police officer exclusive discretion to carry out search and seizure solely on the basis of reasonable belief that a terrorist act may be committed. Article 21 of the ATP also empowers the police officer to take samples of handwriting, hair, voice, fingerprint, photograph, blood, saliva and other fluids of a person suspected of acts of terrorism for investigation. The powers of the police granted by virtue of Article 16 and Article 21 of the ATP may pose a threat to the constitutional right to privacy.

Another specific legislation which restricts the right to privacy is the Anti-Corruption Proclamation. As seen in the earlier discussion, the FDRE Constitution guarantees the right to the inviolability of one's notes and correspondence (communications privacy) including postal letters, and

[69] Ibid, Art 17(3).
[70] Ibid, Art 18 (1).
[71] Ibid, Art 16.

communications made by means of telephone, telecommunications and electronic devices. However, this aspect of privacy can also be intercepted in order to investigate and prosecute corruption offences. In this regard, Article 46 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation of Ethiopia states:

> (1)Where it is necessary for the investigation of corruption offence, head of the appropriate organ may order the interception of correspondence by telephone, telecommunications and electronic devices as well as by postal letters... (3) An order given in accordance with sub article (1) of this article shall indicate the offence which gives rise to the interception, and the duration of the interception, and, if it is a telephone or telecommunication, the link to be intercepted. Unless head of the appropriate organ decides otherwise, the duration of the interception may not exceed four months.

The Federal Ethics and Anti-corruption Commission (FEAC) of Ethiopia is an independent federal government organ which has a full mandate to investigate and prosecute corruption offences.[72] The FEAC can order the interception of one's correspondence if it is necessary for investigation of corruption offences. The interception cannot however be made for indefinite period. In the absence of a decision by the investigating organ, the duration of interception should not be longer than four months. The provision gives the FEAC an exclusive discretion without court warrant to intercept the communications of individuals. Hence, such a discretionary power may undermine the constitutional right to privacy.

3.2 Mass Media Law and Right to Privacy

[72] The Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation, Proclamation No.433/2005, Negarit Gazeta, Art 73(2 and 4) and Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005, Negarit Gazeta, Art 2(3).

Privacy of individuals and freedom of expression may stand in direct conflict. These two fundamental rights serve important functions: the first, protecting the individual from unlawful or arbitrary intrusion; the second, communicating information deemed to be in the public interest.[73] The FDRE Constitution guarantees freedom of expression, opinion and thought under Article 29. Freedom of expression as recognized in the FDRE Constitution consists of the right to seek, receive and impart information and ideas. Freedom of information (the right to access information) is the crucial aspect of freedom of press or other media. Accordingly, individuals are at liberty to receive information about the government representing them. Concomitantly, press and other mass media are entitled to gather information in the process of seeking information and disseminating them to the public. This means that the government is duty bound to be transparent and make its documents accessible to the press so long as it is for public interest. These rights can only be limited through laws based on the principle that freedom of information and expression cannot be limited on account of the content or effect of the point of views expressed.[74] The limitation can be laid down for the purpose of protecting the well being of the youth, and the honor and reputation of individuals.[75]

The Proclamation on Freedom of Mass Media and Access to Information (hereinafter Proclamation on Mass Media) provides that all persons have the right to seek, obtain and communicate any information held by public bodies, except exempted information therein.[76] The exempted information from

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[73] L. Pyk, "Putting the Brakes on Paparazzi: State and Federal Legislators Propose Privacy Protection Bills", DePaul J. Art & Ent. Law, Vol. IX: 187, 1999, p.187.

[74] FDRE Constitution, supra note 63, Art 29(6).

[75] Ibid.

[76] Freedom of Mass Media and Access to Information Proclamation, Proclamation No.590/2008, Federal Negarit Gazeta 14th Year, No. 64. Arts 12(1) and 15.

disclosure is *inter alia* personal information. In this respect, Article 16(1) of the Proclamation on Mass Media provides "any public relation officer must reject a request for access to a record of the public body if its disclosure would involve the unreasonable disclosure of personal information about third party, including a deceased individual who has passed away before 20 years." Had it not been for this provision, the personal information of a person would have been at risk in the course of seeking and disseminating information. However sub-article 2 of Article 16(1) of the same proclamation stipulates situations where personal information may be disclosed with the consent of the person concerned.

The Proclamation on Mass Media has clearly defined personal information means as information about an identifiable individual, including information relating to one's medical history, ethnic or national origin, identifying numbers, personal references, views or opinions, blood type etc. [77] The Proclamation on Mass Media lays down examples of personal information

[77] Art 2(8) of the Freedom of Mass Media and Access to Information Proclamation defines 'personal information' as 'information about an identifiable individual, including but not limited to: (a) information relating to the medical or educational or the academic, employment, professional or criminal history, of the individual or information relating financial transactions in which the individual has been involved; (b) information relating to the ethnic, national or social origin, age, pregnancy, marital status, colour, sexual orientation, physical or mental health, wellbeing, disability, religion, belief, conscience, culture, language or birth of the individual; (c)information relating to any identifying number, symbol or other particular assigned to the individual, the address, fingerprints or blood type of the individual; (d) the personal opinions, views or preferences of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual; (e) the views or opinions of another individuals about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; (f) the views or opinions of another individual; or (h) the name of the individuals where it appears with other personal information relating to the individual or where the disclosing of the name itself would reveal information about the individual; but excluding information about a person who has passed away before 20 years.'

without being exhaustive. Unlike the definition of European Union (EU) Data Protection Directive, the Proclamation on Mass Media definition expressly include biological material of an individual when Article 2 (8) (c) refers "information relating to any identifying number, symbol or other particular assigned to the individual, the address, fingerprints or blood type of the individual" to be personal information. Indeed, the definition is broad enough to include any information about identifiable person, but is muted about information relating to an identified person. We believe that information about an identifiable person should be treated personal information. In this regard, the EU Data Protection Directive has made it clear that personal data means any information related to an identified or identifiable individual.[78]

As per Article 16 of the Proclamation on Mass Media, personal information held by public body should not be disclosed under the guise of access to the records. The provision contains one of the basic principles of personal data processing i.e. disclosure limitation. However, its scope is limited in the sense that it refers to personal information held by only public body. The provision does not say anything about personal information held by private sectors. Private sectors may gather, process, and transfer personal information in a way that undermines the constitutional right to privacy.

3.3 Tax Seizure Rules and Right to Privacy

The Ethiopian law of tax embraces tax seizure rules as new tools of tax enforcement. A peculiar feature of these seizure rules is that the tax authority is empowered to unilaterally seize and sell delinquent taxpayers property

[78] The European Parliament and of the Council, The Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Directive 95/46/EC (1995), Art 2(a).

should the latter fall in default of paying taxes due.[79] Unlike the pre-2002 collection schemes, the authority no more resort to courts to demand execution against defaulting taxpayers as the so called tax foreclosure rules enable self-execution by the tax authority.

Nevertheless, that tax seizures are enforceable by tax authorities unilaterally without any judicial oversight inevitably become a cause for concern particularly in relation to the rights of taxpayers. This is because such procedures give unfettered latitude to authorities thereby putting rights and interests of allegedly delinquent taxpayers at stake. More particularly, the constitutional rights to privacy might be at stake as the right to privacy guaranteed under the FDRE Constitution includes the right not to be subjected to seizure. That the bureaucracy is hardly mature, prone to impropriety and less synchronized to win the confidence of taxpayers compounds the concern.

The right to privacy under the FDRE Constitution, as noted earlier, can be restricted only if the three cumulative conditions are met; i.e. first, there must be compelling reasons necessitating the seizure, second, there must be specific laws authorizing such restrictions, and third, there must be legitimate objectives such as crime prevention, national security, public peace and morality. It transpires from the above proviso that on top of having tax laws authorizing seizure it is highly necessary seizures must be made only in those circumstances compelling the action. Compelling circumstances perhaps include those cases jeopardizing the collection of taxes. In line with this understanding, a sheer existence of tax laws authorizing seizure, and a mere default on the part of taxpayers cannot itself warrant the constitutionality of

[79] For details see, K. Yilma, infra note 82.

the seizure. Seizure should be undertaken only when delinquent taxes[80] cannot be recovered in any other possible means without affecting the fiscal interest of the government.

The UN Human Rights Committee has, as pointed out earlier, given authoritative insights on whether a mere existence of a law authorizing interference (seizure in our case) justifies any interference with one's right to privacy. The Committee held that the term 'unlawful' means that no interference can take place except in cases envisaged by law, which in itself must comply with the provisions, aims and objectives of the ICCPR.[81] It further stated that an arbitrary interference might take place even in cases where the interference is provided under the law. It flows from this that arbitrary tax seizure that runs over other fundamental rights such as the right to property of taxpayers although mandated under the law might be in breach of Article 17 of the ICCPR.

In mitigating the privacy implications of the tax seizure rules, we suggested elsewhere the issue of requiring judicial warrant before any act of seizure as it is the case in criminal matters.[82] The very fact that the tax authority is the sole decision maker on whether there is a 'compelling circumstance' warranting seizure of property is a cause for concern. In dealing with such situation requiring prior tax seizure warrant would be perhaps befitting. Requirements of prior tax seizure warrants are also common in countries

[80] Delinquent taxes are taxes already due but not yet paid by the taxpayer; the defaulting taxpayer is referred to as a delinquent taxpayer.

[81] General Comment No. 16, supra note 33, Para 1.

[82] K. Yilma, "On Tax Foreclosure Rules and Taxpayers' Rights to Privacy and of Access to Justice in Ethiopia", *Ethiopian Journal of Human Rights*, Vol.1, 2013, pp.195 *et seq.*

where the tax system is remarkably developed, and where regard to basic rights of taxpayers is a paramount priority.[83]

The tax foreclosure regime also entails other features with privacy invasive penchant. For instance, tax authorities are exempted from issuing a notice of seizure to the taxpayer when they found out that collection of taxes is in jeopardy. All what is required of the tax authority is to make a demand for 'immediate payment of the tax'; upon failure or refusal, seizure without notification would be lawful.[84] This provision stands in contradistinction with the rule in Canada, for example, where the tax authority is required to obtain judicial warrant even in cases where 'collection is in jeopardy.[85] In so doing, the tax authorities would be required to demonstrate the existence of urgency justifying abrupt collection action. The provision in the Ethiopian tax law appears to negatively affective the due process of law.

There is also a related privacy invasive procedure called jeopardy assessment whereby the tax authority may order the immediate blockage of taxpayer's bank account and have access to information thereof where it believes that

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[83] In the US, for instance, seizure of taxpayers' property violates right to privacy unless the tax authority (IRS) obtains a prior judicial warrant save the exception when seizure is made at public places. See, *2nd American Jurisprudence: Federal Tax Enforcement*, Vol. 35, (Cooperative Lawyers Publishing Company, 2001), p. 20; see also, E. Enright, "Probable Cause for Tax Seizure Warrant", *The University of Chicago Law Review,* Vol. 55, No. 1, 1988, pp. 210-211. A slightly similar rule applies in Canada. To give an authorization of seizure, the Minister of National Revenue must certify that all or part of an amount payable has not been paid and register a certificate in the Federal Court of Canada. See, J. Li, infra note 85, p.115; see also Sections 222-225 of Consolidated Canadian Income Tax Act of 1985, infra note 85.

[84] See Income Tax Proclamation, Proclamation No. 286/2002, Federal Negarit Gazeta, 8th Year, No. 34, Art 77(5).

[85] J. Li, ''Taxpayers' Rights in Canada'', Revenue Law Journal, Vol. 7, Issue 1, 1997, p. 115; see also Sections 222-225 of Consolidated Canadian Income Tax Act of 1985, available at <http://laws-lois.justice.gc.ca/eng/acts/I-3.3/page-365.html#docCont.> [Accessed on September 27/2013]

the collection of the tax is in jeopardy to make immediate assessment of the tax for the current period.[86] It must then obtain a court authorization within 10 days from giving the administrative order. As it can readily be noted, the tax authority has to obtain judicial authorization *ex post* after having blocked the bank account and accessed personal data of the taxpayer.

The purpose of the judicial authorization is not clear as it will be obtained after the damage is done to the privacy of the taxpayer; nor is it clear what remedies are available to the taxpayer should the court reject the administrative order whose effect has already taken place. It would have been in line with the constitutional right to privacy if the judicial authorization was required before the administrative order is given by the tax authority.

3.4 Telecom Fraud Offence Law, Deep Packet Inspection and Unsolicited Communications

3.4.1. Telecom Fraud Offences Law

The recently adopted Telecom Fraud Offense (TFO) proclamation No. 761/2012 is the other legislative instrument with potential threats to right to privacy. Few recent legislative initiatives of the Ethiopian government received as much attention and criticisms as the TFO. Apart from the usual human rights whistle-blowers, it has been a point of discussion in mainstream international media such as Al-Jazeera[87] and the BBC.[88] The issues and concerns that the bill gives rise to are twofold. Whilst criticisms over the

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[86] See Income Tax Proclamation, supra note 84, Art 81.

[87] Aljazeera held a special program on the alleged ban of Skype. See, Skype Me May Be, The Stream, Aljazeera, June 14, 2012; available at < http://stream.aljazeera.com/story/ethiopia-skype-me-maybe-0022243> [Accessed on September 27/2013].

[88] K. Moskvitch, Ethiopia Clamps Down on Skype and other Internet Use on Tor, BBC News, Technology, June 15, 2012; available at <http://www.bbc.com/news/technology-18461292> [Accessed on September 27/2013].

alleged ban of Voice Over Internet Protocol (VOIP) call dominated the discussion, few have quipped on the potential privacy implications of the law. A local English weekly, Addis Fortune, slammed the proposal in livid terms that 'there seems to be an inherent interest to put every beast under control; no matter how harmless it is'.[89] In its editorial, Addis Fortune stated: [90]

> Worse, the bill transcends the Constitution by violating the right to individual privacy with a long list of admissible evidence. Although individual notes and communications are protected by the Constitution, the new bill makes digital evidence collected through unlawful interference admissible in a court of law. No matter how infant the debate over privacy is, closer, there is no worse situation than providing the state with the power to interfere with individual communications.

The above concern relates to the power of covert search bestowed to the police under the the TFO proclamation. According Article 14 of the TFO proclamation, a police officer may request a court in writing for a covert search warrant 'where he has reasonable grounds to believe that a telecom fraud offence has been committed or is likely to be committed.' This provision legalizes secrete surveillance by the police upon suspicion that a telecom fraud offense has been or is likely to be committed. It, however, blends it with judicial oversight by requiring prior judicial warrant which is commendable on its own.

What remains unclear, however, is the discretion of courts in reviewing the request for a search warrant. Are courts at liberty to reject requests should there appear not to exist a reasonable ground to believe the commission or

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[89] Editor's Note, Addis Fortune, Volume 13, Number 632, Published on June 10, 2012, available at <http://www.addisfortune.net/fortune_editors_note.htm.> [Accessed on September 29/2013].

[90] Ibid.

likelihood of commission of an offense? Or is it just a formal requirement whereby the police just go to receive the imprimatur of the court? What if the police overstep the warrant and seize properties of the person under surveillance? At the most basic level, one might even ask what 'search' refers to within the meaning of the provision. While it might be thought to embrace surveillance, it is ambiguous whether it also includes interception of communications or eavesdropping. In the absence of clearly articulated powers of surveillance or interception, it would be hard to justify the latter as having been carried out in compliance with the constitutional right to privacy.

The drafters of the law regrettably missed valuable examples from the Ethiopian Criminal Procedure Code on the conditions and discretion of courts in entertaining requests for search warrant. The Code states that no search warrant shall be issued unless the court is satisfied that purposes of justices will be served by the issuance of the warrant.[91] More interestingly, the law sets out important elements that any search warrant must incorporate. For instance, it provides that the warrant shall clearly specify the property to be searched and goes to set the time when searches have to be undertaken, between 6 A.M. and 6 P.M.[92] The later aspects of the Code are apparently privacy friendly and has the potential to mitigate extreme cases of *ultra vires* by authorities in charge of covert searches.

Given that limitation to the right to privacy are possible in very exceptional circumstances, it is also doubtful if the proviso on covert search by the police is clear enough to qualify to the 'specific law' requirements of Article 26(3)

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[91] The Criminal Procedure Code of Imperial Ethiopian Government, Negarit Gazeta, Proclamation No.185 of 1961, Art 33(1).

[92] Ibid, Arts 33(2) and 33(5) respectively.

of FDRE Constitution. The jurisprudence on the legality of interception and secret surveillance in other jurisdiction offers valuable insight on this. For instance, the European Court of Human Rights (ECHR) held that the mere fact that there is law authorizing (telephone) interception doesn't warrant the legality of the interception unless the law in question indicates with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities to give the individual adequate protection against arbitrary interference.[93] In another case, the ECHR noted that powers of secret surveillance are often tolerable in so far it is strictly necessary for safeguarding democratic institutions.[94] The TFO proclamation seems to fail short of these privacy-friendly standards with vague and crude formulation of police surveillance powers.

A troubling side of the surveillance is that any evidence obtained through surveillance or interception shall be admissible in court proceedings.[95] Apparently, Article 15 of the TFO proclamation concerns admissibility of evidences obtained based on the covert police search carried out under Article 14 of the same law.[96] This is particularly worrying because rules of evidence admissibility, if any, don't regulate exclusion of certain illegally

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[93]See, European Court of Human Rights, *Kruslin v. France*, 24-04-1990, available at <http://sim.law.uu.nl/sim/caselaw/Hof.nsf/e4ca7ef017f8c045c1256849004787f5/340529db2776b38dc1256640004c1cf2?OpenDocument. > [Accessed on September 27/2013].

[94]See, European Court of Human Rights, *Klass v. Germany*, 1978, available at <http://www.hrcr.org/safrica/limitations/klass_germany.html.> [Accessed on September 27/2013]

[95]See Art 15 of Telecom Fraud Offense Proclamation, Proclamation No. 761/2012, Federal Negarit Gazeta, 18th year, No. 61. Note that Reporters without Borders similarly states 'it also allows evidence gathered through such (covert search) interception or surveillance to be admissible'. See, Reporters without Borders for Freedom of Information, Although Still At Draft Stage, New Telecoms Rules Give Cause For Concern, July 6, 2012, available at <http://en.rsf.org/ethiopie-although-still-at-draft-stage-new-06-07-2012,42957.html.> [Accessed on September 27/2013].

[96] This can also readily be gleaned from the consecutive arrangement of the provisions.

obtained evidences.[97] In other countries such as the USA, the exclusionary rule allows exclusion of evidences obtained by any illegal means. As TFO proclamation stands, it is uncertain what kinds of evidences are admissible, leaving many open questions. Is any evidence collected by (any) means admissible as long as there is a search warrant? One plausible line of interpretation is that only evidences collected through warrantless searches or surveillance are to be rendered inadmissible before courts. Yet, the provision leaves a room for unbridled arbitrary search in the name of having judicial warrant.

3.4.2. Deep Packet Inspection and Privacy of Communications

A report on the recent installation of Deep Packet Inspection (DPI) technologies by the Ethio-telecom, in concert with Information Network Security Agency (INSA), indicates the potential of the practice in threatening privacy in Ethiopia.[98] DPI is a computer network packet filtering technique that involves inspection of contents of packets as they are transmitted across the network.[99] Since most of the internet traffic is unencrypted, DPI enables Internet Service Providers (ISPs) to intercept virtually all of their customers' internet activity, including web surfing data, email, and peer-to-peer

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[97] The only relevant provision in this regard is Art 19(5) of the FDRE Constitution which provides that any evidence obtained from an arrested person through coercion shall be inadmissible. In this context, some constitutional law lawyers, in informal conversations, tended to argue that the scope of application of the constitutional provision is so broad enough to be extended even in cases of evidences obtained through secret surveillance under the TFO.

[98] Tor Project, a virtual tunnel that enables online anonymity, reported on 31st of May 2012 that the then Ethiopian Telecommunications Corporation (now Ethio-Telecom) has deployed or begun testing Deep Packet Inspection of all internet traffic. See, Tor, Ethiopia Introduces Deep Packet Inspection, May 31, 2012, available at < https://blog.torproject.org/blog/ethiopia-introduces-deep-packet-inspection.> [Accessed on September 27/2013]

[99] Electronic Privacy Information Center, Deep Packet Inspection and Privacy, available at <http://epic.org/privacy/dpi/.> [Accessed on September 27/2013]

downloads.[100] The uses of DPI seem to generate *prima facie* privacy concerns, as data about users' behavior on the internet (which could also include sensitive data) is being monitored and used for various purposes.[101] The danger with widespread use of DPI is that it may be abused in certain circumstances for purposes that violate end users privacy.[102]

The DPI technologies would practically enable the sole state-owned ISP, Ethio-Telecom, to intercept and survey almost every communication over the net. In the absence of a law authorizing the use of such technologies in circumstances set out under Article 26(3) of the FDRE Constitution, the surreptitious use of DPI would violate the right of persons to inviolability of their communication through the internet guaranteed under Article 26(2) of the FDRE Constitution. Although there might exist compelling circumstances necessitating using tools such as the DPI, the easy way forward would be to set forth a clear framework within which the incumbent telecom company may interfere with the private communications of right-holders.

3.4.3. Unsolicited Communications[103] and Privacy of Communications

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[100] Ibid.

[101] A. Daly, "The Legality of Deep Packet Inspection", 2010, First Interdisciplinary Workshop on Communications Policy and Regulation 'Communications and Competition Law and Policy – Challenges of the New Decade', University of Glasgow 17 June 2010, p. 7; available at < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628024 .> [Accessed on September 27/2013].

[102] C. Hangey, "Deep Packet Inspection and Your Online Privacy: Constitutional Concerns and the Shortcomings of Federal Statutory Protection", 2008, available at <http://ssrn.com/abstract=1907078.> or http://dx.doi.org/10.2139/ssrn.1907078> [Accessed on September 27/2013].

[103] As can readily be gleaned from the phraseology "This right shall include(sic).." under Art 26(1) of the FDRE Constitution, the right to privacy is guaranteed broadly in that it possibly includes the right to be let alone. The latter includes the right to decide what kinds and forms of communications to receive. The electronic

Speaking of telecommunications and privacy, a recently adopted law on advertisements partly deals with unsolicited telecommunication advertisements. According to this law, unsolicited advertisements sent to subscribers' telephones shall be prohibited unless the subscriber consented in advance.[104] In effect, the law adopts what is elsewhere called 'opt-in' approach of communications by which electronic communications such as e-mail have to be addressed to individuals only after consent is secured. The law however carves out an exception to those advertisements addressed by the telecom provider, Ethio-telecom itself and public advertisements.[105] While the inclusion of opt-in approach is commendable measure in protecting the privacy of subscribers, the broader exception of advertisements by the Ethio-telecom may be called into question.

Given that most of the advertisements sent over to subscribers are from Ethio-telecom itself, we suggest that the exception should rather be restricted only to those relevant and perhaps mandatory service advertisements rather than commercial and sometimes political advertisements and communications. Moreover, there should be an option for a subscriber to 'opt-in' at the time of subscription or to 'opt-out' at a later stage. Also striking about the law on advertisement is its apparent failure to include unsolicited communication through electronic mail. Indeed, it includes 'internet website' (lets us assume that this is meant to include e-mail) in defining means of advertisement dissemination. In a country where the level

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communications may be either unsolicited e-mails, also called spam, sent from botnets maintained abroad or mobile SMS/MMS or even cold phone calls.

[104] A Proclamation on Advertisement, Proclamation No. 759/2012, Federal Negarit Gazeta, 18th Year, No. 59, Art 22(2)..

[105] Ibid.

of internet penetration is close to 1.1%,[106] the omission might not come as a surprise. It must nevertheless be stressed that regulation shall envision future developments in ICT sector of our country so that legal protection of citizens would not be a piecemeal exercise.

At the time of writing of this article, a draft cybercrime law that, among others, criminalizes dissemination of commercial advertisements through e-mail — or spamming — has emerged.[107] The draft text of the law states that whosoever disseminates spam through e-mail accounts is criminally punishable.[108] The law further sets forth exceptional circumstances where spamming will not be punishable; these are:

i. There is prior consent from the recipient, or

ii. The primary purpose of the advertisement is to introduce existing users or subscribers with new products or services, or

iii. The advertisement contains valid identity and address of the sender, and valid and simple way for the recipient to reject or unsubscribe receipt of further advertisement from the same source.

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[106] According to Internet World Stats 2012 report, the level of internet penetration in Ethiopia is 1.1%. See, Internet World Stats, Usage and Population Statistics, available at <http://www.internetworldstats.com/africa.htm#et.> [Accessed on September 27/2013]. In an interview with Ethiopian News Agency (ENA) on 13th June 2012, Minister of Communication and Information Technology and Deputy Prime Minister Dr. Debre-Tsion Gebre-Micael stated that the number of internet users have reached 2.5 million, which roughly would put the level of internet penetration 2.87 %. See, details about the news report at < http://danielberhane.com/2012/06/17/ethiopia-internet-users-no-reached-2-5-million-minister-says/ >. [Accessed on September 27/2013]

[107] Note that the authors of this article had the opportunity to take part in the workshop called on to comment on the draft text of the law drafted by the Information Network Secuirity Agency held at the Golf Club, Addis Ababa between July 22 – 23, 2013.

[108] See the Proclmation to Legislate,Prevent and Control Computer Crime (Draft), 2013, Art 14 available on file with the authors.

The initiative to regulate spam is commendable on its own though most spam destined to our e-mails are from overseas and indeed from those highly sophisticated spammers. The challenge ahead is thus formidable as policing and prosecuting such offenders would require significant technological and institutional readiness.

3.5 Few Words on Evolving Privacy Invasive Media Practices

On 25 January 1883 Samuel Warren married Mabel Bayard, a daughter of a United States Senator from Delaware and a candidate for President, Thomas Bayard.[109] The New York Times and the Washington Post shortly featured detailed and sensitive reportage of the wedding.[110] Furious about the details disclosed by the press, Warren and his colleague Lois Brandeis wrote one of the most widely cited law review article in 1890[111], an article tout to invent the 'right to privacy as we know it today'.[112] In the article, Warren and Brandeis attacked unethical and intrusive reporting practices of the press. They stated that 'the press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as wells as effrontery'.[113]

Although not in a scale described by Warren and Brandeis a century ago, evolving media practices are posing real dangers to privacy in Ethiopia.

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[109] A. Gajda, "What If Samuel D. Warren Hadn't Married A Senator's Daughter?: Uncovering The Press Coverage That Led To 'The Right to Privacy'", *Michigan State Law Review,* 2008, Vol. 35, p. 36.

[110] Ibid, pp. 36-37.

[111] S. Warren and L. Brandeis, The Right to Privacy, Harvard Law Review, Vol. 4, 1890, available at < http://www.law.louisville.edu/library/collections/brandeis/node/225>. [Accessed on September 27/2013]

[112] D. Glancy, "The Invention of The Right to Privacy", *Arizona Law Review*, Vol. 21, No. 1, 1979, p. 1.

[113] Warren and Brandeis, supra note 111.

Following a slight liberalization of the media sector, private radio and television channels are increasingly becoming viable alternatives to state media. The peculiar feature of these channels is that the greater portion of the transmissions focuses on entertainment programs anchored almost in similar fashion. And, some of them heavily rely on disclosing very private information of celebrities or other eminent personalities. A few examples are in order.

A radio program called '*Ethiopica Link*', aired throughout the week except on Sundays on Fana FM 98.1, has a special program named *'ye Ethiopia mishit'* on air for three hours.[114] While the radio show is often penchant on disclosure of information about celebrities, foreign or local, the one hour program that it presents on Saturday nights raises questions of privacy. The program, dubbed '*wist awaki*', probably inspired by a US TV program called *'Insider'*, focuses on divulging very sensitive and intimate private information of individuals and families. There doesn't seem to exist a limit on what kind of personal information has to be disclosed. This is obviously due to the absence of any data protection law in Ethiopia that regulates processing of personal data by data controllers including the media. Lack of clear privacy regime has inextricably blurred the boundaries of freedom of expression and the right to privacy of citizens.

One might be struck that the said radio program has received a considerable attention from a good portion of the public. According to Warren and Brandeis, such attention should not come as a surprise as gossips are of easy

[114] Recently, this program has been forced to leave FM 98.1 and has started airing in another FM station called Zami FM 90.7. The structure of the program has however resumed as before, if not with more anti-privacy tendency.

comprehension and are appealing to the weak side of human nature.[115] Limitless engagement in sniffing around the private affairs of others is said to have serious social and psychological implications. Warren and Brandeis, for instance, argued that overly privacy invasive acts of the media have the potential to cause serious mental pain and distress whose harm may even be far reaching than physical injury.[116] In similar fashion, Westin associates numerous instances of suicide and nervous breakdown to unfettered exposure of individuals' private affairs.[117] Lowering moral and social standards are also possible results of unfettered curiosity and yearning for gossip. In the view of Warren and Brandeis, when personal gossip attains the dignity of (print), and crowds the space available for matters of real interest to the community, it nourishes triviality than robustness. With rapid mushrooming online blogs operated by a good mass of the youth, which requires just a computer and cheaply accessible internet, mainly CDMA wireless modems, privacy unfriendly incidents are in the horizon in Ethiopia.[118]

Another example is a newly launched television program called *'chewata'*, where in one of its episodes, the hosts tried to create fun by spraying water on innocent pedestrians from a hidden location. The right not to be subjected to unlawful molestation is among the various personality rights guaranteed under the Ethiopian Civil Code by which a person subject to molestation can

[115]Warren and Brandeis, supra note 111.
[116] Warren and Brandeis, supra note 111.
[117] Ibid.
[118]The wedding of music star Tewodros Kassahun (aka Teddy Afro) which attracted extensive media attention perhaps signals the future. On top of many photos of the musician and his bide gone viral over the net (apparently taken in what they call it the US Paparazi snapshots), some bloggers went a bit far to disclose sensitive previous individual relationships of the bride and bridegroom. See, for instance, Teddy Afro and Amleset Muchie Get Married, *Addis Journal,* september 27, 2012, available at < http://arefe.wordpress.com/>. [Accessed on September 27/2013]

demand cessation of the act[119] and perhaps be entitled to damages for harms done under extra-contractual liability.[120] A number of tort law provisions may also be invoked against the molestation by the media, physical assault and interference with ones liberty.[121]

3.6 Privacy and Collection and Cross-organizational Transfer of Personal Data

While Ethiopia doesn't have specific data protection law proper, there are a handful of provisions scattered across various legislations that provide for data protection. A good case in point is the duty of confidentiality provision of the Income Tax Proclamation (ITP). The tax authority is obliged under Article 39 of the ITP to keep tax information confidential except such disclosures, *inter alia*, to law enforcement agencies for prosecuting a person for tax violations. The same provision carves out an exception also for such disclosures to courts to establish tax liabilities or any other criminal cases.[122] Yet, bodies to which such information are disclosed are under obligation not to transfer the data to other parties except to the limit necessary to achieve the purpose for which the disclosure is permitted.[123]

In all other cases, disclosure of tax information is possible only when the taxpayer gives a written consent.[124] It is to be noted that the exception with regard to disclosure for law enforcement agencies is strictly qualified in that disclosure would be lawful only when it relates to a specific taxpayer, and

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[119] The Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, Negarit Gazetta, Extraordinary Issue, Art 10.

[120] E. Stebik, *Ethiopian Law of Persons: Notes and Materials* (St. Mary University College Faculty of Law, 2007), p. 123.

[121] See the Civil Code, supra note 119, Arts 2038 and 2040 of.

[122] Income Tax Proclamation, supra note 84, Art 39(1(c)).

[123] Ibid, Art 39(2).

[124] Ibid, Art 39(3).

most importantly, it must be for the purpose of prosecuting tax violations such as tax evasion. This exception therefore doesn't allow disclosure to other authorities that may seek to proceed against a taxpayer for other purposes such as for prosecuting for crimes related to terrorism or treason. Given that tax violations are prosecuted by the tax authority itself as it has a special prosecution wing[125], there could not be tax violation cases that the intelligence authorities might be interested in.

That notwithstanding, a relatively recent law on prevention and suppression of money laundering and financing of terrorism categorically changes the duty of confidentiality noted above. According to this law, no obligation of confidentiality imposed by other laws (income tax law included) shall affect obligations of accountable persons[126] to report or furnish information on customers to competent authorities.[127] It hence completely lifts the duty of confidentiality of tax information so long as the latter happens to help to gather information on money laundering offences. This is not the only catastrophe that the law brought along; it also allows the competent authorities to share the information obtained to other authorities, be it local or foreign, without regard to the consent of the data subjects.[128]

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[125] See the Proclamation to Provide for the Establishment of The Ethiopian Revenues and Customs Authority. No. 587/2008, Federal Negarit Gazeta., 14th year, No. 44, Art 7(2).

[126] The Ethiopian Revenues and Customs Authority is among the long list of accountable persons with the obligation to disclose confidential information to 'competent authorities'. See, Art 2(1(g)), A Proclamation on Prevention and Suppression of Money Laundering and Financing of Terrorism, Proclamation No. 657/2009, Federal Negarit Gazeta, 16th Year, No. 1.

[127] Art 2(4) of the Proclamation defines 'competent authorities' to include, among others, the Financial Intelligence Center.

[128] See Art 4(2) of the Proclamation No. 657/2009, supra note 126.

The Financial Intelligence Center, a body principally entrusted with enforcing the proclamation on the Prevention and Suppression of Money Laundering and Financing of Terrorism, is reportedly revising the law with view to make amendments.[129] According to reports, the revision mainly concerns providing detailed definitions of some of the terms in addition to making adjustments to the overall structure of the proclamation.[130] It is thus unlikely that the revision would concern the rules on disclosure of confidential information.

Other recent legislative developments are not also flattering. A recently adopted law on a uniform National Identification Card (NIC) permits cross-organizational transfer of data collected in the course of issuing the NIC to wide range of institutions including intelligence authorities without requiring the consent of the data subject.[131] The law stresses that information collected in relation to NIC has to be properly stored in a 'central database' in manner that the stored information could further be used for other purposes other than for which it was initially collected.[132] This proviso is at odds with one of the cardinal principles of data protection law called 'use limitation principles' which holds that 'use of personal data for purposes other than those specified should occur only with the consent of the data subject or clear legal

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[129] E. Araya, Financial Intelligence Centre Drafting Anti-money Laundering Bill Update, Addis Fortune, Volume 13, Number 643 July 22, 2012; available at <http://www.addisfortune.net/Financial%20Intelligence%20Centre%20Drafting%20Anti-money%20Laundering%20Bill%20Update.htm.> [Accessed on September 27/2013].

[130] Ibid.

[131] See the Proclamation on the Registration of Vital Events and National Identity Card, Proclamation No. 760/2012, Federal Negarit Gazeta, 18th Year, No. 58, Arts 63 and 64. See also አዲስ አድማስ, ምስጢራዊ ቁጥር ያለው መታወቂያ የሚያሰጥ ረቂቅ አዋጅ ወጣ, June 23/2012.

[132] Ibid, Art 63(1). Intelligence and security agencies, tax authorities, crime investigation authorities are among a list of entities to which information collected in connection with NIC could possibly be disclosed.

authority'.[133] What is worrisome about these proposals is that the envisioned NIC database is set to include very private information about individuals such as 'ethnicity'.

In systems with developed data protection regimes such as the European Union, processing of sensitive personal data (which includes collection, disclosure by transmission and dissemination) is strictly prohibited save few exceptions such as when the data subject gives his explicit consent.[134] We suggest introduction of a clearly defined consent regime in those areas where disclosure of (sensitive) personal data is required.

3.7 Making Sense of Snowden's Leakes — The Impact on Privacy of Ethiopians

On June 6, 2013, The Guardian and the Washington Post revealed massive secret surveillance documents. Edward Snowden, a former US National Intelligence Agency (NSA) analyst, was later announced to be the source of the intelligence documents. According to the leaked documents, a top secret program called "PRISM" enables the NSA to directly access the servers and databases of internet giants such as Microsoft, Google, Facebook and Apple.[135] NSA analysts, through this program, are able to access users' search history, content of e-mails, file transfers and live online chats.

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[133] See, L. Bygrave, "Data Protection Pursuant with the Right to Privacy in Human Rights Treaties", *International Journal of Law and Information Technology*, Vol. 6, 1998, p. 249.

[134] See, theEuropean Union Data Protection Directive 95/46, Art 8 available at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF> [Accessed on September 27/2013]

[135] G. Greenwald and E. MacAskill, 'NSA Prism Program Taps into User Data of Apple, Google and Others', The Guardian, 7 June 2013, available at <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>. [Accessed on September 27/2013]

Another related surveillance program called XKeyScore enables analysts to search, with no prior authorization, through vast databases containing e-mails, online chats and browsing history of millions of individuals.[136] Apparently, the surveillance concerned any internet user irrespective of his/her geographic locations. Indeed, it also covered foreign presidents and embassies of various countries.[137] This has resulted in stiff row between the US and other countries including its strategic allies. The EU, known for its robust data protection regime, threatened to suspend data sharing pacts that it has with the US.[138] This is notwithstanding the lots of criticisms forwarded and concerned aired from privacy advocates and commentators.[139]

Defending the surveillance, President Obama said that "it was a modest encroachment on privacy necessary to protect the US from terrorist

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[136] G. Greenwald, XKeyScore: NSA Tool Collects 'Nearly Everything a User Does on the Internet', The Guardian, 31 July 2013, available at < http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>. [Accessed on September 27/2013]

[137] The news that the surveillance targeted presidents of Brazil and Mexico caused controversies between the countries and the United States. See details at <http://www.bbc.co.uk/news/world-latin-america-23938909>. [Accessed on September 27/2013]

[138] A Croft, EU Threatens to Suspend Data-sharing with U.S. Over Spy Reports, Yahoo! News, July 5 2013, available at < http://news.yahoo.com/eu-threatens-suspend-data-sharing-033550042.html >[Accessed on September 27/2013]

[139] Dismayed by the news of surveillance, some scholars even preferred to suggest a better technical solution to curb massive surveillance of internet activities by the state, rewriting the internet! See, L. Lessig, 'It's Time to Rewrite the Internet to Give Us Better Privacy, and Security', The Daily Beast, June 12 2013, available at <http://www.thedailybeast.com/articles/2013/06/12/it-s-time-to-rewrite-the-internet-to-give-us-better-privacy-and-security.html>. [Accessed on September 27/ 2013] A more enlightnening work on the impact of the NSA spying on non-American wasby the British privacy expert Caspar Bowden. See, C. Bowden, The US National Security Agency (NSA) Surveillance Programmes (PRISM) and Foreign Intelligence Surveillance Act (FISA) Activities and their Impact on EU Citizens' Fundamental Rights, Briefing Note to the European Parliament, September 2013. Available at <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/briefingnote_/briefingnote_en.pdf> [Accessed on September 27/2013]

attacks".[140] The US spy chief James Clapper defended the act stating that all the information gathered under PRISM was obtained with the approval of FISA court, a secret surveillance court established under Foreign Intelligence Surveillance Act of 2008 (as amended) to entertain requests for surveillance.[141] Obama's remarks that the 'the monitoring of internet communications doesn't apply to American citizens and those who live within the United States' fanned the fire as he made it crystal clear that non-Americans are targets of the surveillance programs. It is certainly true that US surveillance law is entirely clear in that non-US citizens and those who are not residing the US (Ethiopians included) are with no constitutional protections.[142]

Little is heard from Africa in general and Ethiopia in particular about the privacy invasions by the NSA. Given that only a few million Ethiopians are connected to the internet (about 2.5 million by the end of 2012), the lack of concern from Ethiopian internet users is not unexpected.[143] It is in fact doubtful if an average Ethiopian internet user had ever felt what the revelations meant to his/her privacy.

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[140] M. Dorning and C. Strohm, 'Obama Defends Data Spying as Modest Privacy Encroachment', Bloomberg, June 8 2013, available at < http://www.bloomberg.com/news/2013-06-07/obama-defends-data-spying-as-modest-privacy-encroachment.html > [Accessed on September 27/ 2013]

[141] See US Spy Chief Clapper Defends PRISM and Phone Surveillance, BBC News, 7 June 2013, available at < http://www.bbc.co.uk/news/world-us-canada-22809541> [Accessed on September 27/2013]

[142] I. Brown,'Yes, NSA Surveillance Should Worry the Law-abiding', The Guardian, 10 June 2013, available at <http://www.theguardian.com/commentisfree/2013/jun/10/nsa-snooping-law-abiding>. [Accessed on September 27/2013]

[143] For more on the rampant oblivion on the right to privacy in Ethiopia, see K. Yilma, 'Where Does the Right to Privacy End?',Addis Fortune, Vol. 14, No. 688, 7 July 2013, available at <http://addisfortune.net/columns/where-does-the-right-to-privacy-end/>. [Accessed on September 27/ 2013]

What is more serious is the fact that Ethiopia does not have a legal framework through which internet content providers such as Google and Facebook, accessories in the above data snooping, could be held liable for breach of user data. Like many internet users in other countries, Ethiopian users barely have both the interest and the patience to thoroughly read through the terms of use of internet services of those companies which often are set out in rather complex and lofty manner. Most reluctantly and grudgingly accept those terms. In fact, there barely exists any other option than accepting the terms.

What is peculiar about these terms of use is that they are mere self-regulatory policies, not laws in the stricter sense of the expression. And, it is in response to this that may countries have enacted data protection laws that regulate acquisition, storage and processing of users personal data by service providers like Facebook, Google, and Yahoo!.[144] As already noted, Ethiopia doesn't have data protection law proper. The Information and Communication Technology Policy of 2009 however clearly recognizes the need to issue data protection law.[145] As the number of internet users increases overtime (the government plans to increase it to 3.69 million by the end of the Growth and Transformation Plan year), data privacy of Ethiopian

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[144] Close to 90 countries have so for issued data protection laws. See, G. Greenleaf, 'Global Data Privacy Law: 89 Countries and Accelerating', Queen's Mary University of London School of Law, Legal Studies Research Paper No. 98, 2012, available at < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000034&download=yes>. [Accessed on September 27/2013]

[145] See *The Federal Democratic Republic of Ethiopia, The National Information and Communication Technology Policy and Strategy*, Addis Ababa, August 2009, p. 8 *et seq*. Laws that regulate behavior online are on the pipeline in Ethiopia. A cybercrime law (drafted by the Information Network Security Agency) and E-commerce law (reportedly drafted by the Ministry of Communication and Information Technology in collaboration with UN Economic Commission for Africa) are examples. Nothing is, however, heard so far concerning data protection law.

internet users would undoubtedly be more vulnerable to abuses and breaches. It is therefore high time to promulgate a law that protects citizens from data privacy breaches by internet companies and foreign intelligence agencies.

4. Conclusion

Though to a varying degree, Ethiopia recognized the right to privacy of citizens throughout its constitutional history .Well informed by major international human rights instruments especially the UDHR and ICCPR, the FRDRE Constitution succinctly sets out the right to privacy of persons in their persons, home and communications. Nevertheless, the nature, scope and limits of the right to privacy have not received due academic interest. More importantly, the privacy provision of the FDRE Constitution and its interplay with other laws of the country with potential privacy implications have not been subjected earnest critique.[146] With the view to partly mitigate this void, this article has closely examined a selection of post-1995 laws and practices

[146] It is also doubtful if there have been cases litigated before courts that implicate right to privacy. Quite interestingly, in a widely acclaimed didactic TV program called '*chilot*', which presents role-playing of court proceedings concerning various laws of Ethiopia, an issue relating to privacy was recently raised. The matter related to customs/tax law violation where employees of the tax authority along with a tax/customs evader were accused of conspiring to let in goods without the proper customs procedure and without paying taxes due. The prosecutor presented an electronic evidence (obtained from a secret surveillance Closed Circuit Television or CCTV camera) to corroborate the charges of abetting and aiding the commission of the crime. And, the accused (employees of the tax authority) argued that such evidence should not be admissible as they were not aware of the existence of such secret surveillance and that they would do other 'private' activities assuming that the spot is not under surveillance. [Note that what the accused persons raised is what in the US privacy jurisprudence called "reasonable expectation of privacy", which literarily denotes that persons reasonably expect privacy when they are not in public places]. The court ruled, without any further inquiry, that there is no legal bases to exclude evidences obtained through secrete surveillance and that the issue shall rather be on how much weight shall be attached to the evidence. Note however that neither the court nor the accused persons mentioned Art 26 of the FDRE Constitution. See podcast of the program at < http://www.youtube.com/watch?v=luasDXonHcM>. [Accessed on September 27/2013]

and uncovered their potential implication on the constitutional right to privacy.

It began by tracing the origin of claims of privacy in primitive and modern societies. We noted that the desire for temporal seclusion and delineation of private sphere is to be found virtually in every society. The various conceptualizations of privacy such as privacy as non-interference, privacy as informational control, privacy as freedom and privacy as dignity have also been briefly highlighted. The second part of the article presented privacy as a human right and described privacy as provided in maior international human rights instruments and the FDRE Constitution.

The third part of the article closely scrutinized a selection of laws such as the recently adopted law of telecom fraud offenses, tax foreclosure rules, and criminal procedure rules in light of Article 26 of the FRDE Constitution. Collection and cross-organizational transfer of taxpayers' personal data, installation of deep packet inspection are among practices reviewed in the light of the privacy provision of the FDRE Constitution. We stressed that aspects of those laws and practices have presented insidious threat to the constitutionally envisaged right to privacy of citizens and must be revisited to live up to the requirements of the FDRE Constitution. Ongoing legislative initiatives such as the issuance of national identification number have also been raised in passing pointing out their potential privacy implication.

Accordingly, we proffer the following recommendations:
In order to prevent and control a terrorist act, the National Intelligence and Security Service and the police are empowered to use different methods ranging from electronic surveillance to warrantless search. The preventive

police work includes the use of covert and sudden searches. In a sudden search, the police officer is granted to carry out warrantless search and seizure solely on the basis of reasonable belief that a terrorist act may be committed. Such discretionary powers may pose a threat to the constitutional right to privacy. We recommend that such a search should be conducted upon judicial authorization.

ii. The Revised Anti-Corruption Special Procedures and Rules of Evidence Proclamation grants the head of appropriate organ to order a warrantless exclusive discretion to intercept the communications of individuals. Such a discretionary power would undermine the constitutional right to privacy. We suggest that interception should be made through judicial oversight.

iii. Given the low level of the development of the tax administration system and with the view to enhance confidence of taxpayers towards the tax system, and indeed to maintain constitutionality, we suggest embracing judicial authorization before taking abrupt collection. This applies mainly in relation to seizing the property of allegedly delinquent taxpayers.

iv. We strongly recommend clarity on the scope of the power police covert search powers and the discretion of courts in entertaining a request for a covert search warrant. The rule on the admissibility of evidences obtained through secret surveillance needs also to be revisited. This may better be dealt with by clearly setting out the powers and roles of both the police and courts in relation to covert searches. Once that is sorted out, all evidences collected through police surveillance in contravention of the search warrant would be inadmissible.

v. We found the anti-money laundering proclamation's rule that obliges a range of entities to disclose personal data of individual without the explicit consent of the individuals concerned as dangerous erosion of the right to privacy.

While we acknowledge the need to combat terrorism, obliging data controlling entities to disclose personal data of their clients represents the biggest threat to the protection of personal data. As a result, we recommend revising this part of the law and setting a clearer consent regime under the proclamation.

vi. At the most basic level, it is worth stressing the importance of exposing draft laws to public and expert debates before they enter the statute book. Views of experts and concerned stakeholders on draft legislations would significantly help in honing the laws thereby preemptively avoiding glitches during implementation.

vii. We also call the attention of concerned stakeholders including the relevant state organs and the media to pay attention to the privacy implications of evolving media practices. This should include extensive public awareness education on the right to privacy and its relation with the freedom of expression.

Finally, the authors want to stress that this article has focused on major laws and practices and there is a need for further study on these and other laws and practices in relation to their impact on the right to privacy.

Regulation of Merger under the Ethiopian Competition Law

Hussein Ahmed Tura*

Introduction

Issues in market dominance are of crucial importance to developing countries at their early stages of the implementation of competition policy and law. Merger is one of the transactions that give rise to market dominance. Mergers have both benefits and costs in a market economy. Entities merge for different business and commercial reasons. They may merge to achieve economies of scale and scope, to expand business capacity, to be operative in different markets, to produce at lowest marginal cost and various others.[1] Nonetheless, there could be many reasons why governments, market players, shareholders and individuals might object to mergers.

Governments may object mergers because it may be against the industrial or foreign policy or a transaction which could lead to production of illegal quality or quantity of a particular product. Market players might object to a merger transaction as it could lead to monopoly or could create barriers to entry and similar anti-competitive practices. Shareholders might oppose to mergers which result in reduction of share value or share effectiveness or transaction. Similarly, individuals may oppose to a transaction which might

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[1] Neeraj Tiwari, 'Merger under the Regime of Competition Law: A Comparative Study of Indian Legal Framework with EC and UK', *Bond Law Review*, Vol. 23 No. 1 (2011), 117-141

result in higher market prices, decrease in quantity or quality of goods and other analogous practices.[2]

Merger regulation is based on the preventive theory and generally operates *ex ante*, i.e., to prevent a transaction adversely affecting competition before it is consummated. In addition, cost of de-merging entities is not an easy operation for competition and other regulatory authorities.

Most countries in the world have enacted competition laws to protect their free market economies and have thereby developed an economic system in which the allocation of resources is determined mainly through the process of demand and supply. In the case of Ethiopia, competition law was introduced in 2003. However, Proclamation No.329/2003 was not only inadequate but also obsolete in certain respects; particularly, in light of merger regulation as it did not contain provisions governing the subject matter. To overcome such limitation, the Ethiopian government has enacted the Competition and Consumers Protection Proclamation in 2010. This enactment follows the country's opening up of its economy, and the removal of controls leading liberalization.

This article examines Ethiopia's Competition and Consumers' Protection law with specific reference to merger regulation in light of international best practices. With a view to drawing lessons from the experiences of countries that already adopted advanced merger regulation regime, the article reviews the relevant laws of the United States of America, the European Union, the United Kingdom and South Africa. In general, the article would be useful to understand the scope of the law in Ethiopia and to identify the strengths and weaknesses of the provisions in the Ethiopian law on regulation of merger.

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[2] Ibid.

To this effect, the article identities successful practices in other jurisdictions that could be adapted in the Ethiopian context in accordance with the prevailing circumstances. The article attempts to answer the following specific questions:

- What are the different types of mergers and what are their effects on competition?
- How do relevant laws address issues in merger regulation such as threshold limits and substantive procedures for determining fate of mergers?
- How is joint venture transactions dealt with under competition laws?
- What are the major strengths and weaknesses of Ethiopia's Competition and Consumers' Protection law in addressing the main issues in merger?

Primary legislations such as proclamations (statutes or acts), regulations and guidelines as well as relevant commentaries and observations of jurists and experts have been referred to in the course writing this article.

The article is organized into six sections. The first section reviews the Ethiopian competition law and policy by exploring relevant provisions of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), and relevant subsidiary laws. The second and third sections respectively explain the meaning and different types of mergers; and elaborate on effects and consequences of various merger transactions. The fourth section attempts to elucidate on significant aspect of threshold limits,

notification of merger, and explains substantive tests used for assessment of mergers and the factors considered by competition authorities before deciding the fate of mergers. The fifth section looks into the much debated aspect of control of joint ventures under merger laws and will examine how different jurisdictions have dealt with the same. Finally, the article offers conclusions which could be considered in improving the Ethiopian competition law with specific reference to merger regulation.

1. Overview of Competition Law and Policy in Ethiopia

This section briefly reviews the Ethiopian competition policies and laws. It first looks at the competition policies starting from the period of Transitional Government (1991) and onwards. It discusses the constitutional basis of competition law and policy in the current legal framework. It then reviews Ethiopian laws governing unfair competition including: the Commercial Code, the Civil Code and the Criminal Code. The section gives special emphasis to the Trade Practice and Consumers Protection Proclamation No.685/2010 and reviews its contents with a view to indicating the existing legal framework with respect to competition law and consumers protection in the country.

1.1 Competition Policy

The Ethiopian government has committed to enforce free market economic policy starting from the transitional period. The Transitional Government defined its economic roles under the transitional economic policy adopted in 1991 and promised to reduce the scope of its economic activities in the interest of free market; and to promote domestic and foreign private

investments.[3] The FDRE Constitution also authorizes the Council of Ministers to formulate the socio-economic policies and obliges the government to formulate policies which ensure that all Ethiopians can benefit from the country's legacy of intellectual and material resources.[4] Accordingly, the ruling party (the Ethiopian People's Revolutionary Democratic Front- EPDRF) elaborated on the economic policy objective of the country in 2000.[5] It focused on the significance of private sector as engine of economic growth and foresaw the market correction and developmental roles of the government.[6] The Federal government launched a strategy of Agricultural Development Led Industrialization by adopting rural development policy and industrial development strategy among others. Through these policies and strategies the government elaborated on a number of economic and social policy objectives including: reducing the direct role of the government in business, encouraging the development of private sector, promoting competition, economic efficiency and growth, correcting market failures, providing goods and services which market may not provide, avoiding price and quality abuses, ensuring consumers protection and integrating the Ethiopian economy with the global economy.[7] Moreover, the government adopted an ambitious 'Growth and Transformation Plan' in 2010, to make Ethiopia a middle income country by 2025 and realize domestic food security by 2015, in which it reiterated its commitment to

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[3] Transitional Government of Ethiopia, Ethiopia's Economic Policy during the Transitional Period, (Nov 1991), pp.17ff; See also Harka Haroye, 'Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law', *Mizan Law Review* Vol. 2 No.1, (Jan 2008).

[4] Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc. No. 1, Federal Negarit Gazeta, Year 1, No. 1. (FRDE Constitution), Arts 55(10), 89 (1).

[5] EPDRF, Revolutionary Democracy: Development lines and Strategies, (Mega Publishing Enterprise, August 2000), pp. iv, vi, 3-32 and 123-239.

[6] Ibid.

[7] Solomon Abay, "Designing the Regulatory Roles of Government in Business: The Lessons From Theory, International Practice And Ethiopia's Policy Path", *Journal of Ethiopian Law*, Vol. XXIII No.2 (Dec 2009), p.119.

promote free market economy. In an effort to enforce these policies, the government has also taken a number of practical measures. It has privatized some public enterprises and is continuing to promote investments and private sectors through various incentives. The Ethiopian business community has also responded very positively to these openings, as demonstrated by the number of new Ethiopian entrants into several sectors such as banking, insurance, textiles and floriculture industries. However, it has also been argued that:

> (t)he process of introducing free competition into the economy is far from complete. Despite new entry, important sectors are still overwhelmingly dominated by State-owned enterprises, and the retail sector and financial services are, for the most part, closed to competition from foreign firms. Government monopolies also continue to exist in energy and other sectors.[8]

1.2 Unfair Competition under the Commercial Code

The Commercial Code of Ethiopia contains rules governing unfair competition. Particularly, Article 133 prescribes acts of competition which are considered as unfair:

1. Any act of competition contrary to honest commercial practice shall constitute a fault.
2. The following shall be deemed to be acts of unfair competition:
    a. any act likely to mislead customers regarding the undertaking, products or commercial activities of a competitor;
    b. any false statement made in the course of business with a view to discrediting the undertaking, products or commercial activities of a competitor.

[8] United States Agency For International Development, *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic*, (January 2007), p. 60.

Where an act of unfair competition has been committed by one trader against another, the Commercial Code affords the victim remedies. Article 134 (1) the Code provides for certain remedies: damages and other orders that are deemed fit to put an end to the unlawful act.[9]

1.3 Unfair Competition under the Civil Code

Unfair trade practices which may affect trade within Ethiopia are also prohibited by the Ethiopian Civil Code. The Code states that "a person commits an offence where, through false publications, or by other means contrary to good faith, he compromises the reputation of a product or the credit of a commercial establishment."[10] Furthermore, "in the case of unfair competition, the court may order the abandonment of the dishonest practices used by the defendant."[11] The orders may in turn take the form either of an order for corrective publicity under Article 2120 of the Civil Code or an injunctive order Article 2122 of the Civil Code. Sub-art (2) of Article 134 of the Commercial Code stipulates:

> The court may in particular:
> a) order the publication, at the costs of the unfair competitor, of notices designed to remove the effect of the misleading acts or statements of the unfair competitor to cease this unlawful acts in accordance with Article 2120 of the Civil Code.
> b) order the unfair competitor to cease this unlawful acts in accordance with Article 2122 of the Civil Code.

While entertaining a claim for damages arising from unfair commercial competition, the courts must stick to the rules and principles of the Civil Code governing extra-contractual liability. In this regard, Everett F. Goldberg

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[9] See also Civil Procedure Code of Ethiopia, 1965, Art 155.
[10] Civil Code of Ethiopia, 1960, Art 2057.
[11] Ibid, Art 2122.

also argues that: "[s]ince unfair competition is a species of extra-contractual liability, all the Civil Code provisions on extra-contractual liability dealing with matters not expressly covered in Articles 132-134 are applicable; for example, period of limitation, burden of proof, extent of damages, responsibility of persons or bodies corporate for the acts of others, etc."[12]

1.4 Unfair Competition under the Criminal Code

The Criminal Code defines criminal unfair competition as follows:[13]

> Whoever intentionally commits against another an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular:
>
> 1. by discrediting another, his goods or dealings, his activities or business or by making untrue or false statements as to his own goods, dealings, activities or business in order to derive a benefit therefrom against his competitors; or
>
> 2. by taking measures such as to create confusion with the goods, dealings or products or with the activities or business of another; or
>
> 3. by using inaccurate or false styles, distinctive signs, marks or professional titles in order to induce a belief as to his particular status or capacity; or
>
> 4. by granting or offering undue benefits to the servants, agents or assistants of another, in order to induce them to fail in their duties or obligations in their work or to induce them to discover or reveal any secret of manufacture, organization or working; or
>
> 5. by revealing or taking advantage of such secrets obtained or revealed in any other manner contrary to good faith,

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[12] Everett F. Goldberg, "The Protection of Trademarks in Ethiopia", *Journal of Ethiopian Law*, Vol. VIII, No.1, (1972), p. 134.

[13] Criminal Code of Ethiopia, 2004, Art 719.

is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.

1.5 Trade Practice Proclamation No 329/2003

With a view to safeguarding against private and public impediments to free competition taking place, and as part of the move to introduce free market forces into the Ethiopian economy, the Ethiopian Parliament passed the Trade Practices Proclamation No. 329/2003 (TPP). This legislation states that the government is committed to "[establishing] a system that is conducive for the promotion of a competitive environment, by regulating anticompetitive practices in order to maximize economic efficiency and social welfare."[14] It prohibits anticompetitive behavior and unfair or deceptive conduct by one competitor against another; authorizes regulation of prices for basic goods and services in times of shortage; and requires disclosure on labels of basic consumer information such as weights and measures. The law also provides for the creation of two implementing institutions, the Trade Practices Commission and the Trade Practices Secretariat.

The TPP has five parts: (a) definitions, objectives, scope, and exceptions; (b) prohibited trade practices; (c) enforcement bodies and appellate rights; (d) labeling and pricing regulations; and (e) remedies for violation. The substantive provisions of the law prohibit anticompetitive agreements[15] and abuses of dominance[16] as well as unfair competition.[17]

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[14] Trade Practice Proclamation, Proclamation No. 329/2003, Fed. Neg. Gaz, 9thYear No. 49, Preamble.
[15] Ibid, Art 6.
[16] Ibid, Art 11.
[17] Ibid, Art 10.

Article 6 of the TPP prohibits price fixing, bid rigging (collusive tendering), market and customer allocations, and refusals to deal. The Ministry may authorize exceptions to these prohibitions when "the advantages to the Nation are greater than the disadvantages".[18] This exception seems to authorize exceptions for national champions and may be used to discriminate against foreign companies, even in those sectors in which foreign firms may participate fully.[19]

For the most part, Article 11 (2) of the TPP prohibits the same kind of monopolistic conduct listed as prohibited in many jurisdictions. It prohibits, for example, price discrimination, tying arrangements, refusals to deal, excessive prices, and predatory pricing. Some of these conducts are not considered illegal in the United States, but are illegal in other developed countries.[20] Prohibiting excessive pricing puts the Commission in the position of being a price regulator of a sort, a position that is antithetical to the notion that the market sets prices and output. However, the class of persons to whom the prohibition applies under Article 11 (1) of the TPP is vague. The language of this Article is not clearly directed at those firms that are likely to achieve dominance. It states that "no person may carry on trade . . . having or being likely to have adverse effects on market development." This is unusually broad in that it is not limited to persons who are dominant or likely to achieve dominance, and the effect is that it focuses instead on "market development." Prohibiting single-firm conduct without regard to the firm's dominance opens wide the possibility that either competitively neutral or, even, pro-competitive conduct will be prohibited.[21] It would be

[18] Ibid, Art 7.
[19] USAID, supra note 8, p.59.
[20] Ibid, p.61.
[21] Ibid, p.60.

reasonable to interpret Article 11 as applying only to those who have dominance because it falls under the general heading of "Abuse of Dominance."

The TPP is incomplete as it does not deal with issues related to concerted action and mergers, takeovers and other forms of conglomerations at domestic, regional and international levels, which could lead to monopoly power in production and services provision. It does not define "market dominance." The Commission lacks the power to issue implementing regulations that may fill some of this gap, while the Council of Ministers or Regional Councils do have the power to do so.[22] In the only two actions that the Commission has brought that have involved, among other issues, alleged abuses of dominance, actions brought against Total and Mobile Oil, apparently no analysis was done to determine if the parties were dominant in their markets.[23]

1.6 Trade Practice and Consumers Protection Proclamation No. 685/2010

1.6.1 Introduction

This law comes into picture as an amendment of the Trade Practice Proclamation of 2003 and covers a number of issues related to competition and consumer protection. It reiterates the Ethiopian government's commitment to build free market economy. The Proclamation provides that "... commercial activities must be undertaken in accordance with appropriate practices based on free market economic policy of the country".[24] The

[22] Proclamation No.329/2003, Art 29.
[23] USAID, supra note 8.
[24] Trade Practice And Consumers' Protection Proclamation, Proclamation No. 685/2010, Fed.Neg.Gaz.,_16th Year No. 49, Preamble.

legislature also intended to protect the business community from anti-competitive and unfair market practices and consumers' from misleading market conducts; and to establish a system that is conducive for the promotion of competitive market.[25] The Proclamation also explicitly lists five objectives: protecting consumers' rights and benefits; ensuring the suitableness of the supply of goods and services to human health and safety and installing a system of follow up; ensuring that manufacturers, importers, service dispensers and persons engaged in commercial activities in general carry on their activities in a responsible way; preventing and eliminating trade practices that damage the interests and goodwill of business persons; and accelerating economic development.[26]

The Proclamation has seven parts: general provisions[27], trade practices,[28] consumer protection,[29] Trade Practice and Consumers Protection Authority[30], instituting of actions and conducting investigation[31], the distribution of goods and services[32] and miscellaneous provisions[33] respectively. This law is progressive in a number of ways. It deals with the protection of consumers comprehensively for the first time in the history of Ethiopian legal system despite the scattered provisions concerned with consumers' protection in different legislations like the Civil Code particularly dealing with extra-contractual liability and unjust enrichment; and provisions of the Commercial Code dealing with protection of goodwill of traders and prohibition of unfair

[25] Ibid.
[26] Ibid, Art 3.
[27] Ibid, Art 1 to 4.
[28] Ibid, Art 5 to 21.
[29] Ibid, Art 22 to 30.
[30] Ibid, Art 31 to 40.
[31] Ibid, Art 41 to 43.
[32] Ibid, Art 44 to 47.
[33] Ibid, Art 48 to 58.

trade practices. This law also defines what constitutes market dominance, an element which was missed in the Trade Practice Proclamation No. 329/2003. Moreover, it contains relatively detailed provisions concerning with regulation of merger. Above all, it reestablishes the Trade Practice and Consumers Protection Authority with clear responsibilities and tries to ensure its independence. In addition, this legislation contains rules prescribing various categories of penalties for violation of specific prohibitions on different aspects of competition law and consumers' protection.

1.6.2 General Provisions

Part one of Trade Practice and Consumers Protection Proclamation contains general provisions dealing with definitions, objectives and scope of application of the Proclamation. The Proclamation defines "Anti Competitive or Acts Restricting Market Competition" as "acts limiting the competitive capacity of other business persons in commercial activities through acts of putting business persons engaged in selling similar goods and services at loss by reduction of prices or through acts of taking over of businesses and technologies of business persons engaged in similar businesses or through act of restricting the entry of other business persons into market or through acts of restricting the suppliers of goods and services from determining their selling prices or through the tying of the sale of certain goods and services with the sale of other unlike goods and services by limiting the choices of consumers or users or are the acts prohibited under Articles 5, 11, 15 and 21 of this Proclamation and the like".[34] The specific provisions cited in this definition deal with prohibitions of different aspects of anti-competitive acts. Articles 5 prohibits abuse of market dominance as "[n]o business person, either by himself or acting together with others, may carry on commercial

[34] Ibid, Art 2 (18).

activity by openly or dubiously abusing the dominant position he has in the market." Article 11, on the other hand, states that "Agreement or concerted practice or a decision by an association is prohibited if it has the object or effect of preventing, restricting or distorting competition." Furthermore, Article 15(1) stipulates for a principle regarding regulation of merger as "the Authority shall prohibit the act of merger, if it decides that it causes or is likely to cause a significant restriction against competition or eliminates competition." In the same token, article 21 of the Proclamation prohibits unfair competition.

1.6.3 Prohibited Trade Practices

Part two of the Proclamtion governs *Trade Practices* and has three chapters. It addresses abuse of market dominance; agreements, concerted practices and decisions of associations of business persons and regulation of merger and unfair competition respectively. The first chapter deals with abuse of market dominance. As per this Proclamation, "a business person either by himself or acting together with others in a relevant market, is deemed to have a dominant market position, if he has the actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition in the relevant market."[35] Accordingly, this law fills the gap in the Trade Practice Proclamation which failed to define *market dominance*. Furthermore, the Proclamation provides for guidelines on assessment of dominance as:[36]

1) A dominant position in a certain market may be assessed by taking into account the business person's share in the market or his capacity to set barriers against the entry of others into the market or other factors as may be appropriate or a combination of these factors.

[35] Ibid, Art 6.
[36] Ibid, Art 7.

2) The market relevant for the assessment of a dominant position is the market that comprises goods or services that actually compete with each other or fungible goods or services that can be replaced by one another.
3) The geographic area of this market is the area in which the conditions of competition are sufficiently homogeneous and can be distinguished from the conditions of competition in neighboring areas.
4) The Council of Ministers may determine by regulation the numerical expression of the degree of market dominance.

Thus, the main factor that must be considered in the assessment of market dominance is the market share of a business person or its ability to limit others entry into the market that involves goods or services or fungible goods or services. In addition, the geographic area of the market should be assessed subjectively as it can be distinguished from the conditions of competition in other neighboring areas.

Besides, detailed acts of abuse of dominance are stipulated in this latest competition law of the country. The following acts shall, in particular, be considered acts of abuse of market dominance:[37]

1) limiting production, hoarding or diverting or preventing or withholding goods from being sold in regular channels of trade;
2) with the view to restraining or eliminating competition, doing directly or indirectly such harmful acts, aimed at a competitor, as selling at a price below cost of production, causing the escalation of the costs of a competitor, preempt inputs or distribution channels;
3) directly or indirectly imposing unfair selling price or unfair purchase price;

[37] Ibid, Art 8.

4) contrary to the clearly prevalent trade practice refuse to deal with others on terms the dominant business person customarily or possibly could employ as though the terms are not economically feasible to him;
5) without justifiable economic reasons, denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person;
6) with a view to restraining or eliminating competition, impose discrimination between customers, in prices and other conditions in the supply and purchase of goods and services;
7) without any justifiable cause and with the view to restraining or eliminating competition:
    a) making the supply of particular goods or services dependent on the acceptance of competitive or non competitive goods or services or imposing restrictions on the distribution or manufacture of competing goods or services or making the supply dependent on the purchase of other goods or services having no connection with the goods or services sought by the customer;
    b) in connection with the supply of goods or services, imposing such restrictions as where or to whom or in what conditions or quantities or at what prices the goods or services shall be resold or exported.

Any business person who violates these provisions shall be punished with a fine of 15% (fifteen percent) of his annual income or where it is impossible to determine the amount of his annual income with fine from birr 500,000

(five hundred thousand birr) to birr 1,000,000 (one million birr) and with rigorous imprisonment from 5 (five) to 15 (fifteen) years.[38]

In the Second Chapter of the Proclamation, "agreement or concerted practice or a decision by an association is prohibited if it has the object or effect of preventing, restricting or distorting competition."[39] Unlike the case of abuse of market dominance, certain agreements or concerted practices are absolutely prohibited under this section:[40]

a) agreements or concerted practices or decisions by associations of business persons in a horizontal relationship[41] and have the object or effect of the following:
    i. directly or indirectly fixing prices;
    ii. collusive tendering;
    iii. allocating customers, or marketing territories or production or sale by quota;
b) agreement between business persons in a vertical relationship that has an object or effect of setting minimum retail price.

Article 49 further provides that:

> Any business person who violates the provisions of Article 13 sub article (1) (a) and (b) of this Proclamation shall be punished with a fine of 20% (twenty percent) of his annual income or where it is impossible to determine the amount of his annual income with fine from birr 1,000,000

[38] Ibid, Art 49 (1).
[39] Ibid, Art 11.
[40] Ibid, Art 13.
[41] Horizontal relationship is deemed to exist between competing business persons in a certain market, whereas vertical relationship is deemed to exist between business persons and its customers or suppliers or both. See Ibid, Art13 (2).

(one million birr) to birr 2,000,000 (two million birr) and with rigorous imprisonment from 5 (five) to 10 (ten) years.[42]

The third chapter of the Proclamation provides for Regulation of Merger[43] and Unfair Competition[44]. The provisions dealing with regulation of merger will be covered under the next section in light of international practices in detail. Unfair competition is dealt with under Article 21 of the Proclamation. Accordingly, "any act or practice carried out in the course of trade, which is dishonest, misleading, or deceptive and harms or is likely to harm the business interest of a competitor shall be deemed to be an act of unfair competition."[45] Specifically, the following acts of unfair competition are prohibited:[46]

- any act that causes or is likely to cause confusion with respect to another business person or its activities, in particular, the goods or services offered by such business person;
- any act of disclosure, possession or use of information, without the consent of the rightful owner of that information, in a manner contrary to honest commercial practice;
- any false or unjustifiable allegation that discredits, or is likely to discredit another business person or its activities, in particular the products or services offered by such business person;
- comparing goods and services falsely or equivocally in the process of commercial advertisement;
- with a view to acquire an unfair advantage, disseminating to consumers or users, false or equivocal information including the

[42] Ibid, Art. 49 (2).
[43] Ibid, Art 15 to 20.
[44] Ibid, Art 2 (12),Unfair Trade Practice is defined as "any act in violation of provisions of trade related Laws".
[45] Ibid, Art 21 (1).
[46] Ibid, Art 21 (2).

source of which is not known, in connection with the prices or nature or system of manufacturing or manufacturing place or content or suitableness for use or quality of goods and services; and

- obtaining or attempting to obtain confidential business information of another business person through his ex-employee or obtaining the information to pirate his customers or to use for purposes that minimize his competitiveness or obtaining the information to pirate his customers or to use for purposes that minimize his competitiveness.

Moreover, it is stipulated that "any business person who violates Article 21 of this Proclamation shall be punished with fine of 10% (ten percent) of his annual income or where it is impossible to determine his annual income with fine from birr 300,000 (three hundred thousand birr) to birr 600,000 (six hundred thousand birr) and with rigorous imprisonment from 3 (three) to 5 (five) years."[47]

1.6.4 Protection of Consumers

The third part of the Proclamation deals with protection of consumers. It covers a range of topics including: the right of consumers[48], display of price of goods and services[49], labels of goods[50], issuing receipts and keeping their pads[51], self disclosing,[52] commercial advertisements,[53], defects found in

[47] Ibid, Art 49 (3).
[48] Ibid, Art 22.
[49] Ibid, Art 23.
[50] Ibid, Art 24.
[51] Ibid, Art 25.
[52] Ibid, Art 26.
[53] Ibid, Art 27.

goods and services,[54] prohibition of waiving obligations through contract,[55] and unfair and misleading acts.[56] Any consumer shall have the right to[57]: i) get sufficient and accurate information or explanation on the quality and type of goods and services he purchases; ii) selectively buy goods or services; iii) not to be obliged to buy for the reasons that he looked into quality or options of goods and services or he made price bargain; iv) be received humbly and respectfully by any business person and to be protected from such acts of the business person as insult, threat, frustration and defamation; v) submit his complaints to the Trade Practice and Consumers Protection Authority for adjudication; and vi) be compensated for damages he suffers because of transactions in goods and services.

Furthermore, the following unfair and misleading acts are prohibited from being committed by any person or business person:[58] 1) issuing misleading information on quality or quantity or volume or acceptance or source or nature or component or use of goods and service may have; 2) failing to disclose correctly the newness or model or the decrease in service or the change in or re-fabrication or the recall by the manufacturer or the second hand condition of goods; 3) describing the goods and services of another business person in a misleading way; 4) failing to sell goods and services as advertised or advertising goods or services with intent not to supply in quantity consumers demand, unless the advertisement discloses a limitation of quantity; 5) making false or misleading statements of price reduction; 6) applying or attempting to apply a pyramid scheme of sale by describing that a consumer will get a reward in cash or in kind by purchasing a good or

[54] Ibid, Art 28.
[55] Ibid, Art 29.
[56] Article, Art 30.
[57] Ibid, Art 22.
[58] Ibid, Art 30 (1-18).

service or by making a financial contribution and which describes that the consumer will get additional reward in cash or in kind where other consumers through his salesmanship purchase the good or service or make financial contribution or enter into the sales scheme, based on the number of consumers; 7) failing to meet warranty obligation entered in connection with the sale of goods and services; 8) misrepresenting the need for repair or replacements of parts to be made to goods as though not needed; 9) delivering services of repairing or replacing parts of goods or immovable properties or delivering the service of making or building immovable properties or delivering any other services below the standard recognized in the business or with deficiency; 10) preparing or making available for sale or selling goods or services that are dangerous to human health and safety or those source of which is not known or whose quality is below standards set in advance or are poisoned or have expired or are adulterated; 11) doing any act of cheating or confusing in any transaction of goods and services; 12) refusing to sell goods and services for reasons that are not protecting the rights of the consumer; 13) making available for sale or selling goods or services without standard marks for which the standard mark is needed; 14) selling goods or services at a price above the price affixed to the goods or the price posted in the business premise; 15) describing the country of the making of goods falsely; 16) unduly favoring one consumer over the other; 17) subjecting the consumer to purchase a good or service not desired in order to sell another good or service; 18) cheating in balance or measurements or any other measurement contrary to the lawful ones.

Any business person who violates sub articles (6) and (10) of Article 30 of this Proclamation (regarding unfair and misleading acts) shall be punished with fine from Birr 100,000 (one hundred thousand) to Birr 300,000 (three

hundred thousand) and with rigorous imprisonment from 10 (ten) to 20 (twenty) years.[59] Similarly "any business person who violates the provisions of Article 30 of this Proclamation other than sub articles (6) and (10) ... shall be punished with fine from birr 50,000 (fifty thousand) to birr 100,000 (one hundred thousand) and with rigorous imprisonment from 3 (three) to 7 (seven) years."[60]

1.6.5 Institutional Framework

The Proclamation establishes the *Trade Practice and Consumers Protection Authority* (the TPCP Authority) as an autonomous federal government organ having its own legal personality which is accountable to the Ministry of Trade and Industry.[61] The Proclamation also states that "the Authority shall be free from any interference or direction by any person with regard to the cases it adjudicates."[62] Moreover, the Authority shall have the following powers and duties:[63] 1) takes appropriate measures to increase market transparency; 2) takes appropriate measures to develop public awareness on the provisions of this proclamation and implementation; 3) receives and decides on merger notifications; 4) makes study and research in connection with commercial competition and consumer interests and rights; 5) regularly announces to consumers goods banned by government or internationally from being consumed or sold; 6) organizes various education and training forums and provides education and training in order to enhance the awareness of consumers; 7) ban advertisements of goods and services which are inconsistent with health and safety requirements or with this

[59] Ibid, Art 49 (4).
[60] Ibid, Art 49 (5).
[61] Ibid, Art 31 and 32.
[62] Ibid, Art 33.
[63] Ibid, Art 34.

Proclamation when it is aware of them by itself or when it is reported to it by any person, and order the issuance of announcements of corrections for such advertisements, in the methods the advertisements were made at the expense of the person in whose interest they were made;8) ensure that the interests of consumers have got proper attention; 9) protect consumers from unfair activities of business persons and from unfair prices of goods and services aimed at obtaining unjustifiable profit; 10) take administrative and civil measures against business persons or other persons on violation of this Proclamation; 11) give necessary advice and support to branch offices to be established; 12) establish relationship and cooperation with national, continental and international bodies having similar objectives; 13) own property, enter into contracts, sue and be sued in its own name; 14) perform such other duties as may be defined by law and undertakes other activities necessary for the attainment of its objectives; 15) determine the employment, administration and dismissal of the staff of the authority in accordance with federal civil servants Proclamation; 16) initiate policy issues, participate on policy and strategy drafting undertakings by other organs of government.

The Authority has power and duties to adjudicate, impose administrative and civil sanctions, and get complainants compensated for damages they sustained.[64] The Authority has a Director General to be appointed by the Prime Minister upon the recommendation of the Minister of Trade and the necessary judges and staff. The TPCPP also stipulates that "regional states may, when necessary, establish organs that adjudicate on matters of consumer rights protections as indicated in this Proclamation."[65]

[64] Ibid, Art 35.
[65] Ibid, Art 39.

2. Defining Merger

Merger is ordinarily understood as 'the absorption of one company (especially a company) that ceases to exist into another that retains its own name and identity; and acquires the assets and liabilities of the former'.[66] It involves two separate undertakings merging entirely into a new entity.[67] However, under competition law, the term 'merger' is used in a wider sense to mean and include amalgamation, acquisition of shares, voting rights, assets or acquisition of control over enterprise.[68] In an extensive ambit, merger is a transaction that brings change in control of different business entities enabling one business entity to effectively control a significant part of assets or decision making process of another.[69] An effective control through any form of acquisition mentioned above, amounts to merger as per the European Commission Merger Regulation (ECMR hereinafter) guidelines if there is a 'possibility of exercising decisive influence' by the acquiring firm over the acquired one.[70] In various decisions, the European Commission has determined that the question whether a particular transaction results in a merger (or concentration as used in the ECMR) is to be determined by analyzing if the market in future will function less competitively than it did prior to merger.[71] The Ethiopian Competition law uses the terminology 'causes or likely to cause appreciable adverse effects on competition' to determine the veracity of a transaction.[72] It provides that "merger is deemed to occur when two or more business organizations previously having independent existence amalgamate or when such business

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[66] Black's Law Dictionary, (7th ed, 1999), p.1002.
[67] Richard Wish, *Competition Law*, (Oxford University Press, 6th ed., 2009), p.798.
[68] Ibid, p. 799; see Vinod Dhall, *Competition Law Today* (Oxford University Press, 1st edition, 2007), p.15.
[69] Dhall, supra note 68, p.93.
[70] Whish, supra note 67, p. 799.
[71] Case M 890 Blokker/Toys 'R' Us, decision of 26th June, 1997, OJ [1998] L 316/1.
[72] Trade Practice and Consumers' Protection Proclamation No.685/2010, Art 15.

organizations pool the whole or part of their resources to carry on a certain business purpose."[73] Merger also occurs by directly or indirectly acquiring shares or securities or assets of a business organization by a person or group of persons jointly or the business of another person through purchase or any other means.[74]

The focus of many competition laws is typically on mergers proper or acquisitions of shares or assets or acquisition of control, etc.; of entities with turnovers (assets) above a certain prescribed threshold limit as such transactions are considered to be more likely to negatively impact competition. Joint ventures, although at times not mentioned explicitly by merger control provisions of competition laws, may also fall within their ambit.[75]

3. Types of Merger

Mergers can be classified on a basis of the position of merging parties in the economic chain prior to the merger, acquisition or the joint venture as the case may be. On this basis, mergers may be classified as horizontal, vertical or conglomerate. Vertical and conglomerate mergers are referred to as non-horizontal mergers. The guidelines issued by various competition authorities for the evaluation of mergers are based on the classification into horizontal and non-horizontal mergers.

This classification may become important when assessing the effects of competition on the proposed transactions as the factors taken into account to assess such impacts may vary with the type of merger.

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[73] Ibid, Art 16 (1).
[74] Ibid, Art 16 (2).
[75] Tiwari, supra note 1, p.121.

3.1 Horizontal Merger

The most common type of merger is horizontal merger. It occurs when actual or potential competitors operating on the same level of market of the same product and at same level of production or distribution like soft drinks manufacturers, Coca-Cola and Pepsi Cola, combine.[76]

Horizontal merger is considered as the most blemish to competition than the other type of mergers. This merger has an adverse effect on market concentration and use of market power as it leads to reduction in number of market players; and increases the market share of the merged entity.[77] It may result in the undertakings acquiring or strengthening a position of market power and, consequently, in an increase in the market price of the products or services on the relevant market. A merger between two or more previously independent undertakings which do not lead to the creation of an individual dominant position may, however, lead to a substantial increase in the concentration of a particular industry. This may lead to the creation or strengthening of a collective dominant position on an oligopolistic market and may consequently facilitate collusion, explicit or tacit, between the undertakings operating on the relevant market.[78] Commentators state that:

> [M]ergers may raise two potential competitive concerns. First, by eliminating the competitive constraints which currently exists

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[76] Whish, supra note 67, p. 799; See Tiwari, supra note 1; See also Pieter T. Elgers and John J. Clark, Merger Types and Shareholder Returns: Additional Evidence, Financial Management, Vol. 9, No. 2 (Summer, 1980), pp. 66-72.

[77] Alan H Goldberg, 'Merger Control' in Vinod Dhall (ed) *Competition Law Today*, (Oxford University Press, 1st ed., 2007), p.93; See also David M. Barton and Roger Sherman, 'The Price and Profit Effects of Horizontal Merger: A Case Study', *The Journal of Industrial Economics,* Vol. 33, No. 2 (Dec., 1984), pp. 165-177; See also Alan A. Fisher et. al., 'Price Effects of Horizontal Mergers', *California Law Review*, Vol. 77, No. 4 (Jul., 1989), pp. 777-827

[78] Nnamdi Dimgba, 'Merger Control under Nigeria's Proposed Competition Law', *Journal of Law and Investment,* vol. 1(2) (2007), Paper presented at the NBA Section on Business Law Conference, Abuja, (April 16, 2009), p.6.

between the parties, they may weaken to a significant degree the strength of the overall competitive constraints acting on one or both of the two parties. As a result, the prices charged by the merged entity may increase relative to their pre-merger level. A merger which has these characteristics is said to give rise to a situation of single dominance [the unilateral effect of the merger]. Secondly, the merger may lead to a reduction in the effectiveness of competition if the change in market structure creates a competitive environment more favorable to sustainable tacit collusion.[79]

For this reason, many competition authorities adopt a merger policy which seeks to prevent undertakings from merging to create or strengthen a collective dominant position.[80] For instance, the European Commission's Horizontal Merger Guidelines mention two conditions where horizontal merger affect healthy competition in the market.[81] These conditions are creation or strengthening of dominant position of one firm having high market share post-merger.[82] The second being reduction in competition restrains which existed pre-merger.[83]

The International Competition Network Merger Guidelines Workbook ('ICN Workbook') produced by a Subgroup of International Competition Network, states theories of competitive harm through mergers, having coordinated or

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[79] S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, (Sweet & Maxwell, London, 1999), p.68.

[80] H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice,* (West Publishing, 1994), pp. 445 and 447.

[81] John J. Parisi, 'A Simple Guide to the EC Merger Regulation', January 2010, available at http://www.ftc.gov/bc/international/docs/ECMergerRegSimpleGuide.pdf (last visited on 30 April, 2013)

[82] Ibid.

[83] Ibid.

non-coordinated effects.[84] As explained in the European Commission 's Horizontal merger guidelines,[85] and Office of Fair Trading ('OFT') guidance[86] and United Kingdom's Competition Commission Guidelines,[87] anti-competitive effects arising post-merger, but due to non-coordinated action by market players are known as non-coordinated or unilateral effects. The most common non-coordinated effect of a merger arises when post-merger the market players are reduced in number and their market power increases due to which they are vastly empowered to increase profit margins or able to reduce output, quality or variety.[88] For example, if there are three market players viz. 'X', 'Y' and 'Z' and merger occurs between two of them to form 'XY', the number of competitors in the market is reduced and market share of the players increase post-merger. Now, if 'XY' increases profit margin, and customers start preferring 'Z'; 'Z' may also increase its profit margin due to its position in the market post-merger.[89] This situation is referred to as 'non-collusive oligopoly' in paragraph 25 of European Commission Horizontal Merger Guideline where with little or no coordination the market players are in a position to act in such a way that consumer interest is at detriment.[90] The ICN Workbook, the European

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[84] International Competition Network: Investigation and Analysis Subgroup, 'ICN Merger Guidelines Workbook' ('ICN Workbook'), (April 2006), p.11

[85] EC, 'Horizontal Merger Guideline', 2004, sec 24

[86] Office of Fair Trading, *Mergers: Substantive Assessment Guidance* ('OFT guidance'), (May 2003), Article 4.7 -4.10.

[87] UK Merger references: 'Competition Commission Guidelines' ('UKCC guidelines'), (June 2003), Article 3.28-3.31.

[88] ICN Workbook, supra note 84 at 39, sec C.4; Other non-coordinated effects can also arise from merger as mentioned in ICN Workbook at 40, sec C.8 'Unilateral effects can also arise in other contexts, including bidding or auction markets, where different firms compete to win orders. The specific model used will vary depending upon the circumstances of the market, but should have a common thread of attempting to assess whether there is any increase in market power as a result of the merger, for example, by combining the two lowest-cost bidders and thus allowing the merged firm to win with a higher bid.'; See also Whish, *supra* note 67 p.808.

[89] Whish, *supra* note 67 p.808.

[90] EC, 'Horizontal Merger Guideline', 2004, article 25.

Commission 's Horizontal Merger Guideline, OFT guidance and UKCC Guidelines explain various factors which may be relevant in determining whether non-coordinated effects might occur due to merger. The list being only illustrative in nature, mention a range of factors such as high market concentration, restricted consumer choice, weak competitive constraints from other market players, buyer power, elimination of potential competitor or new entrant, amongst others.[91]

Coordinated effects arising out of mergers have also been explained by the ICN Workbook, and other state legislations. Coordinated effects arise where competitive constraints amongst the market players are reduced post-merger, thus creating or strengthening the situations whereby the players are able to coordinate their competitive behavior.[92] The Horizontal merger guideline explains that situations may arise where players without entering into an agreement behave in a coordinated way, towards price fixation, levels of production, expansion of capacity, allocation of markets or contracts in bidding markets.[93] Three important factors have been explained by ICN Workbook and various other legislations including the U.S. Horizontal Merger Guidelines, which are relevant to determine whether coordination effects have occurred due to merger are: a) market transparency must make it possible for the coordinating firms to monitor whether the terms of coordination are followed, b) existence of credible deterrents for the firm to maintain the coordinated policy, and c) no retort from competitors or consumers that would imperil the coordinated policy.[94] Apart from these

[91] ICN Workbook, supra note 84 at 42-43; OFT guidance, article 4.26, 4.27; UKCC guidelines, article 3.58; Whish, *supra* note 67 p.859; Parisi, supra note 81, p.13

[92] ICN Workbook, supra note 84 p.45

[93] EC Horizontal Merger Guideline, 2004 at article 40.

[94] ICN Workbook, *supra* note 84 p.42-43; US, Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines ('FTC guidelines'), (August 2010), 25,

factors, other aspects such as past coordination or coordination in similar markets may be considered.[95]

3.2 Vertical Merger

Vertical merger occurs when two entities which operate at different but complimentary levels of production chain.[96] Hence, a merger between a raw material supplier and manufacturer of final product from that raw material is a vertical merger. Vertical merger may have backward integration, as the case of transaction between supplier and manufacturer and can also be forward integration, for example, between the manufacturer and retailer.[97]

Vertical mergers do not pose as much of a danger to competition as horizontal mergers. In fact, they have been found to be beneficial to both firms and consumers including by facilitating long term investment, enhancing the quality of the product, etc.[98] The purpose and effect of vertical integration including through mergers may be cost reduction and where transaction costs of buying and selling between two vertical levels are relatively high, greater efficiency can be achieved by such integration, which can also be resorted to so as to avoid being a price victim of a monopolist or dependence upon an already vertically integrated competitor.

However, they may have certain harmful effects as such transactions may lead to foreclosing rivals from previously independent firms at the vertical

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sec 7.2; OFT guidance sec 5.5.12-13; UKCC guidelines, article 3.41; Whish, supra note 67 p.860; Parisi, supra note 81, p.13.

[95] EC Horizontal Merger Guideline , 2004, sec 43; Whish, supra note 67, p.861

[96] James L. Hamilton and Soo Bock Lee, 'Vertical Merger, Market Foreclosure, and Economic Welfare', *Southern Economic Journal,* Vol. 52, No. 4 (1986), pp. 948-961.

[97] *Ibid*; See Tiwari, supra note 1, p.122

[98] OECD/World Bank, 'A Framework for the Design and Implementation of Competition Policy and law', (1991), p. 43.

level thereby making entry more difficult which reduces opportunities available to potential new entrants.[99]

3.3 Conglomerate Merger

The third type of merger is conglomerate merger, which generally refers to mergers between entities that are not linked. Conglomerate mergers in economic sense can be classified further as: a) pure conglomerate, where merging entities are not connected in any manner; b) product extension merger, where the product of the acquiring entity is complementary to that of acquired entity; and c) market extension merger, where the merging entities seek to enter into a new market.[100]

Pure conglomerate mergers are said to occur where there is absolutely no functional link between the merging entities. On the other hand, in product line extension mergers, the merging entity/entities seek(s) to add new products to their existing product line. In a product extension merger, the products of the acquiring company are complementary to the products of the acquirer. In market extension mergers, entities enter into newer markets through the merger, amalgamation, or acquisition as the case may be rather than doing so by internal growth.

These mergers can also pose certain threats to competition including in the case of market extension mergers, which have been noted to have an affinity with horizontal mergers. Other impacts include increase in opportunities for reciprocal dealing, increases in overall industrial concentration and a danger of dilution of functioning of capital markets. Conglomerate mergers may enhance the likelihood of mutual forbearance, the development of a 'live and let live policy' that is comfortable for firms but harms consumers.

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[99] Tiwari, supra note 1, p.120.
[100] Ibid.

The European Commission has issued Non-Horizontal merger guidelines in 2007, which also recognize that non-horizontal mergers are less likely to significantly impede competition.[101] The UK's OFT guidelines also mention the progressive effects to non-horizontal mergers.[102] However, these guidelines also state that there can be circumstances where non-horizontal mergers cause anti-competitive effects. Examining vertical mergers, one may identify two possible anti-competitive effects that could arise: a) non-coordinated effects likely to cause foreclosure of other market players,[103] and b) coordinated effects carried out by the merged entity.[104] Non-coordinated effects are chiefly classified as input foreclosure and customer foreclosure. Input foreclosure occurs when the merged entity is likely to restrict products or services in the downstream market for other market players, thereby increasing their cost of production, leading to higher costs for consumers.[105] Customer foreclosure occurs when the supplier integrates with a customer base in the market, thereby depriving other players' access to customers.[106] Coordinated effects may occur in non-horizontal mergers. However, the factors to determine whether coordinated effects have occurred are similar to that present in horizontal mergers.[107] Conglomerate mergers also have minimal anti-competitive effects although three concerns arising out of these kinds of mergers have been detailed by the OFT guidance.[108] Firstly, conglomerate mergers may lead to market domination over various portfolios

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[101] EC, 'Non-Horizontal Merger Guidelines', 2007, Article 12, 20 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:01:EN:HTML (Accessed on 3 May, 2013).

[102] OFT guidance, supra note 86, Article 5.3, 5.4.

[103] EC, 'Non-Horizontal Merger Guidelines', 2007, Article 18; OFT guidance, Article 5.4.

[104] Ibid, Article 19; OFT guidance, supra note 86, Article 5.5; See Whish, supra note 67, p.808.

[105] Ibid, Art 34.

[106] Ibid, Art 58.

[107] Whish, supra note 67, p. 867; EC, 'Non-Horizontal Merger Guidelines', 2007, Article 79-90

[108] OFT guidance, supra note 86, Art 6.1.

of products in a market. Secondly, such merger may lead to anti-competitive practices such as predation;[109] and thirdly, it may lead to coordinated behavior in the market.[110]

4. Merger Regulation in Ethiopia: Comparison with International Experience

Part three of the Ethiopian Trade Practice and Consumers Protection Proclamation deals with regulation of merger. Pursuant to this legislation "[M]erger ... is deemed to have occurred when two or more business organizations previously having independent existence amalgamate or when such business organizations pool the whole or part of their resources to carry on a certain business purpose."[111] It also occurs by directly or indirectly acquiring shares or securities or assets of a business organization by a person or group of persons jointly or the business of another person through purchase or any other means;[112] and "a person or a group of persons shall be deemed to have acquired or to have taken control of a business organization or a business where such person or group of persons could influence the decision making in the affairs or in the administrative activities of a business organization or a business."[113] The main aim of this section is to analyze the regulation of merger under Ethiopian competition and consumers' protection law in light of international best practices with a view to indicating strengths and weaknesses, if any, of the Ethiopian law.

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[109] Ibid, Arts 6.2 and 6.3.
[110] Ibid, Arts 6.4 and 6.5
[111] Trade Practice and Consumers Proclamation No. 685/2010, Art 16 (1).
[112] Ibid, Art 16(2).
[113] Ibid, Art 16 (3).

4.1 Threshold Limits

Threshold limits are important aspect of all competition laws and policies as these limits determine which transaction is to be notified to or which needs to be reviewed by the competition authorities. The ICN Recommended Practices on Merger Notification Procedures state that threshold limits should be clear, understandable and determined on objectively quantifiable criterion and information.[114] The laying down of threshold limit also eases the pressure of competition authorities of inspecting all mergers, as is done in mandatory notifying systems and allows the authorities to focus only on most likely mergers to affect transactions.[115] It is important to note that threshold limits are used in order to provide a straightforward mechanism in determining the jurisdiction of competition authorities over a transaction and should not be considered as means of substantive assessment over the transaction.[116]

Different jurisdictions have set out different threshold limits in the terms of assets, sale, turnover etc., of the undertakings involved. In spite of there being difference in criteria, the ICN practices suggest that sufficient assets or sales of the undertakings involved in the transactions should be within the territorial limits of a country where authority is exercising jurisdiction.[117] This is also known as the local nexus provision.

In United States, the Hart-Scott-Rodino Antitrust Improvements Act, 1976 (HSR Act has set out three ways of determining jurisdictional thresholds. The

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[114] International Competition Network, 'Recommended Practices for Merger Notification Procedures', pp. 3-4

[115] Alan H Goldberg, 'Merger Control' in Vinod Dhall (ed) *Competition Law Today*, (Oxford University Press, 1st ed., 2007), p.96.

[116] Whish, supra note 67, p. 828

[117] International Competition Network, 'Recommended Practices for Merger Notification Procedures', p.1

first is 'the commerce test', which states that if the undertakings involved in the transaction i.e. either the acquiring or the acquired party are engaged in the US commerce or any activity affecting US commerce, then the authorities have power to inspect.[118] The second is the 'size of transaction test' which states to look into the voting securities or assets that will be held by acquiring party through the proposed transaction.[119] This test has been simplified by the 2001 amendment of HSR Act, which now states that the competition authorities will intervene only if the aggregate value of voting securities or assets held by the acquiring party exceeds US$ 50 million.[120] The third and important method of determining jurisdictional threshold is the 'size of parties' test. This test looks at size of the parties involved in the transaction and is satisfied if one party has worldwide sales or assets of US$10 million or more and the other has worldwide sales or assets of US$100 million or more.[121] It is important to note that the terms of acquired party and acquiring party have been given, very wide understanding in the law and include entire corporate family of the parties involved.

In contrast to the US law, the EU law only looks at turnover as an important aspect for determining jurisdictional threshold. The ECMR for large-scale transactions provides that authorities will have jurisdiction if the aggregate worldwide turnover of the parties exceeds €5 billion and the Community wide turnover of each of at least two parities, exceeds €250 million unless each of the parties achieves more than two-third of its aggregate Community

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[118] HSR Act, 1976, sec 7A(a)(1).

[119] Jeffrey I. Shinder, 'Merger Review in the United States and the European Union', available at http://www.constantinecannon.com/pdf_etc/Pres_USEC_merger.pdf (Accessed on 3 May, 2013).

[120] HSR Act, 1976, sec 7A(a)(2).

[121] Ibid; See also FTC Premerger Notification Office. 'To File or Not to File: Introductory Guide',(September 2008),3

wide turnover in one and the same member state.[122] Similarly, for small scale transactions the ECMR will intervene if the aggregate worldwide turnover of the parties exceeds €2.5 billion and the Community wide turnover of each of at least two parities exceeds €100 million and in each of at least three member states, the aggregate turnover of all the parties exceeds €100 million and in these three member states, the turnover of each of at least two parties exceeds €25 million unless each of the parties achieves more than two-third of its aggregate Community wide turnover in one and the same member state.[123] The term turnover is understood as amount derived from the sale of products or provision of services in the preceding financial year.[124]

The UK law is similar to the EU one. However, the jurisdictional tests laid in the Enterprise Act of 2002 are much simpler. The UK law also mainly follows the turnover test, where a relevant merger situation is created and authorities can inspect, if the value of turnover of the enterprise being acquired exceeds £70 million.[125] The turnover is determined by aggregating the total value of the turnover in UK of the enterprises which are ceasing to be distinct and deducting: the turnover in UK of any enterprise, which continues to be carried on under the same ownership or control or if no enterprise continues to be carried on under the same ownership and control, the turnover in UK which of all turnovers concerned, is the turnover of the highest value. The Act also provides for 'share of supply' test, whereby it states that authorities will intervene if the merger creates or enhances 25%

[122] EC, 'Merger Regulations', 2004, art 46(2)
[123] Ibid at Art 46(3)'
[124] Tiwari, supra note 1.
[125] UK, Enterprise Act, 2002, sec 23(1).

(one-quarter of the goods or services) share of supply or purchases in UK or in substantial part of it.[126]

The South African law, though largely based on the EU and the UK laws, talks about both turnover and assets. The South African law also differentiates small, intermediate and large mergers, which is not seen in any of the developed jurisdictions worldwide. Intermediate merger is one where if the value of the proposed merger equals or exceeds R560 million (calculated by either combining the annual turnover of both firms or their assets), and the annual turnover or asset value of the acquired party is at least R80 million.[127] Similarly, if the combined annual turnover or assets of both the acquiring and acquired party are valued at or above R6.6 billion, and the annual turnover or asset value of acquired party is at least R190 million, it qualifies as large merger and the Commission has power to intervene.[128]

The Ethiopia's Trade Practice and Consumers Protection law is silent on the issue of threshold limits. The Authority is empowered to prohibit the act of merger if it decides that it causes or is likely to cause a significant restriction against competition or eliminates competition.[129] There is no objective quantitative requirement in the law to determine a threshold above which a merger transaction could be prohibited.

4.2 Pre-merger Notification

Many merger control regimes impose mandatory pre-merger notification for mergers of a certain size. Insofar as the ECMR is concerned, it is concentrations and combinations that are to be notified to the respective

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[126] Ibid at sec 23(3) and 23(4.)

[127] South Africa, 'Merger Thresholds', April 2009 available at http://www.compcom.co.za/merger-thresholds/ (Accessed on 3 May, 2013).

[128] Ibid.

[129] Trade Practice and Consumers' Protection Proclamation No. 685/2010, Art 15.

competition authorities and which may be substantively reviewed irrespective of notification provisions. The ECMR does not provide for separate avenues by which merging parties can specifically seek clearance of a merger (on the basis that it is not of a type specifically prohibited by legislation because of its anti-competitive effects) or authorization (on the grounds of the benefits likely to result from the merger).[130]

On the other hand, the UK merger control regime does not impose the mandatory notification requirements for any type of merger. Instead, merging parties may voluntarily opt to notify competition authorities. The availability of merger clearance, which gives merging parties' certainty that the competition authority will not seek to prevent the merger if it proceeds, can make voluntary pre-merger notification attractive option despite the various costs involved.[131]

The existing competition law of Ethiopia (Proclamation No. 685/2010) provides for mandatory pre-merger notification. It states that "a government office, which conducts commercial registration, shall inform the Authority, the merger of business organizations or the transfer of shares or securities or assets which shall be entered in the commercial register before registering the

[130] Tiwari, supra note 1, p.123.

[131] Goldberg favours the 'mandatory notification for mergers valued above certain monetary thresholds' as such criteria for notification lessens the administrative burden for competition authorities, compared with mandatory notification of all mergers. It also enables competition authorities to identify and focus upon the mergers which are most likely to be of concern. See supra note 4 at 96. But some commentators argue that merger pre-notification thresholds do not have to limit the competition authority's jurisdiction to review any combination that it feels might harm competition markets competition can be harmed by the combination of even relatively smaller firms. See Subhadip Ghosh and Thomas Ross, 'The Competition Amendment Bill, 2007: A Review and Critique', *EPW*43:51, 35, ((2008), p. 39.

same."[132] It further provides that "any person, who is concerned with an agreement or arrangement that has the purpose of merger, shall inform the Authority of the conclusion of an arrangement agreement with the purpose of merger or an attempt to conclude the same"[133]; and that "(N)o merger arrangement shall be implemented before the Authority grants permission."[134]

Mandatory pre-merger notification is helpful in screening out harmful mergers before they are consummated. It can also reduce a long and cumbersome publication of notice process involving a number of government departments which demand much resource and time. The bureaucratic delays in publishing such notices would also lead to many potentially harmful mergers escaping the Authority's net. Thus, mandatory pre-merger notification requirement under the existing law is significant to ease the regulation of abuse of dominance that could be caused as a result of consummation of harmful mergers. However, the Proclamation does not provide for minimum threshold limits for merger notification.

4.3 Substantive Assessment of Mergers

Every merger transaction would most likely have certain pro-competitive as well as anti-competitive effects. It is the duty of the competition authorities to balance out these effects through substantive tests and procedures and determine whether the proposed transaction meets the requirements to be blocked.[135] It has been determined through series of cases by the European courts that the burden of proof is on the competition authorities to produce

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[132] Trade Practice and Consumers' Protection Proclamation No.685/2010, Article 17 (1)
[133] Ibid, Art.17 (2).
[134] Ibid, Art17(3).
[135] Whish, supra note 67, p.849.

convincing evidence that the transaction is anti-competitive in nature.[136] There is no presumption for or against any transaction.[137]

In United States, the Clayton Act prohibits transactions that may 'substantially lessen competition or tend to create a monopoly'.[138] Subsequently, various guidelines have laid down 'test of efficiency', which states that a merger transaction should not be blocked if it increases substantial efficiency in the market.[139] These guidelines also state that a merger should not be permitted to proceed if it will create or enhance market power or will facilitate its exercise. Merger transactions in US are usually analyzed through the following steps: i) identification of the relevant product and geographic markets which are likely to be affected by the transaction; ii) assessment of the market shares of the players involved in transaction and the degree of concentration in the market; iii) identification of possible anti-competitive activities to be carried out by the resultant entity of the transaction such as predation, barrier to entry, refusal to deal etc, and iv) acknowledging possible pro-competitive effects and efficiency created through the transaction such as reduction in market prices, consumer welfare etc.[140]

Similarly, the European Commission's guidelines on merger regulation prohibit any merger transaction which would "significantly impede effective competition in common market or in substantial part of it."[141] The ECMR guidelines lay special importance to check creation or strengthening of

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[136] Shinder, supra note 119.
[137] Ibid.
[138] US, Clayton Act, 1914,sec 7.
[139] US, FTC guidelines, p. 29, Art 10.
[140] Organization for Economic Co-operation and Development, Substantive Criteria used for Merger Assessment, October 2002, 293 available at http://www.oecd.org/dataoecd/54/3/2500227.pdf (last visited on 4 May, 2013).
[141] EC, 'Merger Regulations', 2004, Art 2(1).

dominant position by the resultant entity of the proposed transaction.[142] The ECMR guidelines also provide for analysis of the relevant market to be affected by the said transaction and the market shares of players involved in the transaction. As per the Merger Regulation of 1989, the authorities relied on test whether the merger would create or strengthen a dominant position, which would 'substantially lessen competition' (the 'SLC Test'). Hence, creation of a dominant position was a necessity to block a merger transaction. However, it was very critically fricasseed that there would certain situations in which, in spite of not being in dominant position, a merged entity could cause significant harm to competition and such harmful mergers could not be challenged under ECMR.[143] The 2004 amendment to the regulations removed market dominance as the exclusive test and empowered the authorities to block any merger which would 'significantly impede effective competition' (the SIEC Test'). The guidelines also provide for 'appraisal criteria', whereby the authorities also look into a checklist of factors that should guide the Commission, few of them being: interest of consumers, development of technical and economic progress, alternative players and products in the market etc.[144]

The United Kingdom also follows similar approach in inspecting mergers and uses the SLC test in analyzing the pro-competitive and anti-competitive effects of a merger transaction.[145] The antitrust authorities have laid down various procedures for analyzing merger transaction. The OFT has laid down procedures in the 'Mergers: Substantive Assessment Guidance'[146] and the Commission has in 'Merger References: Competition Commission

[142] Ibid , Art 2(1) and 2(3)
[143] Whish, supra note 167, p. 852
[144] EC, 'Merger Regulations', 2004, Arts 2(1)(a),2(1)(b).
[145] UK, Enterprise Act, sec 35, 36.
[146] OFT guidance, supra note 86.

Guidelines'.[147] The guidelines provide for methods for defining market and market infiltration.[148] Guidelines also provide for inspection into the coordinated or non coordinated effects likely to be caused by the merger, which could lead to SLC and importantly also provide for relevance of efficiencies.[149] The efficiency test has also been laid down in the Enterprise Act which provides for decision making authorities to consider 'relevant customer benefits' from the merger transaction.[150] A merger may be permitted, in spite of causing SLC, if parties are able to prove efficiencies which are demonstrable, merger-specific and likely to benefit consumers.[151] Benefit to customers would denote lessening of prices, increase of choices, betterment of quality and other analogous benefits.[152] The OFT guidance and UKCC guidelines also in certain cases recognize the 'failing-firm defense' where three conditions are importantly analyzed: first, the firm would have to exit the market if merger transaction does not take place; second, the firm is not in a position to stabilize its operations; and third, there is no other less anti-competitive approach than the merger.[153]

The South African legislation relying on like method lays down certain factors which the authorities should consider before clearance of merger. Few of these are: the actual and potential level of import competition in the market, the ease of entry into the market, the level and trends of concentration, history of collusion and the degree of countervailing power in

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[147] UKCC guidelines, supra note 87.
[148] OFT guidance Art 3.12; UKCC guidelines, Art 2.7.
[149] Ibid, Art 4.39- 4.35; UKCC guidelines, supra note 87, Arts 3.26, 3.27, 4.34-4.45.
[150] UK, Enterprise Act, sec 30,sec 22(b).
[151] OFT guidance, supra note 86, Art 4.34.
[152] UK, Enterprise Act, sec 30(1)(a).
[153] OFT guidance, supra note 86, article 4.37; CC guidance 3.61-3.63; See also Morven Hadden, 'EC Merger Control Regime' in Gary Eaborn, *Takeovers: Law and Practice*, (Lexis Nexis Butterworth, 2005), p.714.

the market.[154] Considering the socio-economic condition in the country, the South African legislation very significantly lays down consideration for public interest and importance to aspects such as employment, the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive and the ability of national industries to compete in international markets. [155]

The Ethiopian Trade Practice and Consumers Protection Proclamation, which has largely followed the European and UK laws, prohibits any merger which causes or is likely to cause a significant restriction on competition or that eliminate competition.[156] Article 18 stipulates that:

1. The Authority shall prohibit the acts of merger that cause or are likely to cause a significant restriction on competition or that eliminate competition.

2. The Authority, when a notification of merger is submitted to it, shall immediately communicate to the applicant in writing of its decision either to grant or deny its permission.

3. If the Authority needs additional information or documents, it shall communicate its decision to the applicant within a short period of time in order that the information and documents be submitted.

4. Where the Authority deems necessary, it may notify the applicant how he shall amend the merger and that it gives the permission on condition of the submission of the amendment.

5. The Council of Ministers may specify by regulation those acts of mergers that are subject to supervision.

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[154] South Africa, Competition Act, 1998, sec 16(2).
[155] Ibid at sec 16 (3).
[156] Proclamation No.685/2010, Art18 (1).

However, the law does not mention various factors to be considered by the competition authorities while analyzing a merger like that of South African law which provides for consideration of actual and potential level of competition through imports, extent of barriers to entry, the degree of countervailing power in the market, likelihood of increase in market prices by the merged entities and possibility of failing business.

The Proclamation also provides for certain exceptional cases in which the Authority may grant a permission to implement a merger although it may have anticompetitive effects where an applicant can justify the merger by proving that gains in this respect cannot be obtained without restricting competition; and technology, efficiency and precompetitive gains resulting from the merger outweigh its anticompetitive effects.[157] This provides a space for the Authority to consider economic benefits of merger and balance it in terms of the prospective costs and benefits. Regulation of merger in Ethiopia should, like that of South African law, consider the reality in the country while granting or prohibiting mergers. Multiple objectives of promoting domestic and international market competition, efficiency and protection of consumers could be considered together. In addition, dominance *per se* is not harmful and merger should be regulated on the basis of *rule of reason.*[158] Thus, this exceptional provision in the law is vital to

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[157] Ibid, Art 19.

[158] 'Rule of reason' is a standard that courts use in testing the legality of business conduct under section 1 of the Sherman Antitrust Act (1890), which prohibits "every contract, combination... or conspiracy in restraint of trade." At first, the Supreme Court read the act as condemning every restraint of trade. The Court then began moving away from literalness, and in 1911 Chief Justice Edward D. White, writing for the majority, in Standard Oil Co. of New Jersey v. United States and United States v. American Tobacco, explained that the Act condemned only those practices "which operated to the prejudice of the public interests" by unduly restraining trade. He states that Congress intended that the courts apply the standard of reason in determining whether the act had been violated. Although the Court ordered the oil trust to be dissolved, the rule of reason's factual evaluation of business practices on

balance the costs and benefits of merger in one hand and to build a market for further competition on the other.

Furthermore, the Proclamation provides for exemptions. It states that "the Council of Ministers may specify by regulation those trade activities it deems are vital in facilitating economic development to be exempted from the application of the provisions chapter three (i.e., regulation of merger)."[159]

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a case-by-case basis was widely viewed as "pro-trust." In Chicago Board of Trade v. United States (1918), Justice Louis D. Brandeis listed some factors to be considered in applying rule of reason: "the facts peculiar to the business to which the restraint is applied, its condition before and after restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." The rule of reason was the dominant approach in antitrust cases for about two decades. After 1937, as the power of the national government expanded, the Court increasingly declared that various business agreements or practices were conclusively presumed to be unreasonable without elaborate inquiry about the harm caused or the business justification. These activities were *per se* illegal "because of their pernicious effect on competition and lack of any redeeming virtue" (Northern Pacific Railway Co. v. United States 1958, p.5). The per se approach dominated antitrust litigation from 1940s through the 1960s. Per se rule proscribed a range of restrictive agreements that included price fixing and market allocation. With an increasing emphasis on deregulation and a free market in the 1970s and 1980s, the court began to abolish or modify per se rules, returning to the rule of reason as the prevailing standard to test many business practices. Per se rule retain some validity, however, particularly when applies to restraints among competitors. In 1978 the Court declared in the National Society of Engineers Vs. United States that "the inquiry mandated by the rule of reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. ... Although the rule of reason and the per se illegality rule are sometimes viewed as dichotomous, they can also be viewed as complementary categories and converging methods of antitrust analysis. Several court cases in the 1980s reflect a methodological overlap between the two standards, with some justices advocating a quick threshold examination of a business practice for competitive impact on before applying a per se or rule of reason approach. Debate over the rule of reason remains lively. Some commentators view the Court's renewed emphasis on the rule of reason as part of free market, pro-business, antigovernment philosophy and as fostering increased economic concentration. Others welcome the diminishing influence of per se rules they consider to base on unsound economic theory. Several commentators criticize the rule of reason as lacking substantive content, asserting that it focuses on a lengthy list factors, allowing an unlimited, freewheeling, high cost judicial inquiry without providing sufficient guidance to trial courts or businesses. See Whish supra note 67.

[159] Ibid, Art 20.

This means, irrespective of the nature of the merger, the Council of Ministers may exempt trade activities as long as they are important for economic development of the country. However, since the law gives the Regulator a very wide discretionary power without specific guidelines, it might erode the purpose of the Proclamation itself. To maintain the purpose of the law, such broad discretion of the regulator should be accompanied by certain specific guidelines.

Generally, competition bodies over the world are reluctant in making mergers unlawful per se, unlike price-fixing, market division and other cartel agreements and abuses of dominant positions, or even coming anywhere near such a rule because of beneficial effects of a merger. Furthermore, most competition authorities work with the guiding principle that mergers are good things.[160] Accordingly, the duty of the competition authorities is to identify and prohibit those mergers which have such an adverse impact on competition or society that any benefits resulting from them are outweighed or should be ignored. By and large, this involves a careful balancing act on the part of the authorities on the basis of rule of reason.

5. Joint Ventures

Another important aspect under merger regulations, which has been highly debated worldwide, is that of intrusion of joint ventures into these regulations. Whether joint ventures are covered under merger regulations is not a settled position of law and different jurisdictions have taken different stands in this regard. At the outset, joint venture may be defined as "any arrangement whereby two or more parties co-operate in order to run a

[160] S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (MUP, 1999), p. 205.

business or to achieve a commercial objective."[161] The European Community law earlier provided for concentrative and co-operative joint ventures whereby concentrative joint ventures, which would meet threshold requirements should be notified to the competition authorities.[162] However, since the 2004 amendment, ECMR provides for 'full function joint ventures' whereby only fully functional joint ventures, which meet threshold criterion should be notified to the competition authorities. Article 3(4) of the ECMR stipulates three conditions to determine the existence of 'fully functional joint ventures': a) existence of joint control, b) sufficient resources, assets and financial resources to operate its business autonomously, and c) existence for sufficiently long duration as to bring about a lasting change in the structure of the market concerned.[163]

A joint venture which does not fulfill the above criteria is inspected to check if it goes/falls under any other competitive principle.[164] The United States FTC defines Joint Ventures as "a set of one or more agreements, other than merger agreements, between or among competitor agencies to engage in economic activities and the economic activity resulting there from."[165] Joint venture involving acquisition of assets or voting securities for the formation of a for-profit venture are subject to the HSR Act.

The Ethiopian Trade Practice and Consumers Protection does not deal with joint ventures. A certainty over the status of joint venture needs to be

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[161] Nishith Desai Associates, 'Joint Ventures in India', April 2011, available at http://www.nishithdesai.com/Research2011/Paper/Joint%20Ventures%20in%20India.pdf (Accessed on 4 May, 2013).

[162] Kiran S. Desai, et. al., *Joint Ventures Under India's Competition Act*, Mayer Brown and Khaitan & Co., available at http://www.mayerbrown.com/publications/article.asp?id=10438 (Accessed on 3 May, 2013)

[163] EC, 'Merger Regulations', 2004, Art 2(4).

[164] Whish, supra note 67.

[165] US, Department of Justice and Federal Trade Commission, Antitrust Guidelines.

elucidated by the law. If the joint ventures are treated as acquisitions, as done under the American law, where if two or more parties contribute to form a new company, and as a result receive voting securities of this new company, the contributing parties are treated as acquiring party and the new company is treated as acquired party if the relevant turnover thresholds are satisfied. It is also to be noted that treating such transaction within the ambit of merger regulation would increase the burden on the Competition Authority as the possibility of complaints arising is much higher.

6. Conclusion

Ethiopia has taken a number of measures to promote free market economy since 1991. The Transitional Government defined its economic roles under the transitional economic policy adopted in 1991 whereby it promised to reduce the scope of its intervention into the economy in the interest of free market, and to promote domestic and foreign private investments.[166] The FDRE Constitution also authorizes the government to formulate policies that ensure all Ethiopians benefit from the country's intellectual and material resources.[167] Thus, the ruling party (EPDRF) elaborated on the economic policy objectives of the country in 2000, which focused on the importance of free market as an engine of economic growth.[168] The country also enforces substantive provisions prohibiting unfair competition under its Commercial Code, Civil Code and Criminal Code.

The first formal competition law was introduced in 2003 by enactment of the Trade Practice Proclamation No. 329/2003. Although this legislation contained legal and institutional frameworks targeting at promotion of

[166] Transitional Government of Ethiopia, Ethiopia's Economic Policy during the Transitional Period, supra note 3.
[167] FRDE Constitution, Art 89 (1).
[168] EPDRF, Revolutionary Democracy: Development Lines and Strategies, supra note 5.

market economy and protection of consumers, it lacked clarity and comprehensiveness to address important issues related to abuse of dominance, regulation of merger, protection of consumers and independence of implementing institutions. To fill the gaps in this legislation and to further strengthen the free market economy and protection of consumers, the Federal Parliament (the House of Peoples Representatives) introduced the Trade Practice and Consumers Protection Proclamation No. 685/2010.

The preceding sections of this article reviewed the competition laws and policies of Ethiopia and made specific reference to provisions pertinent to regulation of merger and critically examined them in light of international best practices regarding issues like setting of threshold limits, pre-merger notification and substantive assessment of mergers. It is found that the Ethiopian Trade Practice and Consumers Protection Proclamation has its basis on the developed jurisdictions such as the EU and US. Nevertheless, the law lacks in provisions regarding definite threshold limits.

The Ethiopian Trade Practice and Consumers Protection should, therefore, provide for threshold limits and consider the fact that setting monetary thresholds needs timely restructuring as the economic and commercial factors keep shifting rapidly. The developed jurisdictions have clutched the intricacies of changing economies and market structures which is yet to be confronted by Ethiopia. Moreover, setting out threshold limits could avoid a situation where mergers, which do not meet the monetary requirements to be inspected by the Authority, come into operation with a possibility of having adverse effects on competition. Furthermore, there is a need for clear and cogent guidelines or principles on types of mergers and their effects. The Ethiopian law should provide for guidelines similar to those of the EU or US

guidelines of horizontal and non-horizontal mergers, which prescribe for coordinated and non-coordinated effects caused by mergers.

The fate of joint ventures should also be clarified under Ethiopian competition law. Particularly, whether joint ventures are treated as merger transactions or as anti-competitive agreements needs to be described. Since both possibilities have their own pros and cons, this concern needs appropriate consideration. Moreover, like the laws of South Africa and other jurisdictions discussed above, the Ethiopian Competition law should ascertain crucial concerns of employment, benefits to previously deprived and abandoned entities and, very importantly, ability of national entities to compete in the international markets. Due consideration of these factors in the regulation of merger plays a vital role in facilitating economic development as well as acceptance amongst the market players and consumers.

The Environmental and Social Sustainability of Biofuels: A Developing Country Perspective

Fantu Farris Mulleta*

Introduction

The term biofuel refers to a "wide range of alternative transport fuels made from organic matter such as crops and agricultural residue".[1] The most commonly known forms are ethanol and biodiesel, and to a lesser extent methanol and biobutanol. While ethanol is largely made of starch plants including sugarcane and corn, biodiesels are made out of oil seeds like soybean, palm oil, rape seed and sunflower seed[2]. The two leading producers of ethanol are USA and Brazil, together accounting for around 79% of the world ethanol production.[3] The EU is a major producer of biodiesel, taking a share of around 89% of the global biodiesel production.[4] Within the EU, Germany takes the lead in biodiesel production.[5]

The production of biofuels, in particular ethanol and biodiesel, has grown extremely fast since the start of 2000. For instance, the volume of ethanol produced in the US has doubled between the years 2000-2005 and further

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[1] B. Childs and R. Bradley, *Plants at the pump: Biofuels, climate change and sustainability* (2008), p.9

[2] J. Cheng and G. R. Timilsina 'Advanced biofuel technologies: status and barriers', *World Bank Policy Research Working Paper*, No. 5411 (2010), p.2

[3] T. Harmer 'Biofuels subsidies and the law of the WTO', *ICTSD Issue Paper*, No. 20 (2009), p.3

[4] J. Von Braun, J. and R. K. Pachauri 'The promises and challenges of biofuels for the poor in developing countries', IFPRI Policy Paper (2007), p.3.

[5] Nuffield Council on Biofuels, Biofuels: Ethical Issues (2011), p.26.

tripled in 2005-2010.[6] Also, the production of biodiesel in the EU has grown fourfold between the years 2000-2005 and then threefold more in 2005-2010.[7] Such a rapid growth in the production and use of biofuels is expected to intensify in the years to come.[8]

Such recent intensification of biofuel production is not a purely market-driven incident. It is rather a result of policy choices by the EU, the USA and some other countries which are promoting the extensive use of biofuels to address national and global policy concerns. Under its 2003 Directive on biofuels, the EU sets a clear objective of promoting biofuel production so as to replace petroleum and diesel as transport fuel. Under same Directive, the EU sets two core policy goals which will be met through biofuel production - reducing green house gas (hereinafter GHG) emissions in the transport sector and decreasing dependence on imported energy.[9] In addition to these two mandates, a third policy goal of enhancing rural development through involvement of small and medium-sized enterprises is added to the biofuel mandate under a subsequent EU Directive.[10]

While the first mandate of reducing GHG emissions is part of the global climate change mitigation package, the second mandate (reducing dependence on imported energy) is more of a political economy concern at the national level. Given the fact that global energy consumption is growing, especially in emerging economies, and the price of oil is prone to shocks, domestic production of biofuels is considered to have a promise of reducing

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[6] Renewable Fuels Association, 'Climate of opportunity: 2010 ethanol industry outlook' (2010), p.6

[7] Nuffield, supra note 5, p.27.

[8] International Energy Agency, *World Energy Outlook 2010* (2010), p.9.

[9] The European Parliament and of the Council on the promotion of the use of biofuels or other renewable fuels for transport, Directive 2003/30/EC.

[10] The European Parliament and of the Council on the promotion of the use of energy from renewable sources, Directive 2009/28/EC.

import bills and also improving energy security.[11] On the basis of these mandates, both the EU and USA set ambitious targets to expand biofuel production and use.[12] Other countries like Brazil, China and India also have set their own national target of boosting domestic biofuel use.[13]

Beyond setting consumption targets, policy interventions also extend in providing incentives for biofuel producers. As the production cost of biofuels is much higher than petroleum based fuels, major producing countries support their biofuel industries through the imposition of high tariffs on imported biofuels, provision of tax credit schemes, government loans and loan guarantees.[14] The global outlays on biofuel subsidies was estimated at around US$20 billion in 2009 which is projected to increase to US$45 billion in 2010-2020 and further to US$65 billion 2021-2035.[15] The EU takes a leading role in protecting domestic biofuel production through, among others, imposing a tariff of around US$1.10 per gallon of ethanol and 6.5% ad valorem duty on imported biodiesel, together with tax credits of different amount within each member state.[16] The US applies a duty of US$0.54 per gallon on imported biofuels and also provides tax credits of US$0.45 and US$1.00 per gallon of blended ethanol and biodiesel respectively[17].

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[11] D. Rajagopal, S. E. Sexton, D. Roland-Holst and D. Zilberman, 'Challenge of biofuel: filling the tank without emptying the stomach', *Environmental Research Letters*, Vol. 2, No. 4 (2007), p.2.

[12] While the EU intends to increase the share of biofuel consumption in the transport sector from 2.5% in 2007 to 5.75% in 2010 and further to 10% in 2020, the US aims to expand the amount of renewable fuel used for transport by 28.4 billion litters in 2012 and further by 136 billion litters in 2020, See US Energy Policy Act (2005); See also Directive 2009, supra note 10.

[13] Von Braun and Pauchauri, cited above at note 4, p.9.

[14] Harmer, cited above at note 3, p.4.

[15] International Energy Agency, supra note 8, p.10.

[16] D. Mitchell 'A note on rising food prices', *World Bank Policy Research Working Paper*, No. 4682 (2008), p.9

[17] Harmer, supra note 3, p.17.

In recent years, many developing countries, including Ethiopia, have followed the footsteps of the EU and US with the formulation of domestic biofuel policies and strategies which propagate the same policy goal of reducing GHG emissions, decreasing dependency on imported energy and promoting rural development through biofuel production and use.

In Ethiopia, a strategy document on Biofuel Development and Utilization was formulated in 2007 by the Ministry of Mines and Energy, later approved by the Council of Ministers, aiming to foster several policy goals of which main are: saving and earning foreign exchange, boosting rural development as well as reducing GHG emissions.

While countries are expanding the production of biofuels with the hope of fulfilling the above mentioned policy goals, sceptics are concerned about their intended and unintended consequences. Many criticise biofuels for causing further GHG emissions, a loss of biodiversity, rising food prices and many others. After identifying the particular dimensions through which biofuels can benefit and/or harm the environment and human welfare, this article aims to explore the stakes of developing countries in the biofuel business. It also looks at recent and expected developments in the biofuel industry towards a more sustainable biofuel production and how such developments can affect the interests of developing countries as suppliers of feedstock and potential biofuel producers.

This article is divided in to five main parts. The first part looks at the prospects and challenges associated with the first biofuel mandate of reducing GHG emissions. The second part is devoted to issues of energy security and the place of developing countries in the production and use of biofuels. The third part examines how developing countries can gain or lose out from biofuels in terms of rural development. Recent developments in

making biofuels more sustainable are covered under the fourth part. The last part offers conclusion and policy recommendations on how developing countries can benefit more from the prospects of biofuels and at the same time overcome the challenges. While most of the discussion in this article remains general to the case of developing countries, some specifics to the context of Ethiopia will be highlighted in relevant parts.

1. Are biofuels efficient solutions to environmental problems?

Promoting the clean environment agenda is one of the three policy goals that biofuel production is expected to fulfil. For instance, the EU regards increased use of biofuels as one mechanism of ensuring compliance with its commitment under the Kyoto Protocol.[18] However in recent years, there is an increasing doubt against biofuels as environmentally efficient sources of energy. While it is largely agreed that biofuels have certain environmental advantages compared to conventional fossil fuels, they also have their own environmental costs. The following two sub-sections briefly examine the prospects and challenges attached to biofuel production in fulfilling its clean environment mandate.

1.1. Environmental prospects

One of the most alarming environmental problems of the day is climate change, which is mainly a result of GHG accumulation in the atmosphere through emissions and a reduction of carbon sinks.[19] While 80% of total GHG emissions is attributed to CO_2 emissions from fossil fuels, the transport

[18] Directive 2003/30/EC, supra note 9
[19] Nuffield, supra note 5, p.17.

sector alone accounts for around 15% of such GHG emission[20]. In this context, biofuels are deemed to reduce GHG emission by replacing the use of fossil fuels in the transport sector which is generally considered carbon inefficient. Biofuels are characterized as carbon neutral because the carbon emitted from their use is considered as not being additional to the atmosphere but cyclical since biofuel feedstocks absorb carbon from the atmosphere while planted.[21] This is unlike fossil fuels which emit additional carbon as they are extracted from underground.

According to the US National Research Council, the use of corn-based ethanol is believed to reduce carbon emission by 12-19% compared to the emission level from gasoline usage.[22] The same research revealed that use of biodiesels made of soybean have a potential of reducing carbon emission by 41%. Accordingly some estimate that biofuels can contribute around 3% to the overall emission reduction plan with an increasing carbon saving prospect for the future.[23]

1.2. Environmental challenges

The characterization of biofuels as carbon neutral is opposed by some for it only takes in to account the carbon emitted during end use or combustion which is said to be lesser than the carbon absorbed by feedstocks that are used as biofuel input.[24] Such a calculation is, however, not comprehensive since there are several other channels, other than end use, through which biofuels can add to carbon emissions.[25] Hence, if all these channels are

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[20] B. Metz, O. R. Davidson, P. R. Bosch, R. Dave and L. A. Meyer (eds) *Climate change 2007: mitigation of climate change* (2007), p.105

[21] Childs and Bradley, supra note 1, p.10.

[22] Office of the Legislative Auditors, *Biofuel policies and programs* (2009), p.38.

[23] International Energy Agency, World Energy Outlook 2009 (2009), p.44.

[24] Nuffield, supra note 5, p.20

[25] Childs and Bradley, supra note 1, p.10.

properly accounted for, biofuels may no longer be carbon neutral. This sub-section looks at three of these channels through which biofuels can further carbon emissions.

1.2.1. Land use change

The one thing that most writers agree about biofuels is that it is a land intensive investment. The greater the percentage of biofuels in blends, as targeted by the EU, USA and other countries, the higher its production volume becomes and thus the pressure it puts on land.[26] According to an estimation made by the Organisation for Economic Co-operation and Development (hereinafter the OECD), it would take around 72% of EU's and 30% of USA's total agricultural land if these countries are to meet their target of replacing 10% of their transport fuel with biofuels – unavoidably necessitating changes in the existing usage and nature of land.[27]

The effect of biofuels on land use change can be either direct or indirect.[28] While direct land use change refers to the direct conversion of a land for planting biofuel feedstocks, indirect land use change involves conversion of a land for food production or another purpose which is indirectly triggered by biofuel production in other places.[29] An example of local level indirect land use change can be clearing of a forestland by farmers following displacement from their farmland due to biofuel production. Indirect land use change may also be trans-boundary in that increased biofuel demand or production in one

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[26] T. Searchinger, R. Heimlich, R. A. Houghton, F. Dong, A. Elobeis, J. Fabiosa, S. Tokgoz, D. Hayes and Tun-Hsiangyu, 'Use of US croplands for biofuels increases greenhouse gas through emission from land-use change", *Science,* Vol. 319, No. 1238 (2008), p.1238.

[27] OECD (2006) 'Agricultural market impacts of future growth in the production of biofuels', *Working Party Report,* AGR/CA/APM(2005)/Final

[28] Nuffield, supra note 5, p.32.

[29] Searchinger et al., supra note 26, p.1238.

part of the world can cause conversion of land use in another part through price effects.[30]

Indeed, the extensive production of biofuel feedstocks has a considerable effect in changing the nature of lands through deforestation, clearing of grass lands or use of uncultivated land, which in turn can cause further carbon emission from cut plants, reduction of the carbon storage capacity of lands and reduced biodiversity.[31] In terms of carbon balance, conversion of any form of land be it a forest area, grass land or even an abandoned land has the impact of increasing carbon emission, though of different magnitude. According to one study, the carbon emitted from biofuel-induced clearing of grasslands is estimated to be offset only after 93 years of ethanol use, while it requires 48 years of ethanol use to offset the carbon emitted from the use of an abandoned land.[32]

The consequence is even worse when it comes to deforestation that has several environmental implications beyond carbon emission. In this regard, recent intensification of deforestation in places like Brazilian Amazon and Indonesia is mainly attributed to rapid expansion of biofuel production in such places. A similar challenge had been evidenced also in some parts of Ethiopia with the allocation of environmentally protected areas for feedstock cultivation. A popular example can be the allocation of around 10,000 hectares of land for the production of castor oil seed, part of which land

[30] C. Bowyer, 'Anticipated indirect land use change associated with expanded use of biofuels and bio-liquids in the EU – An analysis of the national renewable energy action plans' (2010), p.4.

[31] Ibid

[32] Office of the Legislative Auditors, supra note 22, p.44

forms part of Babile Elephant Sanctuary, a home for several unique animal species.[33]

According to a report by the Food and Agriculture Organisation of the United Nations (hereinafter the FAO), land use for biofuel production in Latin America is estimated to further expand by 12.3 million hectares in 2030, all of which land is expected to come from forest conversion.[34] Also in Africa around 56% of the increase in land demand for biofuel production in 2030 is expected to be met by forest conversion. This indeed will directly contribute to deforestation and climate change, the welfare impact of which is more direct in developing countries where the livelihood of many poor is largely dependent on land and weather conditions.

Besides, those biofuel feedstocks with higher emission reduction potential, for instance soybean, require more land to grow, compared to other feedstocks like sugarcane which demand lesser land to grow but have minimal emission reduction potential[35]. As such, there is a clear trade off between the carbon saving potential and land impact of the different forms of biofuels.

1.2.2. Extensive use of chemicals

Beyond their carbon emission effect through land use change, biofuels can also increase GHG emission through extensive use of chemicals like that of nitrogen and phosphate for fertilization and pesticide[36]. Indeed most lands growing biofuel feedstocks are highly treated with nitrogen so as to ensure

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[33] BirdLife International, 'Fuelling the ecological crisis – Six examples of habitat destruction driven by biofuels' (2008), p. 4; See also Rajagopal et al, supra note 11, p.2.

[34] FAO, 'State of the world's forests' (2011), p.35.

[35] P. Al-Riffai, B. Dimaranan, and D. Laborde, 'Global trade and environmental impact study of the EU biofuels mandate', *IFPRI Study Report* (2010), p.35.

[36] Rajagopal et al, supra note 11, p.77.

high yields. According to the Department of Agriculture of the US, 95% of US corn production for ethanol uses nitrogen fertilizer.[37] This causes emission of nitrous oxide to the atmosphere which is one of the most powerful GHGs in its global warming potential.[38] The chemical intensive nature of feedstock farming is also susceptible of causing a reduction in soil and water quality which again is a very serious concern for many developing countries where majority of the population live in rural areas, mainly relaying on these natural resources for subsistence agriculture.

1.2.3. GHG emission in biofuel processing

Biofuel production is not only land and chemical intensive but also energy intensive. Although the process of converting biofuel feedstocks in to liquid fuel almost always requires some form of energy, the amount of energy demanded varies across different biofuels depending on the type of feedstock they employ as an input.[39] Whereas the process of converting grain to ethanol is estimated to consume around 2/3 of the energy it produces, biodiesel production from soybean and palm oil takes around 1/3 and 1/9 of their energy output, respectively.[40] While the amount of energy consumed in biofuel processing is a central issue in the debate on energy efficiency, what is even more important for the environment debate is the type of energy employed and the resulting carbon balance. Accordingly, while the use of coal in biofuel processing is estimated to have a negative carbon balance with 3% increase in net emission, utilization of natural gas and biomass is said to

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[37] Office of the Legislative Auditors, supra note 22, p.56.
[38] Nuffield, supra note 5, p.32.
[39] S. Kartha 'Environmental effects of bioenergy, in P. Hazel and R. Pachauri (eds) *Bioenergy and agriculture: promises and challenges*, IFPRI Focus Brief, Vol. 14 (2006), Brief 4 of 12.
[40] Childs and Bradley, supra note 1, p.11.

have a positive carbon balance of 28% and 52%, respectively.[41] In general, the net effect of biofuels in reducing GHG emissions appears very minimal given all the different channels through which it also contributes to carbon emission[42].

At the heart of the environmental problem with biofuels is the poor or none conduct of proper Environmental Impact Assessment (herein after EIA) which can allow host countries to make an informed decision on the environmental benefits and costs of biofuel production. Similar to many other developing countries, this problem prevails also in Ethiopia where many agricultural projects, including on biofuels, are either let off from their duties to conduct EIA or subjected to a lenient EIA procedure.[43] This is contrary to the Environmental Policy regime of the country and the EIA Proclamation No. 299/2002 - a strong legal regime requiring the carrying out of EIAs prior to implementation of investment project.

As the chart below shows, biofuels contribute the least to carbon saving when compared to other mitigation strategies including energy efficiency in end use, efficiency in power plants as well as use of nuclear power and other renewables.

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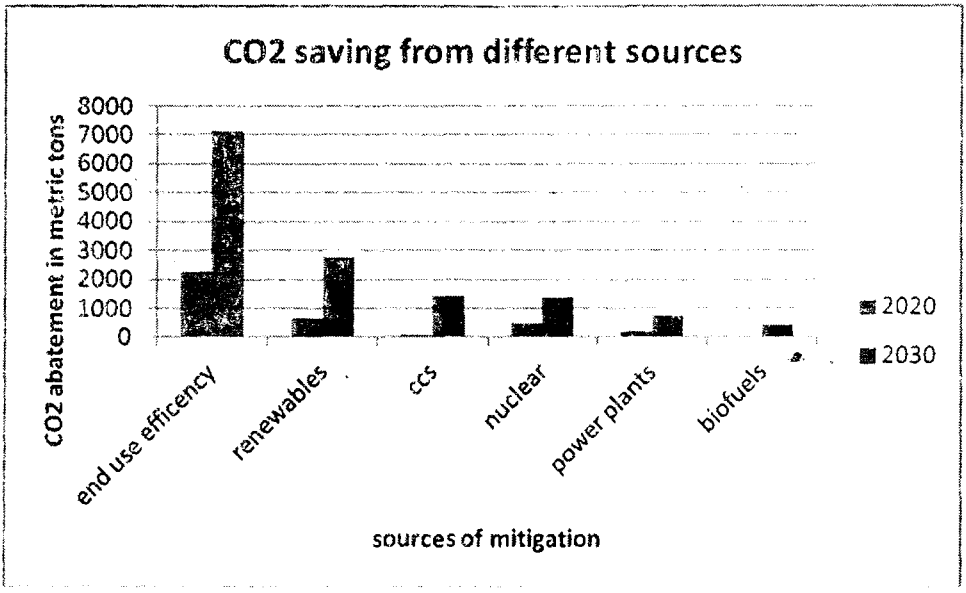
[41] Office of the Legislative Auditors, supra note 22, p.38-39.

[42] J. Franco, L. Levidow, D. Fig, L. Goldfarb, M. Honicke and M. Mendonca 'Assumptions in the European Union biofuel policy: frictions with experiences in Germany, Brazil and Mozambique', *Journal of Peasant Studies*, Vol. 37, No. 4 (2010), p.664.

[43] T. Anderson and M. Belay, 'Rapid assessment of biofuels development status in Ethiopia and proceedings of the national workshop on environmental impact assessment and biofuels'(2008), p. 28.



Source: World Energy Outlook, 2009

Given such minimal role biofuels play in reducing GHG emission, it is indeed questionable whether the clean environment mandate is the underlying policy drive behind extensive production of biofuels. The next section examines the second and perhaps the most sensitive policy goal for biofuel expansion – energy sovergnity and security.

2. Biofuels as a means to energy security: whose energy security?

Given their contentious role in reducing GHG emissions, the key role of biofuels can be seen to centre on their use as an alternative source of energy and thereby reducing the oil import bills of countries and contributing to improved energy security. With a rapid rise in economic growth and resulting industrial expansion and urbanization in emerging economies and some other developing countries, the global energy consumption is ever-increasing and is estimated to further grow by 71% by the year 2030 - developing countries

accounting to three-quarters of such growth.[44] Such increasing demand for energy, coupled with declining oil reserves and geopolitical factors surrounding oil production[45] have contributed to the volatile nature of oil prices with frequent spikes.[46]

In particular, the world has witnessed a significant hike in oil prices during 2004-2008, with oil price reaching US$145 per barrel in 2008, which according to the International Monetary Fund (hereinafter the IMF) signifies the beginning of a "period of increased scarcity of oil".[47] It is during this same period that the production of biofuels has intensified as an alternative transport fuel. This is essentially because biofuels are considered as relatively 'cheap' and 'reliable' sources of energy with a promise of reducing oil demand in the transport sector which now takes around 50% of the global oil supply.[48] The price trend especially during 2007-2008 has incentivised biofuel industries as oil prices have been well above the floor price at which biofuels can stay commercially viable – US$35 per barrel for ethanol from Brazil, US$55 for US ethanol and US$80 for EU biodiesel.[49] Whilst the price of oil has sharply declined after its peak in mid-2008, it again took a rising trend and has persistently stayed over $US80 per barrel as of beginning of 2011.[50]

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[44] US Department of Energy, International Energy Outlook 2006 (2006), p.7.

[45] Uncertainties in oil prices is partly attributed to strategic decision being taken by members of Organization of the Petroleum Exporting Countries (OPEC) to limit oil production well below their optimal production capacity causing global scarcity of oil and price hikes. See J. L. Smith "World oil: market or mayhem?", *Journal of Economic Perspectives*, Vol. 23, No. 3 (2009), p.150.

[46] Ibid.

[47] IMF, World Economic Outlook (2011), p.89.

[48] Id, p.96.

[49] J. Piesse and C. Thirtle, 'Three bubbles and a panic: An explanatory review of recent food commodity price events', *Food Policy*, Vol. 32, No. 2 (2009), p.127.

[50] IMF, cited above at note 47, p.89

Even if volatility and hikes in oil prices is a common concern for all oil importing countries, only few have taken the lead in the biofuel industry. In the year 2007, around 90% of the global biofuel production came from the US, Brazil and EU each respectively accounting 43%, 32% and 15% to the figure.[51] The remaining 10% was produced by China, Indonesia, Malaysia, Singapore, Argentina and Canada. The US and EU are not, however, just the biggest producers of biofuel, they are also the biggest importers. Brazil on the other hand is the biggest exporter of biofuel, followed by China, Indonesia, Malaysia and Argentina.[52] This is indicative of the fact that the demand and consumption of biofuels is relatively very high in the US and EU which indeed exceeds their domestic supply. Biofuel consumption is high also in Brazil which however falls within the domestic supply of the country. One can safely conclude that biofuel production is greatly dominated by few countries and its use is currently limited to these same countries.

Many developing countries, including Ethiopia, take part in the biofuel production process as suppliers of feedstocks, which is at the lowest level of the value chain. The share of developing countries in the export market for some biofuel crops like coarse grain and oilseeds is estimated to increase and even exceed the share of OECD countries in the years 2005-2017.[53] This is essentially because of a higher potential for yield improvement in many developing countries, especially in Africa, despite the general trend of declining yield improvement in most parts of the world.[54] Most African countries have a comparative advantage in feedstock cultivation also because of the relative abundance of arable land, inexpensive labour force and

[51] UNEP, 'Towards sustainable production and use of resources: assessing biofuels' (2009), p.34.
[52] Ibid.
[53] OECD and FAO, 'OECD-FAO Agricultural Outlook 2008-2017' (2008), p.24.
[54] UNEP, supra note 51, p.73

favourable climate in these countries. According to one study, expansion of biofuels and increasing demand for feedstock is estimated to require additional land of 18-36 million hectares in 2020 and further 19-44 million hectares in 2030, of which around two-thirds will come from developing countries.[55]

Ethiopia has already started tapping its potential with extensive cultivation of biofuel feedstocks both by foreign and domestic investors. According to some estimates, cultivation of biofuel crops in Ethiopia lately accounts for around 40% of the total land active in agricultural investment.[56]

Given the strong comparative advantage most developing countries have in producing feedstock, one may reasonably ask why these countries are not actively engaged in biofuel processing. This is partly because establishing new biofuel plants and building processing and distribution facilities require a huge amount of start up capital which is lacking in most developing countries.[57] Given the prevailing uncertainties in the oil market and related investment risks in the biofuel industry, potential biofuel processors may also seek some incentives from governments as is the case in the US, EU and other biofuel processing countries. Hence, biofuel processing is an area that is more suited for high capital foreign investment in developing counties provided appropriate incentives are availed by these countries.

Moving up in the value chain can provide developing countries with several opportunities including satisfying their increasing energy demand and thereby reducing oil bills: creating further employment opportunities in

[55] International Institute for Applied Systems Analysis, 'Biofuels and food security' (2009), p.29.

[56] T. Lavers "Land grab' as a development strategy? The political economy of agricultural investment in Ethiopia", *Journal of Peasant Studies*, Vol. 39, No. 1 (2012), p. 114.

[57] Id, p.41.

biofuel plants; and raising foreign earnings through export of a value added product. Brazil is a good example in this respect with its saving of more than US$100 billion from its import bill and creation of employment for around 1 million of its citizens after starting domestic processing of ethanol in the 1970's.[58]

Countries in sub-Saharan Africa, including Ethiopia, can especially gain the most from domestic processing and use of biofuels as energy prices are relatively very high in such countries, slicing a considerable share of their limited budget. As a net importer of fuel, Ethiopia for instance spends a great share of its financial resource on oil import which is estimated at around US$1.6 billion on the year 2007/08 - an outlay in excess of the country's total export earnings.[59]

Increased export earning is also the other benefit developing countries can gain from engaging in biofuel processing. According to the United Nations Conference on Trade and Development (hereinafter UNCTAD), developing countries could have increased their export earnings by a minimum of US$14.3 billion and maximum of US$294.2 billion in 2010 (based on different trade scenarios) if they exported a processed biofuel of an amount comparable to the feedstock they exported raw.[60]

Nonetheless, the markets of major biofuel importing countries are not all open for potential exporters. As stated in introductory part, both the EU and the US have several trade protectionist policies that favour local biofuel

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[58] J. R. Moreira, "Brazil's experience with bioenergy" in P. Hazel and R. Pachauri (eds) 'Bioenergy and agriculture: promises and challenges', *IFPRI Focus Brief*, Vol. 14 (2006), Brief 8 of 12

[59] Anderson and Belay, supra note 39, p.6; See also D. Mitchell, 'Biofuels in Africa: Opportunities, prospects and challenges' (2011), p.Xxi.

[60] UNCTAD, The biofuels market: current situation and alternative scenarios (2009), p.51.

producers. Though most developing countries, especially least developed countries, already have a preferred access to the US and EU markets and thus can do away with high biofuel tariffs, they will still lose their competitive advantage due to intensive subsidisation of biofuels in the EU and the US. This is essentially because the subsidies provided by the US and the EU are directly tied to production volume which thus have the effect of boosting domestic production and creating artificial reduction of prices, making it hard for unsubsidized biofuels from developing countries to compete on same level. Indeed according to UNCTAD, developing countries have a potential of raising their biofuel export earnings in 2020 by more than US$520 billion if export is made in the absence of EU and US subsidies. Such earnings will, however, reduce by more than twofold if the support measures continue to exist.[61] As such, it is clear that tariffs and subsidies can play a very restrictive or distortive role in the future export of biofuels from developing countries - posing a challenge to the attainment of developing countries' policy goal of increasing export earnings through biofuel processing and export.

Thus, while the prospect of developing countries to actively take part in biofuel processing highly depends on their capability to attract high capital investments, their prospect of effectively exporting biofuels to the US and the EU is reliant on liberalisation of biofuel policies in such major export destinations.

3. Biofuels and sustainable rural development: can the two go together?

The third and relatively less publicized policy goal of biofuels is the promotion of rural development. The EU aspires to meet this policy goal

[61] Ibid.

through involvement of small and medium-sized rural enterprises in biofuel production. Similarly, the Biofuel Development and Utilization Strategy of Ethiopia aims to advance rural development from biofuel production through different ways including through increased job opportunities in feedstock production, biofuel processing and marketing; through direct involvement of farmers in small-scale production of feedstock as well as through the creation of benefit sharing schemes between large-scale producers and small-scale farmers[62].

While it is true that biofuels do actually offer some opportunities for the rural population, they are also susceptible of having an adverse impact on rural wellbeing. This is an important concern in a developing country context where there is large and predominantly poor rural population. The next sub-sections explore three main dimensions through which biofuels can affect rural wellbeing in developing countries.

3.1 Food security

Production trends in the biofuel industry can easily affect the price of food commodities since biofuels largely depend on edible feedstocks as an input and also compete with food production for same agricultural resources. In fact, one of the most serious impacts of biofuels has been their impact on rising food prices. Following years of rapid expansion of biofuels, the world has faced a hike in the price of some important food commodities in 2007-2008. Such price hike was quite drastic as the global food prices were in a relatively stable trend for the preceding two decades.[63] Even though

[62] The Biofuel development and Utilization Strategy of Ethiopia, 2007, paragraphs 4.2, 5.3, 7.2.2.3 and 7.4.5.

[63] Piesse and Thirtle, supra note 49, p.119.

expansion of biofuels was not the only reason behind the price hike[64], it made an important contribution through its impact on the alteration of food demand and supply.

Despite a general consensus on the key role biofuels played in the soaring food prices during 2007-2008, there are different estimates on the exact contribution of biofuels to the price hike. According to the International Food Policy Research Institute (hereinafter IFPRI), biofuels contributed 39% for the total rise in the price of maize and around 20% for rice and wheat prices[65]. The IMF made a greater estimate where 70% of the rise in maize prices and 40% for soybean were attributed to biofuel production.[66]

Biofuels affect the price of food commodities through different channels including through an increase in the demand for food items that are used as biofuels inputs; a decline in supply of food commodities not used in biofuel processing but compete for same resources; and through consumption substitution.

On the demand side, increased biofuel production raises the demand for corn and oilseeds as they are intensively used in the production of ethanol and biodiesel. In fact, the biofuel industry is becoming the largest consumer of these feedstocks. For instance during 2007, one-third of US's total corn production was consumed by the ethanol industry.[67] Even if the global maize production grew by 55 million tons in 2007, the consumption of maize in the US ethanol industry alone increased by almost the same amount, unavoidably

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[64] Of the main drivers behind the price rise were low food stock to utilization ratio; increasing oil prices; declining value of US dollar; and speculation in food markets, Id, p.120-24.

[65] Al-Riffai et al., supra note 35, p.18.

[66] Lipsky in Mitchell, supra note 16, p.4.

[67] Piesse and Thirtle, supra note 49, p.127.

pushing the global price of maize upward.[68] Accordingly the global maize price increased by almost threefold during 2005-2008. The same holds true in the global oilseeds production, 7% of which was consumed by the biodiesel industry in 2007, contributing a part in the tripling of the price of palm oil and soybean during same period.[69]

On the supply side, biofuels affect the price of food commodities which are not used for biofuel processing, mainly through resource diversion. Expansion of biofuel production puts a pressure on agricultural resources, especially land and water, and thus reduces the availability of such resources for food cultivation. This in turn results in a decline in output and a rise in the price of those food items which compete with biofuels for same resource.[70] In the US for instance, the amount of farmland used for maize production increased by 23% during 2007-2008, causing a 16% decline of land available for soybean cultivation and consequently depletion of US's soybean stock by 75%.[71] Also increased planting of biodiesel oilseeds in major wheat exporting countries has attributed to lesser expansion of land for wheat production and thus a decline in total output and a rise in price of wheat.[72]

The third and more indirect channel through which biofuel production can cause a rise in food prices is through consumption substitution. As the price of one food commodity rises, consumers tend to shift their consumption patter and demand more of other substitute goods, bringing a second round effect on the price of substitutes. An example of this can be the increase in

[68] Mitchell, supra note 16, p.18.
[69] Piesse and Thirtle, supra note 49, p.127.
[70] Franco et al., supra note 43, p.672.
[71] Piesse and Thirtle, supra note 49, p.127.
[72] Mitchell, supra note 16, p.11.

demand and price of rice in 2007-2008 following the rising price of wheat and corn.[73]

With expansion of biofuels in the years to come, global food prices also are expected to stay higher. Such impact of biofuels on rising food prices has a considerable implication for food security in developing countries with a broader understanding of food security not just as the physical availability but also the economic and social accessibility of sufficient, safe and nutritious food.[74]

It is generally true that increases in the global price of food commodities may not be directly transmitted into developing country domestic markets because of market imperfection problems such as segmentation of markets and existence of non-traded food items. But to the extent it transmits, its welfare impact is very high. This is because a significant portion of household income in developing countries is devoted for food consumption and thus a rise in food prices can easily push households into a poverty situation.[75] According to a projection by Leturque and Wiggins[76] future expansion of biofuels to meet the 10% target will increase domestic food prices in sub-Saharan Africa only in a small amount compared to the price impact in the EU, North America, Latin America and South East Asia. However, the poverty impact will be highly felt in sub-Saharan Africa than other regions for the above mentioned reason.

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[73] Mitchell, supra note 16, p.13. Rice is neither used as biofuel feedstock nor cultivated in same regions where biofuel feedstocks are extensively harvested. Hence the rise in the price of rice is not directly linked to resource diversion.

[74] FAO, 'Trade reform and food security: conceptualizing the linkages' (2003), p.10.

[75] M. Ivanic and W. Martin, 'Implications of higher global food prices for poverty in low-income countries', *World Bank Policy Research Working Paper*, No. 4594 (2008), p.1.

[76] H. Leturque and S. Wiggins, 'Biofuels: could the south benefit?', *ODI Briefing Paper*, No. 48 (2009), p.2.

The impact of biofuels on food prices is of a particular concern for developing countries also because the price effect is particularly high on maize which is a staple food in many developing countries, especially in Africa, which thus takes a significant share of the total food expenditure.[77]

As such, biofuels pose some threat on the food security of poor populations in most developing countries by affecting both the physical availability and economic accessibility of food items. Nonetheless, it is also worth noting that increased biofuel production can positively affect the food security of rural poor by raising on-farm income and thus enhancing their purchasing capacity. This indeed is a real potential as a significant many of the rural population have farm-based livelihood, making possible the transmission of price effect into rural income. Yet, as it will be discussed under subsequent section, several bottlenecks are there limiting the transmission of increased price of farm outputs into rural income and food security. To make such transmission possible, there indeed is a need for the designing of right policy measures which can enable small-scale farmers to be key beneficiaries of the rising farm income as elaborated under subsequent section.

3.2 Rural income

Despite their impact on rising food prices, extensive production of biofuels and resulting rise in the price of feedstocks is mostly referred as having a positive impact for the rural poor through increased farm income and employment.[78] In most developing countries where a significant portion of the poor live in rural areas, increased farm income is considered central to a nationwide development and poverty alleviation. On this basis, some argue

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[77] Ivanic and Martin, supra note 75, p.20.

[78] P. Hazell and R. K. Pachauri, 'Bioenergy and Agriculture: Promises and Challenges', *IFPRI Focus Brief*, Vol. 14, (2006).

that even the effect of biofuels on increasing food prices is tolerable since such price effect will be offset by growing farm income.[79] Leturque and Wiggins[80] have quantified the potential increase in farm income with their estimate that the earnings of sugarcane and palm oil producers can raise from 5 or lesser US$ to 7-16 US$ per day by supplying for biofuel processors rather than selling them in traditional markets. However it is important to question the extent to which the rural poor are engaged in the production of biofuel feedstocks. This is because the net welfare impact of biofuels will be positive only if the rural poor earn a much higher income to cover their increasing food cost or else if they are net-food producers, which is mostly not the case.

Recent experiences from most developing countries, including Ethiopia, show that cultivation of biofuel feedstocks is mainly dominated by large-scale corporate farming and there is less opportunity for small farmers to directly benefit from biofuels.[81] It is becoming the norm for corporate producers to cultivate feedstock in large plantations, often in more than 10,000 hectares of land and sometimes going up to 500,000 hectares.[82] Hence, much of the increase in farm earnings directly goes to corporate producers and not small-scale farmers.

There are however few exceptional cases where small-scale farmers are well integrated in to the biofuel business. One case is in Brazil where more than 30% of sugarcane for ethanol production comes from around 60,000 small-

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[79] D. G. De La Torre Ugarte, 'Developing bioenergy: economic and social issues', in P. Hazel and R. Pachauri (eds) Bioenergy and agriculture: promises and challenges, *IFPRI Focus Brief*, Vol. 14 (2006), Brief 2 of 12.

[80] Leturque and Wiggins, supra note 76, p.3.

[81] Franco et al., supra note 43, p.676.

[82] K. Deininger and D. Byerlee 'The rise of large farms in land abundant countries: do they have a future?', *World Development*, Vol. 40, No. 4 (2012), p.702

scale farmers in the country.[83] Another case is in Mali where more than 4000 small-scale farmers supply jatropha to a foreign biofuel company through a contract farming arrangement wherein such farmers, through their union, also hold 20% share in the company.[84] Though the Biofuel Development and Utilization Strategy of Ethiopia aspires well integrate small-scale farmers and their cooperatives in the biofuel business through agricultural extension programs, no major achievement is recorded so far on the area.

Perhaps a more visible role of biofuel production in increasing rural earning comes through increased labour participation in large-scale feedstock plantations.[85] While the positive impact of increased labour participation on rural earning is quite undeniable, given the seasonal or irregular nature of employment conditions in most plantations, the net effect in terms of enhancing both rural income and sustainable livelihood can be more promising if small-scale farmers are directly integrated in to the supply chain.

3.3 Access to land

The land intensive nature of biofuel production and resulting land use change can be detrimental not only to the environment but also to the right of local people to have access to land.[86] This is an important concern in a developing country context where biofuel feedstocks are largely produced on large-scale commercial farms while a vast majority of local people lead a poor and land-based rural livelihood. In most developing countries land has several values in the life of rural populations, which goes much beyond its market value. It

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[83] Moreira, supra note 58.

[84] S. Vermeulen and L. Cotula "Over the heads of local people: consultation, consent and recompense in large-scale land deals for biofuels projects in Africa", *Journal of Peasants Studies*, Vol. 37, No. 4 (2010), p.902-03

[85] Franco et al., cited above at note 43, p.690-91

[86] Id, p.665.

is often a reflection of social identity; source of water, energy and grazing, as well as a means to have access to credit.[87]

According to IFPRI, between 15-20 million hectares of farm land in developing countries have been transferred to large-scale investors, mostly foreign, since 2006.[88] Increased biofuel production is one of the main drivers for recent intensification of large-scale land acquisition in developing countries, especially in sub-Saharan Africa.[89]

Because land is not subject to private ownership and purchase in most developing countries, including Ethiopia, transfers are largely carried out through long-term lease agreements negotiated and contracted between host governments and investors. In such cases, the interest of local people will be at stake as prior holders or users of the land. Lately, there is almost a general consensus on the principle that local people should be effectively consulted and compensated when a land they hold or use becomes a subject of investment transfer.[90]

However, because land holdings are not fully registered in many developing countries and customary land rights not formally recognized at all levels of government[91], local people are in reality vulnerable to displacement without consultation, compensation or other alternative arrangements. In case consultations are held, they are mostly meant to inform local people but not

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[87] Vermeulen and Cotula, supra note 84, p.900.

[88] Vermeulen and Cotula, supra note 84, p.902.

[89] K. Deininger, D. Byerlee, J. Lindsay, A. Norton, H. Selod and M. Stickler, 'Rising global interests in farm land: can it yield sustainable and equitable benefits?', (2011), p.51-53.

[90] FAO, IFAD, UNCTAD and The World Bank Group, 'Principles for responsible agricultural investment that respects rights, livelihoods and resources' (2010); See also AU, 'Land policy in Africa: A framework to strengthen land rights, enhance productivity and secure livelihoods' (2009).

[91] Deininger et al., supra note 89, p.99.

involve them in real decision making.[92] Yet, even in cases of transfer of 'marginal' or 'idle' lands which in the eyes of many host governments involve no displacement or harm on local people, the latter tend to suffer in terms of loss of grazing land and source of fuel wood, water and traditional medicine.[93] As such, large-scale land transfers for biofuel production can have an adverse impact on the socio-economic and cultural livelihood of rural populations, especially when land transfers are carried out in disregard of local concerns.

4. Towards environmentally and socially sustainable biofuels: sustainable solutions or technological fix?

The preceding parts have pointed out the major prospects and challenges biofuels bring. In recognition of the challenges, some developments are recently underway to ensure the environmental and social sustainability of biofuels. The prospect of producing biofuels in a more efficient manner and prevailing constraints to that are looked in to under the following sections on second-generation biofuels and the EU certification scheme.

4.1 Second generation biofuels

Second generation biofuels are advanced forms of biofuels which are made from feedstocks like switch grass, jatropha, agricultural residue or wood residue.[94] Their major difference from conventional or first generation

[92] Vermeulen and Cotula, supra note 84, p.913.

[93] J. Von Braun and R. Meinzen-Dick, " 'Land grabbing' by foreign investors in developing countries: risks and opportunities", *IFPRI Policy Brief*, No. 13 (2009), p.2.

[94] Cheng and Timilsina, supra note 2, p. 3.

biofuels is that they are not extracted directly from the edible parts of feedstock but from residues or wastes.[95]

These advanced forms of biofuels are considered both environmentally and socially more efficient than first generation biofuels as they are relatively less demanding in terms of land use, energy consumption and use of food stocks. For instance production of biodiesel from jatropha is believed to minimize deforestation and conversation of arable land for biofuel production since jatropha can be grown on a marginal or semiarid land with less competition against food production and biodiversity.[96] Also ethanol production from switch grass or cellulose is considered to enhance the energy efficiency of biofuels as it takes a considerably lesser energy to convert cellulose in to ethanol than converting corn or sugarcane.[97] The 4th Assessment Report of the Intergovernmental Panel on Climate Change regards the use of second generation biofuels as one of the strategic ways to increase the carbon efficiency of the energy sector in the future.[98]

Second generation biofuels are also efficient solutions to food security concerns since they neither use food stocks nor cause diversion of arable land from food production. Hence, they are assumed to not affect food commodities both in the demand and supply side.

Yet, even these advanced forms of biofuels are not as ideal as they are sometimes presented. There are several technical challenges attached to their production which can in turn limit their future expansion and prospect. For instance, conversion of cellulose in to ethanol involves a very complex process compared to the processing of corn or sugarcane, which makes the

[95] Nuffield, supra note 5, p.47.
[96] Von Braun and Pachauri, supra note 4, p.6.
[97] Childs and Bradley, supra note 1, p.20.
[98] Metz et al., supra note 20, p.60.

whole production process more expensive and thus economically less attractive to producers[99]. Besides the high cost of production, the economic viability of extracting cellulosic ethanol especially from agricultural residue which are land and carbon efficient is very much limited by low level of ethanol yield.[100] The same holds true for jatropha whose prospect for market expansion is highly limited by low yield, if it is to become land and environmentally efficient and grown on degraded land[101] as foreseen in biofuel policies of many countries including the Biofuel Development and Utilization Strategy of Ethiopia.

The above points are illustrative of the fact that the land and input efficiency of second generation biofuels does not come without a trade off. The productive or economic return of almost all second generation biofuels is quite limited, which makes it unlikely for such advanced forms of biofuels to replace the conventional biofuels any time soon, unless with intensive government subsidy or development of advanced technologies to improve yield. Hence where we stand now, much hope is placed on future agricultural and industrial technologies to fix the environmental efficiency and social sustainability of biofuels. A typical example of such a technological fix is the ongoing effort to produce biofuels from algae which is said to provide a high biodiesel yield, with no competition for land, but under a huge investment cost.[102] According to a recent estimate, investment for the production of advanced forms of biofuels involves a cost that is ten times higher than the cost of producing first generation biofuels[103]. This calls into question the

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[99] Nuffield, supra note 5, p.53.
[100] Cheng and Timilsina, supra note 2, p.13.
[101] S. Wiggins, J. Keane, J. kennan, H. Leturque, and C. Stevens, 'Biofuels in Eastern Africa: dangers yes, but much potentials as well', *ODI Project Briefing*, No. 66 (2011), p.2.
[102] Nuffield, supra note 5, p.56.
[103] VDB in Franco et al., supra note 43, p.677.

prospect, if any, of small-scale producers in such a technology and capital intensive future of biofuels and thus whether future biofuels can fulfil their mandate of enhancing rural development through inclusion of small and medium-scale producers.

4.2 The EU certification scheme

The second mechanism recently put in place to mitigate the challenges associated with biofuels has come from the EU, which belatedly recognised the unintended adverse impacts of biofuels on the environment and human welfare. Under its 2009 Directive on biofuels, the EU set up a certification scheme for the sustainable production of biofuels under which scheme eligibility for biofuel subsides and compliance certification are made conditional on the fulfilment of certain sustainability criteria by biofuel producers. These criteria are: contribution to reduction of GHG emission by at least 35%, and further by 50% in 2017 and 60% as of 2018; non-use of feedstock originating from a land that is rich in carbon stock or biodiversity holding (including wetlands, primary forests, wood lands, grass lands with high biodiversity and areas designated for protection of endangered ecosystems or species), and non-use of food stocks originating from peat lands.[104]

While this certification scheme of the EU is the first in its kind and a good move towards addressing the challenges associated with increased biofuel production, it is very much limited in its scope and aapplication.[105] To start with its general application, the scheme is very soft in that it has no direct effect of deterring unsustainable production of biofuels. While it certifies

[104] Article 17 of Directive 2009, supra note 10.

[105] M. Munting, 'De L'expansion des cultures pour biocarburanta dans les pays en developpement' (2010), p.XXXiX.

biofuels produced in a sustainable manner, it neither penalises nor restricts the sell or use of biofuels which are produced without fulfilling the sustainability criteria. One may argue that making sustainability of production a precondition for biofuel subsides already has a deterrent effect since the biofuel industry is heavily reliant on subsides. Even then, given the fact that subsides are provided only for domestic producers, the certification scheme fails short of regulating the sustainability of biofuels imported from other countries.

The certification scheme is also criticised for setting a very narrow list of sustainability criteria despite the far-reaching challenges biofuels pose.[106] To begin with, almost all the criteria address only environmental concerns and thereby ignore the social challenges associated with biofuel production including food insecurity and rural displacement.[107] However, a closer look at the criteria reveals that even the environmental challenges are not fully addressed under the scheme. For instance, by requiring the production of feedstocks on lands which are not rich in carbon stock or biodiversity, the scheme only regulates environmental problems associated to direct land use change and left out concerns of indirect land use change. Also, cases of direct land use change covered under the criteria are those dating after 2008. As per Article 17 of the EU Directive[108], a biofuel can be certified as sustainable if its feedstock comes from a previously forestland that however is converted for biofuel production before 2008. Hence, the certification scheme plays only a preventive role and does not redress pervious land use changes as it has no retrospective application.

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[106] Ibid.
[107] Ibid.
[108] Directive (2009), supra note 10.

In general, the ability of existing EU certification scheme to mitigate the unintended adverse impacts of biofuels is limited given its narrow scope of coverage and weak application. However, also the setting of high environmental and social standards by the EU can have a detrimental impact on the export capacity of small-scale producers especially those in developing countries.[109]

Conclusion and Recommendations

Both first and second generation biofuels have their own prospects and challenges in fulfilling the three core policy goals of reducing GHG emissions, ensuring energy security, and promoting rural development. Under the clean environment mandate, first generation biofuels have a carbon saving potential as they release no additional carbon during combustion. However such potential is rendered moderate by the direct and indirect emissions first generation biofuels cause during land use change and fuel processing. Second generation biofuels hold a much better carbon saving potential as they can be grown in marginal areas causing no threat of conversion of lands with high carbon storage capacity including forests and grasslands.

In relation to energy security, biofuels bring a prospect of reducing oil bills by serving as a cheaper and reliable alternative to traditional transport fuels. With the prevailing biofuel technology, first generation biofuels have a higher energy yield potential than advanced biofuels. Most second generation biofuels provide a very low energy yield if they employ marginal lands to cultivate feedstocks or use agricultural residues for processing. Recent trends show that only a few countries are largely producing and using biofuels as

[109] Wiggins et al., supra note 101, p.4.

alternative sources of energy, and developing countries have not yet taken full advantage of this opportunity for lack of high capital investment on biofuels.

There are some tradeoffs between the prospects of first and second generation biofuels when it comes to rural development. While first generation biofuels can potentially benefit rural populations through increased farm income, they at the same time cause a rise in food bills and loss of access to arable land. Second generation biofuels on the other hand are relatively neutral in terms of food prices and land usage; they however are capital and technology intensive and thus less accessible to developing countries as feedstock suppliers and small-scale biofuel producers.

Because of the dominance of large-scale plantations in feedstock cultivation, most developing countries have not yet capitalized on the prospect of first generation biofuels in increasing earnings of the rural poor. With dominance of large-scale corporate farming, small-scale farmers in the rural parts of developing countries tend to lose out from rising food prices and loss of access to land rather than grasping the opportunity of increased farm income.

As we stand now there is no clear insight as to how the biofuel business will progress in the future. But with the prevailing technology, second and third generation biofuels have a very low prospect of becoming commercially viable any time soon. Hence, first generation biofuels are expected to prevail in the market in the foreseeable future. On this basis, this article proposes the following policy recommendations to enable developing countries better benefit from biofuel prospects while overcoming the challenges:

A) With the aim of promoting the rural development dimension of biofuels, policy makers in developing countries will need to look for

possibilities of integrating small-scale farmers into the supply chain for biofuels. Contract farming or out-growers scheme can be one option where small-scale farmers supply their output to biofuel processors on the basis of a contract made a priori. This can be beneficial in terms of sustainable rural livelihood since small-scale farmers will retain control of their land holding and land-based livelihood as well as benefit from better access to agricultural inputs and knowhow.

B) Increasing the capacity of developing countries to also engage in biofuel processing is beneficial from the view point of both developing and developed countries. Developing countries can immensely benefit from engaging in biofuel processing through, among others, satisfying their increasing and costly energy demand, creating employment opportunities and increasing export earnings. Given the rising demand for biofuels and limited availability of land, there is already an import demand in developed countries which can be satisfied by efficient production in developing countries. But considering the need for huge capital and technology to start and run biofuel industries, developing countries may need to attract foreign investors or solicit for foreign partnerships. Here donor agencies can play a positive role in supporting infrastructural development in developing countries which is essential to facilitate production and distribution and hence attract foreign investors into the biofuel industry. This can also fall under the Aid for Trade framework at the multilateral level, which calls for a provision of technical and infrastructural support for developing countries so that they can take full advantage of global trading opportunities like the one from biofuels.

C) Also, the EU and the US may need to consider reduction of biofuel tariffs and excessive dependence of their biofuel industries on subsidies. Given the trade distortive nature of production subsidies, reduction or elimination of them will allow meaningful market access for biofuels coming from developing countries and also benefit the EU and the US with access to cheaper biofuels. Hence both developing and developing countries can benefit from a more liberal trade regime and resulting increased trade on biofuels. This should be seen as part of the broader move towards decoupling subsides from production volume under the World Trade Organization.

D) Policy makers in developing countries need to create a more favourable business environment for investments on biofuels. This includes provision of policy support or investment incentives such as allowing duty free importation of capital goods and giving temporary tax credits to facilitate establishment of industries (the nature of tax credit proposed here is different from the one being provided by the US and EU since it will only be available for new biofuel industries, without being tied to production volume).

E) Developing countries should also ensure clarity and stability of their policies on biofuels and investments in general which is an important factor to attract high capital investments.

F) Another thing policy makers in developing countries may need to consider is to promote the creation of synergies between biofuel industries and other sectors in the economy so that risks and uncertainties in the biofuel market can be reduced. In this respect, Brazil is a good example where most ethanol industries also engage in sugar production and generation of electricity thereby reducing

risks in the biofuel business.[110] Ethiopia has made a similar move where its major sugar factories are lately expanding into the production of ethanol.

G) Developing countries should also use proper regulatory policies and measures to reduce the potential adverse impacts of biofuels on the environment and human welfare. This may include:

i) Restricting the cultivation of biofuel feedstock only to lands that are less costly in terms of food production, biodiversity and rural livelihood and also regulating the intensity of chemicals applied on lands.

ii) Promoting the planting of energy and food crops in rotation.

iii) Setting safeguard schemes whereby feedstock produced as biofuel inputs may be exceptionally diverted into the local food market in times of severe food shortage (such an exception is already allowed under the World Trade Organization in relation to export ban).

iv) Ensuring that local people get effectively consulted and adequately compensated in unfortunate cases of displacement.

[110] Moreira, supra note 58.

Analysis of Ethiopia's Draft Sui Generis Geographical Indications Laws in the light of their International Protection

Seble G. Baraki*

Introduction

About a decade ago, the Ethiopian Intellectual Property Office (hereinafter EIPO) undertook the Ethiopian Fine Coffee Trademarking and Licensing Initiative (hereinafter the Initiative) for the country's well known coffee names; Harar, Yirgacheffee and Sidamo. The Initiative selected trademark as the appropriate intellectual property (hereinafter IP) tool to protect these quality coffee types and their well-known names. After the registration of these geographic names in over 36 countries including member states of EU, USA, Japan & South Africa, this initiative resulted in the issuance of over 100 voluntary and royalty free license agreements with domestic and international exporters, importers, roasters, retailers and association of producers. At the time, the initiative was praised for utilizing already established IP right in the country to protect these valuable names. On the contrary, the initiative was also criticized for choosing trademarks over sui generis Geographical Indications (hereinafter GIs) system as the latter was argued to provide more protection for geography-product linkage. Recently after leading up the initiative, the EIPO and also the Ethiopia Environmental Protection Authority (hereinafter EPA) commenced, though separately, on designing two separate sui generis GIs systems.

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Despite the continuing contention at the international level, today GIs are used among the main IP rights as assets for the protection of variety of quality products. What's more, the interests of developing countries in using GIs systems are currently on the rise. To comprehend the implications that this IP right has, the nature, type of legal protection (national and international), as well as some socio-economic outcomes inherent to a GIs system are succinctly discussed. GIs being a recent development in Ethiopia, it is the aim of this article to canvass relevant literatures on the subject and highlight their significance. The author trusts that this article will be taken as a stepping stone for further and more detailed researches on this area of law. The article is divided into four sections. The first section explains the nature, rationale and modalities of GIS protection. The second section discusses the international protection of GIS. The third section explores the status of GIs protection in Ethiopia. The last section offers conclusion.

1. Nature, Rationale and modalities of GIs Protection

Acknowledging the essential role that food production and agricultural products play in every culture, it is not surprising that special legal regimes have long been developed to regulate origin oriented and quality goods. This is essentially true in countries such as France, Spain, Portugal and Italy, where such products have contributed a great deal to their economic advancement.[1] To date, products in the agricultural, food or beverages industry such as Champagne and Roquefort Cheese of France, Parma Ham and Parma Cheese of Italy, Coffee de Colombia of Colombia, Tequila of Mexico and many others are known to be sources of significant economic gains and national prides. In this globalized world, knowledge is increasingly becoming an important source of income for most economies, especially so

[1] L. Bently & B. Sherman, *Intellectual Property* (9th ed., 2009), p. 975.

for those in developed countries. However, knowledge should be understood to include not only high tech ones in industrialized countries but also knowledge passed from generation to generation in rural societies as well.[2] In most remote regions of the world, one can find everyday life depending on vital knowledge developed over many centuries. To properly appropriate and avoid usurpation by illegitimate users, countries have, among other legal regimes, been using IP to protect such high quality and origin oriented goods. Among these rights GIs protection is becoming more and more significant.

Principally, GIs are place-based names 'that convey the geographical origin, as well as the cultural and historical identity of agricultural products.'[3] Place-based products are protected under different names according to the nature of protection and the place in which the protection is based.[4] They include 'appellation of origin' or 'designation of Origin', 'indication of source' and 'geographical indications'. While these names are interconnected and on the face of it appear to be similar, they are different. The difference between these names is primarily the strength of the link between the geographical area and the product. Presently however, the term 'GIs' is more common and overarching, with the slight exception of appellation/designation of origin, in relation to origin oriented goods. The term GI has been described as '...an umbrella term used with an overall purpose of distinguishing the identification of a product's origin and its link with particular characteristics related to that origin.'[5] In simple words, they are 'signs used in connection

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[2] Ibid

[3] Sarah Bowen & Ana Valenzuela Zapata, 'Geographical Indications, terroir, and Socioeconomic and Ecological Sustainability: The Case of Tequila', *Journal of Rural Studies* Vol. 25.(2009), p.110.

[4] Ibid.

[5] Sara Bowen, 'Development from Within? The Potential for Geographical Indication in the Global South', *Journal of World Intellectual Property* (2010) Vol. 13 No. 2 pp. 231-252, p. 233

with goods in order to induce their geographical origin.'[6] However, being the first multilateral legal text to use the term 'geographical indications', TRIPS has also provided under Article 22(1)[7] an extensive definition:

> [...] indications which identify a good as originating in the territory of a member state, or a region or locality in that territory [of a member state]or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to this geographical origin

From the readings of Article 22(1), it can be gathered that GIs under TRIPS have the following important features. First, the indication should relate to goods to be protected as a GIs. This leaves services from the scope of protection of TRIPS agreement.[8] Second, there should be a link between the good and a particular territory i.e., the good should originate from a specific region, locality or even a country. Third, the quality, reputation or characteristic of the goods must be essentially attributable to the geographical origin. This can be manifested through the natural attributes of the place such as soil compositions, climate or other topographical conditions as well as man-made factors in terms of special or traditional methods of production

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[6] Teshager Worku Dagne, 'Law and policy on Intellectual Property, traditional knowledge and Development: Legally protecting Creativity and collective rights in traditional Knowledge based Agricultural Products through Geographical Indications", *The Estey Centre Journal of international Law and Trade Policy*, Vol. 11 (2010), p. 73.

[7] This definition is said to have been derived from the definition of 'appellation of origin' as is provided under the Lisbon Agreement for the Protection of Appellation of origin and their International Registration of 1958. See, World Intellectual Property Organization, "Definition of Geographical Indications" Standing Committee on the Law of Trademarks, Industrial Design and Geographical Indications, (2002) No.SCT/9/4, P.3.

[8] However, GIs for services can exist under national legal instruments as is the case in countries such as Azerbaijan, Bahrain, Croatia, Jamaica, Switzerland, Liechtenstein, Peru, Morocco, Korea, Singapore and others. See, O'Conner and Company, "Geographical indications and TRIPS 10 Years Later....A Roadmap for EU GI Holders to get Protection in other WTO Members" (2005), (http://trade.ec.europa.eu/dolib/html/135088.htm) (Accessed on January 12, 2013). See also, Irina Kireeva & Bernard O'Connor, 'Geographical Indications and the WTO Agreement; What protection is provided to Geographical indications in WTO Members?' *The Journal of World Intellectual Property* (2010) Vol. 13, p. 282.

within that specific region or locality.[9] This definition demonstrates that a GI is focused on the link between names and characteristics essentially attributable to a territory, irrespective of the size, since even the name of a country could be used as a GI.[10] Ready examples of this are 'Ceylon tea', 'Italian Brandy' and '*Café de Colombia*'. Altogether, the geographical linkage that a product has with a territory, no matter the size, may give it a unique commercial value resulting in a protectable property right. They are sought to collectively protect producers with products associated with qualities, reputations or other specific characteristics of their place or mode of production with the aim to maximize profits.

The basic and simple rationales for GIs are rendering legal protection for the goodwill and reputation of producers from designated geographic territories against 'free riders' as well as serving as tools of differentiating their product on the market. The exposition is that harm is inflicted by someone who is 'free riding' on the reputation of others, who may be producers of the authentic product or consumers misled by the authenticity of such free riding.[11] What is more, GIs serve a number of economic and social benefits which demand their legal protection. The main economic rationale for protecting GIs derives mainly from the fact that place of origin may be used as a quality signal, or alternatively, 'that the resources of the region may be captured as quality attributes'.[12] Generally, from an economic and social point of view, some of the potential benefits of GIs can be summarized as follows. From an economic perspective, in the absence of free riders and

[9] Kireeva and O'Connor, supra note 8, p. 283.

[10] H. Ilbert and M. Petit, 'Are Geographical Indications a Valid Property?', *Development Review,* Vol.27 (2009), p.507.

[11] Daphne Zografos, 'Geographical Indications & Socio-Economic Development' IQsensato, Working paper 3, (2008), p. 3.

[12] C. Bramley & J.F. Kirsten, 'Exploring the Economic Rationale for Protecting Geographical Indicators in Agriculture', *Agrekon,* Vol.46, (2007) p.74.

counterfeiting realized through systematic protection, authorized producers can expand sales, allowing them to achieve economies of scale. Here, protection can bring increased demand and a higher retail price for quality products, which in turn means a better distribution of economic returns for small household farmers. This, however, will depend on the strength of the marketing strategy of producers as well.

Another important point worth considering is, through the protection of specific GIs, producers from the locality in question are able to create a barrier to entry into the market for that product and exploit monopoly rents by charging consumers higher prices.[13] Also, as producers can be more easily identified and held responsible for their products, GIs will contribute to product safety and consumer protection. Importantly, it is being argued that GIs can encourage informal innovation. GIs protection is said to be a suitable means to protect 'informal innovation', peculiarly because the right is related to the product itself and does not depend on a specific right holder as such.[14]

The collective nature of GIs is emphasized as a benefit here. Proponents claim that GIs may be used to protect traditional products or crafts if particular characteristics of such products can be attributed to a particular geographical origin. In other words, products based on traditional know-how and innovation could be reasonably protected by using this branch of IPRs.[15] Some even broaden the benefits of GIs in this regard by stating that it is the appropriate regime from among the extant IP right for the protection of

[13]May Yeung & William Kerr, 'Are Geographical Indications a Wise Strategy for Developing Country Farmers? Greenfields, Claw Backs and Monopoly Rents', *The Journal of World Intellectual Property*, Vol. 14, (2011), p.358.
[14]Bramley & Kirsten, supra note 12, p. 74.
[15] Bowen, supra note 5, p. 234.

traditional knowledge based products.[16] This however, is highly disputed and a contentious issue in most forums including at the World Intellectual Property Organization (WIPO) and should be handled with caution. Their potential in attracting investment and tourism towards the designated region as well as supporting sustainable rural development constitute as their socio-cultural benefits.[17] Due to these and other socio-economic benefits mired, different modalities of protection are in place to safeguard the proper utilization of these place-based names.

In light of diverse philosophical and policy variations as to how geographical denominations should be protected as well as the level of economic importance attached to them among nations, varying modes of protection exist. Generally, there are two options employed currently to protect geographical denominations: providing a GIs specific 'sui generis' system and utilizing extant IP rights such as trademark, collective marks or certification marks or other legal mechanisms such as tort or unfair competition laws to provide protection. Here, sui generis GIs systems and different types of trademarks, being the prevalent in most national laws, will be succinctly discussed.

Sui generis systems are specific to GIs and can be administered either through registration or non-registration mechanisms. Generally, the common type of sui generis GIs protection is through registration i.e., compulsory registration is required for protection to exist. Registration systems may vary depending on the scope of the names or type of goods protected. That is, countries determine what is protected under such registration systems based

[16] Teshager Worku Dagne, supra note 6, P. 84-85.
[17] Zografos, supra note 11, p.12.

on either the names protected or the type of products which fall within the scope of application of their laws.[18] In other words, while countries such as Russia register only indications of geographic places, administrative districts, and regions or in exceptional cases, whole countries, other sui generis laws in countries like Thailand register indications which can be recognized as places of geographic origin, not limited to merely the name of the particular place of origin.[19] This kind of distinction is mainly made between systems of AO and GIs depending on how closely the product is linked with the specific geographical area. Also, AO systems protect only the name of place of origin while GIs protect any indication that identifies a product with its geographic origin.

A sui generis GIs system based on the type of product protected focuses mainly on the type of products that fall under the scope of protection. In this regard, many countries distinguish between agricultural products, foodstuffs, products of the vine, handcrafts or industrial products. That is, some countries only provide sui generis GIs protection for agricultural goods and foodstuffs while others broaden the scope of application of their laws to include handicraft and industrial products which highlight the specific qualities of a product due to human factors that can only be found in the place of origin of the products such as specific manufacturing skills and traditions.[20] Non-registration systems do not require registration for protection of GIs to subsist. That means, despite introducing special or sui generis protection for GIs, these systems do not require registration. Such laws exist in countries like Singapore, Jordan and Sri Lanka.[21] There are also

[18] Kireeva & O'Connor, supra note 8, P.279.
[19] Ibid.
[20] Ibid.
[21] Ibid, P. 277-279.

GIs systems in other countries, mostly developing, where a sui generis protection through registration is provided but does not require compulsory registration.[22]

Among the sui generis GIs systems, the more comprehensive is that of the European Union (EU). Regulation (EU) No. 1151/2012 of the European Parliament and of the council of 21 November 2012 on quality schemes for agricultural products and foodstuff, Regulation (EU) No. 1234/2007 on common organization of the market in Wine, and Regulation (EU) No. 110/2008 on the definition, description, presentation, labeling and the protection of geographical indications for spirit drinks are the most relevant laws which provide specific GIs protection per the type of products in the EU.[23] The protection afforded to PDOs and PGIs includes, among other

[22] Countries such as India, Qatar & Mauritius can be mentioned. Under these systems, it is stipulated that registration entails a stronger protection.

[23] Regulation (EU) of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs, 2012, Art 5(1)& (2) Reg. No.1151, Official Journal of the European Union, L 343/1. As defined under this regulation, a Protected designation of Origin (PDO) refers to 'a region or a specific place or, in exceptional cases a country; whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and the production steps of which all take place in the defined geographic area' (Art 5(1). However, in exceptional cases, as stipulated under Art 5(3), certain names shall be treated as DOs even though the raw materials (including only meat, milk and live animals) for the products concerned come from a geographical area larger that, or different from, the defined geographical area. Whereas, a Protected Geographical Indications (PGI) is defined as 'the name of a region, specific place, or in exceptional cases a country used to describe an agricultural product or food stuff which originate in that region, a specific place or country and which possesses a specific quality, reputation or characteristic attributable to that geographical origin, and the production and/or processing and/or the preparation of which takes place in the defined geographical area.' (Article 5(2)) of Council regulation No. 1151/2012.

things, an exclusive right to use the product name and protection from direct or indirect encroachment as well as from becoming generic.[24]

Then again, as stated above, many countries such as the USA, Australia, many African and Arab countries provide protection for designations of goods from a certain geographical origin through already existing legal tools namely that of trademarks. In countries which provide protection through trademarks, GIs are considered as a type of trademark, mainly that of certification and collective marks. Hence, such countries employ the extant trademark regime which is familiar to most businesses to protect geographic names or indications. It is indicated that using extant trademarks systems spare governments from spending additional resources for creating new and expensive GIs registration or protection system.[25] This argument has been invoked to denounce the importance of having sui generis GIs systems in developing countries.[26] Hence, it is important to grasp that the relationship between trademarks and GIs could be strange at times. This may relate to the fact that conceptually both are considered as indicators of source and quality: trademarks are indicators of commercial origin of a particular product, while GIs serve as identifiers of geographical origin and the quality emanating thereof.[27] However, it ought to be underlined that they are quite distinct from one another. GIs and trademarks, as put by some 'are distinguishable, equal

[24] Art 3(6) of Regulation (EU) No. 1151/20102), generic terms means '...the names of products which although relating to the place, region or country where the product was originally produced or marketed, have become the common name of a product in the union.' See also Art 13 of Regulation (EU) No. 1151/2012.

[25] William A. Kerr, 'Enjoying a good port with a clear conscience: geographical indicators, rent seeking and development', *The Estey Centre Journal of International law and trade policy*, Vol. 7, (2006), p. 7.

[26] Ibid

[27] Kireeva & O'Connor, supra note 8, p. 286.

and independent categories of IP used to denote specific product or classes of products.'[28]

The notable and canonic departures between GIs and trademarks can be stated as follows. First, these IP rights entail different kinds of property status i.e. while trademarks are private property with exclusive rights conferred upon their owners, GIs are fixtures of a particular region or locality where rights arising from them are held by communities thus provide communal rights. Second, GIs attach a location to products where such affixation is not relevant in most trademark protection. In other words, for a product to be protected as a GI, at least some portions of the production chain be carried out in a particular region whereas a trademarked product can be produced anywhere.[29] Third, unlike trademarks where the name usually depends on the choice of the manufacturer or right holder, the name in case of GIs is predetermined as being the place of the locality, origin terms intrinsically associated with the place of production. This is undoubtedly the case in relation to designation/appellation of origin where the name of the protected good should be the place of origin. Fourth, while trademarks can be sold or licensed to third parties, geographical indications cannot.[30]

At this juncture, it is necessary to distinguish between individual and collective trademarks such as collective marks and certification marks. Though an individual trademark is owned by a specified natural or legal person, the collective trademarks belongs to a public or private collective

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[28]C.Fink & K.Maskus, 'The Debate on Geographical Indications in the WTO', (2005) (www.ppl.nl/bibliographies/wto/files/6531.pdf) (Accessed on August 9, 2013, P. 202-203).

[29] T. Wattanapruttipaisan, 'Trademarks and Geographical Indications: Policy Issues and Options in Trade Negotiations and Implementation', *Asian Development Review* , Vol. 26, (2009), p. 169.

[30]Fink & Maskus , supra note 28, P. 202-203.

such as trade association or other groups.[31] A collective trademark is principally designed to guarantee certain product's characteristics, quality, nature or origin for consumers.[32] However, a certification mark indicates that the products on which it is used have been made or obtained subject to given standards, e.g. origin, material, mode of manufacture or quality.[33] These standards are defined and inspected by the owner of the certification mark, which is usually an independent enterprise, institution or governmental entity.[34]

At this level, one may be compelled to ask the main and underlining difference between GIs and collective trademarks. It is the opinion of this author that GIs encompasses a broader interest than what is embraced by collective trademarks. Whereas trademarks personalize and identify the producer of a product or service, geographical indications identify the place of origin of a good and the characteristics that are derived from that geographic origin in addition to the commercial goodwill of producers. In other words, though trademarks, both personal and collective, are focused on identifying the origin, quality or producers of particular goods, such identification may not necessarily relate to a particular geography. A GIs system, however, identifies both the producers of a particular good as well as the region from where the product originated. It also entails other socio-cultural nexus between a product and a region such as traditional methods of production.

2. International Protection of GIs

[31] Ibid.
[32] Kireeva & O'Connor, supra note 8, p. 29113, no.2, pp.275-303.
[33] Ibid.
[34] See S. Stern, 'The Overlap between geographical indications and trademarks in Australia', Melbourne Journal of International Law, Vol.2, (2001).

Like other IPRs, GIs are territorial in nature. However, as trade expanded in the 19th century, it became apparent that national protection alone was not sufficient as goods and their names were imitated outside of their country of origin. In the course of such transactions, international cooperation was required to ensure that GIs were properly protected through mutual reciprocity. To date, a number of international texts as well as bilateral and multilateral agreements have been devised to protect geography-product linkage. These texts aim at strengthening the status of GIs as IPRs at the national and international level and create a more harmonized mode of protection. Since the coming into effect of the Paris Convention on the Protection of Industrial Property in 1883(hereinafter Paris Convention), a number of agreements have been devised. The prominent multilateral texts on GIs include the Madrid Agreement on Repression of False or Deceptive Indications of Source on Goods of 1891(herein after the Madrid Agreement), the Lisbon Agreement on Appellation of Origin and their International Protection thereof of 1958 (hereinafter the Lisbon Agreement) and the WTO Agreement on Trade Related Aspects of Intellectual Property (hereinafter the TRIPS). This section will discuss in short the content of these multilateral texts with the aim of showing the evolution of GIs protection.

2.1 The Paris Convention

The Paris Convention, which has to date 175 contracting states, has undoubtedly been the most pertinent multilateral text on IP adopted in the 19th Century. It has shaped IP legislations developed by many countries

throughout the 20th Century as well as subsequent multilateral texts.[35] It is also the first international treaty which governed the protection of indications identifying the origin of goods by encompassing 'indications of source' and 'appellation of origin' objects of industrial property under its Article 1(2).[36] According to Article 1(3) of the Paris Convention, industrial property does not only include industry and commerce but should also be understood in the broader sense of the term to include agriculture and its produce as well. These terms are not defined by the Paris Convention. Nonetheless, as can be understood from Article 1(1) of the subsequent Madrid Agreement, indications of source are characterized by a link between the 'indication' and the 'geographical origin' of the product, which may be a certain country or a place in a country.[37] The Paris Convention prohibits any direct or indirect use of false indications of sources. Article 10(3) of the Paris Convention also prohibits the use of indications that were liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods. It also makes available remedies under article 10, for genuine producers such as seizure upon importation of goods bearing false indications as to their source or the identity of the producer. The stipulations of the Paris Convention do not discriminate between contracting member states and provide for the principle of national treatment i.e. even producers from member countries with little or no protection should acquire the minimum level of protection provided under it.[38] However, under the Paris Convention, taking actions against such usurpations depend largely on the legal mechanisms available in each of the contracting member states.

[35] E.C. Creditt, 'Terrior Vs. Trademarks: The Debate over Geographical Indications and Expansions to the TRIPS Agreement', *Vanderbilt Journal of Entertainment and Technology law*, Vol. 425, (2009) p. 4.

[36] Ibid.

[37] Teshager Worku Dagne, supra note 6, p. 84-85.

[38] Paris Convention on the Protection of Industrial Property, 1883, Art 2(1), as last revised in 1979.

This is considered a weakness as right holders had little recourse in states with weak or no existent remedies for IP in general and indications of sources in particular.[39]

Producers from the members of the Union created under the Paris Convention are not expected to provide proof of domicile of country of claimed protection while producers outside of the Union need to provide domicile in one of the member countries for protection to subsist.[40] Some argue that the provision of national treatment creates problems to those producers from countries with weak national legislations and is even insignificant to those producers with no domestic legislations to such effect.[41] Generally, the Paris Convention, despite the large territory it covers, does not provide states with enough options for mandatory sanctions and does not apply to merely misleading indications of sources.

2.2 The Madrid Agreement

The Madrid Agreement is another essential legal text relevant to GIs. This Agreement is an extension of the Paris Convention open for signature for members that were in favor of providing a stronger protection for indications of source. The Madrid Agreement restricts misuse of indications and 'seeks to prevent the marketing of goods with false or misleading assertions as to their sources'.[42] Signatories to this Agreement concurred to border measures on goods bearing fraudulent or misleading indications of sources and on

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[39] J.M. Martin, 'TRIPS Agreement: Towards a better protection for Geographical Indications?' *Brooklyn Journal of International law,* Vol. 30, (2004) P. 3

[40] Paris Convention, supra note 38, Art2 & 3.

[41] Ibid .

[42] Madrid Agreement on Repression of False or deceptive indications of Sources on Goods, 1891, Art 3bis.

measures to prevent indications of sources from becoming generic terms.[43] In addition, judiciaries within member states are given the authority to decide which products or appellations of origins are generic, hence out of the ambit of this agreement and protection within the borders of the individual state.[44] Like its predecessor, the Paris Convention, the Madrid Agreement depended much on the domestic laws of each signatory state for enforcement. Some suggest that the expansive view given to indication of sources may be the reason why the Madrid Agreement has only few signatory states.[45]

2.3 The Lisbon Agreement

The Lisbon Agreement was an attempt to extend the protection afforded to GIs further than the Paris Convention and the Madrid Agreement. This was intended to be achieved through the instauration of an international system of registration. Under its Article 2(1), the Lisbon Agreement defines appellation of origin (hereinafter AO) as '...the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors'. The Agreement applies to an 'appellation of origin' only if it is a geographical name and its quality and characteristics are linked to the geographical environment.

Article 5 of the Lisbon Agreement outlines the registration procedure as follows: (1) producers for goods register their appellation of origin in their country; (2) the country of origin then registers those appellations with the International Bureau responsible for registering AO which is under the

[43] Martin, supra note 39, p. 3.
[44] Madrid Agreement, supra note 42, Art 4.
[45] Martin, supra note 39, p.3.

WIPO; and (3) International Bureau will notify the other contracting member countries as to the registration of the specific AO. The registration of AO has to come after an opposition period of one year for any refusal from member countries on the basis of grounds such as the term has become generic before registration.

Upon registration, AOs are protected against any usurpations or imitation even if the true origin of the product is mentioned or phrased to indicate that the product is not truly from the specific region but only something similar to those products originating from the specific locality, region or country.[46] This stipulation protects a registered AO from becoming generic which is useful in protecting geographic names against usurpation by free-riders. However, the Lisbon Agreement is a closed treaty which only guarantees against misappropriations occurring within the member states. The international significance of this Agreement is diminished due to its limited geographic scope with only 28 contracting member states.

2.4 The TRIPS Agreement

The TRIPS Agreement is internationally accredited as the most detailed and comprehensive agreement on IP yet negotiated and the first multilateral legal text which used the term 'Geographical indications'. The historical development of this section of TRIPS is quite different from other types of IPRs. Articles 22 to 24 of the TRIPS Agreement are the product of elemental compromises between the EU, India and Switzerland, on the one hand, advocating for a good level of protection for GIs and Australia, Argentina,

[46] Lisbon agreement on Appellation of Origin and their International Registration, 1958, Art 3.

the US, and other countries, on the other side, with little interest in enhancing the protection granted to GIs.[47] To this effect, a number of proposals have been submitted by countries on the basis of their apprehension of GIs. This resulted in two kinds of protection for GIs; general protection for all goods and extended or additional protection for wines and spirits. Over the years, various proposals to alter curtail or clarify the provisions of Section three of the TRIPS agreement have been made. Economic agendas, the provision of effective protection, and the protection of producers and consumer's welfare are among the most important rationales provided for the proposed modifications.[48]

When it comes to GIs under the TRIPS, the old north-south division of IP is not present and various groups of countries from different levels of economical as well as technological backgrounds could be found perusing similar agendas and goals. New rules and mechanisms for the protection of GIs have been a subject of lively discussions in the multilateral trading round-the Doha development agenda (DDA).[49] Establishment of a multilateral system of registration for geographical indications and the extension of the higher level of protection to goods other than wines and spirits are the main issues under negotiation. As the main purpose of this section is to emphasize the fundamental conceptions of GIs under TRIPs, the ongoing negotiations will not be dealt here. In order to show the evolution of the protection of GIs and because the TRIPS Agreement is the most significant in relation to the type of protection provided to GIs, the following

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[47] T. Cottier & P. Veron,' Concise international and European IP law; TRIPS, Paris Convention, European Enforcement and Transfer of Technology', (2009), p.60.

[48] World Trade Organization, "TRIPS: Geographical Indications background and current situation." (http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm) (Accessed on August 10, 2013)

[49] Ibid.

paragraphs will attempt to **outline** the different minimum levels of protection provided in the TRIPS Agreement.

A) General Protection under Article 22 of the TRIPS Agreement

This provision defines GIs and sets out the minimum standards of protection available for all goods. As seen earlier, it is apparent that practically any good which can be associated with a certain locality, region or even a country may be protected as a GI where it possesses certain quality, reputation and characteristics due to its origin. 'Quality, reputation or other characteristics' which are essential conditions for the existence of protection are each in their own rights sufficient but indispensible conditions. In other words, the existence of one of these conditions is sufficient for protection to subsist. In addition, these conditions are to be determined according to the laws of the country where protection is sought.[50] Article 22 (2) creates negative rights that only provide the legal means for interested parties to prevent third parties from undertaking certain actions.[51] Still, this right can only be invoked where such actions mislead public or constitute acts of unfair competition. Among the main features of the TRIPS Agreement, the relationship between trademarks and GIs under Article 22(3) should be mentioned here. Article 22(3) provides member states measures such as denying or invalidating the registration of a trademark which constitute a GI and which might be likely to mislead the general public as to the true origin of the good. Such an action

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[50] Cottier & Veron, supra note 47, p. 63.

[51] Agreement on Trade Related Aspects of Intellectual Property(TRIPS), 1995, Art 22(2) '..... members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).'

may be taken by members either ex-officio, where there is a stipulation to its effect, or upon a request by an interested party. However, this sub article should be read in conjunction with the exception contained under Article 24(5).[52]

In 2005, the WTO panel dealt with the issue of pre-registered trademarks and new GIs when addressing the complaint lodged against EU regulation No. 208/92 by Australia and the US. In passing its decision, the WTO panel affirmed that article 22(3) only applies to resolve conflicts with later trademarks and does not apply to conflicts with prior trademarks.[53] It also stated that in relation to prior trademarks unqualified co-existence of these two rights in accordance with article 16(1) of the TRIPS Agreement was not recognized in the EU regulation No.208/92.[54] Article 22(4) also sets the conditions for the equal treatment of homonymous[55] GIs. Here, the 'misleading test' also applies where if use of one of the homonymous GIs in a WTO member would falsely represent a product that originates in the

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[52]Art 22(5): 'Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI; or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.'

[53] European Communities, Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs - Status Report by the European Communities (2006). (http://docsonline.wto.org/imrd/GEN_searchResult.asp), (Accessed on August 12, 2013)

[54] Ibid

[55] Homonymous names are two geographical names which are spelled and/or pronounced alike, but which designate the geographical origin of products emanating from different countries. See World Intellectual Property Organization, World Symposium on Geographical indications (WIPO/GEO/BEI/07/5), (2007), retrieved from (www.wipo.int/edocs/.../en/.../wipo_geo_bei_07_www_81775.doc) (Accessed on August 12, 2013)

territory of another, interested parties will have the legal means to prevent such use.[56]

B) Extended protection for wines and spirits under Article 23of the TRIPS Agreement

The additional protection for wines and spirits under Article 23 of the TRIPS Agreement is said to be due to a preeminence given to the concerns of the European wine and spirit sectors.[57] That is, the push from major wine producing countries, mainly European ones, at the Uruguay Round, resulted in a higher level of protection for wines and spirits under Article 23, which states:

> Each member should accord the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question.....even where the true origin of the good is indicated or the geographical indication is used in translation or accompanied by expression such as 'kind', 'type', 'style', 'imitation', or the like.

The strong and additional protection for wines and spirit originating from a particular geographical area protects these indications not only from direct abuse of reputation but also from indirect use of GIs. Furthermore, as per this extended protection, it is unnecessary to show that the public might be misled or that the use constitutes an act of unfair competition before it amounts to infringement unlike what is stipulated under Article 22. However, similar with Article 22(3), member states are granted an authority to take *ex officio* actions in relation to the registration or invalidation of trademarks for wines

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[56] Ibid .

[57] D. Gervais, *The TRIPS Agreement: Drafting history and Analysis*, (2nd edition,, Australia; Law Book CO, 2008) paragraphs 2.201-2.207

and spirits which contain illegal use of GIs.[58] However, where there is no *ex officio* regulation in the legislations of each member states, such action against trademarks may only be taken upon request by interested parties.[59] Article 23 also provides similar stipulations similar with what is provided under Article 22 in relation to homonymous names for wines and spirits.

At this point, it is important to mention the enforcement mechanisms provided under the TRIPS Agreement. Recognizing the personal and territorial nature of IPRs in general, the TRIPS Agreement makes available enforcement mechanisms. Article 41of the TRIPS Agreement provides the general principles requiring members to provide the legal means for interested parties to protect GIs. Right holders are granted the privilege of demanding protection against any act of infringement of their IPR including expeditious remedies to prevent infringement and deter further infringements. In addition, members are required to create fair and equitable procedures for the enforcement of IPRs.[60] It bestows rights on national courts, under certain conditions, to order the disposal or destruction of pirated or counterfeit goods.[61] The TRIPS Agreement also recognizes the importance of border enforcement procedures that will enable right holders to obtain the cooperation of customs authorities so as to prevent the release of infringing imports into circulation.

[58] TRIPS Agreement, supra note 51, Art 41.2.
[59] Id, Art 23.2.
[60] TRIPS , supra note 51, Art 41.2.
[61] TRIPS , supra note 51, Art 46.

3. The status of GIs Protection in Ethiopia

The agricultural sector is the backbone of Ethiopia's economy. [62] Unfortunately, Ethiopian farmers and pastoralists are among the poorest in the world. Thus, the importance of developing appropriate measures such as an effective legal system, including a comprehensive IP system, cannot be underestimated. Currently, there is no specific legislation for the protection of place-based names such as GIs of high quality agricultural and pastoralist products in Ethiopia. But, protection can be attained by utilizing extant trademarks (Trademarks Registration and Protection Proclamation no.501 of 2006, hereinafter Trademark Proclamation No. 501/2006) and unfair competition laws (see Articles 21, 27, and 30 of the Trade Practices and Consumer Protection Proclamation no. 685 of 2010). Moreover, currently there are two draft laws being designed to provide sui generis GIs in Ethiopia. Before discussing the draft laws, it is necessary to briefly deal with the Trademarking and Licensing Initiative undertook by the EIPO for the country's three well-known coffee names; *Yirgacheffee*, *Harar* and *Sidamo.*

3.1 The Ethiopian fine Coffee Trademarking and Licensing Initiative

In 2004, EIPO, with the aim of moving three coffee types from commodities to high price quality exports of niche market, established the Ethiopia Fine Coffee Initiative (hereinafter the Initiative) to protect three specialty/gourmet

[62]Ethiopian Inistitute of Agricultrual Research. (no date), 'Validating Intellectual Property Policy andGuidelines' Retrived from (http://knowledge.cta.int/en/content/view/full/12824) (Accessed on August 12, 2013).

coffees of the country through trademarks registration.[63] As these and many other coffee types grown in Ethiopia enjoy a very special quality, aroma and test associated with the methods of production as well as the natural attribution of their regions of origin. The Initiative is run by the Ethiopian Fine Coffee Stakeholder Committee, which comprises farmers' cooperatives, private exporters and the EIPO as well as other government entities having direct responsibility for the development of the coffee sector.[64] Through this Initiative, trademark applications were filed for the country's most valuable brands under an umbrella name *'Ethiopian Fine Coffee'* in the EU, Japan, USA and other developed and developing countries.[65] Despite the initial opposition from coffee stakeholders in the USA, namely that of the National Coffee Association (NCA) and the Starbucks Coffee Corporation, all the three names are registered in these countries as personal trademarks.

Currently, there are over a hundred voluntary and royalty free license agreements entered between the initiative and coffee importing, roasting and distributing companies in North America, Europe, Japan and South Africa, including domestic private coffee exporters and coffee farmers cooperative unions.[66] The licensees at the international level, which are mostly coffee roasters and retailers, have the responsibility to engage in the advertisement,

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[63] While a number of coffee producing regions tend to seek protection for their coffees through GIs or take a mixed approach (like Colombia), Ethiopia applied trademarks to achieve the protection coveted. The National Federation of Colombian Coffee farmers (FNC) rather decided to rely on a two-fold strategy – trademark and geographical indication protection – in order to defend and enhance the reputation and value of the product and to further develop Colombian coffee by building up a stronger product identity.

[64] World Intellectual Property Organization, "The Coffee War: Ethiopia and Starbucks Story", (http://www.wipo.int/ipadvantage/en/details.jsp?id=2621) (Accessed on August 14, 2013).

[65] Australia, Brazil, Canada, China, Saudi Arabia and South Africa are also among the 36 countries where the trademarking and licensing of these specialty coffees was first filed.

[66] World Intellectual property organization, supra note 63.

marketing and other promotional activities directly or indirectly through their sub-licensees to enhance the value of these trademarks.[67] The main feature of this licensing agreement is that no royalty fees are to be paid by the licensees for using the trademarks. These names are not registered in Ethiopia because, pursuant to Article 6(1)(e) and (h) of Trademark Proclamation no. 501/2006, using place-based names as trademarks is prohibited for being geographically descriptive and misleading.[68]

A number of reasons were put forward against providing GI protection for these fine coffees. According to the Initiative, the purpose of GIs is not aligned with the goal of the Ethiopian coffee sector, i.e. getting a better price for the coffees. The EIPO and its pro bono legal counsel, Light Years IP, reasoned that the nature and form of GI protection has a disadvantage in terms of protecting these fine coffees. They argued that because GIs are only aimed at protection against copying and counterfeiting,[69] they would not give commercial control of coffee brands to the Ethiopian farmers, thus failing to enhance the producer's power to improve their profits.[70] On top of this, it was argued that, if these specialty coffees were registered as GIs, a GI for '*Harar' coffee* (for example) would require every bag of this coffee to be produced, processed or prepared in the Harar region and have a special quality that is directly dependent on the unique attributes of the region.[71]

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[67] Ibid.

[68] Trademark Registration and Protection Proclamation, 1998, Article 6(2), Proc. No. 501, Neg. Gaz. Year 12, No. 37. The article provides for an exception to this acquired distinctiveness of the name as an exception to these prohibitions

[69] This is also the case with trademark; a trademark only prevents others from using identical or confusing marks but does not prevent the production of similar goods.

[70] Here the experiences of many developing countries such as Colombia (cafe de Colombia) Jamaica (Blue mountain coffee), Dominican Republic coffee, India and Pakistan (Basmati rice (even where there is disagreement about this product at the international level) should be noted.

[71] This is related to the fact that specialty coffee in Ethiopia is grown on over four million small plots of land by an estimated 600,000 independent farmers spread throughout

Unlike a GIs system, a trademark registration does not require a specific coffee to be produced in a specific region or have a particular quality in connection with that region. Nonetheless, a GI scheme does not necessarily require every activity to occur within that specific geographical area or exceptions can be stipulated within national laws to this extent. For instance, if we look at Article 5(3) of EU Regulation No. 1151/2012, a row material for the products concerned may come from a geographical area larger than, or different from, the defined geographic area. Hence, a GIs law in Ethiopia could be designed to make similar exception to such specialty coffee types. What is more, proponents of the Initiative reasoned that GIs are designed to defend valuable intellectual property, not to develop economic value. While this argument is forwarded on the basis that producers have to have direct access to consumer marketing and have already established valuable brands, it might not be entirely correct:

> In the case of *Comte Cheese,* it has been demonstrated that farmers in France benefited from the instigation of a GI, with the value being paid to farmers increasing, thus improving their profit margins. As to whether brands have to be already established there is little evidence to support this. In fact historically it has been the instigation of GIs that has indicated quality and helped establish the product as a valuable resource. [72]

The EIPO also asserted that GIs would be extremely costly to govern. According to the EIPO, a GIs system would be difficult and rather costly for the government to ensure compliance with standards set and the true origin of the coffees (i.e. whether or not these coffees originate from 'Sidamo',

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the country in remote areas. See World Intellectual Property Organization, supra note 63.

[72] J. Watson, & J. Streatfeild, 'The Starbucks/Ethiopian Coffee Saga Geographical Indications as a Linchpin for Development in Developing Countries', Nordic African Institute, Vol.3, (2008), p. 4.

'Yirgacheffee' or 'Harar') and also that the appropriate historic production methods are used. This is a legitimate concern invoked by opponents of the need to have a GIs system in African countries such as Ethiopia. Moreover, another reason is that governmental oversight of coffee producers would be nearly impossible coupled with the fact that farmers may be required to pay a surcharge for governmental oversight, and this would only be an additional burden on many who are already living below the subsistence level.[73]

However, some argue that "...there is no guarantee that any tax increase would be borne by the coffee producers'.[74] In addition, not all farmers will benefit from the trademark, as only certain co-operations are in coalition. There is a concern that trademarking could leave the majority worse off, as they could only sell to one official government buyer rather than the market. GIs, instead, could be applicable to all farmers in an area and therefore all could benefit from the value a GI brings.[75]

Despite the above arguments, trademarking and licensing initiative was seen as a more direct route of protection because it would grant the Ethiopian government the legal right to exploit, license and use the trademarked names in relation to coffee goods to the exclusion of all other traders.[76] Using trademark registrations, the government could then produce greater quantities of specialty coffees from all over the country. Rural producers outside the Sidamo region could grow Sidamo coffee, as it would not need to have a characteristic that is unique to the Sidamo region. This strategy, as was

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[73] Ibid.
[74] Ibid, p. 6
[75] Ibid.
[76] Getachew Mengistie, 'Capturing intangible values of coffee- the Ethiopian Fine coffee designations trademarking and licensing initiative', ICO Seminar on Geographical Indications for Coffee, 20 May 2008, London (UK)

claimed by some, gave the Ethiopian government greater and more effective control over the distribution of its product, which ultimately increases revenue by exporting more goods thereby enabling a rise in prices and benefits to farmers.[77] It was also considered an innovative strategy and perhaps the only viable one if Ethiopia wants to compete in the international marketplace.[78]

In the opinion of some writers, in contrast to the already established trademark system, Ethiopia would have encountered great challenges cost and time wise had it opted to implement a GI system for the protection of its goods.[79] According to some, by seeking protection under trademarks, Ethiopia has not only avoided incurring the cost of establishing and implementing a GI system, but also enabled itself to honor its culture while moving towards the future.[80] In addition, it has been argued that resorting to a GI system in Ethiopia at this time might affect its development strategy because of the traditional and backward production methods within the country.[81] As such, some argue that GIs could potentially leave developing countries like Ethiopia stuck in the past, forcing them to depend on the outdated methods of production instead of developing new, more proficient or environmentally friendly technologies.[82] This however may not be

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[77] Ibid.

[78] M. O'Kicki, 'Lessons Learned from Ethiopia's Trademarking and Licensing Initiative: Is the European Union's Position on Geographical Indications Really Beneficial for Developing Nations?' *Loyola University Chicago International Law Review* ,Vol. 6 (2009), p. 331.

[79] L. Schüßler, "Protecting 'Single-Origin Coffee' within the Global Coffee Market: The Role of Geographical Indications and Trademarks', *The Estey Centre Journal of International Law and Trade Policy* , Vol.10 (2009), p. 170.

[80] Ibid.

[81] O'Kicki, supra note 78, p.331; This however may not be warranted as most developed states have GI systems which seem not to affect their developmental process but instead contribute considerably thereof.

[82] Ibid.

warranted as most developed states have GIs systems which didn't affect their developmental processes but rather contributed considerably to their development.

The improvements that followed the trademarking of these crops in relation to international pricing and consumer awareness cannot be underestimated. Even though Ethiopian coffee has long been recognized for being among the finest, the efforts of the Initiative has resulted in increased economic benefits. Yet without independent study of the factors that contributed to the economic benefits said to have accumulated after 2007/2008[83], it is difficult to clearly state that trademarks is the appropriate IP tool for the protection of high quality products. Even those who praise the Initiative's strategy to successfully take the Ethiopian coffee to the international market agree that Ethiopia should strive to develop a GIs system which will meet the demands and circumstances of the country.[84]

3.2 Towards a Sui Generis GIs System in Ethiopia

Regardless of the efforts to protect specialty coffees through trademarks, laws that provide sui generis GIs protection to different quality agricultural products in Ethiopia are being drafted. To preserve and promote its horticultural heritage, Ethiopia has chosen to design and implement a specific GIs system, designation of origin, by establishing the 'Home Gardens of Ethiopia' under the auspices of the EPA in 2006. Following the closing of 'Home Gardens Ethiopia' project, the duty of developing a law on the

[83] Ron Layton, 'Introduction to the Ethiopian Fine Coffee and Trademark initiative: How $200million was returned to Ethiopia over three years and the opportunities for further benefits', Conference on the Ethiopian Fine Coffee Trademarking and Licensing Initiative: Stepping up the Top Shelf: Training for the Ethiopian Export Sector Licensees, August 2011, Addis Ababa.

[84] Schüβler, supra note 79, p. 170.

designation of origin system is now being carried out by the Ministry of Agriculture. Moreover, since 2006, the EIPO has been engaged in the development of a GIs proclamation. The subsequent paragraphs will look at pertinent issues covered under these two draft laws and proffer certain points for consideration.

3.2.1 The draft designation of ORIGIN Proclamation

The preamble of the draft Designation of Origin proclamation (DO proclamation) recognizes that better protection of natural resources could generate income for farmers all over the country and help to preserve and conserve the environment. This system is mostly used in conjunction with the broader GIs system to provide a separate protection from the general protection provided for other GIs. [85] A 'designation of origin' is defined as follows:

> The name of a specific place, a region or, in exceptional cases, a country, used to describe an agricultural product originating in that specific place, region, or country, if the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined specific place, region, or country.[86]

The terms 'designation of origin' and 'appellation of origin' are used interchangeably. Article 2 of the draft DO proclamation defines 'appellation of origin' in the same manner as that of the Lisbon Agreement.[87] The draft

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[85] For instance, Council Regulation (EC) No. 1151/2012.

[86] World intellectual property organization, Famous Appelation of Origin, (http://www.wipo.int/wipo_magazine/en/2008/06/article_0009.html), (Accessed on June 13, 2013).

[87] The Registraion and Protection of Designation of Origin draft Proclmation (hereinafter Draft DO Proclmation), Art 4: an AO is defined as 'the geographical name of a country, region, or locality, which serves to designate a product originating therein,

DO proclamation aspires to protect registered designations of origin for unique home garden plants and animal products upon registration.[88]

The draft DO proclamation also aspires to provide designation of origin protection for the traditional knowledge [89] based in Ethiopia.[90] The draft DO proclamation seems to be focused only on traditional knowledge that is essential for the production and/or processing of the unique home gardens products. This seems to leave other relevant traditional knowledge out of its scope of application. Certain requirements are provided before protection under the draft DO proclamation can subsist. Initially, a product can bear the name of the area and hence acquire protection as a designation of origin if: a) it originates in a specific place within the boundaries of the proposed designated geographical area; b) its unique characteristics are essentially or exclusively attributable to that area; and c) its production and processing takes place in that specific area.[91] Here, the specific geographic area attributing to the quality or unique characteristics of the good should not be taken only pertaining to the ecosystem of that precisely defined area but also the collective knowledge, techniques and skills of production or processing of the local community within that geographic area.[92] In addition to this, to acquire protection as a designated origin, products originating in a particular

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the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors'.

[88] Ibid.

[89] Ibid, Art 2, Traditional Knowledge is defined as '...Knowledge, practices and norms of local communities that have been developed and accumulated through the years and that are essential for the production and/or processing of a unique product as well as for the conservation and sustainable use of their land the name of which the unique product bears.'

[90] Draft Do Proclamation, supra note 87, Art 3.

[91] Draft DO Proclamation, supra note 87, Art 5.

[92] Ibid.

area must not conflict with plant varieties or animal breeds; and they should not be registered as a trademark or be homonymous names.[93]

As is the nature with sui generis GIs systems, the protection provided for such unique and high quality products is communal, granted to association of local communities.[94] Protection under the draft DO proclamation exists upon registration with the EIPO.[95] A peculiar nature of this draft proclamation is the procedures stipulated under Article 11 which mandate association of a given community to formulate the application together with EPA free of charge. This is can be used as an incentive to encourage the involvement of local communities and associations in the system.[96]

The procedures which must be taken by the Ministry of Agriculture in passing decisions pertaining to the registration of designation of origin and other measures to be taken afterwards are also specified in the draft proclamation.[97] Applicants who are grieved by the decision of the Ministry of Agriculture should first use the available administrative dispute resolution mechanisms and *ad hoc* tribunals before they could resort to judicial solutions. As per Article 8 of the draft DO proclamation, these local associations are given collective and exclusive rights to use the names and benefit from the marketing of these goods but are prohibited from

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[93] Arts 6(3) and (4), Draft DO Proclamation.

[94] An association of local community is defined under article 2 of the draft DO proclamation as '...a group of farmers and/or pastoralists who live in a specified Kebele and have agreed to coordinate their respective activities, traditional community knowledge and technology to jointly manage, protect and use their land the name of which their unique product bears as an appellation'.

[95] The EIPO is responsible for managing the DO register.

[96] However, Art17(2) describes the conditions upon which associations and communities maybe obliged to pay for the process of review the application. The detail regarding the amount of payment is to be determined by a regulation to be issued by the council of ministers (see Art17(3)).

[97] Draft DO Proclamation, supra note87, article 15&16.

transferring these in a form of sale or any exchange. Once a community has registered the rights pursuant to the draft DO proclamation, it would be able to prevent any person from using the same designation without its authorization. Articles 19-22 the draft DO proclamation discuss available legal remedies where the designation of origin is used by illegal persons. These include: provisional measures (custom measures both in case of exportation and importation of products bearing illegally the registered designation of origin and seizure of the counterfeited property), civil remedies as well as criminal sanctions.

3.2.2 The DRAFT GIs Proclamation

In its preamble, the draft GIs proclamation expresses the need to use GIs as an asset in protecting the reputation and goodwill of products originating in a specific geographical area. The commercial value attached with GIs is stressed in the draft GIs proclamation. According to the draft GIs proclamation, a GI is:[98]

> "....a name of a country, region, locality, place or other identifiable geographical area, as well as geographical image or sign used to identify goods originating in the country, region or locality, place or area where a given quality, reputation or other characteristic of the goods is due exclusively or essentially to the geographical area and includes an appellation of origin."

Under the draft GIs proclamation, any geographical name, sign, or image can be registered as a GI where it fulfills the requirements specified under the proclamation; relates to goods; and the given quality, reputation or other characteristic of the good is essentially due to the geographic area. Also, the name, sign or image to be registered as a GI must not be generic and should

[98] Draft Geographical indications proclamation, Art 2(8), (u.d).

not be contrary to any law, public policy or public order.[99] Pursuant to Article 8 of the draft GIs proclamation, any person is eligible to register and thus acquire protection. The right to use the particular GI in question belongs to a person who is located in and operates an enterprise in the particular geographical area and who is a user according to the proclamation.[100]

Article 6(4) of the draft GIs proclamation provides the rights bestowed upon registered GIs and their legitimate users; and the right to use and prevent others from using their registered GIs on products not originating in the designated area in a manner that would mislead the public as to the true origin of goods. The draft GIs proclamation prohibits the illegal use of a registered GI on production, manufacturing, importing, exploring, selling, exhibiting or offering for sell or keeping in stock of goods that bear the name of a geographical area or geographical image or sign that is the same or confusingly similar to protected GIs.[101] The draft GIs proclamation also prohibits the use of a GI on goods even if the true origin of the good is indicated; is used in translation; or is accompanied by terms such as kind, type, make, imitation or the like.[102] This can be equated with the extended protection provided under Article 23 of the TRIPS Agreement for wines and spirits. Also, the draft GIs proclamation provides special protection to reputable GIs even where there is no act of misleading the public as to the true origin of the good.

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[99] Ibid, Art 9.
[100] Ibid, Art 8(2); a user is defined under Art2 as 'a person who is entered in the office records as the user of a protected GI.'
[101] Ibid, Art 10(2)(a).
[102] Ibid.

Protection of all GIs is dependent upon registration unless otherwise expressed by law.[103] Articles 11 to 16 of the draft GIs proclamation specify detailed conditions to be fulfilled for the registration of a geographical name, sign or image as a GI and provides the circumstances where registration will be refused. The EIPO has the authority to register or refuse registration and administer the registration of GIs. However, persons using a geographical name in good faith are allowed to continue the use upon making an application for further exploitation of the name to the EIPO within 6 months from the registration of a GI.[104] Also, Article 7 of the draft GIs proclamation provides a right for producers to institute civil actions against persons who are using the registered GIs illegally.

4. Conclusion

Sound use of GIs system can be of a considerable economic value where producers from a given geographical area are rewarded for their long enduring investment in formal/informal innovation. This can be a valuable asset where countries such as Ethiopia take the necessary measures to protect their quality products. Even with the possible initial risks and high cost attached to their implementation, the focus with GIs systems should be on the value that would be accumulated over time. Ethiopia may benefit in the long run from developing its own GIs system. Actions taken to institutionalize IP in Ethiopia should be considered important steps towards better utilization of IPRs and GIs. In relation to GIs, Ethiopia needs to attach the requisite attention to their local, economic, and social significance. The move to provide protection for both designation of origins and GIs protection in Ethiopia has the potential to ease concerns over governance and demarcation.

[103] Draft GIs proclamation, Art 6(2).
[104] Ibid, Art10(7).

By separating the link between goods and their geographical origin, Ethiopia may avail itself of these two modes of geographical designations.

After duly considering the draft DO and GIs proclamations, the author recommends the following issues be properly investigated before the enactment of the draft laws:

A) Type of protection: The need to provide protection through registration, as envisaged in both drafts, should be critically studied to provide more inclusive schemes. As discussed above, two types of protection exist in relation to sui generis GIs system: registration and non-registration. In this regard, most developing countries which provide for a GIs system adopt the non-registration systems or registration systems which are not compulsory. The draft laws should give due consideration to the implications of providing a compulsory registration system in a country where producers are mostly very poor household farmers.

B) Communal nature of sui generis systems: The main benefit of a GIs system in developing countries is its communal nature. This seems to be understated under the draft GIs proclamation. In order to avoid excluding small-scale farmers, the draft GIs proclamation should give emphasis on the issue.

C) The relationship with trademarks: Article 6(3) of the draft DO proclamation should be redefined to avoid confusion. For example, an understanding contrary to Article 6(3) can be found contained in the Trademark Proclamation no.501/2006, with the exception regarding geographic names which have acquired distinctiveness.[105] Also, the relationship between GIs and trademarks is not dealt under the draft GIs

[105] Trademark Proclamation no. 501/2006, supra note 68, Art 6(1)(e),(h) and (2).

proclamation. The co-existence of these two IP rights should be established in these draft laws. This could help in providing TRIPS compatible laws. Utilizing these two IP rights together to better protect quality products should be pondered upon. In other words, producers of quality agricultural products may use trademarks and GIs as part of their marketing strategy, as has been done in many developing countries.

D) Homonymous names: The draft proclamations exclude these names from being protected as a designated origin or a GI. It is essential to revise the draft laws to include the name thereby providing a TRIPS compatible legal regime as have been discussed above.

E) Traditional knowledge: Both draft laws aspire to protect traditional knowledge, even though the draft DO proclamation only focuses on traditional knowledge that are essential for the production and/or processing of the unique home gardens products. Such distinction does not exist in the draft GIs proclamation. Hence, due regard should be given in devising an appropriate mechanism for the protection of traditional knowledge. It is worth noting that GIs can only provide protection in relation to arbitrary use of origin on goods produced outside the legitimate region and do not prevent others from producing similar goods per se.

F) Enforcement mechanisms: The draft DO proclamation provides for more comprehensive enforcement mechanism while the mechanism furnished under Article 7 of the draft GIs proclamation is not adequate. The draft GIs proclamation needs to make available other measures such as provisional measures, border or criminal sanctions.

G) Environmental issues: The draft DO proclamation shows a strong intention to incorporate environmental issues and methods of

preserving and conserving the environment. Some of the environmental issues provided in the draft proclamation have little to do with IP issues. The main attention should be on providing a comprehensive and effective designation of origin system.

በግንባታ ውል ክርክር ላይ በተሰጡ ፍርዶች ላይ የቀረበ አስተያየት

ፋሲል ታደሰ*

ለዚህ ፅሁፍ መነሻ የሆነው ጉዳይ ሶስት የግንባታ ውሎችን እና እነዚህኑ ውሎች ለማሻሻል የተደረጉ የማሻሻያ ውሎችን ተከትሎ በስራ ተቋራጩ እና በአሠሪው መካከል የተነሱትን አለመግባባቶች በተመለከተ በመጀመሪያ በመሐንዲሱ የተሠጠ ውሳኔ እና ውሳኔው እእንዲፈጸም ለፌደራል ከፍተኛ ፍ/ቤት ቀርቦ በነበረ የአፈፃፀም ክርክር ላይ በተሰጠ ውሳኔ ላይ በየደረጃው እስከ ፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ቀርበው የተሰጡ ውሳኔዎች ናቸው::[1]

1. <u>ስለጉዳዩ አጀማመርና የተሰጡ ውሳኔዎች</u>

<u>መግቢያ</u>

1.1 አልመሸ ኃ.የተ.የግል ማህበር (አሰሪ) እና አሰፋ በለጠ ጠቅላላ ስራ ተቋራጭ (ስራ ተቋራጭ) በአፋር ብሔራዊ ክልላዊ መንግስት በአሳይታ ከተማ መስጊድ፣የመኖሪያ ቤቶችና ት/ቤት ለማሰራት ሰኔ 6 ቀን 1986ዓ.ም. እና ነሐሴ 26 ቀን 1986ዓ.ም. ሶስት የግንባታ ውሎችን የተዋዋሉ ሲሆን፤ባትኮዳ[2] የግንባታታውሎችን በተመለከተ ያወጣው "ደንብ" የውሎቹ አካል እንዲሆንም ተስማምተዋል:: በመቀጠልም ሶስቱንም ውሎች አሰመልክቶ ህዳር 19ቀን 1987ዓ.ም. የማሻሻያ ውሎች የተፈራረሙ ሲሆን በማሻሻያ ውሎቹ በባትኮዳ ከወጣው"ደንብ" ውስጥ በአንቀጽ 1(ሐ እና መ) እና አንቀጽ 67 የተደነገጉትን አሻሽለዋል::[3] በነዚሁ ማሻሻያ ውሎች ወስጥ አቶ

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* (ኤል.ኤል.ቢ - ሕግ ፋክልቲ -አ.አ.ዩ.) የሕግ አማካሪና ጠበቃ

[1] እነዚህኑ ውሳኔዎች መነሻ በማድረግ በግንባታ ውሎች ውስጥ የሚነሱ አንዳንድ ጉዳዮችንም እግረመንገዳችንን አጭር ምልከታእእናደርግባቸዋለን::

[2] ይህ ቃል በእንግሊዝኛ ሙሉ አጠራሩ "Building and Transport Construction Design Authority"(BaTCoDA)በአማርኛ ደግሞ "የህንፃና ትራንስፖርት ኮንስትራክሽን ዲዛይን ባለስልጣን" ተብሎ በአዋጅ ቁጥር 327/1979ዓ.ም. የተቋቋመውን የባለስልጣን መ/ቤት ለመግለጽ በውሎቹም ሆነ በፍ/ቤቶቹ ውሳኔዎች ውስጥ የሚገኝ ነው:: በዚህ ጽሁፍ ውስጥም ይህንኑ ስያሜ ለመጠቀም እንገደዳለን:: ባትኮዳ ከተቋቋመበት ዓላማዎች አንዱ የግንባታ ስራዎች ውል አካል ሊሆኑ የሚገባቸውን ጠቅላላ የውል ሁኔታዎችን (General Conditions of Contract)የሚዘረዝሩ ሰነዶችን ማውጣት ነው:: በዚሁም መሠረት በእንግሊዝኛው አጠራሩ "Standard Conditions of Contract for the Construction of Civil works Projects, 1987" በመባል የሚታወቀውን ስታንዳርድ በማውጣት በስራ ላይ እእንዲውል አድርጓል:: ይህ ሰነድ ወደ 75 አንቀጾችን፣የግንባታ ውል ፎርምን (Form of Agreement)እእና የመልካም ስራ አፈጻጸም ዋስትና ፎርም (Performance Bond)በአባሪነት ይዟል::ታ

[3] በባትኮዳ ደንብ አንቀጽ 1ሐ "መሐንዲስ" ማለት "የተፈጥሮ ወይም የህግ ሰውነት ያለው ሆኖ በባትኮዳ በፅሁፍ መሐንዲስ ተብሎ የተሰየመ ሲሆን ፤በዚሁ አንቀጽ ንዑስ አንቀጽ "መ" ደግሞ ባትኮዳ ማለት ምን ማለት እንደሆነ ትርጉም ተስጥቷል:: በሌላ በኩል የደንቡ አንቀጽ 67 በስራ ተቋራጭና በአሰሪ መካከል አለመግባባት ሲፈጠር በቅድሚያ ውሳኔ የሚሰጠው መሐንዲሱ መሆኑን፣መሐንዲሱ በሰጠው ውሳኔ ቅር የተሰኘው ወገን በውሳኔው ላይ ውሳኔው በደረሰው በ90 ቀን ውስጥ

ወንድወሰን አበበ የተባሉ መሐንዲስ በተዋዋዮቹ መካከል የሚነሱ አለመግባባቶችን አስመልከቶ ውሳኔእንዲሰጡ ተስማምተዋል።
በዚሁ መሠረት ግንባታው እየተከናወነ ባለበት ወቅት በክፍያ ምስክር ወረቀት ቁ.5 ጥቅምት ወር 1989ዓ.ም. ላይ መሐንዲሱ ለስራ ተቋራጩ ሊከፈለው የሚገባውን የገንዘብ መጠን አረጋግጦ ለአሰሪው ላከ። ሆኖም ይህ ሳይፈጸም እጅግ እየዘገየ የስራ ተቋራጩም አቤቱታ እየበረታ የፕሮጀክቱም አፈጻጸም እየተጓተተ ሄዶ በሰኔ ወር 1991ዓ.ም. (እ.ኤ.አ. ጁን 30ቀን 1999)ፕሮጀክቱ ታገደ። በመቀጠልም ስራ ተቋራጩ ግንባታውን ለሚድሮክ ኮንስትራክሽንእንዲያስረክብ ተደረገ። ይህንንም ተከትሎ ስራተቋራጩ ይገባኛል የሚለውን ክፍያ እንዲፈጸምለት የተለያዩ ጥረቶችን ማድረጉን ገልጾ በመጨረሻም ሐምሌ 13 ቀን 1996ዓ.ም. (እ.ኤ.አ. ጁላይ 12 ቀን 2004)በተባፈ ደብዳቤ ሰራኂቸው ለሚላቸው ግንባታዎችና አሰሪው ግዴታውን ባለመወጣቱ ሊከፈለኝ ይገባል ያለውን ገንዘብ እንዲከፈለው እንዲወሰንለት ለመሐንዲሱ ለአቶ ወንድወሰን አበበ አቤቱታ አቀረበ። መሐንዲሱም መስከረም 6 ቀን 1997 ዓ.ም. (እ.ኤ.አ. ሴፕተምበር 16 ቀን 2004) አሰሪው ለስራ ተቋራጩ በጠቅላላው ብር 19,760,954.79(አስራ ዘጠኝ ሚሊዮን ሰባት መቶ ስልሳ ሺህ ዘጠኝ መቶ ሃምሳ አራት ብር ከ79/100) እንዲከፍለው ውሳኔ ሰጡ።

1.2 <u>በፌዴራል ከፍተኛ ፍ/ቤት የተደረገው ክርክር እና የተሰጠው ውሣኔ</u>

ስራ ተቋራጩ የመሐንዲሱ ውሳኔ እንዲፈፀምላቸው በፌዴራል ከፍተኛ ፍ/ቤት (ፌ/ከ/ፍ/ቤት) በመ.ቁ 37147 የአፈፃፀም ፋይል ከፈቱ። በመዝገቡ የፍርድ ባለዕዳ ሆኖ የቀረበው አሰሪው መጋቢት 7 ቀን 1998ዓ.ም. በሰጠው መልስ የባትኮዳን ደንቦች ከራሱ ከባትኮዳ በቀር ተዋዋይ ወገኖች ሊያሻሽሉት እንደማይችሉ፣መሐንዲሱ በባለዕዳው የተቀጠሩት የማሻሻያ ውሎቹ ተፈረሙ ከተባለበት ቀን ሁለት ዓመት የሚጠጋ ጊዜ ካለፈ በኋላ መሆኑን፣ስለዚህም አማካሪ መሐንዲስ ሆነው ሊሰየሙ እንደማይችሉ፣ ከባለዕዳው ጋር የነበራቸው ውል ጥር 4 ቀን 1996ዓ.ም. የተቋረጠ በመሆኑ ከባለመብቱ ተመራላቸው የተባለውን አለመግባባት አይቶ ለመወሰን ስልጣን ያልነበራቸው መሆኑን፣መሐንዲሱ በመሐንዲስነት ተሹመዋል ቢባል እእንኳ ባትኮዳ ባወጣቸው ደንብ አንቀጽ 1(ሸ)መሠረት የባትኮዳን የፅሁፍ ስምምነት (ልዩ ፈቃድ)ሳያገኙ ጉዳዩን አይተው ውሳኔ ሊሰጡ አይችሉም። እንዲሁም መሐንዲሱ በስነስርዓት ሕጉ ሊከተሉ

ለባትኮዳ ይግባኝ ማቅረብ እንደሚችል፣የባትኮዳ ውሳኔ የመጨረሻና አስገዳጅ መሆኑንና ሌሎችንም ጉዳዮች ይደነግጋል።

በውሳኔዎቹ የተጠቀሱት ተከራካሪዎች በደንቡ ላይ ባደረጉት ማሻሻያ መሐንዲሱን እራሳቸው የመረጡት መሆኑን ስለባትኮዳ የተሰጠውን ትርጉም ቀሪ ያደረጉት መሆኑንና አለመግባባት ስለሚፈታበት ሁኔታ የተደነገገውን አንቀጽ 67 በተመለከተ ደግሞ የተመደበው መሐንዲስ በሚሰጠው ውሳኔ ቅር የተሰኘ ወገን ይግባኙን ለባትኮዳ ሳይሆን ለሽምግልና ጉባኤ(Arbitration)እ እንዲያቀርብ ተስማምተዋል።

የሚገባቸውን የሙግት ስርዓት ሳይከተሉ ውሳኔ ሰጥተዋል የሚሉ ክርክሮችን በማቅረብ የመሐንዲሱ ውሳኔ ሊፈጸም የሚችል አይደለም በማለት ተከራክሯል። በግራቀኙ በፅሁፍ ከቀረቡት ክርክሮች በተጨማሪ ፍ/ቤቱ ግንቦት 1 ቀን 1998ዓ.ም. ግራቀኝ ወገኖችን በቃል እንዳከራከረ መዝግቧል።

በመጨረሻም ጥቅምት 14 ቀን 1999 ዓ.ም. በዋለው ችሎት ውሳኔ የሰጠ ሲሆን የውሳኔው ፍሬ ሃሳብ የሚከተለው ነበር።

- አቶ ወንድወሰን አበበ የኮንስትራክሽኑን ስራ እንዲቆጣጠሩ በባለዕዳው የተቀጠሩት የማሻሻያ ውሎቹ ከተፈረሙ በኋላ ስለመሆኑ ባለዕዳው ያቀረበው ማስረጃ ቢያረጋግጥም በማሻሻያ ውሎቹ እኒሁ ሰው ስለመመደባቸው ስለተረጋገጠ፣ እንዲሁም መሐንዲሱ ውሳኔያቸውን ከሰጡበት ቀን በጣም ቀደም ብሎ በመሐንዲሱና በባለዕደው መካከል የነበረው ውል የተቋረጠ መሆኑ በማስረጃ የተረጋገጠ ቢሆንም ባለዕዳው ይህንኑ ሁኔታ ለባለመብቱ በፅሁፍ አላሳወቀም፤ ሌላ መሐንዲስም ስላልተካ የባለዕዳው ክርክር ተቀባይነት የለውም።
- መሐንዲሱ የሙግት ስርዓቱን ተከትሎ የበኩሌን ክርክር እንዳቀርብ ዕድል አልሰጠኝም የሚለውን የባለዕዳውን ክርክር በተመለከተ ደግሞ ባለዕዳው ይህ ጥፋት ተፈፅሞብኛል የሚል ከሆነ በወቅቱ በመሐንዲሱ በተሰጠው ውሳኔ ላይ በማሻሻያው በተቀመጠው ስርዓትና የጊዜ ገደብ ይግባኝ ማቅረብ ነበረበት እንጂ አሁን ይህን መከራከሪያ ሊያቀርብ አይገባም።
- የባትኮዳ "ደንብ" አንቀጽ 2(1)(ሸ) ግራቀኙ በተፈራረምዋቸው የማሻሻያ ውሎች "በግልጽ አለመስረዙ ወይም አለመሻሻሉ አላከራከረም።"ሆኖም ባለመብቱና ባለዕዳው ባደረጓቸው ማሻሻያ ውሎች የባትኮዳን አንቀጽ 67ን በማሻሻል በደንቡ ባትኮዳ የነበረውን የይግባኝ ሰሚነትን ስልጣን ቀሪ ያደረገ በመሆኑ፣ መሐንዲሱ ጉዳዮችን አይቶ ለመወሰን የባትኮዳን ፈቃድ ማግኘት የሚያስፈልገው የመሐንዲሱን ውሳኔ በይግባኝ የሚመለከተው ባትኮዳ ቢሆን ነበር፣ "የደንቡ አንቀጽ 67 ድንጋጌ በማሻሻያ ውሎቹ በሌላ ድንጋጌ መተካት ግራቀኙ የአንቀጽ 2(1)(ሸ)ድንጋጌ በመካከላቸው በሚኖር ጉዳይ ላይ ተፈፃሚ እንዳይሆን በአንደምታ መስማማታቸውን የሚያመለክት እንደሆነ ፍ/ቤቱ ያምናል።" ግራቀኝ ተዋዋይ ወገኖች የባትኮዳን ደንብ በስምምነት እንደተቀበሉ ሁሉ በስምምነት የማሻሻል ነፃነት አላቸው።"በዚህም ሁኔታ መሐንዲሱ ውሳኔውን ለመስጠት የባትኮዳን ፈቃድ የማግኘት ግዴታ ነበረበት በማለት ከባለዕዳው የቀረበው ክርክር ተቀባይነት ያለው ሆኖ ፍ/ቤቱ አላገኘውም።"በማለት የመሐንዲሱን ውሳኔ የፍርድ ባለዕዳው እንዲፈፅም ወስኗል። በዚሁ የፌዴራል ከፍተኛ ፍ/ቤት ውሳኔ ቅር የተሰኘው ባለዕዳው ለፌዴራሉ ጠቅላይ ፍ/ቤት በመ/ቁ.27478 ይግባኝ ያቀረበ ሲሆን፤ ፍ/ቤቱም ግራቀኙን ካከራከረ በኋላ የካቲት 25 ቀን 2000ዓ.ም. በዋለው ችሎት የፌ/ከ/ፍ/ቤት ውሳኔን አፅንቷል።

1.3 በፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የተደረገው ክርክርና የተሰጠው ውሳኔ

ባለዕዳው ክፍብለን በተራቁ. 1.2 በገለፅናቸው ውሳኔዎች ቅር በመሰኘቱ የሰበር አቤቱታ ለፌዴራሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁ.36577 አቤቱታ ያቀረበ ሲሆን ችሎቱም "መሐንዲሱ ሰጠ የተባለው ውሳኔ ግራቀኙ ካደረጉትና ከባትኮዳ አኳያ በፍርድ ሊፈጸም የሚችል መሆን፣ አለመሆኑን፣እንዲሁም ፈቃድ የማግኘትን ሁኔታ በስምምነት ያስቀሩት መሆን አለመሆኑን ለመመርመር" ያስቀርባል በማለት ባለመብቱ በተጠሪነት ቀርቦ እንዲከራከር በማድረግ የግራቀኙን የጽሁፍ እና የቃል ክርክሮች አዳምጧል። ግራቀኙ ወገኖች በሰበር ችሎቱ ያቀረቧቸው ክርክሮች በስር ፍ/ቤቶች አቅርበዋቸው ከነበሩት ክርክሮች የተለዩ ባለመሆናቸው በድጋሚ በዚህ ክፍል ማስፈሩ አስፈላጊ አይደለም።

የሰበር ችሎቱ በአመልካቹና በተጠሪ መካከል ያለውን ክርክር ለመወሰን "ለአፈፃፀም ምክንያት የሆነው ውሳኔ ሊፈጸም የሚችል ነው አይደለም የሚለውን ለመመለስ በቅድሚያ ውሳኔውን ሰጡ የተባሉት መሐንዲስ ውሳኔውን ለመስጠት ሥልጣን ነበራቸው ወይ የሚለውን ነጥብ መመርመር ያለበት" መሆኑን ገልጾ ከዚህ ጭብጥ አንፃር የራሱን ትንተና በመስጠት በፌ/ከ/ፍ/ቤት እና በፌዴራሉ ጠቅላይ ፍ/ቤት የተሰጡትን ውሳኔዎች ሰኔ 16 ቀን 2001 ዓ.ም. በዋለው ችሎት በሰጠው ውሳኔ የሻረ ሲሆን የውሳኔው ፍሬ ሃሳብ የሚከተሉትን ነጥቦች የያዘ ነበር።

- በግራቀኙ በተደረጉት "...የማሻሻያ ውሎች ከባትኮዳ ደንቦች የተሻሻሉት መሐንዲሱን ባትኮዳ ከሚሰይመው ይልቅ አሰሪው የሚሰይመው መሆኑን፣የባትኮዳ ትርጉም ለግራቀኙ ግንኙነት ተፈፃሚ እንደማይሆን፣ እንዲሁም የክርክር መፍቻ ዘዴን ስርዓት በሚመለከት ብቻ ነው። ከነዚህ ደንቦች በቀር ሌላ ማሻሻያ ስላልተደረገ ቀሪዎቹ የባትኮዳ ድንጋጌዎች ተፈፃሚ መሆናቸውን መገንዘብ ይቻላል። ስለዚህም አለመግባባቱን ለመወሰን በአሰሪው የተሰየሙት መሐንዲስ አለመግባባቱን መዳኘት ከመጀመራቸው በፊት በተጠቀሰው ድንጋጌ መሠረት የባትኮዳን ልዩ ፈቃድ ማግኘት ያስፈልጋቸዋል።..."
- "የደንቡ አንቀጽ 2 መሐንዲሱ አለመግባባቶችን ለመፍታት ሌሎች የተዘረዘሩ ጉዳዮች ለመዳኘት ከባትኮዳ ልዩ ፈቃድ የሚያስፈልገው መሆኑን በአስገዳጅነት አስቀምጧል።" ያለ ሲሆን አያይዞም ይህ ሁኔታ ያስፈለገበትን ምክንያቶች ናቸው ያለውን የራሱን አስተያየት ሰጥቷል።
- በማጠቃለያውም ተዋዋዮቹ "... መሐንዲሱ አለመግባባቱን አይቶ ለመወሰን ከባትኮዳ ሊያገኝ የሚገባውን ልዩ ፈቃድ የማግኘት ቅድመ ሁኔታን ያላሻሻሉ በመሆኑና መሐንዲሱ ይህንን ፈቃድ ስለማግኘቱ የቀረበ ክርክርና ማስረጃ ስለሌለ መሐንዲሱ ውሳኔውን ለመስጠት በሕግ ስልጣን አይኖረውም።... ስለዚህም የስር ፍ/ቤት ከባትኮዳ ልዩ ፈቃድ ያልተሰጣቸው መሐንዲስ

የሠጡት ውሳኔ እንዲፈፀም ትዕዛዝ መስጠቱ እና ይግባኝሰሚው ፍ/ቤትም ይህንኑ ማፅናቱ መሠረታዊ የህግ ስህተት ሆኖ አግኝተነዋል።"

2. <u>ስለግንባታ ውሎች አጭር ምልከታ</u>

ከግንባታ ጋር በተያያዘ በሀገራችን ባሉ ሕጎች ውስጥ በተለያዩ አዋጆች እና አዋጆቹን ለማስፈጸም በወጡ ደንቦችና መመሪያዎች ለግንባታ ውል ትርጉም ተሰጥቷል።[4] ከእነዚህ የተለያዩ ትርጉሞች መረዳት የሚቻለው የግንባታ ውሎች ከማይንቀሳቀስ ንብረት ጋር የተገኛኙ መሆናቸውን ነው።
የግንባታ ውል የሚደረገው በአሰሪው (ባለቤት፣ኢንቨስተር በሚባሉ ስሞችም ይታወቃል)እና በስራ ተቋራጩ መካከል ነው። በሌላ በኩል ከአሰሪው ጋር በሚገባው የሙያ አገልግሎት ውል (የአሰሪው ተቀጣሪ ሠራተኛ ሊሆንም ይችላል) የግንባታውን ስራ የሚቆጣጠር፣ለተሰራው ስራ ለስራ ተቋራጩ ሊከፈል የሚገባውን ክፍያ የሚያረጋግጥ፣በተወሰኑ ጉዳዮች ላይ በውሉ ሊሰሩ ስምምነት የተደረሰባቸውን ስራዎች እንዳስፈላጊነቱ የመለዋወጥ፣የስራዎቹን መጠን የመጨመር እና የመቀነስ ትዕዛዝ የመስጠት፣እንደሁኔታው በአሰሪው እና በስራ ተቋራጩ መካከል ከውሉ አፈፃፀም ጋር የሚነሱ አለመግባባቶችን ተመልክቶ በመጀመሪያ ደረጃ ውሳኔ የሚሰጥ አማካሪ መሐንዲስ[5] (ተቆጣጣሪ መሐንዲስ፣ፕሮጀክት ማናጀር...በሌሎችም ስያሜ ይታወቃል)አለ።
አማካሪ መሐንዲስ (በሕንፃ አዋጅ ቁ.624/2001ዓ.ም.የተመዘገበ ባለሙያ በመባልም ይጠራል)በግንባታ ውል ውስጥ ሁለት ዓይነት ሚና አለው።የመጀመሪያውና በግልፅ የሚታየው ከአሰሪው ጋር በገባው የሙያ አገልግሎት ውል መሠረት ግንባታው በውሉ መሠረት እየተከናወነ መሆኑን

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[4] በባትኮዳ ማቋቋሚያ አዋጅቁ.327/1979 አንቀጽ 2(1)"የሕንፃ ኮንስትራክሽን" ማለት ማናቸውም በከፊል ወይም በሙሉ የወለል፣የግድግዳና የጣሪያ ስራ ያለው ለመኖሪያ ወይም ለሌላ አገልግሎት የሚውል ሕንፃና ተዛማጅ ስራዎች የመስራት ወይም የማሻሻል ስራ ነው"በማሸት ትርጉም የተሰጠ ሲሆን፣በአንቀጽ2(2) ደግሞ "የትራንስፖርት ክንስትራክሽን" ማለት የመንገዶች፣የድልድዮች፣የባቡር ሃዲዶች፣የአይሮፕላን ማረፊያዎች የወደቦችና የየብስ ማመላለሻ ተርሚናሎች የመስራት ወይም የማሻሻል ሥራ" እንደሆነ ተደንግጓል።

- "ስለማይንቀሳቀስ ንብረት ስራ ውል" በሚደነግገው የፍትሐብሔር ሕጉ በአንቀጽ 3019(1)የስራ ተቋራጭነት ውል"የሕንፃን ስራ ለመስራት የተሰራውን ለማደስ ወይም አንድ የማይንቀሳቀስ ንብረት ለማደራጀት ..." እንደሚደረግ ይደነግጋል።
- የኢ.ፌ.ዴ.ሪ. የመንግስት የግዥ ስርዓትን ለመወሰንና ተቆጣጣሪ ኤጀንሲውን ለማቋቋም የወጣው አዋጅ ቁ. 430/1997 በአንቀጽ 2(ሐ) ስር "የግንባታ ዘርፍ ስራ" ማለት ከሕንፃ ከመንገድ ወይም ከመሠረተ ልማት ስራ ጋር በተያያዘ የሚከናወን አዲስ የግንባታ፣የማፍረስ፣የጥገና፣የማደስ ስራ እንዲሁም ተጓዳኝ አገልግሎት..." እንደሆነ ይደነግጋል።

[5]የኢ.ፌ.ዴ.ሪ. አስፈፃሚ አካላትን ስልጣንና ተግባር ለመወሰን በወጣው አዋጅ ቁ.691/2003 ዓ.ም. አንቀጽ 25(1)(ቸ)እንደተደነገገው የስራና ክተማልማት ሚንስቴር በዚህ ሙያ ለሚሰማሩ ግለሰቦችና ማህበራት የሙያ ችሎታታ ማረጋገጫ የመስጠት ደረጃዎችን የመወሰን፣የመመዝገብ እና ሌሎች ተያያዥ ተግባራትን ያከናውናል።

መቆጣጠር ሲሆን በዚህኛው ገፅ ሙሉ በሙሉ የአሰሪው ወኪል ነው::[6] ከአሠሪው በተሰጠው ውክልና መሠረት ወኪሉ የአሠሪውን ጥቅም በሚያስጠብቅ መልኩ ተግባሩን ይፈፅማል:: በሌላ በኩል ደግሞ በአሠሪው እና በስራ ተቋራጩ መካከል የሚነሱ አለመግባባቶች ላይ ውሳኔ ይሠጣል:: ይኽኛው ተግባሩ ብዙ ክርክሮችን ያስነሳል:: የወኪሉን ጥቅም የማስጠበቅና የማስቀደም ኃላፊነት በሕግ የተጣለበት አማካሪ መሐንዲስ ወካዩ በሆነው አሠሪ እና ስራ ተቋራጭ መካከል የሚነሳውን አለመግባባት በገለልተኝነት እና በነፃነት አይቶ ሊወስን ይችላልን? የሚለው በቀዳሚነት የሚነሳ ጥያቄ ነው::

ከፍብለንእእንደገለጽነው በግንባታ ውል አፈፃፀም ሂደት ውስጥ አሰሪ፣ስራ ተቋራጭና አማካሪ መሐንዲስ በመባል የሚታወቁ ወገኖች ያሉ ሲሆን በአሠሪውና በስራ ተቋራጩ እንዲሁም በአሠሪውና በአማካሪ መሐንዲሱ መካከል በውል ላይ የተመሠረተ ግንኙነት አለ:: ነገር ግን በስራ ተቋራጩና በአማካሪ መሐንዲሱ መካከል ምንም ዓይነት የውል ግንኙነት የለም:: ሆኖም የግንባታው ውል ከተፈረመበት ጊዜ ጀምሮ እስከማብቂያው ድረስ በሁለቱ ወገኖች መካከል በጣም የጠበቀ የስራ ግንኙነት አለ:: በዚህ ግንኙነት ውስጥ አማካሪ መሐንዲሱ አሠሪውን በመወከል ስራ ተቋራጩ እንደውሉ ግንባታውን እያከናወነ መሆኑን ይቆጣጠራል:: ይህን ተግባሩን ለማከናወን የተለያዩ ትዕዛዞችን ለስራ ተቋራጩ ያስተላልፋል:: ስራ ተቋራጩም ትዕዛዙን ከውሉ ድንጋጌዎች ጋር በማገናዘብ ተግባራዊ የማድረግ ግዴታ አለበት::

በዚህ ግንኙነት ውስጥ የሚነሳው ጥያቄ አማካሪ መሐንዲሱ ከአሠሪው የተሰጠው የውክልና ስልጣን ጉዳይ ነው:: በውለታው ሰነዶች ውስጥ አማካሪ መሐንዲሱ በራሡ በቀጥታ የሚያከናውናቸው ተግባሮች ያሉ ሲሆን አንዳንድ ጉዳዮችን በተመለከተ ደግሞ የአሠሪውን ፈቃድ በማግኘት ብቻ የሚያከናውናቸው ይሆናሉ:: በዚህ ሂደት (ግን ኙነት) ውስጥ አማካሪ መሐንዲሱ በሥራ ተቋራጩ ላይ ጉዳት ቢያደርስ ስራተቋራጩ መብቱን

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[6] የኢ.ፌ.ዴ.ሪ. መንግስት የግዥ ስርዓትን ለመወሰንና ተቆጣጣሪ ኤጀንሲውን ለማቋቋም በወጣው አዋጅ ቁ.430/1997 ዓ.ም. የተቋቋመው ባለስልጣን በአንቀጽ 11 በተሰጠው ስልጣን መሠረት በ1998 ዓ.ም. ካወጣው የግዥ ሰነድ የውሎች ጠቅላላ ሁኔታ (General Conditions of Contract) አንቀጽ 4 ላይ "በዚሁ ሰነድ በተለየ ሁኔታ ካልተገለፀ እና የተቀመጡት ገደቦች እንደተጠበቁ ሆነው መሐንዲሱ በአሠሪው እና ስራ ተቋራጩ መካከል ውለታውን በተመለከተ በሚነሱ ጉዳዮች አሰሪውን በመወከል ይወስናል::" ("Except where otherwise specifically stated and subject to any restriction in the special condition of Contract, the Engineer will decide contractual matters between the Employer and the Contractor in the role representing the Employer." (ሥርዝ የተጨመረ)

- ይህ አማካሪው መሐንዲስ የሚገኝበት ሁኔታ በጣም ግልፅ የሚሆነው መሐንዲሱ የአሠሪው ተቀጣሪ ሠራተኛ በሚሆንበት ጊዜ ነው::ይህ በእኛ ሃገርም ሆኑ በሌሎች ሀገሮች የሚታይ ጉዳይ ነው:: በሀገራችን አንዳንድ የመንግስት ተቋማት በመዋቅራቸው ውስጥ የተለያየ ስያሜ በመስጠት ይህን የአማካሪነት ስራ የሚሰራ ክፍል እና ባለሙያዎች ይኖራቸዋል:: ለምሳሌ ያህል የኢትዮጵያ ንግድ ባንክን መጥቀስ ይቻላል::

ለማስከበር የሚያቀርበው ጥያቄ በምን ላይ የተመሠረተ ይሆናል የሚለው ነው። በመካከላቸው የውል ግንኙነት ባለመኖሩ በውል ላይ ተመስርቶ ስራ ተቋራጩ ሊጠይቀው የሚችለው ጉዳይ አይኖርም። ስለዚህ ከውል ውጭ ኃላፊነት ስለሚቋቋምበት ሁኔታ በሕጉ የተደነገገውን አማራጭ መጠቀም ግድ ይሆናል። አንዳንድ ጊዜም ከአሠሪው ጋር በጣምራ ኃላፊ የሚሆኑበት አጋጣሚም ይኖራል።

የግንባታ ውል ከመፈረሙ በፊትም ሆነ በኋላ ከፍተኛ የሆኑ በሰነዶች ላይ የተመሠረቱ ግንኙነቶች ያለበት ነው። ለምሣሌ ያህል የግንባታ ውሉ ከመፈረሙ በፊት በአሰሪና በምሕንድስና ባለሙያዎች መካከል በሚኖር ውል የአርክቴክቸራል፣ የስትራክቸራል፣የኤሌክትሪካል፣የሳኒቴሪ እና ሌሎች የተለያዩ ዲዛይኖች ይከናወናሉ። እነዚህ ሁሉ ስራዎች በስዕል (Drawing, plans...) እና በፅሁፍ ዝርዝር (Specification) ይገለፃሉ። ወደ ማጠቃለያውም መጠናቸውን እና አይነታቸውን የሚዘረዝር (Bill of Quantities)ሰነድ ይዘጋጃል። ይህ ብቻም አይደለም። እንደሁኔታው በመንግስታዊ[7] ወይም መንግስታዊ ባልሆኑ መደበኛ ማህበራት[8] የሚዘጋጁ ጠቅላላ የውል ሁኔታዎችን የሚደነግጉ (General Conditions of Contract/Standard Conditions of Contract))ሰነዶች በቀጥታ በማስገባት ወይም በመጥቀስ የውሉ አካል እንዲሆኑ ይደረጋል። ተዋዋይ ወገኖች እነዚህን ጠቅላላ የውል ሁኔታዎችን ለራሳቸው ውል በሚፈልጉት መንገድ በማሻሻል ልዩ የውል ሁኔታዎችን (Particular Applications of Contract" በመባል ይታወቃሉ)ይደነግጋሉ። የግንባታ ውል የሚፈረመው ከፍ ብለን የዘረዘርናቸው ተግባራት ከተፈጸመ በኋላ ነው።

3. <u>በፍርዶቹ ላይ የተሰጠ አስተያየት</u>

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[7] በግርጌ ማስታወሻ ተራቁ.6 የተጻፈውን ይመልከቱ። እንደሁም በዚህ ፅሁፍ መግቢያ ላይ በተጠቀሱት የመሐንዲሱ እና የፍ/ቤቶቹ ውሣኔዎች ተደጋግሞ የሚጠቀሰውን ባትኮዳ አውጥቶት የነበረውን እና እ.ኤ.አ. በዲሴምበር 1994 የስራና ከተማ ልማት ሚንስቴር በተቋቋመበት አዋጅ በተሠጠው ሥልጣን መሠረት ያወጣውን የውል ሁኔታዎችን መጥቀስ ይቻላል። ስለአስተዳደር መ/ቤት ውሎች የሚደነግገው የፍ/ብሔር ሕጉ ከአንቀጽ 3135-3139 እንደዚህ ዓይነት ጠቅላላ የውል ሁኔታዎችን እያንዳንዱ አስተዳደር መ/ቤት እንደሚያዘጋጃቸው ገልፆ የሕግ ውጤታቸውንም ዘርዝሯል።

[8] በዓለም አቀፍ ደረጃ በከፍተኛ ሁኔታ ተቀባይነት ያላቸውን ለግንባታ ውሎች የሚውሉ የውል ጠቅላላ ሁኔታዎችንና እነዚሁ ጠቅላላ ሁኔታዎች ወደ ልዩ የውል ሁኔታዎች ማዘጋጀት የሚያስችል መመሪያዎችን (Legal Guide to prepare Particular Conditions)በማዘጋጀት የሚታወቀው የዓለም አቀፍ የአማካሪ መሐንዲሶች ፌዴሬሽን (Federation Internationale DesIngenieurs-Conseils-FIDIC ተብሎ በአህፅሮተ ቃል የሚታወቀው)እና የተለያዩ ሀገራት ብሔራዊ የአማካሪ መሐንዲሶች ማህበር በጋራ ያቋቋሙት ማህበር ነው። ይህ ማህበር ዋናው ጽ/ቤቱን ስዊዘርላንድ ላውሳን በምትባል ከተማ አድርጎ እ.ኤ.አ. ከ1913 ጀምሮ ያለ ማህበር ነው።

እ.ኤ.አ. በ1987 ባትኮዳ አውጥቶት የነበረው የውል ጠቅላላ ሁኔታም ሆነ በዲሴምበር 1994 በስራና ከተማ ልማት ሚንስቴር የወጣው የውል ጠቅላላ ሁኔታ የፊዲክ ቅጅዎች ናቸው።

ከዚህ ቀጥሎ ባለው ክፍል የምናያቸው ነጥቦች፤

1. በየደረጃው ባሉት ፍርድቤቶች በተከራካሪ ወገኖች ተነስተው ውሳኔ ያረፈባቸው እና ውሳኔ ያላረፈባቸው ነጥቦችን በተመለከተ እና
2. በተከራካሪዎቹ ያልተነሡ ፍርድቤቶቹም ያልተመለከቷቸውና ቢመለከቷቸው ኖሮ በሚል ሊነሡ የሚችሉ ነጥቦች የሚሉ ናቸው።

3.1 <u>በየደረጃው ባሉት ፍርድቤቶች በተከራካሪ ወገኖች ተነስተው ውሳኔ ያረፈባቸው እና ውሳኔ ያላረፈባቸው ነጥቦችን በተመለከተ</u>

ክርክሮቹን በአጭሩ ለማስታወስ ያክል ለፍርዶቹ መነሻ የሆነው ጉዳይ በአሠሪው እና ሰራ ተቋራጩ መካከል የነበረውን የግንባታ ውል ይቆጣጠሩ የነበሩት መሐንዲስ አሠሪው ለስራ ተቋራጩ ብር 19,760,954.79(አስራ ዘጠኝ ሚሊዮን ሰባት መቶ ስልሳ ሺህ ዘጠኝ መቶ ሃምሳ አራት ብር ከ79/100) እንዲከፍል የሠጡት ውሳኔ እንዲፈጸምለት ስራ ተቋራጩ በፌዴራል ከፍተኛ ፍ/ቤት የአፈፃፀም ክስ መመስረቱ ሲሆን ለቀረበበት የአፈፃፀም ክስ አሰሪው የሠጠው መልስ 1ኛ/ የባትኮዳን ደንብ ተዋዋይ ወገኖች ማሻሻል አይችሉም 2ኛ/ መሐንዲሱ የማሻሻያ ውሎቹ በተፈረመበት ጊዜ በአሠሪው ያልተቀጠሩ በመሆኑ በመሐንዲስነት ሊሰየሙ አይችሉም፣ስራተቋራጩ ይገባኛል የሚሉትን ጥያቄ ለመሐንዲሱ ካቀረበበት ወቅት ቀደም ብሎ በአሠሪውና በመሐንዲሱ መካከል የነበረው የስራ ውል የተቋረጠ በመሆኑ ከተሰናበቱ በኋላ ተመራላቸው የተባለውን አለመግባባት አይተው የመወሰን ስልጣን አልነበራቸውም 3ኛ/ መሐንዲሱ ከባትኮዳ በፅሁፍ ፈቃድ ሳያገኙ የሠጡት ውሳኔ አስገዳጅነት ሊኖረው አይገባም እና 4ኛ/ መሐንዲሱ ውሳኔ የሰጡት በሙግት ስርዓት የተደነገጉትን አክብረው አሠሪውን ሳይጠሩና ሳያከራክሩ ነው የሚሉ ናቸው።

የፌዴራሉ ከፍተኛ ፍ/ቤት በአሠሪው የቀረቡትን መከራከሪያዎች አንድ በአንድ በመመርመር የራሱን ምክንያት በመስጠት በሙሉ ውድቅ አደርጓቸዋል። በዚህ ፍርድ ቅር የተሰኘው አሰሪው ስርዓቱን ጠብቆ ለፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ያቀረበው አቤቱታ በስር ፍ/ቤት አቅርቦት የነበረውን ክርክር ሲሆን ስራ ተቋራጩ በበኩሉ በመካከላቸው በተደረጉት ማሻሻያ ውሎች የባትኮዳን "ደንብ" አሻሽለው በመካከላቸው የሚፈጠርን አለመግባባት መሐንዲሱ አይተው እንዲወስኑ መስማማታቸውን ፣በዚሁ መሠረት መሐንዲሱ ውሳኔ መስጠታቸውን፣ውሳኔ መስጠቱን አሠሪው በጊዜው ያወቁት ቢሆንም ይግባኝ ስላላቀረቡ ውሳኔው የመጨረሻና ተፈፃሚነት ያለው ነው በማለት መልስ ስጥቷል።

ጉዳዩን በመጨረሻ ያየው የሰበር ችሎቱ ለአፈፃፀም ምክንያት የሆነው ውሳኔ ሊፈፀም የሚችል ነው አይደለም የሚለውን ለመወሰን

"በቅድሚያ ውሳኔውን ሰጡ የተባሉት መሐንዲስ ውሳኔውን ለመስጠት ስልጣን ነበራቸው ወይ" የሚል ጭብጥ በመያዝ ባትኮዳ ባወጣው ደንብ አንቀጽ 2(1) /ሸ/ ላይ መሐንዲሱ አለመግባባቶችን ለመፍታት የባትኮዳን የፅሁፍ ልዩ ፈቃድ ማግኘት አለበት የሚል በመሆኑና ይህንንም ድንጋጌ ተዋዋዮቹ ያላሻሻሉት በመሆኑ፣ መሐንዲሱ የባትኮዳን ፈቃድ ሳያገኝ የሠጠው ውሳኔ አስገዳጅ አይደለም በማለት ወስኗል::

የዚህ ፅሁፍ ፀሀፊ የሰበር ችሎቱ ከያዘው ጭብጥም ሆነ በጭብጡ ላይ በሰጠው ውሳኔ ይስማማል:: ሆኖም በዚህ ጭብጥ ላይ ውሳኔ ለመስጠት ችሎቱ ከሰጠው ምክንያት የሚቀድም ሌላ ወሳኝ ነጥብ አለ:: ይህም በአሠሪውና በመሐንዲሱ መካከል የነበረው የውል ግንኙነት መቋረጥ /ያለመቋረጡ ጉዳይ ነው:: አሠሪው መሐንዲሱን የቀጠርኩት ሕዳር 19 ቀን 1987 ዓ.ም. ከስራ ተቋራጩ ጋር ያደረግናቸውን የማሻሻያ ውሎች ካደረግን ከሁለት ዓመት በኋላ ነው በማለት የሚያቀርበውን ክርክር ለጊዜው ትተነው ስራተቋራጩ ለመሐንዲሱ አቤቱታውን ካቀረበበት ሐምሌ 5 ቀን 1996 ዓ.ም. ሆነ መሐንዲሱ ውሳኔ ከሠጠበት መስከረም 6 ቀን 1997 ዓ.ም. ቀደም ብሎ ጥር 4 ቀን 1996 ዓ.ም. ላይ በአሠሪውና በመሐንዲሱ መካከል የነበረው ውል ተቋርጧል:: እነዚህ ፍሬነገሮች በሚገባ የተረጋገጡ ናቸው::

እነዚህን በመደገፍ አሠሪው በፌዴራል ከፍተኛ ፍ/ቤት አቅርቦት የነበረውን ክርክር ፍ/ቤቱ ውድቅ ያደረገው የውሉ መቋረጥ በአሠሪውና በመሐንዲሱ መካከል ብቻ ውጤት ከሚያመጣ በቀር በስራ ተቋራጩ ላይ መቃወሚያ ሊሆን አይችልም የሚል ምክንያት ሰጥቶ ነው:: በሌላ በኩል የሰበር ሰሚችሎቱ በዚህ ነጥብ ላይ ምንም ያለው ነገር የለም:: መሐንዲሱ በአሠሪው የተሰየመ ነው:: በግንባታ ውሎች እንደሚታወቀው አማካሪ (ተቆጣጣሪ) መሐንዲስ የአሠሪው ወኪል ነው:: አሠሪውን በመወከል ስራውን ይቆጣጠራል:: በአሰሪውና በመሐንዲሱ መካከል የሙያ አገልግሎት ውል ወይም የቅጥር ውል አለ:: አሠሪው መሐንዲሱን በሙሉ ፈቃዱ መርጦ እንደቀጠረው ሁሉ በራሱ ውሳኔ ውሉን ሊያቋርጠው ይችላል:: አማካሪ መሐንዲስ የግንባታ ስራውን ተቆጣጥሮ የማሠራት እና በአሰሪውና በስራ ተቋራጩ መካከል የሚነሱትን አለመግባባቶች የመወሰን ስልጣኑ ምንጭ ከአሠሪው ጋር ያለው ውል ነው:: ስራተቋራጩ አሰሪው የመደበውን አማካሪ መሐንዲስ ከመቀበል ውጭ (ውሉን ከማቋረጥ በቀር ማለቱ ነው) ሌላ ምንም ምርጫ የለውም:: አማካሪ መሐንዲስ በስራተቋራጩ እና በአሠሪው መካከል አለመግባባቶችን አይቶ ውሳኔ ይሰጣል መባሉ በግራቀኙ መካከል በጋራ ስምምነት የተመረጠ "ዳኛ" አያደርገውም:: ይህንንም ስራተቋራጩ ተስማምቶ የተቀበለው የውል ግዴታው ነው::

በአማካሪ መሐንዲሱ፣ በአሠሪው እና በስራተቋራጩ መካከል በሕግና በውል ያለው ግንኙነት ከፍብለን እንደገለጽነው ሆኖ እያለ የፌዴራል ከፍተኛ ፍ/ቤት በአሠሪው እና በመሐንዲሱ መካከል ያለው ውል መቋቋሙም ሆነ መቋረጡ ሁለቱን ወገኖች ከሚመለከት በቀር

በስራተራቋጩ ላይ በመቃወሚያነት ሊቀርብ አይችልም በማለት የሰጠው ፍርድ ትክክል አይደለም። ከዚሁ ጋር በማያያዝ ፍ/ቤቱ አሰሪው ከመሐንዲሱ ጋር የነበረውን የስራ ውል አቋርጫለሁ ካለ በኋላ ተተኪ መሐንዲስ የሰየመ መሆኑን ለስራተቋራጩ በጽሁፍ አለማሳወቁን ለፍርዱ እንደማጠናከሪያ በማድረግ የሰጠው ምክንያትም ቢሆን ከፍብለን ከገለጽናቸው ምክንያቶች አንፃር ትክክል አይደለም።

ከፍብለን እንደገለጽነው በአሰሪውና በመሐንዲሱ መካከል ያለው ውል መቋረጡ ስለሚያስከትለው ውጤት የሰበር ችሎቱ በውሳኔው ምንም ያለው ነገር የለም። የሰበር ችሎቱ መሐንዲሱ ውሳኔ ለመስጠት የባትኮዳን ልዩ ፈቃድ ማግኘት ያስፈልጋቸው ነበር፤ይህን ሳያገኙ የሰጡት ውሳኔ ሊፈጸም አይችልም ብሎ ወስኗል። የሰበር ችሎቱን ውሳኔ በተቃራኒው ብንመለከተው (a contrario reasoning) መሐንዲሱ የባትኮዳን ፈቃድ በፅሁፍ ካገኙ በኋላ ውሳኔ ሰጥተው ቢሆን ኖሮ የሰበር ችሎቱ የመሐንዲሱ ውሳኔ ሊፈፀም የሚችል ነው ብሎ ይወስን ነበር ማለት ይቻላል። ይህ አባባል የሰበርችሎቱ በአሰሪው እና በመሐንዲሱ መካከል የነበረው ውል መቋረጡ ስለሚያስከትለው ውጤት ሊኖረው የሚችለውን አቋም ግን የሚገልጽ አይሆንም።

እንደዚህ ፀሀፊ እምነት የሰበር ችሎቱ ለጉዳዩ እልባት ከሰጠበት ነጥብ ይልቅ በአሰሪው እና በመሐንዲሱ መካከል የነበረው ውል የመቋረጡን ውጤት ቀድሞ ሊያየው እና ሊወስንበት የሚገባ ነበር። በአሰሪው እና በመሐንዲሱ መካከል የነበረው ውል ከተቋረጠበት ጊዜ አንስቶ መሐንዲሱ በአሰሪውና በስራተቋራጩ መካከል በነበረው የግንባታ ውል ውስጥ የነበራቸው የመሐንዲስነት ተግባር ሙሉ በሙሉ ቀሪ ሆኗል። በእርግጥ የዚህ ፅሁፍ አቅራቢም እንደሚስማማው የመሐንዲሱ ውሳኔ ሊፈጸም የሚችል አይደለም። ሆኖም የሰበር ችሎቱ ውል የመቋረጡን ውጤት ቀድሞ ቢያየው ኖሮ ምንም ስልጣን ሳይኖር በተሰጠ ውሳኔ እና ከስልጣኑ በላይ ወይም ደግሞ ተግባሩን ለመፈፀም የሚያስፈልገው ቅድመ ሁኔታ ሳይሟላ በተሰጠ (በሚሰጥ) ውሳኔ መካከል ያለውን የጎላ ልዩነት እና ትርጉም ለማሳየት ይችል ነበር። ምናልባትም ችሎቱ የወሰነውን ጭብጥ ማየትም ላያስፈልገው ይችል ነበር።

"ተዋዋይ ወገኖች የባትኮዳን ደንብ ማሻሻል ይችላሉ አይችሉም የሚለው ክርክር" በተመለከተ

ይህ ነጥብ በሁሉም ፍ/ቤቶች ተነስቶ የነበረ ነው። በዚህ ነጥብ ላይ የስር ፍ/ቤት አቋም ተዋዋይ ወገኖች በፈቃዳቸው የባትኮዳን "ደንብ" የውላቸው አካል እንዲሆን እንደተስማሙ ሁሉ የደንቡን የተለያዩ ድንጋጌዎች በስምምነት የማሻሻል ነፃነት አላቸው የሚል ሲሆን ሰበር ችሎቱ ግን በዚህ ነጥብ ላይ ምንም ሳይል ይልቁኑም አንጠልጥሎት ነው ያለፈው። በዚህ ነጥብ ላይ የፌዴራል ከፍተኛ ፍ/ቤት የያዘው አቋም ትክክል ነው። የባትኮዳን "ደንብ" እራሱ ባትኮዳ ካልሆነ በቀር ተዋዋይ ወገኖች ሊያሻሽሉት አይችሉም የሚለውን ክርክር ያቀረበው

አሰሪው ነው። እንደዚህ አይነት ክርክሮች እና በተመሳሳይ ሁኔታ ባትኮዳም ሆነ ስራና ከተማ ልማት ሚንስቴር ያወጣቸው የውል ጠቅላላ ሁኔታዎች በቀጥታ እንደ ሕግ ተፈፃሚ ናቸው የሚሉ ክርክሮች ይነሣሉ። ለክርክሮቹ መሠረት የሆነው ምን ሊሆን ይችላል ብሎ ለሚጠይቅ ሰው በመጀመሪያ የሚታሰበው መልስ እነዚህ ሰነዶች "ደንብ"እእየተባሉ መጠራታቸው ያመጣው ችግር አንድ መልስ ነው።

በዚህ ነጥብ ላይ የፌዴራል ከፍተኛ ፍ/ቤት የያዘው አቋም በፍ/ብ/ሕጉ "ጠቅላላ የውል ሁኔታዎች" (General Conditions)በመንግስታዊ ተቋማት ሊወጡ እንደሚችሉ፤ የወጡ የውል ጠቅላላ ሁኔታዎች ውጤት (Effects) ከተደነገገው ጋር የሚስማማ ነው። በፍ/ሕግ ቁ.3138(1) እንደተደነገገው እንደዚህ ዓይነት ጠቅላላ የውል ሁኔታዎች በእያንዳንዱ ውል ላይ በግልጽ ተመልክተው ካልተጠቀሱ በቀር በቀጥታ ተፈፃሚ አይሆኑም። በዚሁ አንቀጽ በንዑስ ቁ. (2) ደግሞ በአንድ ውል ላይ በተለይ የተዘረዘሩ የውል ሁኔታዎች በጠቅላላ በውሎች ሁኔታ ውስጥ የተዘረዘሩትን ሊሸሩ እንደሚችሉ ተደንግጓል። የመንግስት የግዥ ሰነዶችን የማዘጋጀትና መፈጸማቸውን የመቆጣጠር ስልጣን የተሰጠው የመንግስት ግዢ ኤጀንሲ ለግንባታ ውሎች የሚውሉ ሰነዶች በሚያዘጋጅበት ወቅት የሚከተለው ስርዓት ጠቅላላ የውል ሁኔታዎችን (General Conditions of Contract)እና እነዚህኑ የሚያሻሽሉ ልዩ የውል ሁኔታዎችን (Special Conditions of Contract) በሚፈቅድ መልኩ ነው። ከዚህም አልፎ የኤጀንሲውን የፅሁፍ ስምምነት በቅድሚያ በማግኘት "ከተፈቀደ መደበኛ የግዥ ሰነዶች አሰራሩን ከሚመሩ ቅጾች እና ሌሎች ለግዥ አፈፃፀም አግባብነት ካላቸው ሰነዶች ውጪ ግዥ"ሊፈጸም እንደሚችል በሕጉ ተደንግጓል።[9]

3.2

<u>ተከራካሪዎቹ ያልተነሡ ፍርድቤቶቹም ያልተመለከቷቸውና ቢመለከቷቸው ኖሮ በሚል ሊነሡ</u>
<u>የሚችሉ ነጥቦች</u>

ዋናዎቹ ውሎች በአሰሪና በስራተቋራጩ መካከል በመጀመሪያ ጊዜ የተፈረሙት ሰኔ 6 ቀን 1986 እና ነሐሴ 20 ቀን 1986 ዓ.ም. ሲሆን፤የማሻሻያ ውሎቹን የተፈራረሙት ደግሞ ሕዳር 19 ቀን 1987 ዓ.ም. ነበር። ባትኮዳ የተባለው መንግስታዊ ተቋም ያወጣው የግንባታ ውሎች ጠቅላላ ሁኔታ (በተከራካሪዎቹም ሆነ በፍርድ ቤቶቹ ውሳኔዎች ውስጥ ደንብ እየተባለ የሚጠቀሰው)የመጀመሪያዎቹ ውሎች አካል እንዲሆን ግራቀኙ የተስማሙ ሲሆን፤በማሻሻያዎቹ ውሎች ውስጥ በስምምነት ካሻሻሏቸው የባትኮዳ ድንጋጌዎች በቀር የባትኮዳ ሰነድ የውለታዎቹ አካል መሆኑ ቀጥሎ ባለበት ጊዜም ሆነ

[9] አዋጅ ቁ.430/1997 ዓ.ም. አንቀጽ 11(4እና5)እና አንቀጽ 35 ይመለከቷል።

በፍ/ቤቶቹ ክርክር በሚደረግበት ወቅት ይኸው ባትኮዳ (በሙሉ ስሙ "የሕንፃና የትራንስፖርት ኮንስትራክሽን ዲዛይን ባለስልጣን" በእንግሊዝኛ አጠራሩ ደግሞ "The Building and Transport Construction Design Authority" በመባል የሚታወቀው) የተባለው ተቋም የተቋቋመበት አዋጅ ቁጥር 327/1979ዓ.ም. በአዋጅ ቁጥር 41/1985 ዓ.ም.[10] ተሽሮ የባትኮዳ መብቶችና ግዴታዎች በዚሁ አዋጅ ለስራና ከተማ ልማት ሚኒስቴር ተላልፈዋል።

ሆኖም ምንም ማስረጃ ሳይቀርብበት የተረጋገጠው እና መረጋገጡም የዳኝነት ግምት (Judicial Notice)ሊወስድበት የሚገባው የባትኮዳ ሕልውና ማብቃት ጉዳይ በተከራካሪዎቹም አልተነሳም። ፍርድቤቶቹም አልተመለከቱትም።[11] በሌላ በኩል ተከራካሪዎቹ ወገኖች ዋናዎቹን ውሎችም ሆነ ማሻሻያዎቹን ሲፈራረሙ ባትኮዳ የተቋቋመበት አዋጅ መሻሩም ሆነ ስልጣንና ተግባሩ ወደ ሌላ ሚኒስቴር መ/ቤት የተላለፈ መሆኑን አያውቁም ነበር ብሎ በእርግጠኝነት መባፍ ይቻላል። እንደዚህ ዓይነት ስህተቶች ከፍተኛ በሆኑ ሰነዶች በሚቋቋመው የግንባታ ውሎች ውስጥ የሚያጋጥሙ ናቸው። አብዛኛውን ጊዜ ቀደም ብለው የተዘጋጁና የተፈረሙ ውሎችን የተዋዋይ ወገኖችን ስም፣አድራሻቸውን፣ሊሠራ የታሰበውን ስራዎች ዝርዝር እና ዋጋ ብቻ በመለወጥ (Copy & Paste በማድረግ)ተገቢውን ጥንቃቄ ባለማድረግ የሚዘጋጁ ውሎች ለከፍተኛ አለመግባባት እና ጉዳት ይዳርጋሉ።[12]

ከፍብለን ያነሳነውን የባትኮዳን በሕግ ሕልውናው የማብቃቱን ነገር በመከራከሪያነት ቢያነሳው የሚጠቀመው ወገን አቀረበው ወይም ደግሞ የሰበርሰሚው ችሎት የሕግ ጥያቄን ያስከትላል ብሎ አነሳው

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[10] ይሄው አዋጅ ቁ.41/1985 (እንደተሻሻለ)በአዋጅቁ.4/1987 ዓ.ም. የተሻረ ሲሆን ይህም አዋጅ እራሱ በአዋጅ ቁጥሮች 93/1990፣134/1991፣256/1994፣380/1996፣411/1996 እና 465/1997 የተሻሻለ ቢሆንም በአዋጅ ቁ. 471/1998 ተሽሯል። ይኸው አዋጅ ቁ. 471/1998 ዓ.ም. (እንደተሻሻለ) በአዋጅ ቁ.691/2003ዓ.ም. የተሻረ ሲሆን ይኸው አዋጅ ደግሞ በማረሚያ ቁ.7/2003 የታረመ ቢሆንም በአዋጅ ቁጥሮች 720/2004 እና 723/2004 ተሻሽሏል።

[11] በእርግጥ የፌ/ከ/ፍ/ቤት ጉዳዩን በመጀመሪያ ደረጃ የተመለከተው በመሆኑ በፍ/ብ/ሥ/ሥ/ሕጉ ካለበት ገደብ አንፃር በግራ ቀኙ ያልተነሱ ጉዳዮችን በራሱ አልተመለከተም ተብሎ ትችት ማቅረቡ አግባብ ላይሆን ይችላል።

[12] የዚህ ጽሁፍ ጸሀፊ በፍ/ቤትና የመዳኘት ስልጣን በተሰጣቸው ሌሎች አካሎች ዘንድ በሚታዩ የግንባታ ውሎችን በሚመለከቱ ክርክሮች ላይ እንደዚህ ዓይነት ችግሮች ገጥሟቸዋል። በአንድ ጉዳይ ላይ ተዋዋዮቹ ወገኖች የውላቸው አካል እንዲሆኑ በሚዘረዝሩበት ክፍል ውስጥ ሕልውናው ያበቃው ባትኮዳ ያወጣው ጠቅላላ ሁኔታ እና የስራ ከተማ ልማት ሚኒስቴር እ.ኤ.አ. ዲሴምበር 1994 ያወጣው የውሎች ጠቅላላ ሁኔታ በአንድ ላይ የውለታው አካል ናቸው ብለው ተስማምተውባቸዋል። በአንድ ሌላ ጉዳይ ደግሞ በተዋዋዮቹ መካከል የውለታው ጠቅላላ ሁኔታዎች እንዲሆን የተጠቀሰው የመንግስት ግዥ ኤጀንሲ በ1998 ዓ.ም. ያወጣው ጠቅላላ የውል ሁኔታዎች ሆኖ ነገር ግን የዚህ ውል አካል በሆነ እና የውሎችን መሠረታዊ ነጥቦችን በአጭሩ በሚያስቀምጠው አባሪ ውስጥ ደግሞ የስራና ከተማ ልማት ሚኒስቴር አውጥቶት የነበረው የውል ሁኔታዎች አንቀጾች ተጠቅሰዋል።

የሚል ግምት (assumption) በመያዝ ምን ውጤቶች ሊከተሉ ይችሉ ነበር የሚሉ እና ተያያዥ ጉዳዮችን አንስተን እንወያይ።

በቅድሚያ ግን ፅሁፌን የምቀጥለው የተወሰኑ ነጥቦችን ግልፅ በማድረግ ይሆናል። ከፍብዬ በተራቁ. 3.1 በመሐንዲሱ እና በአሠሪው መካከል የነበረው ውል ቀደም ብሎ የተቋረጠ በመሆኑ መሐንዲሱ ይህን ጉዳይ በተመለከተ ምንም ዓይነት ስልጣን የለውም በማለት የገለፅኩት አቋሜን አልለወጥኩም። ስለዚህም በፅሁፌ ለመቀጠል መሐንዲሱ ጉዳዮን ተመልክተው በወሰኑባቸው ጊዜያቶች በሙሉ ከአሠሪው ጋር የነበራቸው የውል ግንኙነት አልተቋረጠም ማለት ግድ ይሆናል።

ሀ. <u>ሕልውናው በአዋጅ ያበቃለት ባትኮዳ በተዋዋዮቹ ወገኖች መጠቀሱ እና በፍ/ቤቶቹም መደገሙ</u>

ከፍብለን በተደጋጋሚ እንደገለፅነው ተዋዋዮቹ ወገኖች የመጀመሪያዎቹ ውሎቻቸውን ከተፈራረሙበት ጊዜ ከአንድ ዓመት በላይ ቀደም ብሎ ባትኮዳን ያቋቋመው አዋጅ ቁ.327/1979ዓ.ም. በአዋጅ ቁ.41/1985ዓ.ም. ተሽሯል። ተከራካሪዎቹም ሆኑ ፍ/ቤቶቹ በሌለ ተቋም ላይ በመደገፍ (የሌለ ተቋምን በመጥቀስ)ያቀረቧቸው ክርክሮች እና የሠጧቸው ፍርዶች ምንም ትርጉም የላቸውም።

ለ. <u>የባትኮዳ "መብቶች እና ግዴታዎች" በአዋጅ ቁ. 41/1985ዓ.ም. አንቀጽ 60(2) የተላለፉለት የስራና ከተማ ልማት ሚኒስቴርስ?</u>

በርዕሱ በተጠቀሰው አዋጅ ለሚኒስቴር መ/ቤቱ የተላለፉት የባትኮዳ መብቶች እና ግዴታዎች ናቸው። በአሰሪው የተነሳው ክርክር እና በሰበርስሚው ችሎትም አስፈላጊ እና አስገዳጅ ቅድመ ሁኔታ ነው ተብሎ የተጠቀሰው የጽሁፍ ፈቃድ ለመሐንዲሱ የመስጠት ጉዳይ የባትኮዳ "መብቶች እና ግዴታዎች" ውስጥ ሊካተት የሚችል ነው ወይስ አይደለም? በማለት ሊነሳ የሚችል ክርክር እንደተጠበቀ ሆኖ፤ውሎቹ በተፈጸሙበት ጊዜ ባትኮዳ "በህይወት" ባለመኖሩ ሊቀበለው የሚችለው ነገር የለም። ስለዚህም ሊያስተላልፈው የሚችለው ነገር የለም። ሆኖም ግን ባትኮዳ በአዋጅ ከመፍረሱ በፊት ባትኮዳን በማስገባት በተደረጉ የግንባታ ውሎች የተጀመሩ እና ሳይጠናቀቁ ባትኮዳ በአዋጅ መፍረሱ ለዚህ ጽሁፍ መነሻ በሆኑት ፍርዶች ላይ ከተጠቀሱት ውሎች የሚለይ በመሆኑ በተለየ ሁኔታ ሊታይ ይገባል ማለት ይቻል ይሆናል።[13] ይሄም ሁኔታ ቢሆን አከራካሪ የሆኑ ጉዳዮችን ያስነሳል። የተወሰኑ የጥቦችን እንመልከት።

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[13] ከዚህ ጋር በተያያዘ ብሔራዊ መሐንዲሶችና ስራተቋራጭ ድርጅት (ብ.መ.ስ.ተ.ድ/ስራ ተቋራጭ)እና ዘፍኮ ኃ.የተ.የግ.ማ(ዘፍኮ/አሠሪው)መካከል የነበረው ጉዳይ ጥሩ ምሳሌ ነው። አሠሪው እና ስራ ተቋራጩ በአዲስ አበባ ከተማ ውስጥ ባለስድስት ፎቅ ሕንፃ የመገንባት ውል መጋቢት 4 ቀን 1984 ዓ.ም. ተዋውለው የነበረ ሲሆን በውቀቱ ባትኮዳ የነበረ ሲሆን በባትኮዳ ፅውቀት ኤኪፕ ኢንጂነሪንግ ኃ.የተ.የግ.ማሕበር (ኤኪፕ)አማካሪ መሐንዲስ ሆኖ በአሠሪው ተሰይሟል። በሌላ በኩል አሠሪው እና ስራተቋራጩ ሐምሌ 1 ቀን 1985 ዓ.ም. የማሻሻያ ውል ሲያደርጉ ባትኮዳ አልነበረም። ምናልባትም ከዚህ ቀን በፊት ስራና ከተማ ልማት ሚኒስቴር በውሉ አፈፃፀም ላይ መግባት ጀምሯል። በአሠሪው እና በስራ ተቋራጩ መካከል የነበረውን ውል አፈፃፀም ይቆጣጠር እና ያስተዳድር የነበረው

በግርጌ ማስታወሻ ቁጥር 13 ላይ በዘረዘርነው ጉዳይ ላይ ጉዳዩ ወደ ፍ/ቤት ለአፈፃፀም እስከሄደበት ጊዜ ድረስ ሁለቱም ወገኖች ሚኒስቴር መ/ቤቱ ጉዳዩን ለማየት ስልጣን የለውም በማለት ያቀረቡት ተቃውሞ አልነበረም። በመካከላቸው የነበረው ውል የአስተዳደር መ/ቤት ነው? የሚለው ክርክር እንደተጠበቀ ሆኖ ግራቀኙ ወገኖች በፈ ፀሟቸው ተግባራቶች (አሠሪውም የአማካሪ መሐንዲሱን ውሳኔ ለማሻር ወደ ሚኒስቴር መ/ቤቱ አቤቱታ በማቅረቡ ስራተቋራጩም ለዚሁ አቤቱታ በሚኒስቴር መ/ቤቱ ትዕዛዝ መሠረት መልስ በመስጠቱ) የሚኒስቴር መ/ቤቱን የመዳኘት ስልጣን ተቀብለዋል ማለት ይቻላል።

ነገር ግን በስልጣኑ ላይ ተቃውሞ ለማስነሳት የሚያስችሉ መከራከሪያዎች ነበሩ ብሎ ይህ ፀሀፊ ያምናል። አንዱ ነጥብ ለሚኒስቴር መ/ቤቱ የተላለፈለት የባትኮዳ «መብቶች እና ግዴታዎች» በመካከላችን ያለውን ጉዳይ መዳኘትን አያካትትም የሚለው ነው። ባትኮዳን ያቋቋመው መንግስት ይከተለው ከነበረው የኢኮኖሚ ፖሊሲ አንፃር ከመንግስት ውጭ ያለው ሕብረተሰብ በኢኮኖሚው ውስጥ የነበረው ተሣትፎ ውስን ነበር። በሁሉም ጉዳይ ውስጥ መንግስት የገባበት እና የተቆጣጠረው በመሆኑ የባትኮዳ ተሣትፎ ሠፊ እንደሚሆን መገመት አያዳግትም። ሆኖም ከ1983 ዓ.ም. የመንግስት ለውጥ በኋላ አዲሱ መንግስት ከሚከተለው የኢኮኖሚ ፖሊሲ አንፃር የተቃኙት ሕጎች አካል የሆነው አዋጅ ቁ. 41/1985 ዓ.ም. እና ይህንኑ አዋጅ ለማሻሻል በወጡት ሕጎች የሚኒስቴሩ ስልጣን በሀገሪቱ የግንባታ ኢንዱስትሪ ውስጥ ጠቅላላ ፖሊሲና ስታንዳርዶችን ከማውጣት ጋር የተያያዘ ሆኖ ጉልህ ተሣትፎው በመንግስት ባጀት ከሚሠሩ ግንባታዎች ጋር የተያያዘ ነው። ስለዚህም በግለሰቦች መካከል በሚነሱ የግንባታ ጉዳዮች ላይ በቀጥታ የመዳኘት ስልጣን አለኝ ብሎ ሊገባ አይችልም የሚል መከራከሪያ ሊቀርብ ይችላል።

በሌላ በኩል ሊነሣ የሚችለው የተዋዋዮቹ ውል የማድረግ ነፃነት ነው። ለምሳሌ ያህል በስራና ከተማ ልማት ሚኒስቴር የወጣው የግንባታ ውሎች ጠቅላላ ሁኔታ (Standard Conditions of Contract for Construction of Civil Work Projects, December 1994)ተዋዋይ ወገኖች የውላቸው አካል እንዲሆን ካልተስማሙ በቀር ሕግ ሆኖ በቀጥታ ሊፈፀም የሚችል

ኤኪፕ የሕንፃውን ጊዜያዊ ርክክብ ተከትሎ አሰሪው ለስራተቋራጩ ክፍያ እንዲፈጽም በሰጠው "ውሳኔ" ላይ አሠሪው ቅሬታ አለኝ በማለት ወደስራና ከተማ ልማት ሚኒስቴር ሄዷል። ሚኒስቴር መ/ቤቱም ሚያዚያ 29 ቀን 1991 ዓ.ም. በተፃፈ ደብዳቤ የስራተቋራጩ የክፍያ ጥያቄ አግባብ ነው በማለት ወስኗል።

የሚኒስቴር መ/ቤቱ ውሳኔ እንዲፈፀምለት የስራተቋራጩ በፌዴራል ከፍተኛ ፍ/ቤት 1ኛ ፍ/ብ/ቀ/ክስ ችሎት በመ/ቁ.11720 (የቀድሞው መ/ቁ.91/92) የአፈፃፀም ክስ ከፍቶ የነበረ ቢሆንም አሠሪው በመካከላችን ያለው ውል የአስተዳደር መ/ቤት ውል ስለሆነ እና የአስተዳደር መ/ቤት ውል ደግሞ ለሽምግልና ዳኝነት አይቀርብም የሚል ክርክር በማቅረቡ ፍ/ቤቱም የአሠሪውን ክርክር በመቀበል የተሰጠው ውሳኔ ከመነሻውም ሕገወጥ ነው ሊፈፀም አይችልም በማለት ጥቅምት 9 ቀን 1996 ዓ.ም. ውሳኔ ሰጥቷል። በዚህ ውሣኔ ቅር የተሰኘው ስራተቋራጩ ለፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ያቀረበ ቢሆንም ይግባኝሰሚው ፍ/ቤትም በመ/ቁ.13678 ታህሳስ 26 ቀን 1996 ዓ.ም. በዋለው ችሎት የስር ፍ/ቤትን ትዕዛዝ አፅንቶታል።

አይደለም። ባትኮዳን ባቋቋመው አዋጅ ውስጥ በባትኮዳ የሚወጡ የውል ጠቅላላ ሁኔታዎችን የሕግ ውጤት አስመልክቶ በግልፅ የተቀመጠ ድንጋጌ የለም። በግልፅም ሆነ በትርጉም ሊደርስበት በሚችል አገላለፅ የግንባታ ውሎችን አስመልክቶ ለባትኮዳ የተሰጠ የዳኝነት ስልጣንም የለም። ይህን ስልጣን ባትኮዳም ሆነ ሚኒስቴር መ/ቤቱ የሚያገኙት ተቋማቱ ያወጧቸውን ሰነዶች ተዋዋይ ወገኖች የውሎቻቸው አካል ሲያደርጓቸው ብቻ ነው። ስለዚህ ባትኮዳ በህይወት በነበረበት ጊዜ ባትኮዳን ታሳቢ በማድረግ የተዋዋሉ እና ለባትኮዳ የዳኝነት ስልጣን ሠጥተውት የነበሩት ወገኖች ባትኮዳ ሕልውናው ሲያበቃ በመካከላቸው ያለውን አለመግባባት በሁለተኛ ደረጃ የሚያይና የሚወስን ተቋም (ግለሰብ)የመምረጥ መብታቸው ሊከበር ስለሚገባ በቀጥታ ሚኒስቴሩ ባትኮዳን በመተካት «ዳኛ» ሆኖ ሊገባ አይችልም በማለት ክርክር ሊቀርብ ይችላል።

ማጠቃለያ

4.1 ለዚህ ፅሁፍ መነሻ በሆኑት ፍርዶች እንደተመለከተው ሶስት ወገኖች በግንባታ ውል ውሰጥ አለ። እነርሱም አሠሪው፣ስራተቋራጩ እና አማካሪ (ተቆጣጣሪው)መሐንዲስ ሲሆኑ በአሠሪው እና በስራተቋራጩ መካከል የውል ግንኙነት አለ። በሌላ በኩል በአሠሪው እና በአማካሪ መሐንዲሱ መካከል የሙያ አገልግሎት ውል ወይም የቀጣሪ እና የተቀጣሪ ውል አለ። በስራተቋራጩ እና በአማካሪው መሐንዲስ መካከል ግን ምንም የውል ግንኙነት የለም።

4.2 በስራተቋራጩና በአማካሪ መሐንዲሱ መካከል የውል ግንኙነት የሌለ ቢሆንም መሐንዲሱ ከአሠሪው ጋር ባለው የውል ግንኙነት መነሻ አሠሪውን በመወከል ስራተቋራጩ ከአሠሪው ጋር በገባው ውል መሠረት ግንባታውን እያከናወነ መሆኑን፣ለተሠራው ስራ ሊከፈለው የሚገባውን መጠን የማረጋገጥ፣የለውጥ ስራ ትዕዛዝ መስጠት፣...ሌላው ቀርቶ በአሠሪውና በስራተቋራጩ መካከል የሚነሱ አለመግባባቶችን ተመልክቶ ውሣኔ የመስጠት ሥልጣን አለው። አማካሪ መሐንዲሱ ሁለት ኃላፊነት አለበት፤የአሠሪው ወኪል ነው። የዳኝነት ሚናም አለው። የነዚህ ሁለት ኃላፊነት ምንጩ ከአሠሪው ጋር የገባው ውል ነው። አማካሪ መሐንዲሱ በተዋዋዮቹ መካከል የሚነሱ አለመግባባቶችን አይቶ በመጀመሪያ ደረጃ የመወሰን ሥልጣን አለው መባሉ መሐንዲሱ የአሠሪው ወኪልና ተቀጣሪ መሆኑን ሊያስዘነጋም አይገባም።

ከፍብለን ያየናቸው ሁለት ፍርዶች ከዚህ አንፃር ስህተት የተፈፀመባቸው ናቸው። የከፍተኛው ፍ/ቤት በመሐንዲሱና በአሠሪው መካከል ያለው ውል ቀደም ብሎ የተቋረጡ ለመሆኑ በማስረጃ የተደገፈ ክርክር ቢቀርብለትም ክርክሩን ውድቅ ያደረገበት ምክንያት በመካከላቸው ያለውን ግንኙነት ካለማጤን የመጣ ነው። በሌላ በኩል የሰበርሰሚው ችሎት ይህን በቅድሚያ ሊያየው የሚገባውን ነጥብ ሳያይ መሐንዲሱ የባትኮዳን የፅሁፍ ፈቃድ በቅድሚያ ሳያገኝ የሠጠው ፍርድ ሊፈፀም የሚችል አይደለም ወደሚለው ነጥብመሄድአልነበረበትም።

መመስከሪያ ማመሳከሪያ

ይህ የፕሮጀክት መሐንዲሱ ውሳኔ እንዲፈጸምላቸው የሥራ ተቋራጩ በፌደራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁ.37147 የአፈጻጸም ፋይል የከፈቱ ሲሆን ተከሳሹም ቀርቦ ውሳኔው ሊፈጸም አይገባም በማለት ስለተቃወመ ፍ/ቤቱ ጥቅምት 14 ቀን 1999 ዓ.ም በዋለው ችሎት በጉዳዩ ላይ የሚከተለውን ውሳኔ ሰጥቶአል::

ዳኛ:-ሙስጠፋ አህመድ::

የፍርድ ባለመብት በ02-06-98 ዓ.ም. በተጻፈና ፍ/ቤቱ በ25-05-98 ዓ.ም. በዋለው ችሎት በሰጠው ትዕዛዝ መሠረት ተሻሽሎ በቀረበ የአፈጻጸም ማመልከቻ፤

1. የፍ/ባለመብቱና የፍ/ባለዕዳው በአፋር ብሔራዊ ክልላዊ መንግስት በአሳይታ ከተማ የሚሠሩ ሶስት (ማለትም የመስጊድ፣የመኖሪያ ቤቶችና የትምህርት ቤት) የግንባታ ሥራዎችን አስመልክቶ ሰኔ 6 ቀን 1986 ዓ.ም. እእና ነሐሴ 26 ቀን 1986 ዓ.ም. ውል ያደረጉ መሆኑን፣ የእነዚሁ ሶስት ውሎች አካል ነው የተባለውን «The Standard Conditions of Contract for the Construction of Civil Works Project BATCODA, December 1987» አንቀጽ 1(C)፣1(D) እና አንቀጽ 67 ድንጋጌዎችን ለማሻሻል ሁለቱም ወገኖችእእ.ኤ.አ. በ28-11-94 (ጎዳር 19 ቀን 1987 ዓ.ም) ለሶስቱም ውሎች ተመሳሳይ ይዘት ያላቸውን ሶስት የማሻሻያ ውሎች የተፈራረሙ መሆኑን፣

2. በማሻሻያ ውሎቹ መሰረት በሁለቱ ወገኖች መካከል በዋናዎቹ የግንባታ ውሎች አፈጻጸም ላይ ልዩነት ከተፈጠረ መሐንዲሱ አቶ ወንድወሰን አበበ ጉዳዩን ተመልክተው ውሳኔ እንዲሰጡ ስምምነት የተደረገ መሆኑን፣በዚህ መዝገብ አፈጻጸም የተጠየቀውንም ውሳኔ መሐንዲሱ እ.ኤ.አ. በ16-09-2004 (መስከረም 6 ቀን 1997 ዓ.ም.) በውሎቹ በተሰጣቸው ስልጣን መሠረት የሰጡ መሆኑን፣በማሻሻያ ውሎች አንቀጽ 2(1)(B) መሰረት መሐንዲሱ በሰጡት ውሳኔ ቅሬታ ያለው ወገን ውሳኔው በደረሰው በ45 ቀናት ውስጥ ይህንኑ ለሌላኛው ወገን በጽሑፍ መግለጽ የነበረበት ቢሆንም ውሳኔው በ08-02-97 ዓ.ም. የደረሰው ባለዕዳው ይህ የአፈጻጸም አቤቱታእእስከቀረበበት ቀን ድረስ በውሳኔው ቅሬታ ያለው ስለመሆኑ የገለጸው ነገር ስለሌለ በውሉ መሠረት ውሳኔው የመጨረሻ መሆኑን፣

3. መሐንዲሱ ከላይ በተገለጸው መሠረት የፍ/ባለዕዳው ለፍ/ባለመብቱ በአጠቃላይ ብር 19,760,954.79 (አስራ ዘጠኝ ሚሊዮን ሰባት መቶ ስድሳ ሺህ ዘጠኝ መቶ ሃምሳ አራት ብር ከሰባ ዘጠኝ ሳንቲም) እንዲከፍል ውሳኔ የሰጡ መሆኑን፣ባለዕዳው በውሳኔው ቅሬታ ያለው መሆኑን እስካልገለጸ ድረስ ውሳኔው በ30 ቀናት ውስጥ መፈጸም ሲገባው እስከአሁን ድረስ ያልፈጸመ መሆኑን፣

በመዘርዘር ባለዕዳው ይህንኑ በመሐንዲሱ የተወሰነውን ገንዘብ በማሻሻያ ውሎቹ መሠረት መክፈል ከነበረበት ከኅዳር 8 ቀን 1997 ዓ.ም ጀምሮ ከሚታሰብ ዘጠኝ ከመቶ ወለድ ጋር ለባለመብቱ እንዲከፍል፣ በአፈጻጸም አቤቱታው ምክንያት የወጣውን የዳኝነት፣የቴምብር ቀረጥና የጠበቃ አበል ለባለመብቱ እእንዲተካ ትዕዛዝ ይሰጥልኝ፣በማለት የፍ.ብ.ሥ.ሥ.ሕ.ቁ. 316፣319 እና 378 ድንጋጌዎችን መሠረት በማድረግ የጠየቀ ሲሆን በ02-06-98 ዓ.ም. ከተፈጸመ ማስረጃ መግለጫ ጋርም ዋናዎቹንና የማሻሻያ ውሎቹን፣የመሐንዲሱን ውሳኔና ውሳኔው በ09-02-97 ዓ.ም ለባለዕዳው የደረሰበትን ማረጋገጫ በማስረጃነት አቅርቦአል።

የፍ/ባለዕዳው በበኩሉ በ07-07-98 ዓ.ም በተጻፈ ማመልከቻ የፍ/ባለመብቱ ከአፈጻጸም አቤቱታው ጋር በማያያዝ ያቀረባቸውን የጽሑፍ ማስረጃዎች የአቀራረብ ሥርዓት በተመለከተ የጽሑፍ ማስረጃዎች መቅረብ ስለሚችሉበት ጊዜና ሁኔታ በፍ.ብ.ሥ.ሥ. ሕጉ ከተመለከቱት ድንጋጌዎች አንጻር መቃወሚያ ካቀረበ በኋላ በአማራጭ የአፈጻጸም አቤቱታውን ፍሬ ጉዳይ በተመለከተ ያቀረባቸው የክርክር ነጥቦች ባጭሩ፤

1.የባትኮዳ ደንቦች የውሎቹ የማይነጠሉ አካሎች ሆነው እንደሚቆጠሩ በዋናዎቹ እያንዳንዱ ውል በአንቀጽ 1 ስር በግልጽ የተመለከተ በመሆኑ ምክንያት ደንቦቹ በውሎቹ ላይ ተፈጻሚነት ስላላቸው ደንቦቹ በውሎቹ ላይ ተፈጻሚነት እንደማይኖራቸው አስመስለው ባለመብቱ ያቀረቡት ክርክር ተቀባይነት የሌለው በመሆኑና ደንቦቹን የማሻሻል ሥልጣንም የተዋዋይ ወገኖች ሳይሆን የአውጭው ባለስልጣን (የባትኮዳ) በመሆኑ፣

2.የማሻሻያ ውሎቹ ተፈረሙ የተባሉት ኅዳር 19 ቀን 1987 ዓ.ም. ሲሆን አማካሪው መሐንዲስ በኮንስትራክሽን ተቆጣጣሪነት በባለዕዳው የተቀጠሩት ግን የማሻሻያ ውሎቹ ተፈረሙ ከተባለበት ቀን በኋላ ሁለት ዓመት የሚጠጋ ጊዜ ካለፈ በኋላ በሐምሌ 25 ቀን 1989 ዓ.ም በመሆኑ ምክያት በባለዕዳው ከመቀጠራቸው ሁለት ዓመት በፊት በማሻሻያ ውሎቹ አማካሪ መሐንዲስ ሆነው ሊሰየሙ የሚችሉበት ሁኔታ ካለመኖሩም በላይ መሐንዲሱ ከባለዕዳው ጋር የነበራቸው የሥራ ውል ከጥር 4 ቀን 1996 ዓ.ም ጀምሮ የተቋረጠና የሥራ ስንብትና ተመሳሳይ ክፍያዎች ተከፍሎአቸው ከባለዕዳው ድርጅት የተሰናበቱ በመሆኑና የሥራ ውላቸው ተቋርጦ ከባለዕዳው ድርጅት ከተሰናበቱ ከስድስት ወራት በኋላ ሐምሌ 5 ቀን 1996 ዓ.ም. በባለመብቱ ተመራላቸው የተባለውን አለመግባባት አይቶ የመወሰን ሥልጣን ያልነበራቸው በመሆኑ፣

3.መሐንዲሱ አቶ ወንድወሰን አበበ በመሐንዲስነት አልተሾሙም እንጂ ተሹመዋል ቢባል እንኳ ባትኮዳ ባወጣቸው መደበኛ ሁኔታዎች በአንቀጽ 2(1)ሸ በአስገዳጅነት በተደነገገው መሠረት የባትኮዳን ልዩ ፈቃድ

በጽሑፍ ሳያገኙ በደንቦቹ አንቀጽ 67 መሠረት ጉዳዩን አይተው ውሳኔ ለመስጠት የማይችሉ በመሆኑና ይህንን የጽሑፍ ፈቃድ ስለማግኘታቸው ከባለመብቱ የቀረበ ክርክርና ማስረጃ የሌለ በመሆኑ፣

4. መሐንዲሱ ውሳኔውን የሰጡት በዳኝነት የተሰየመ ሰው በሥነ ሥርዓት ሕጉ መሠረት ሊከተል የሚገባውን የሙግት ሥርዓት ሳይከተሉ በመሆኑ፣በተለይም ባለመብቱ አቤቱታ ስለማቅረቡ ለባለዕዳው ሳያሳውቁ ባለዕዳውን ሳይጠሩና በባለዕዳው በኩል ሊቀርብ ይችል የነበረውን ክርክርና ማስረጃ ሳይሰሙ በመሆኑ ምክንያት ውሳኔአቸው ሕጋዊነት የሌለው በመሆኑ ሕጋዊ ፍርድ ሳይኖር ባለመብቱ ያቀረቡት የወጪና የወለድ ጥያቄም ተቀባይነት ሊኖረው ስለማይገባ፣

ፍ/ቤቱ በሕጋዊ መንገድ የተሰጠና ሊፈጸም የሚችል ውሳኔ የለም በማለት የአፈጻጸም ጥያቄውን ሰርዞ ከተገቢ ወጪና ኪሳራ ጋር ያሰናብተን የሚል ነው።

ከመልሱ ጋር በማያያዝም በ07-07-98ዓ.ም. ከተዘጋጀ የማስረጃ መግለጫ ጋር በባለመብቱ በማስረጃነት የቀረቡትን ዋናዎቹን የግንባታ ውሎች፣መሐንዲሱ አቶ ወንድወሰን አበበ በባለዕዳው ድርጅት የተቀጠሩበትን ጊዜና የስራ ውላቸው ተቋርጦ ከስራ የተሰነናበቱበትን ጊዜ የሚያሳዩ ሰነዶችን፣ የባትኮዳ ደንቦችን አንቀጽ 2(1)ሸ እና አንቀጽ 67 ድንጋጌዎችን እና ሌሎችንም ተዛማጅ ሰነዶችን በማስረጃነት አቅርቧል።

የጽሑፍ ክርክሩ በዚሁ ከተጠናቀቀ በኋላ ፍ/ቤቱ ለጉዳዩ አወሳሰን ጠቃሚ ናቸው ብሎ ያመነባቸውን አንዳንድ ነጥቦች አስመልክቶ ግራ ቀኙን በ01-09-98 ዓ.ም. በዋለው ችሎት አነጋግሮ ክርክራቸውን መዝግቦአል።

አጠቃላይ ክርክሩ በዚህ የተጠናቀቀ ሲሆን ፍ/ቤቱም፤

1. ከተሻሻለው የአፈጻጸም አቤቱታ ጋር በማያያዝ ባለመብቱ ስላቀረባቸው የጽሑፍ ማስረጃዎች የአቀራረብ ሥነ ሥርዓት በባለዕዳው የቀረበው መቃወሚያ ተቀባይነት ያለው ነው ወይስ አይደለም?

2. መሐንዲሱ በኮንስትራክሽን ተቆጣጣሪነት በባለዕዳው በሠራተኛነት የተቀጠረው በተቆጣጣሪ መሐንዲስነት መሰየሙ ከተገለጸባቸው የማሻሻያ ውሎች ተፈረሙ ከተባለበት ቀን ሁለት ዓመት በኋላ በመሆኑና ጉዳዩ በባለመብቱ የተመለከተውም መሐንዲሱ ከባለዕዳው ጋር የነበረው የሥራ ውል ከተቋረጠ ከስድስት ወራት በኋላ በመሆኑ ሥልጣን ሳይኖረው የሰጠውን ውሳኔ እንዲፈጽም መገደድ አይገባውም በማለት በባለዕዳው የቀረበው ክርክር ተቀባይነት ያለው ነው ወይስ አይደለም?

3. መሐንዲሱ ውሳኔውን የሰጠው ስለክርክሮች አወሳሰን አግባብነት ያላቸውን የሥነ ሥርዓት ድንጋጌዎች ሳይከተል በመሆኑ ውሳኔውን ለመፈጸም አልገደድም በማለት ከአለዕዳው የቀረበው ክርክር የሕግ ድጋፍ ያለው ነው ወይስ አይደለም?

4. መሐንዲሱ ውሳኔውን የሰጠው የውሎቹ አካል በሆነው በባትኮዳ ደንብ አንቀጽ 2(1) (ሸ) መሠረት የባትኮዳን ፈቃድ በጽሑፍ ሳያገኝ በመሆኑ ከስምምነታችን ውጪ በተሰጠ ውሳኔ ልንገደድ አይገባም በማለት ከባለዕዳው የቀረበው ክርክር የሕግ ድጋፍ ያለው ነው ወይስ አይደለም?

የሚሉትን ነጥቦች በመለየት ጉዳዩን መርምሮአል፤፤

በዚህም መሠረት የመጀመሪያውን ነጥብ በተመለከተ ባለመብቱ ከአፈጻጸም አቤቱታው ጋር የጽሑፍ ማስረጃዎች ሊያቀርብ የቻለው ፍ/ቤቱ በ25-05-98 ዓ.ም በዋለው ችሎት በሰጠው ትዕዛዝ መሠረት በመሆኑ ባለዕዳው ትዕዛዙ አግባብነት ያለው አይደለም የሚል ከሆነ በይግባኝ ማሳረም የሚችል ከመሆኑ በስተቀር ጉዳዩ በዚህ ፍ/ቤት በድጋሚ ሊመረመር የሚችልበት የሕግ አግባብ ባለመኖሩ የመቃወሚያው ክርክር በዚሁ ታልፉአል።

ሁለተኛውን ነጥብ በተመለከተ፣ባለዕዳው የማሻሻያ ውሎቹ ስለተፈረሙበት ሁኔታ መሠረታዊ ያልሆኑና ተቀባይነት የሌላቸውን አንዳንድ የክርክር ነጥቦችን ከማቅረብ ውጪ ሶስቱንም ውሎች መፈረሙን በግልጽ አልካደም። ውሳኔውን የሰጠው አቶ ወንድወሰን አበበ መሀንዲስ ተደርጎ በባለዕዳው የተሰየመ መሆኑ ደግሞ በሶስቱም የማሻሻያ ውሎች አንቀጽ1(1) ሥር ተመልክቶአል። በሌላ በኩል ደግሞ አቶ ወንድወሰን አበበ የኮንስትራክሽን ተቆጣጣሪ ሆኖ በባለዕዳው የተቀጠረው የማሻሻያ ውሎች ከተፈረሙ ከሁለት ዓመታት በኋላ መሆኑን ባለዕዳው ካቀረበው ማስረጃ መረዳት ይቻላል። ይሁን እንጂ ባለዕዳው የማሻሻያ ውሎቹን መፈረሙንና በውሎቹም ግለሰቡን መሀንዲስ አድርጎ መሰየሙን ያልካደ እስከሆነ ድረስ በመሐንዲሱና በባለዕዳው መካከል የሥራ ውል መቋቋሙም ሆነ መቋረጡ፣እንዲሁም የተቋቋመበትና የተቋረጠበት ቀን፣ተዋዋይ ወገኖችን ማለትም መሐንዲሱንና ባለዕዳውን ብቻ የሚመለከት ከመሆኑ በስተቀር በባለመብቱ ላይ በመቃወሚያነት ሊቀርብ የሚችልበትን ሕጋዊ ምክንያት ፍ/ቤቱ አላገኘም። ጉዳዩ ለመሐንዲሱ የተመለከተ ከባለዕዳው ጋር የነበረውን የሥራ ውል ከተቋረጠ ከስድስት ወራት በኋላ ነው በማለት በባለዕዳው የቀረበው ክርክርም በተመሳሳይ ምክንያት ተቀባይነት ሊኖረው የማይገባ ከመሆኑም በላይ የመሐንዲሱ የሥራ ውል ተቋርጦአል ከተባለ በኋላ ባለዕዳው ይህንኑ ሁኔታ ለባለመብቱ በጽሑፍ በመግለጽ ሌላ ተተኪ

መህንዲስ የተሰየመ መሆኑን ለባለመብቱ ስለማስታወቁ ያቀረበው ክርክርና መስረጃ ባለመኖሩ በአጠቃላይ የመሐንዲሱን የቅጥርና የስንብት ቀን የማሻሻያ ውሎቹ ከተፈረሙበትና ጉዳዩ ለመሐንዲሱ ከተመራበት ቀን ጋር በማያያዝ በባለዕዳው የቀረበው ክርክር ተቀባይነት ያለው አይደለም በማለት ፍ/ቤቱ ወስኖአል።

ሶስተኛውን ነጥብ በተመለከተ፣በመሠረቱ መሐንዲሱ ውሳኔውን ከመስጠቱ በፊት የአቤቱታውን መቅረብ ለሌላው ወገን ማሳወቅና በባለዕዳው በኩል ሊቀርብ የሚችለውን ክርክርና ማስረጃ መስማት የነበረበት መሆኑ ከሥነ ስርዓት ሕጉ አንጻር ተገቢ የነበረ ቢሆንም መሐንዲሱ ውሳኔ የሰጠው ይህን ስርዓት ሳይከተል መሆኑን ከውሳኔው ይዘት መረዳት የሚቻልና በባለመብቱም ያልተካደ ነው። ይሁን እንጂ መሐንዲሱ ውሳኔውን የሰጠው ተገቢውን የክርክር ሂደት ተከትሎ አይደለም የሚል ከሆነ ባለዕዳው ይህንኑ በማሻሻያ ውሎቹና በሥነስርዓት ሕጉ መሠረት በወቅቱ በይግባኝ ማሳረም የሚገባው ሆኖ ሳለ በዚህ መብቱ ሳይጠቀም በተገቢው ወቅት የደረሰውን የውሳኔ ግልባጭ ይዞ ከቆየ በኋላ አሁን ውሳኔውን ላለመፈጸም ይህንን ቅሬታ በመከራከሪያነት ማቅረቡ የሕግ አግባብነት ያለው ሆኖ ስላልተገኘ በዚህ ነጥብ ላይ የቀረበውንም ክርክር ፍ/ቤቱ አልተቀበለውም።

አራተኛውንና የመጨረሻውን ነጥብ በተመለከተ፣ባለዕዳው ያቀረበው ክርክር የባትኮዳ ደንቦች የውላችን አካል መሆናቸው በዋናዎቹ ውሎች አንቀጽ 1 ሥር የተመለከተ ሲሆን መሐንዲሱ በአንቀጽ 67 መሠረት ልዩነቶችን ለመፍታት የባትኮዳን ቀጥተኛ የጽሑፍ ፈቃድ ማግኘት የሚገባው መሆኑ በባትኮዳ ደንብ አንቀጽ 2(1) (ሸ) ሥር በአስገዳጅነት የተደነገገ በመሆኑና መሐንዲሱ ይህንን ፈቃድ ስለማግኘቱ በባለመብቱ የቀረበ ክርክርና ማስረጃ ባለመኖሩ፣ እንዲሁም የባትኮዳ ደንብ አንቀጽ 2(1) (ሸ) በማሻሻያዎቹ ውሎች ያልተሰረዘ ወይም ያልተለወጠ በመሆኑ መሐንዲሱ የባትኮዳን ፈቃድ ሳያገኝ ልዩነቶች የሚፈቱበትን ሁኔታ በተመለከተ ከገባነው ስምምነት ውጪ የሰጠውን ውሳኔ የመፈጸም ግዴታ የለብንም የሚል ነው።

ለዚህ ክርክር ፍ/ቤቱ ግራ ቀኙን ባነጋገረበት በ01-09-98 ዓ.ም. በዋለው ችሎት ባለመብቱ ያስመዘገበው መከራከሪያ የባትኮዳ ደንብ አንቀጽ 2(1) (ሸ) ከዚሁ የባትኮዳ ደንብ አንቀጽ 67 ድንጋጌ ጋር ተያይዞ መታየት የሚገባው በመሆኑና የደንቡን አንቀጽ 67 ድንጋጌ ደግሞ በማሻሻያ ውሎቻችን ያሻሻልነው በመሆኑ የደንቡ አንቀጽ 2(1) (ሸ) ድንጋጌ በእኛ ጉዳይ ተፈጻሚነት የሌለው ከመሆኑም በላይ በማሻሻያ ውሎቻችን አንቀጽ 1(2) ሥር የባትኮዳን ደንብ አንቀጽ 1(መ) በመካከላችን ተፈጻሚ እንዳይሆን አድርገናል፤ይህም ማለት የባትኮዳን ድርጅት፣የድርጅቱን ተቋማዊ አካላትና ባለስልጣናትን፣በመካከላችን ባለው ጉዳይ የሚያገባቸው ነገር እእንዳይኖር

ተስማምተናል ማለት ነው፤መሐንዲሱ ውሳኔውን የሰጠው የባትኮዳን ፈቃድ ሳያገኝ ነው የሚል ከሆነ ባለዕዳው ይህንኑ ተፈጽሞአል የሚለውን ግድፈት ማሳረም የነበረበት በማሻሻያ ውሎቻችን መሰረት በይግባኝ ነው እንጂ በዚህ የአፈጻጸም ክርክር አይደለም የሚል ነው::

ከላይ ለሰፈረው የባለመበቱ ክርክር ባለዕዳው በበኩሉ፣በማሻሻያ ውሉ አንቀጽ 1(2) ሥር የተደረገው ማሻሻያ የባትኮዳን ትርጉም (ፍቺ) የሚገልጸው የባትኮዳ ደንብ አንቀጽ 1(መ) ብቻ መሰረዙን እንጂ የአንቀጽ 2(1) (ሸ) ድንጋጌን ጨምሮ የውላቸው አካል እንዲሆኑ በዋናው ውል የተስማማንባቸው የባትኮዳ ደንቦች በሙሉ መሰረዛቸውን የሚያመለክት ባለመሆኑና የባትኮዳ ደንቦች የውላችን አካል መሆኑን የሚገልጸው የዋናዎቹ ውሎች አንቀጽ 1 ድንጋጌ በማሻሻያ ውሎቹ ያልተሰረዘ ወይም ያልተሻሻለ በመሆኑ፣እእንዲሆም ባለመብቱ በማሻሻያ ውሎቻችን የባትኮዳን ደንቦች አሻሽለናል ቢልም እነዚህን ደንቦች የማሻሻል ስልጣን ደንቦቹን ያወጣው ተቋም የባትኮዳ እንጂ የተዋዋይ ወገኖች ሊሆን ስለማይችል በባለመብቱ በኩል የቀረበው ክርክር ተቀባይነት ሊኖረው አይገባም በማለት በዚሁ በ01-09-98 ዓ.ም. በዋለው ችሎት ክርክሩን አስመዝግቦአል::

ከላይ ከተዘረዘረው የግራ ቀኙ ክርክር አንጻር፣

1. የባትኮዳ ደንቦች የውሉ አካል መሆናቸው በዋናዎቹ ውሎች አንቀጽ 1 ሥር የተመለከተ መሆኑን፣

2. የደንቦቹ አንቀጽ 2(1) (ሸ) መሐንዲሱ በአንቀጽ 67 መሰረት ልዩነቶችን ለመፍታት የባትኮዳን ቀጥተኛ ፈቃድ ማግኘት እንደሚገባው የሚደነግግ መሆኑን፣

3. ግራ ቀኙ በማሻሻያ ውሎቻቸው የባትኮዳን ደንብ አንቀጽ 67 በማሻሻል በሌላ ድንጋጌ የተኩት መሆኑን፣ስለባትኮዳ ደንብ አንቀጽ 2(1)(ሸ) ግን በማሻሻያ ውሎቹ ውስጥ የተገለጸ ነገር አለመኖሩን፣

4. ግራ ቀኙ በማሻሻያ ውሎቹ አንቀጽ 1(2) ሥር አሻሽለናል የሚሉት የባትኮዳ ደንብ አንቀጽ 1(መ) የባትኮዳን ፍቺ የሚገልጽ ሆኖ «ባትኮዳ» ማለት የሕንጻና ትራንስፖርት ግንባታ ዲዛይን ባሥልጣን ሲሆን የባለስልጣኑን የሥራ ክፍሎችና ኃላፊዎችም ይጨምራል ተብሎ የሚነበብ መሆኑን፣ግራ ቀኙ ይህንን አንቀጽ ያሻሻልንበት ነው የሚሉት የማሻሻያ ውሎቹ አንቀጽ 1(2) በባትኮዳ ደንብ አንቀጽ 1(መ) ሥር ያለው ድንጋጌ (ፍቺ) በግራ ቀኙ መካከል ባለው ጉዳይ አግባብነት እንደሌለው የሚያመለክት መሆኑን፣ከዋናው የማሻሻያ ውሎቹ መረዳት ይቻላል::

መሐንዲሱ በዚህ መዝገብ እንዲፈጸም የተጠየቀውን ውሳኔ ለመስጠት በደንቦቹ አንቀጽ 2(1)(ሸ) መሰረት የባትኮዳን ፈቃድ የማግኘት ግዴታ ነበረበት ወይስ አልነበረበትም የሚለውን ነጥብ ፍ/ቤቱ እንደሚከተለው መርምሮአል፡፡

በዚህም መሠረት የባትኮዳ ደንቦች የውሎቹ አካል መሆናቸው፣በማሻሻያ ውሎቹም የባትኮዳ ደንብ አንቀጽ 2(1)(ሸ) ድንጋጌ በግልጽ አለመሰረዙ ወይም አለመሻሻሉ አላከራከረም፡፡ ይሁን እንጂ በአንቀጹ ድንጋጌ ላይ በግልጽ እንደተመለከተው፣ልዩነቶችን ለመፍታት መሐንዲሱ በመሠረቱ በአንቀጽ 2(1)(ሸ) መሠረት የባትኮዳን ፈቃድ የማግኘት ግዴታ የሚኖርበት ልዩነቶቹን የመፍታታት ሥርዓት የሚከናወነው በደንቦቹ አንቀጽ 67 መሰረት ከሆነ ነው፡፡ በፍ/ቤቱ እእምነት መሰረት መሐንዲሱ በአንቀጽ 67 መሰረት ልዩነቶችን የባትኮዳን ፈቃድ ማግኘት አለበት ተብሎ በአንቀጽ 2(1)(ሸ) ስር የተደነገገበት ዓይነተኛ ምክንያት መሐንዲሱ በአንቀጽ 67 መሰረት ልዩነቶቹን መርምሮ በሚሰጠው ውሳኔ ላይ ይግባኙ የሚቀርበው ሰባትኮዳ መሆኑ በአንቀጽ 67 ስር በመደንገጉ ሲሆን ይህም መሐንዲሱ በሚሰጠው ውሳኔ ላይ ሊቀርብለት የሚችለውን ይግባኝ የሚያየው አካል (ባትኮዳ) የጉዳዩን በመሐንዲሱ መታየት መጀመር ከወዲሁ እንዲያውቅና እእንዲፈቅድ እንዲሁም እንደአስፈላጊነቱ ባለው የዘርፉ ደንብና አሠራር መሰረት ስለውሳኔ አሰጣጡ ሥርዓት ተገቢውን እገዛና ክትትል ለማድረግ እንዲያስችለው ታስቦ የተደረገ እእንደሆነ ይገመታል፡፡

በሌላ በኩል ግን ግራ ቀኙ በማሻሻያ ውሎቻቸው ባትኮዳን ደንብ አንቀጽ 67 በሌላ ድንጋጌ የተኩ ሲሆን በዚህ የአንቀጽ 67 ድንጋጌን በተካው አዲሱ ድንጋጌም መሐንዲሱ በሚሰጠው ውሳኔ ላይ የሚቀርበው ይግባኝ ከባትኮዳ ውጪ በሆነ ሌላ አካል እንዲታይ በማድረግ ግራ ቀኙ ልዩነቶች የሚፈቱበትን ሥርዓት በተመለከተ በመካከላቸው ባለው ጉዳይ ባትኮዳ ምንም ዓይነት ጣልቃገብነትና ስልጣን እንዳይኖረው የተስማሙ መሆኑን ከማሻሻያ ውሎቹ አንቀጽ 2 ድንጋጌ መረዳት ይቻላል፡፡ በዚህም ሁኔታ የደንቦቹ አንቀጽ 2(1)(ሸ) በማሻሻያ ውሎች በቀጥታ ያልተሰረዘ መሆኑ ቢታወቅም በልዩነቶች አፈታት ሥርዓት የባትኮዳን ጣልቃ ገብነት (የመሐንዲሱን ውሳኔ በይግባኝ የማየት ሥልጣን) የሚደነግገው የደንቡ አንቀጽ 67 ድንጋጌ በማሻሻያ ውሎቹ በሌላ ድንጋጌ መተካት ግራ ቀኙ የአንቀጽ 2(1)(ሸ) ድንጋጌ በመካከላቸው በሚኖር ጉዳይ ላይ ተፈጻሚ እንዳይሆን በአንድምታ መስማማታቸውን የሚያመለክት እንደሆነ ፍ/ቤቱ ያምናል፡፡ ግራ ቀኙ በማሻሻያ ውሎቹ አንቀጽ 1(2) ሥር የባትኮዳን ፍቺ የሚገልጸው የደንቦቹ አንቀጽ 1(መ) በመካከላቸው ባለው ጉዳይ ተፈጻሚ እንዳይሆን መስማማታቸውን ልዩነቶች የሚፈቱበትን ሥርዓት በተመለከተ በመካከላቸው ባለው ጉዳይ ባትኮዳና ባለስልጣናቱ ምንም ዓይነት ስልጣን እንዳይኖራቸው የተስማሙ መሆኑን የሚያመለክት ነው ከሚባል በስተቀር ለዚህ የማሻሻያ ድንጋጌ የተለየ ትርጉም ሊሰጥ የሚችልበትን ሁኔታ ፍ/ቤቱ አላገኘም፡፡ የባትኮዳ ደንቦች የውሎቹ አካል እስከሆኑ ድረስ በተዋዋይ ወገኖች ፈቃድ እንደተደረጉ ውሎቹ የሚቆጠሩ በመሆኑ ምክንያት ተዋዋዮቹ እነዚህን የባትኮዳ ደንቦች በስምምነት እንደተቀበሉ ሁሉ በስምምነት ማሻሻል የማይችሉበት ምክንያት ስለሌለና ዋናዎቹ ውሎችም ሆነ የባትኮዳ ደንቦች

ይህንኑ የሚከለክሉ ስለመሆኑ ባለዕዳው ያቀረበው ክርክር ባለመኖሩ የባትኮዳ ደንቦች በአውጪው ባለስልጣን እንጂ በተዋዋይ ወገኖች ሊሻሻሉ አይችሉም በማለት ባለዕዳው ያቀረበው ክርክር በፍትሐብሔር ሕጉ ከተደነገገው የሰዎች የመዋዋል ነጻነት አንጻር ተቀባይነት ያለው አይደለም:: በዚህም ሁኔታ መሐንዲሱ ውሳኔውን ለመስጠት የባትኮዳን ፈቃድ የማግኘት ግዴታ ነበረበት በማለት ከባለዕዳው የቀረበው ክርክር ተቀባይነት ያለው ሆኖ ፍ/ቤቱ አላገኘውም::

በመሆኑም መሐንዲሱ ውሳኔውን የሰጠው በባትኮዳ ደንብ አንቀጽ 2(1)(ሸ) መሰረት የባትኮዳን ፈቃድ ሳያገኝ በመሆኑ ከስምምነታችን ውጪ የተሰጠን ውሳኔ የመፈጸም ግዴታ የለብኝም በማለት ከባለዕዳው የቀረበው ክርክር የሕግ ድጋፍ ያለው አይደለም በማለት ፍ/ቤቱ ወስኖአል::

በአጠቃላይ በውሳኔው መሰረት ላለመፈጸም ባለዕዳው ያቀረባቸው የክርክር ነጥቦች ከላይ በሰፊው በተዘረዘረው ሁኔታ ተቀባይነት የላቸውም የተባለ በመሆኑ ባለዕዳው ብር 19,760,954.79 (አስራ ዘጠኝ ሚሊዮን ሰባት መቶ ስልሳ ሺህ ዘጠኝ መቶ ሃምሳ አራት ብር ከሰባ ዘጠኝ ሳንቲም) ለባለመብቱ እንዲከፍል መሐንዲሱ በ06-01-97 ዓ.ም የሰጠውን ውሳኔ ባለዕዳው የመፈጸም ግዴታ አለበት በማለት ፍ/ቤቱ ወስኖአል::

የወለድ ክፍያ ጥያቄን በተመለከተ በውሳኔው ላይ ስለወለድ የተመለከተ ነገር ባለመኖሩ ጥያቄው ታልፎአል:: ባለመብቱ ለአፈጻጸም ክርክሩ ያወጣውን ወጪ የመጠየቅ መብቱ እንደተጠበቀ ሆኖ ዝርዝሩ ሲቀርብ የሚታይ ይሆናል::"

በዚህ ውሳኔ ቅር በመሰኘት የፍርድ ባለዕዳው አልመሸ ይግባኝ ለፌደራል ጠቅላይ ፍርድ ቤት ያቀረበ ሲሆን ፍ/ቤቱም የግራ ቀኙን ክርክር ሰምቶ በ25/06/2000 ዓ.ም. በመዝገብ ቁ.27478 በሰጠው ውሳኔ የከፍተኛውን ፍርድ ቤት ውሳኔ አጽንቶታል:: እንደገናም፣በዚህ ውሳኔ ላይ የፍርድ ባለዕዳው ለሰበር አቤቱታ ያቀረበ ሲሆን ችሎቱም በሰ/መ/ቁ36577 አቤቱታውን በመቀበል ሰኔ 16 ቀን 2001 ዓ.ም. በሰጠው ፍርድ የሥር ፍ/ቤቶችን ውሳኔዎች ሽሮአቸዋል:: ችሎቱም በሰጠው ውሳኔ ላይ የሚከተለው ፍሬ ቃል ይገኝበታል:

"<u>ዳኞች</u>:- ዓብዱልቃድር መሐመድ፣ሒሩት መለሰ፣ጸጋዬ አስማማው፣በላቸው አንሺሶ፣ሱልጣን አባተማም::

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ይህ ችሎትም መሐንዲሱ ሰጡ የተባለው ውሳኔ ግራ ቀኙ ካደረጉትና ከባትኮዳን አኳያ በፍርድ ሊፈጸም የሚችል መሆን አለመሆኑን፤ እንዲሁም ፈቃድ የማግኘትን ቅድመ ሁኔታታ በስምምነት ያስቀሩት መሆን አለመሆኑን ለመመርመር አቤቱታው ለሰበር ችሎት ያስቀርባል በማለት ግራ ቀኙ ክርክራቸውን በጽሑፍ ያቀረቡ ሲሆን ችሎቱም የቃል ክርክራቸውን በተጨማሪ ሰምቷል፣ አቤቱታ የቀረበበትንም ውሳኔ አግባብ ካለው ሕግ አኳያ መርምሯል::

ከላይ እንደተመለከተው፣የክርክሩ መነሻ ግራ ቀኙ በአፋር ብሔራዊ ክልላዊ መንግስት አሳይታ ከተማ ውስጥ የሚሰሩትን 3 ግንባታዎች በተመለከተ ባደረጉት ውል ምክንያት የተነሳውን አለመግባባት ተመልክተው መሐንዲሱ የሰጡት ውሳኔ እንዲፈጸም የቀረበው አቤቱታ ነው:: ተጠሪ

ውሳኔው ሊፈጸም ይገባል የሚሉት ለሶስቱ ግንባታ ውሎች በተደረጉት ማሻሻያ ውሎች የዋናዎቹ ውሎች አካል የሆነው የባትኮዳ ደንብ አንቀጽ 1(ሐ)፣1(መ) እንዲሁም 67 ስለተሻሻሉና በዚህም መሰረት በሁለት ወገኖች የሚነሳውን አለመግባባት አይተው እንዲወስኑ ለአቶ ወንድወሰን አበበ ስልጣን ተሰጥቷቸው ውሳኔ ስለሰጡ፣አመልካችም ውሳኔው ደርሶት በውሳኔው ቅሬታ ካለው በውሉ በተመለከተው ጊዜ ውስጥ ይህንኑ ለተጠሪ ስላላሳወቀ ውሳኔው የመጨረሻ እእና ተፈጻሚነት ያለው መሆኑ ነው በማለት ነው::

አመልካች በበኩሉ መሐንዲሱ በአማካሪነት አልተሾሙም፣ተሹመዋል ቢባል እንኳ የባትኮዳን ፈቃድ ስላላገኙ ውሳኔ መስጠት አይችሉም፣የባትኮዳን ደንብ ማሻሻል የሚችለው አውጪው ባለስልጣን እንጂ ተዋዋዮች ሊሆኑ አይችሉም፣የሚሉና ሌሎች ክርክሮች አቅርቦ ውሳኔው ሊፈጸም አይችልም ብሏል::

ይህ ችሎትም ለአፈጻጸም ምክንያት የሆነው ውሳኔ ሊፈጸም የሚችል ነው አይደለም የሚለውን ለመመለስ በቅድሚያ ውሳኔውን ሰጡ የተባሉት መሐንዲስ ውሳኔውን ለመስጠት ስልጣን ነበራቸው ወይ የሚለውን ነጥብ መመርመር ያለበት ሆኖ አግኝቶታል:: ተጠሪ፣መሐንዲሱ ውሳኔውን ለመስጠት ስልጣን ነበራቸው የሚሉት የማሻሻያ ውሎችን በመጥቀስ ነው:: በመሆኑም ችሎቱ እነዚህን ማሻሻያ ውሎች ተመለክቷል:: በነዚህ ውሎች ተሻሽለዋል የተባሉት የባትኮዳ ደንብ አንቀጽ 1(ሐ)፣(መ) እና 67 ናቸው:: የባትኮዳ ደንብ አንቀጽ 1(ሐ) መሐንዲስ ማለት የተፈጥሮ ወይም ሕጋዊ ሰውነት ያለውና የባትኮዳ መሐንዲስ ተብሎ የተሰየመ መሆኑን ያመለክታል:: ይህ ድንጋጌ በማሻሻያ ውሎቹ ተሻሽሎ መሐንዲስ የሚባለው አሠሪው የሚሰይመው ወይም በየጊዜው የሚሾመው እንዲሆን ተደርጓል:: በግራ ቀኙ ጉዳይ አቶ ወንድወሰን አበበ መሐንዲስ ሆነው መሰየማቸውን የውሎቹ አንቀጽ 1 ያመለክታሉ::

የደንቡ አንቀጽ 1(መ) ባትኮዳ ለሚለው ቃል ትርጉም የሚሰጥ ሲሆን በማሻሻያ ውሎቹ ይህ የደንቡ ድንጋጌ በግራ ቀኙ ግንኙነት ተፈጻሚ እእንደማይሆን ተመልክቷል::

የመጨረሻው ተሻሽሏል የተባለው የደንቡ አንቀጽ 67 ሲሆን ድንጋጌው፣ ባትኮዳ የሚሰይመው መሐንዲስ አለመግባባቶችን አይቶ በሚሰጠው ውሳኔ ያልተስማማ ወገን ለባትኮዳ ይግባኝ የማቅረብ መብት ያለው መሆኑን ሲያመለክት ማሻሻያ ውሎቹ ላይ መሐንዲሱ (በአመልካች የተሰየሙት መሐንዲስ) በሚሰጠው ውሳኔ ግራ ቀኙ ያልተስማሙ ከሆነ ጉዳዩ ለሽምግልና ጉባኤ እንደሚቀርብ ያመለክታል::

ከላይ በተመለከቱት የማሻሻያ ውሎች ከባትኮዳ ደንቦች የተሻሻሉት መሐንዲሱን ባትኮዳ ከሚሰይመው ይልቅ አሰሪው የሚሰይመው መሆኑን የባትኮዳ ትርጉም ለግራቀኙ ተፈጻሚ እንደማይሆን፣እንዲሁም የክርክር መፍቻ ዘዴን ሥርዓት በሚመለከት ብቻ ነው:: ከነዚህ ደንቦች በቀር ሌላ ማሻሻያ ስላልተደረገ ቀሪዎቹ የባትኮዳ ድንጋጌዎች ተፈጻሚ መሆናቸውን መገንዘብ ይቻላል:: ይህ ከሆነ ደግሞ የባትኮዳ ደንብ አንቀጽ 2(1)(ሸ) በግራ ቀኙ ግንኙነት ተፈጻሚ የማይሆንበት ምክንያት አለ ለማለት አይቻልም:: ስለዚህም አለመግባባቱን መዳኘት ከመጀመራቸው በፊት በተጠቀሰው ድንጋጌ መሠረት የባትኮዳን ልዩ ፈቃድ ማግኘት ያስፈልጋቸዋል:: ምክንያቱም ግራ

ቀኙ ይህንን ልዩ ፈቃድ የማግኘት ቅድመ ሁኔታ ቀሪ በማድረግ ያደረጉት ግልጽ ማሻሻያ የለም። ተጠሪ፣መሐንዲሱ ይህ ልዩ ፈቃድ ማግኘት አያስፈልጋቸውም ከማለት ውጪ ፈቃድ አላቸው በማለት ያቀረቡት ክርክርም ሆነ ማስረጃ የለም። የፌደራል ከፍተኛ ፍርድ ቤትም ቢሆን ባትኮዳ ደንብ አንቀጽ 2(1)(ሸ)ን በተመለከተ ግራ ቀኙ ያደረጉት ግልጽ ማሻሻያ የሌለ መሆኑን ተቀብሎ ነገር ግን የዚህ ድንጋጌ አስፈላጊነት በአንቀጽ 67 መሰረት መሐንዲሱ የሚሰጠው ውሳኔ ላይ ይግባኝ የሚቀርበው ለባትኮዳ በመሆኑ ባትኮዳ ጉዳዩ በመሐንዲሱ መታየት መጀመሩን እንዲያውቅና እንዲፈቅድ፣እንደአስፈላጊነቱ ስለውሳኔ አሰጣጡ ሥርዓት ተገቢውን እገዛ ክትትል ለማድረግ እንዲችል ነው፣ግራ ቀኙ ደግሞ ባትኮዳ በጉዳያቸው ጣልቃ እንዳይገባ ያደረጉ በመሆኑ ፈቃድ ማግኘት አስፈላጊ አለመሆኑን በአንድምታ ተስማምተዋል በማለት ነው።

የደንቡ አንቀጽ 2 መሐንዲሱ አለመግባባቶችን ለመፍታት ሌሎች የተዘረዘሩ ጉዳዮች ለመዳኘት ከባትኮዳ ልዩ ፈቃድ የሚያስፈልገው መሆኑን በአስገዳጅነት አስቀምጧል። ከድንጋጌውም መገንዘብ እንደሚቻለው መሐንዲሱ አለመግባባቶችን ከመፍታቱ በፊት ይህን ለማድረግ እእንዲችል ስልጣን የሚሰጠውን ፈቃድ ከባትኮዳ ማግኘት ግዴታ ያለበት መሆኑን ነው። ፈቃድ የማግኘት ግዴታ በመስፈርትነት የተቀመጠውም ፈቃድ ሰጪው አካል ጉዳዩን ለማየት የሚሰየሙት መሀንዲሶች ሥራው የሚጠይቀውን ችሎታ፣ዕውቀት ልምድ እና ሌሎች አስፈላጊ ነገሮችን የሚሉ መሆን አለመሆናቸውን በማረጋገጥ ብቁ ናቸው ለሚላቸው በህግ ፊት ተቀባይነት ያለው ውሳኔ ለመወሰን የሚያስችላቸውን ስልጣን ለመስጠት እና እንዲሁም የግንባታዎችን ጥራት እና ደረጃ ለመጠበቅ መሆኑን ችሎቱ ያምናል። ፈቃድ የማግኘት ዓላማው ይህ ከሆነ ደግሞ ምንም እንኳን መሐንዲሱ በሰጡት ውሳኔ ላይ ይግባኝ ለባትኮዳ የሚቀርብ ባይሆንም መሐንዲሱ አለመግባባቶችን ለመዳኘት ልዩ ፈቃድ ያስፈልጋቸዋል። የሥር ፍ/ቤትም ፈቃድ የማግኘት ዓላማው ጉዳዩ በመሐንዲሱ መታየት መጀመሩን ለባትኮዳ ለማሳወቅና ባትኮዳም አስፈላጊውን ክትትል እንዲያደርግ ብቻ በመሆኑ መሐንዲሱ ፈቃድ ማግኘት አያስፈልጋቸውም በሚል የደረሰበት ድምዳሜ አግባብ ሆኖ አላገኘነውም። በሌላ በኩል የሥር ፍ/ቤት ግራ ቀኙ ባትኮዳ በጉዳያቸው ጣልቃ እንዳይገባ ስላደረጉ የተጠቀሰውን ድንጋጌ ተፈጻሚነት በአንድምታ አስቀርተዋል ብሏል። ነገር ግን በማሻሻያ ውሎቹ ስለ ባትኮዳ ትርጓሜ የሚናገረው አንቀጽ ተፈጻሚነት እንዳይኖረው ያደረገ ሲሆን ትርጓሜውን ተፈጻሚ አለማድረጋቸው የሚያስከትለው ውጤቱ ምን እንደሆነ ግልጽ ባይሆንም በግራ ቀኙ ግንኙነት ባትኮዳ ምንም እንደማይመለከተው የሚያሳይ ነው ማለት ግን አይቻልም። ሀሳባቸው ይህ ቢሆን ኖሮ ይህንኑ በግልጽ ማስቀመጥ በቻሉ ነበር።

በአጠቃላይ በአሠሪው የተሰየመው መሐንዲስ በአሠሪው ከመሰየሙ በተጨማሪ አለመግባባትን ለመፍታት ስልጣን የሚሰጠውን እእና አስገዳጅ የሆነውን የባትኮዳን ልዩ ፈቃድ የማግኘት ቅድመ ሁኔታ ማሟላት ይጠበቅበታል። በተያዘው ጉዳይም ምንም እንኳን በግራ ቀኙ ተዋዋይ ወገኖች የባትኮዳን ደንብ ማሻሻል ይችላሉ አይችሉም የሚለው ክርክር

እንደተጠበቀ ሆኖ ማሻሻል ይችላሉ ቢባል እንኳን ግራ ቀኙ ባደረጉት ማሻሻያ ውሎች መሐንዲሱ አለመግባባቱን አይቶ ለመወሰን ከባትኮዳ ሊያገኝ የሚገባውን ልዩ ፈቃድ የማግኘት ቅድመ ሁኔታ ያላሻሻሉ በመሆኑና መሐንዲሱም ይህን ፈቃድ ስለማግኘቱ የቀረበ ክርክርና ማስረጃ ስለሌለ መሐንዲሱ ውሳኔውን ለመስጠት በሕግ ስልጣን አይኖረውም:: በሕግ ስልጣን የሌለው አካል የሰጠው ውሳኔ ደግሞ በ45 ቀናት ውስጥ ቅሬታውን ለሌላኛው ወገን በጽሑፍ መግለጽ ነበረበት፣ይግባኝ አልተባለበትም፣ በሚል ምክንያት ውሳኔው ሕጋዊ ውሳኔ ተደርጎ ሊወሰድ የሚችልበትና እንዲፈጸም የሚደረግበት የሕግ አግባብ ሊኖር አይችልም:: ስለዚህም የሥር ፍርድ ቤት ከባትኮዳ ልዩ ፈቃድ ያልተሰጣቸው መሐንዲስ የሰጡት ውሳኔ እንዲፈጸም ትዕዛዝ መስጠቱ እና ይግባኝ ሰሚው ፍርድ ቤትም ይህንኑ ማጽናቱ መሰረታዊ የህግ ስሕተት ሆኖ አግኝተነዋል::»

Acquiring Ownership of Property through Possession in Good Faith: Exploring its Dimensions and Scope of Application

A Case Comment

Beza Dessalegn[♣]

1. Introduction

This case comment is inspired by a binding decision rendered by the Federal Supreme Court Cassation Division which held that the right of ownership over 'businesses' can be transferred through possession in good faith. Before directly embarking upon the summary of the facts and analysis of the ruling, the commentary provides for preliminary notes on property law to give a general highlight into the foundations of ownership right. It also in a brief way discusses classification of objects of property as it is indispensable to the analysis of the case at hand. That is then followed by a discussion into the realm of possession in good faith in order to elucidate its scope of application. Afterwards, a case brief of the decision and an analysis of the same is made in the context of examining whether acquisition of ownership through possession in good faith is really applicable to 'businesses'. Finally, the discussions made are summarized and the case comment ends with brief concluding remarks.

2. Preliminary Notes

The subject matter of property or property law can be traced as far back as the Roman times in which they equated it to both physical objects in space and to economic interests understood as rights having a pecuniary value and

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protected by law.[14] Property law is particularly concerned about the relationship of persons with respect to things. In this parlance, property rights exist within the context of a given set of events and realities in which there must exist a subject matter which could be tangible or intangible over which property rights are located.[15] Hence, property law limits and delimits objects or things in relation to which property rights may be exercised and their classification, the types of rights which are considered as property, how property rights are acquired, transferred, extinguished, the specific rights and obligations of the right holder and the comparative obligations of others towards the holder.[16]

Property law generally aspires to put a legal ground for principles, policies and rules by which disputes are to be resolved and transactions may be structured. In the strict legal sense, property refers to a person's right over a thing. In this sense, things are not property but they are objects over which property rights can be held by a person.[17] This can be further corroborated by the expression "things are not property rather they are objects over which property rights can be held." Rights emanating from things or goods are thus regarded as objects of property.

The right to property is an exclusive right to use the thing and to claim it from any person who might have unlawfully taken it away. That is why such an entitlement over the property creates a '*right in rem*' as opposed to '*right*

[14] H.C. Dunning, *Property law of Ethiopia*, AAU Law Library Unpublished Material, P 1.
[15] Muradu Abdo, *The Subject Matter of Property Rights: Naming and Meaning*, Ethiopian Journal of Legal Education, Vol. 2, No. 2, September 2009, p.119.
[16] For an in depth discussion of such rights See, Muradu Abdo, *The Subject Matter of Property Rights,* supra note 2, p. 121.
[17] Muradu Abdo, *Ethiopian Property Law: A Text Book*, School of Law, Addis Ababa University, September 2012, P 14

in personam' which usually applies to rights arising out of law of obligations.[18]

Book III Title IV of the Civil Code primarily governs the Ethiopian context of the relationship that exists between persons with respect to things or objects.[19] However, the Civil Code is not the only legal framework regulating the notion of property in Ethiopia. In addition to it, we have the lease holding proclamation, the condominium proclamation, expropriation of land holdings for public purposes and payment of compensation proclamation as well as some provisions from the Commercial Code, the Criminal Code, the Family Codes and the various directives and regulations issued for the implementation of the various proclamations. It should not also be forgotten that the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) provides the policy as well as the legal framework in which property law is to be understood and interpreted.[20]

As reiterated above, property law has its own realm of application. Not every transaction, right or liability relating to physical objects is within the ambit of its application. Obligations arising between persons especially those which create a '*right in personam*' are depending upon the circumstances governed by law of contracts, torts or laws of inheritance as the case may be.

At this juncture, a distinction should be made between patrimonial legal rights and extra patrimonial rights. Patrimonial rights simply connote those rights which can be assessed in monetary terms while the later refer to all rights which cannot be quantified in terms of money. In our legal framework we find land and natural resources as extra commercium as per Article 40(2)

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[18] Ibid, pp. 20-26.

[19] The provisions beginning from Article 1126 up to Article 1674 of the Civil Code govern such relationships.

[20] Article 40 of the FDRE Constitution provides for such a framework.

of the FDRE Constitution as they are out of the reach of the private domain when it comes to private ownership.

Articles 1126 up to 1139 of the Civil Code tell us in some fashion what 'things' ('goods' in the expression of the Civil Code) under Ethiopian law are and also help us to understand which things may be considered as objects of property in Ethiopian property law.[21] Article 1126 simply states that 'goods' are either movable or immovable without defining what 'goods' are. It also uses the terms 'goods' and 'things' interchangeably, even though in the strict legal sense their meanings are quite distinct.[22]

As will be discussed in the subsequent sections Article1126 has also assimilated incorporeal things like securities to bearer and electricity to refer to corporeal chattels. From this it can be inferred that objects of property under the Civil Code are movables and immovables including those that have been assimilated to corporeal chattels only. Having laid down this preliminary understanding about law of property and objects of property, let us now see the issue of classification.

3. Classification of Objects of Property

It is a common feature of any intelligible study to undertake classification in a scientific way. However, classification of object of property in the Ethiopian legal framework transcends this objective and has a wider set of implications in the transfer, acquisition and abandonment of the right of property over objects. The category in which a certain 'good' is classified is imperative as to which law is applicable to the modality of its acquisition and

[21] Some go on to argue that 'goods' within the context of the Civil Code should be taken to mean anything that is capable of appropriation thereby setting the boundaries for objects of property See, Muradu Abdo, *The Subject Matter of Property Rights*, supra note 2, p.133.

[22] For a discussion of the distinction between 'goods' and 'things', See, Muradu Abdo, *Ethiopian Property Law: A Text Book*, supra note 4, pp. 37-50.

transfer including abandonment of the right of objects of property. The Civil Code seems to have undertaken the classification of goods in a two tier system as primary and subsidiary classification of goods. The primary classification that the Code adopts is by classifying goods as movable and immovable based on the two criterions which are the physical notion of mobility and the legislative fiction it has created.[23] Things which are classified as movables are ones that have a material existence and can move themselves or be moved by man without having to lose their individual character.[24] The Code designates the term corporeal chattels for such goods. The Code goes on and classifies certain intangible things as corporeal chattels by creating a legislative fiction.[25] It is obvious that things in such a category are only to be perceived by the human intellect and are devoid of material existence.

On the other side of the primary classification there exist immovable things otherwise explained as things having relative fixity. The Code by way of enumeration mentions land and buildings as immovable properties.[26] From this classification one can also discern the relative disparity of the law applicable to each undertaking in circumstances of transaction. For example, contracts of mortgage (with the exception of businesses') and antichresis can only be concluded over immovable properties.[27] The requirements of registration and authentication in transferring ownership of an immovable[28] and acquisition of ownership through usucaption[29] are not applicable to

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[23] H.C. Dunning, *Property law of Ethiopia,* supra note 1, p. 6-8.
[24] Article 1127 of the Civil Code.
[25] Articles1128 and 1129 of the Civil Code mentions securities to bearer and natural forces of an economic value which have been mastered by man as the outstanding examples.
[26] Article 1130 of the Civil Code.
[27] See Articles 3042, 3044, 3045 and 3117 of the Civil Code.
[28] See Article 1723 of the Civil Code.
[29] Article 1168 of the Civil Code.

movable properties. In contrast, transfer of ownership upon delivery[30] along with acquisition of ownership through possession in good faith[31] and occupation[32] are not applicable to immovables at all. At this point it is visible that the purpose of classification clearly goes beyond the law of property.

Under the subsidiary classification of goods there exist a set of numerous classifications which have been designed to complement the primary classification of goods.[33] The subsidiary classification of goods includes corporeal and incorporeal, consumable and non-consumable, fungible and non-fungible, divisible and indivisible, principal and fruits, public domain property and private domain property, collective and personal assets, single and collective, present and future properties, as well as ordinary and special movables.[34] For the sake of this case comment discussion will only be made on the subsidiary classification of movables into ordinary and special in the coming sections, as these ones are crucial to the case at hand.

4. Acquisition of Ownership

Ownership is the supreme judicial manifestation of the enjoyment and disposal of property.[35] This has also been described by the Civil Code as the widest right that may be had on a corporeal thing.[36] An owner may do whatever he wants with his property subject to the limitations imposed by the law. This includes the right to *usus, fructus* and *abusus* to the extent of

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[30] Transfer of ownership for ordinary corporeal chattels is effected through delivery or transfer of possession see Article 1193 of the Civil Code.
[31] Article 1161 of the Civil Code.
[32] Article 1151 of the Civil Code.
[33] Muradu Abdo, *Subsidiary Classification of Goods under Ethiopian Property Law: A Commentary*, Mizan Law Review, Vol. 2, No. 1, p. 52.
[34] Muradu Abdo, *Subsidiary Classification of Goods,* supra note 20, p. 52.
[35] H.C. Dunning, *Property law of Ethiopia,* op.cit. P. 23.
[36] Article 1204(1) of the Civil Code.

abandonment. This right is exclusive in the sense that it is something ascribed to the owner only.

Acquisition of ownership could be completed in two ways. The first is original ownership in which a person acquires ownership of a corporeal thing which has never been owned before or has been totally abandoned by a former owner. The second mechanism is through derivative ownership whereby the current owner derives his ownership from a previous owner in accordance with the legal requirements. According to the Civil Code, there are four modalities of acquiring ownership, which are occupation, possession in good faith, usucaption and accession.

Occupation, which is one of the primitive forms of acquiring ownership over, requires the corporeal chattel to be without a master accompanied by possession that need actual control and intention by the possessor to own the property.[37] In case of possession in good faith, four cumulative requirements should be fulfilled before ownership could be acquired. Article 1161 of the Civil Code states 'whosoever in good faith enters for consideration into a contract to acquire the ownership of a corporeal chattel shall become the owner thereof by virtue of his good faith when he takes possession of such chattel [emphasis added]. Usucaption, which is otherwise known as acquisitive prescription, is another mechanism of acquiring ownership over immovable properties. Usucaption which means taken by usage entitles a possessor who has paid tax for fifteen consecutive years relating to the ownership shall acquire ownership right over it.[38] The final mechanism is accession, which refers to the addition of property to another.[39] It could be

[37] Article 1161 of the Civil Code.
[38] Article 1168 of the Civil Code.
[39] The provisions beginning from Article 1170 up to 1183 of the Civil Code deal with Accession.

immovable over an immovable, movable over a movable, or movable over an immovable. Accession could be through union in which one property unites or mixes with the other property or accession through separation, which is when a property is added upon separation like in the case of a principal yielding fruits. Having stated this about the recognized modes of acquiring ownership under the Civil Code, let us now narrow down our discussion to acquiring ownership through possession in good faith.

5. Possession in Good Faith: It's Scope of Application

It is a common rule in Roman as well as Common law that the transferee can take no better title than his transferor as the maxim "nemo dat quod non habet" states.[40] However, this principle is superseded in circumstances of acquiring ownership through possession in good faith provided a contract for consideration for transferring the ownership is made over a corporeal chattel in good faith and the transferee has taken possession of the corporeal chattel as a result. This literally means the transferee can have a better title than the transferor. This is because it is stated that the transferee shall retain the corporeal chattel even though the transferor had no valid title.[41] At this point one is tempted to inquire why such a privilege exists for such an acquirer. This question can be examined from the vantage point of the requirements of possession in good faith.

The scope of application or to which types of 'goods' possession in good faith applies is beneficial in exploring its dimensions. To start from the simplest of issues, let us dwell a little into collective exploitation of

[40] H.C. Dunning, *Property law of Ethiopia,* supra note 4, p. 55.

[41] Article 1161(2) of the Civil Code. However, it should be noted here that in circumstances where the corporeal chattel has been lost or stolen it could be traced back to its owner warranting restitution of the property as provided under Article 1165.

property.[42] Under collective exploitation of property a subsidiary classification of goods as property forming part of the public domain or private domain is adopted by the Civil Code.[43] The basis for such a subsidiary classification is of no doubt driven by the policy consideration that goods forming part of the public domain deserve extraordinary fortification as they are destined for the use of the public.[44] In the presence of such a safeguard, the law distinctively states that property whether movable or immovable which forms part of the public domain may not be acquired by possession in good faith or usucaption.[45]

As stated under Article 1161(1), possession in good faith is only applicable to corporeal chattels. In our discussion made in the preceding sections we have seen that corporeal chattels equate with movable properties.[46] We have also mentioned that under subsidiary classification of 'goods' movable properties are sub-divided into ordinary and special movables, which is explored further in the next section.

5.1. Dichotomy of Movables as Special and Ordinary

Many issues of acquisition and transfer of ownership relating to corporeal chattels are answered by the dichotomy of movables as ordinary and special. There is no explicit mention of the dichotomy of corporeal chattels into ordinary and special, rather recognition of the division can be inferred from some provisions of the Civil Code.[47] These provisions by way of an implicit connotation show one that there exist movable properties which have been accorded special place by the legislature. In doing so, the provisions of the

[42] The provisions beginning from Articles 1444 up to 1488 provide the rules on how goods forming part of the public domain shall be governed.
[43] Article 1444 of the Civil Code.
[44] Article 1445 of the Civil Code.
[45] Article 1455 of the Civil Code.
[46] Article 1127 of the Civil Code.
[47] Articles 1186(2), 2267(2), and 3047(2) are exemplary in this regard.

Civil Code and other separate legislations have singled out a number of movables as special movables warranting separate legal protection especially when it comes to how ownership is to be transferred and acquired over them. Muradu Abdo mentions three compelling reasons for the special attention accorded to them.[48] The first reason he mentions is the economic value that is attached to them. The second one is security reasons warranting tight control of goods like firearms and the third is the need to ensure continued enjoyment by debtors after such things are given in the form of security.

Coming to the perplexing issue of dichotomy, the simplest way of distinguishing between ordinary and special movables is following the rule that every movable which has not been classified by the law as a special movable is an ordinary one.[49] However, this would have the danger of being too simplistic to underpin, as many separate legislations apart from coining out the separate legal requirements do not explicitly name corporeal chattels as special movables. Hence, this would require us to make a further in depth analysis of the matter.

Ordinary movables ownership is transferred by mere delivery accompanied by a contract or other valid causes as the case may be. The moment the person takes possession of the object, ownership is transferred.[50] However, with regard to special movables such an acquisition or transfer shall be accompanied by registration. As all special movables have certificate of title or title deed, their acquisition cannot be made without registration and to some extent authentication of the contract transferring ownership.[51] Such a

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[48] Muradu Abdo, *Subsidiary Classification of Goods,* supra note 20, p. 79.
[49] Ibid, p. 80.
[50] Article 1186(2) cum. Article 1193(1) of the Civil Code.
[51] For example, Ships are registered in accordance with the Maritime Code, motor vehicles are registered in accordance with, Motor Vehicle and Trailer Regulation, legal notice and construction machineries are registered in accordance with registration

move by the legislature clearly has the purpose of encouraging swift market transactions for transacting ordinary movables at the same time enhancing efficiency by reducing transaction cost. Moreover, it would practically be impossible to award each and every ordinary movable with a certificate of title thereby requiring registration and authentication for each of their market operation.

However, in connection with special movables the legislator is driven by a policy consideration that they deserve special protection due to their special significance while at the same time maintaining their swift marketability in the economy. For the purpose of maintaining this objective, the legislator makes sure that separate legislations govern their acquisition and transfer.

Coming back to our starting point, the term corporeal chattels as envisaged under Article 1161(1) of the Civil Code refers to ordinary movables only. As stated in the preceding paragraphs the law governing the acquisition and transfer of ownership of special movables is governed by separate legislations.

6. Case Brief of the Federal Supreme Court Cassation Division[52]

The case first arose at the Addis Ababa City First Instance Court in which the present Cassation Division respondent (W/o Berekenesh Shewarege) who was a plaintiff at the beginning of the suit sued the Addis Ababa City Administration, Woreda 22 Kebele 04 Administration, and Ato Wosene

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and control of Construction machineries proclamation. In addition, The FSC Cassation Division in the case of W/o Asnakech W/Mariam vs Ato Alemayehu Ahemed file no 24643 gave a binding interpretation that authentication is a requirement for the transfer of ownership of a motor vehicle through a contract. It should also be noted here that these laws provide that the particular special movable's ownership shall only be evidenced by the certificate of title awarded to it from the relevant authority.

[52] The full version of the FSC Cassation Division is found in የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች፣ ቅጽ 8, ገጽ 321-323, ጎዳር 2003.

Tsega who are second, third, and fourth respondents respectively at the cassation suit and who were first, second and third defendants respectively at the First Instance Court. The point of contention was a 'business' located in a house located at Addis Ababa City Woreda 22 Kebele 04 house no 596 which is registered as a house for undertaking 'business.' The first respondent claimed that the house was registered in her name for undertaking business before and after the government issued a directive for such type of houses. The contract relating to the house was concluded between the first respondent on the one side and second and third respondents on the other. However, the later, by defying their contractual obligations, concluded another business contract over the house with the fourth respondent. The second respondent claims that this amounts to an illegal dispossession and sued the second, third, and fourth respondents for possessory (legal) action. The court held that the first respondent possessed the house over a legal business contract before and after the issuance of the government directive. This entails that the rest of the respondents had no right justifying their interference in the house. The Court stated that the action they took is an unlawful deprivation of the possessory right of the second respondent and hence ordered for the restoration of the house to the first respondent.

Afterwards the present petitioner (Ato Yalew Dilnesawe) presented himself as a party in opposition to the judgment as per Article 358 of the Civil Procedure Code and sought the Court to review the judgment on the following grounds. He argued that he concluded a sale of business contract over the house located at Woreda 22 Kebele 04 on Yekatit 16 1992 E.C. with the fourth respondent for which he has acquired a business license. However, as per the judgment rendered by the Court, he is being forced to relinquish the house to the first respondent. Therefore, he pleaded to the Court for the setting aside of the judgment which affected his interests.

The Court after examining the arguments of both sides opined that the contract concluded over the house by the first respondent was still in force before and after the issuance of the directive over business houses by the government. In addition, the present petitioner same has not sought any kind of invalidation of the contract. This shows that the fourth respondent had no legal ground to conclude a business contract over the same house with the petitioner. This in effect gives rise to no legal right over the house to the petitioner. Hence, the Court stated that it has affirmed its previous decision upholding the right of the second respondent and dismissed the plea of the petitioner. Discontented by the decision, the petitioner lodged its appeal in the city Court Cassation Division, which was rejected.

The petitioner as a final resort submitted his petition to the Federal Supreme Court (FSC) Cassation Division. The Cassation Division accepted the plea of the petitioner and summoned all the parties for a review of the lower courts' judgment. In its reasoning, the Court opined that the present petitioner in buying the business situated in the stated house by a sale of business contract from the fourth respondent took all the necessary precautions to make sure that the fourth respondent had a legal right over it. He even went to check for the existence of any encumbrance over the house in which the business is conducted at the Acts and Registration Office. This shows that even if the contract which was concluded by the second and third respondents with the fourth respondent for the sale of the business to the present petitioner was illegal, it would not impair any right the petitioner would have on the house as he is a person who entered into the sale of the business contract with the fourth respondent in good faith. The Court went on to state its argument that, as stipulated under Article 1161 of the Civil Code a person who entered into a contract for the acquisition of ownership over a corporeal chattel if she/he took possession of the object and entered into a contract for the same in good

faith shall be regarded as the owner thereof. As business is recognized as an incorporeal movable as per Article 124 of the Commercial Code, this would automatically subject it to the application of Article 1161.

Therefore, as the petitioner possessed the house as a result of a business contract concluded in good faith, the FSC Cassation Division decided that the ruling rendered by the lower courts did not take into account the stipulation provided under Article 1161 of the Civil Code and ordered that it be set aside and instructed that the business located under the Addis Ababa city Woreda 22 Kebele 04 House no 596 shall stay with the petitioner as he acquired it through possession in good faith from the fourth respondent.

7. Analysis of the Ruling

It is interesting to note from the decision of the FSC Cassation Division that it rested its ruling on the argument that business is an incorporeal movable and so long as it is a movable property the scope of application of acquisition of ownership through possession in good faith automatically applies to it. Therefore, the accuracy of the ruling entirely depends on whether 'businesses' could be categorized under the subsidiary classification of ordinary movables for acquisition of ownership through possession in good faith.

As stated in the previous sections, the simplest way of distinguishing a certain corporeal chattel as ordinary or special movable is looking at whether it has been designated as special or not by the legislature. In this regard, the provisions of Article 124-209 of the Commercial Code set for how they should be dealt and transacted with. These provisions sufficiently show that businesses are to be treated separately from the provisions of the Civil Code. But, the FSC Cassation Division to applied Article 1161 of the Civil Code because of the stipulation provided under Article 124 of the Commercial

Code, which defines business as an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying out any of the commercial activities specified under Article 5 of the Code. The problem was the FSC Cassation Division simply singled out and took the term 'incorporeal movable' for granted at face value and cross referred it with the provisions of possession in good faith without a thorough analysis of its components.

A deeper insight into the constituent elements of business reveals that it is composed of both corporeal and incorporeal elements.[53] The corporeal elements are equipments or goods in which the business is carried out.[54] The incorporeal elements are goodwill, trade name, special designations, patents, copyrights and rights like leasing the premises in which the trade is carried on.[55] It is clear from the outset that incorporeal rights are not governed by the provisions of Book III of the Civil Code dealing with goods as they have their own separate legislations dealing with the acquisition and transfer of such type of rights.[56]

Further evidence which rules out businesses from being understood as ordinary corporeal chattel is the duty of registration. Any person or business organization carrying out commercial activities is duty bound to be registered.[57] As business is an incorporeal movable set up for the purpose of carrying out commercial activities it is a requirement that it be registered.[58] As discussed earlier, registration is one of the distinguishing features between an ordinary and special movable. Apart from business being

[53] Article 127 and 128 of the Commercial Code.
[54] Article 128 of the Commercial Code.
[55] Article 127 of the Commercial Code.
[56] See for example Articles 148 and 149 of the Commercial Code.
[57] Article 100 of the Commercial Code.
[58] Article 124 of the Commercial Code.

required to be registered at the time of its establishment, registration is still a requirement when that business is let out for hire or when it is sold.[59] The law states that in circumstances of business being let out for hire or sell, the name of the purchaser or lessee can only be registered after the name of the former is cancelled from the register.[60] It can easily be deduced from that, acquisition and transfer of ownership right over a business by simple delivery corroborated by a contract even with the existence of good faith as stated in the requirements of possession in good faith is not possible. This is because the law unequivocally requires the system of registration in transferring ownership of business from one to the other. Even in the mild cases of hire of a business, for the purpose of protecting the rights of third parties, the law requires the publication of the lease contract[61] and eventually the owner of the business who let out for hire of his business shall cause his name to be struck off and the lessee shall cause his name to be entered in the commercial register.

The purpose behind the stipulation of registration over business is clear: for one thing the legislator has taken due recognition of the economic significance business plays in the country's economy and deduced that it deserves special attention and protection. Moreover, if there is a system of registration, there would be no debate about whether the party was in good faith at the time of the transaction or not over the business. What the contracting party needs to simply do is go on to check for the existence of any encumbrances or previous dealings over the property he intends to transact upon. This way the law ascribes protection for such parties by providing them with a mechanism to check into what they are about to do.

[59] Article 102 of the Commercial Code.
[60] Ibid.
[61] Article 195 of the Commercial Code.

Hence, it offers no consolation by accepting their plea of good faith in such circumstances.[62]

The fact that business is a special movable is not that much hard to figure out. Even a simple look at Articles 171-193 which stipulates for mortgage of business would have been sufficient. The recognition that a business is a special movable, one can argue, has elevated it to the status of an immovable property for it to be subject to mortgage as a security devise as opposed to many special movables which are subject to pledge when it comes to using them as a means of security devices. Needless to mention, once a mortgage is established over a certain property the encumbrance follows the property irrespective of into whosoever hands it falls upon.[63] The simplistic assumption to equate business as an ordinary movable by taking the term that business is an incorporeal movable has led to the application of the provisions of possession in good faith over business by the FSC Cassation Division.

Coming back once again to the case at hand, the petitioner claimed that he bought the business from the fourth respondent. He in effect claimed that he himself secured it from the second and third respondents. Therefore, he should not have been allowed to get hold of the business as an acquirer through possession in good faith. This is because the protection available to him was to go and check on the commercial register[64] for encumbrances if any over the business he wanted to transact upon. In doing so, he could have

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[62] However, it goes without saying that the practical application of these purposes of the law are severely handicapped by the inefficient and clumsy registration system that we have in place at the moment. But, that shouldn't be taken as a justification for giving an interpretation which is far from the sprit and purpose of the law. It should always be the case that the law dictates the practice and not the other way round.

[63] Article 190 of the Commercial Code.

[64] The organization of commercial registers is found legislated from the provisions of Articles 86-93 of the Commercial Code.

found out the existence of a previous contract. If, however, the petitioner having taken all these precautionary measures entered into the contract and the commercial register did not provide him with the relevant information, then the one at fault and to be sued would be the office of the commercial register and not the first respondent.[65]

8. Concluding Remarks

The Ethiopian judicial system has taken a novel step towards bringing consistency and uniformity of judgments by making interpretations of law rendered by five judges at the cassation level of the FSC to have a binding effect on the Court rendering them and subsequently to all subordinate courts.[66] To date, the FSC has done an ardor task of publishing and distributing hundreds of binding decisions in thirteen volumes. These decisions by far have settled many controversies and divisions which have bedeviled the judiciary in dealing with long overdue debates.

In spite of this, judgments given by the FSC Cassation Division have at times been inconsistent and incongruent with one another.[67] A decision given at one time has been undermined or rendered useless by a decision given at a later occasion. This has been exemplified by the numerous decisions the Cassation Division has given on the single issue of interpreting Article 1723 of the Civil Code.[68]

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[65] It is a general principle of extra contractual liability that whosoever has caused damage to another by an offence shall compensate the damage he has caused as stated under Article 2028 of the Civil Code.

[66] Proclamation 454/2005, A Proclamation to Re-amend the Federal Courts Proclamation 25/1996, Article 2(4).

[67] See, Yoseph Aemero, የፍትሐብሔር ክርክሮች ሂደት፡ፈተናዎች እና ተስፋው, in Yazachew Belew (ed.), *The Resolution of Commercial/Bussiness Disputes in Ethiopia: Towards Alternatives to Adjudication*?, Ethiopian Business Law Series, Vol. V, December 2012, P. 15-18.

[68] Ibid.