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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 4, No.1 of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to Fiona McKinnon who did the painstaking editorial work of this issue. We also acknowledge Melkamu Aboma's immense contribution in preparing the final layout.

On this occasion, again, the Editorial Committee would like to make it clear that the *Bahir Dar University Journal of Law* is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of law and practice. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider national, regional, supranational and global perspectives are welcome.

The Editorial Committee appeals to all members of the legal profession, both in academia and in the world of practice, to assist in establishing a scholarly tradition in this well celebrated profession in our country. It is time to see more and more scholarly publications by various legal professionals. It is time for us to put our imprints on the legal and institutional reforms that are still underway across the country. It is commendable to conduct a close scrutiny of the real impacts of our age-old and new laws upon the social, political, economic and cultural life of our society today. It is vitally important to study and identify areas that really demand legal regulation and to advise law-making bodies to issue appropriate legal instruments in time. Many aspects of the life of our society seem to require that we in the legal profession do something today. The Bahir Dar University Journal of Law is here to serve as a forum to make meaningful contributions to our society and to the world at large.

The Editorial Committee is hopeful that the *Bahir Dar University Journal of Law* will engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of our beloved country.

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Bahir Dar University Journal of Law

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Dual Constitutions and Concurrence of Constitutional Powers in Ethiopia: Who Has the Mandate to Determine Particulars by Law?

Nigussie Afesha*

Abstract

Federations vary in the crafting of their constitutions. These variations range from those federations whose constitutional distribution of power is too comprehensive, including details normally articulated in ordinary legislation, to those federations whose constitutions endeavor to demonstrate the major tasks of government in a holistic manner. In those federations which follow the latter trend, only the major issues are stated in their constitutions. The Ethiopian practice resembles the second model. After incorporating major issues explicitly, the FDRE Constitution leaves the details to be determined by ordinary legislation. The same arrangement is observed in regional states' constitutions. The issue therefore is who has the mandate to determine the details through legislation: the federal or regional governments? This article explores how the Constitution provides in what manner the particulars shall be determined by law and attempt to indicate who has the mandate to do that.

Key Terms: Federalism, Constitutional powers, dual constitutions, Ethiopian Constitution

Introduction

The idea of federalism presupposes the existence of tiers of government on the same land that have defined competency and dominion of

jurisdiction and directly act on the same people.[1] These powers and functions are essentially enshrined in their compact law which is also named the supreme law of the land: otherwise called a "federal constitution." It should be noted that federal constitutions vary enormously and contain copious provisions that stipulate distribution of exclusive, concurrent, framework, implied and residual powers of the two tiers of governments.[2] However, constitutional distribution of power is not as comprehensive as the distribution detailed under ordinary legislation. Often, constitutions endeavor to set out the major tasks of different levels of governments. In this manner, constitutions generally outline the powers and functions of each level of government in a holistic manner.[3]

At this juncture, there is a large measure of choice as to what is put into the constitution or left to ordinary laws.[4] By the same token, apart from the usual apportionment of powers either in the exclusive or concurrent powers list, both the FDRE Constitution and the regional state constitutions contain provisions in a number of places that pronounce matters to be dealt

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[1] Solomon Negussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Rev. ed., Wolf Legal Publishers, Oisterwijk, 2008, p.32 [hereinafter Solomon, *Fiscal Federalism*].

[2] Ibid

[3] Alder, John, *General Principles of Constitutional and Administrative Law*, 4th ed., Palgrave Macmillan, Basingstoke, 2002, p. 4 [hereafter Alder, *General Principle of Constitutional Law*].

[4] Anderson, George, *Federalism: An Introduction*, Oxford University Press, Oxford, 2008 [hereinafter Anderson, *Federalism*].

with by ordinary legislation. To use the constitutional terminology, "Particulars shall be defined/determined by law."[5]

This is a clear indication that the Constitution has itself determined what should be incorporated and is leaving the remaining part to subsequent ordinary laws. Therefore, taking the general principles enshrined in the Constitution into account, these matters should be governed by detailed forthcoming legislations. However, some of the perplexing issues in here are how these axioms can be construed? Whose mandate is it to detail these matters by law? Is this considered to be part of residual power of the regional states or not? Close line-by-line scrutiny of the entire text of the Constitution is required to answer these questions.

This article contains diverse issues and is organized as follows. Section 1, which directly follows this introduction, deals with the issue of national and regional anthems. Since the federal and regional constitutions envisage the possibility of preparation of national and regional state anthems respectively, cognizant of this fact this section explains the territorial applicability of the federal and regional states' anthems and examines what

[5] I use this expression for those parts of the constitution that contain this term. The issue is far from being settled. A reader may find the same expression in other parts of the constitution, not included in this article. For instance Article 6 of the FDRE Constitution which is headed 'Nationality' contains the same expression. This provision, states that any person of either sex shall be an Ethiopian national where both or either parent is Ethiopian and that foreign nationals may acquire Ethiopian nationality. In sub-article (3) it says, "Particulars relating to nationality shall be determined by law." The mandate to determine the details by law concerning nationality is indisputably given to the federal government in Article 51(17). It reads as follows: "[It] shall determine matters relating to nationality." Therefore, this part of the Constitution is not incorporated into this piece. The same holds true for other provisions of the Constitution which contain the same kind of expressions and the mandate to determine the details is easily traced by referring to the appropriate provisions of the Constitution that discuss distribution of power: Articles 51, 52 and 55 of the FRDE Constitution.

the practice looks like. Section 2 emphasizes the conduct and accountability of government. This section considers who can enact a law that regulates issues of government conduct and accountability at the federal and regional state levels. This is viewed from the current electoral law perspective in an attempt to highlight the exact mandate of both the federal and regional states on this point. In contrast, Section 3 discusses matters of marital, personal and family rights from the perspective of federal and state constitutions. Section 4 deals with property rights and how these matters are addressed in both the federal and regional constitutions. Section 5 articulates the treatment and status of the federal capital city of Addis Ababa in the FDRE Constitution. The federal Constitution provides for the coexistence of the self-governing power of the Addis Ababa City Administration and its accountability to the federal government. It also deals with who can determine the accountability of the city to the federal government by law, as well as the protection of the interests of Oromia in Addis Ababa. Section six discusses the constitutional articulation of representation of minorities and explains who can determine which communities are qualified to entitle special representation in the HoPR and regional state councils. Finally, section seven contains concluding remarks.

1. The National Anthem in Ethiopia

The national anthem is the third symbol of the state, next to the national flag and emblem.[6] This is one of the pivotal areas where the importance of the symbols of state in enhancing nation- building and creating a spirit of unity

[6] Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect*, Red Sea Press, Ewing Township, 1997, p. 204 [hereinafter Fasil, *Constitution for a Nation of Nations*].

and common pride is well recognized.[7] The FDRE Constitution states that "[t]he national anthem of Ethiopia, to be determined by law, shall reflect the ideals of the Constitution, the commitment of the Peoples of Ethiopia to live together in a democratic order and of their common destiny."[8] This provision articulates the idea that the national anthem should mimic what has been transcribed in the preamble of the Constitution. It is equally important to note that the federal government has enacted a separate proclamation providing for particulars concerning the flag.[9] However, this proclamation does not mention anything about the national anthem. It only indicates the symbolism of the flag and its color composition as well as places and events where the national flag flies. Moreover, it contains a pictorial representation of the same.[10] With this state of affairs in mind, one may well question who has the legal mandate to determine the national anthem. And it is possible to argue that a law promulgated to regulate the national anthem might require the involvement of the two tiers of government.[11] However, there is little room for the involvement of the federation units in the federal law-making process in Ethiopia. The House of Federation has no significant lawmaking power.[12]

Therefore, it may be argued that the mandate to determine the details of a national anthem by law should be left to the federal government for the

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[7] Ibid.

[8] Proclamation No. 1/1995, Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st Year, No. 1, Addis Ababa, 21 August 1995, adopted on 8 December 1994, entry into force 21 August 1995, Article 4 [hereafter, FDRE Constitution].

[9] See Proclamation No. 654/2009 Flag Proclamation, Federal Negarit Gazeta, 15th Year, No. 58, Addis Ababa, 28 August 2009 [hereinafter Flag Proclamation].

[10] Ibid., Articles 5-9.

[11] For the establishment of a federal government and state government, see FDRE Constitution, *supra* note 8, Article 50(1).

[12] See FDRE Constitution, *supra* note 8, Article 62.

following reasons. First, the FDRE Constitution requires that the contents of the national anthem reflect the ideals of the FDRE Constitution, the commitment of the Peoples of Ethiopia to live together in a democratic order and of their common destiny. This mandate is the jurisdiction of the federal government, since regional states are established and empowered to deal with regional matters that are important for the expression of their regional identities. Second, a power which is common to or represents the interests of the member states of the federation is given to the central government.[13] By logical extension we may conclude that since the national anthem is required to reflect the interests of the whole community and to become the symbol of the country, the central government should determine the content of the national anthem by law.

In addition, one may find parallel provisions with the same content in regional constitutions.[14] Some of the expressions shared by these constitutions reiterate the idea that state anthems shall reflect the ideals of the regional states' constitution, the commitment of the peoples of states to live together with the rest of the peoples of Ethiopia in a democratic order, and of their common destiny. However, the language of the constitutions of the regional states still says that details shall be determined by law.[15] Based on these kinds of provisions, it is not illogical to argue that regional states should develop and promulgate laws to regulate their regional anthems.

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[13] Watts, Ronald, *Comparing Federal Systems*, 2nd ed., McGill-Queen's University Press, Montreal, 1999, p. 35 [hereafter Watts, *Comparing Federal Systems*].

[14] See Article 4 of Revised Constitution of Southern Nations, Nationalities and Peoples State, as well as the Oromia, Tigray and Amhara and Afar Regional State Constitutions, and Article 5 of the Revised Somali and Gambela Regional State Constitutions.

[15] Ibid.

However, is this tantamount to allowing regional states to have their own anthems? If the answer to this question is positive, where would the applicability of such provincial anthems be? Where would we use the national anthem if each federal unit prepared its own regional anthem? To explore the matter, let us consider a hypothetical situation where a sports festival is organized among the regional states and a given participant who represents one of the regions becomes a gold medalist. Which anthem should be offered: the national or the regional one? Unless it is decided that there is no practice of celebrating victories by playing the participant's regional anthem after each winning race, it could be agreed that the anthem of the specific region where the winner of a race belongs to will be offered for celebrations. On the other hand, if the national anthem that can be played for the festival, it is purposeless to regulate regional anthems via laws.

If regional states are permitted to have their own anthems to be used in their territory, one also has to determine the situations and places where the national anthem should be applicable. We can reason in the usual way: it should be played in the City Administrations of Addis Ababa and Dire Dawa. For one thing, Addis Ababa and Dire Dawa City Administrations may regulate in the same way as the regional states since they have a full measure of self-government.[16] Second, the federal law has territorial applicability throughout the country,[17] so it can be used everywhere for all kinds of ceremonial events. It can even be argued that the national anthem should be

[16] See Article 49(1) of the FDRE Constitution and the preamble of Proclamation No. 416/2004, the Dire Dawa Administration Charter Proclamation, Negarit Gazeta, 10th Year, No. 60, Addis Ababa, 30 July 2004.

[17] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Wolf Legal Publishers, Oisterwijk, 2006, p. 353 [hereinafter Assefa, *Federalism and Accommodation of Diversity*].

used in federal institutions like universities and the Ministry of National Defense. However, the culture of using it in day-to-day life has vanished unless one argues that it can be used in national Flag Day celebrations or in sports festivals and races within and outside of the country.[18]

Practice across regional states reveals that they have been using the national anthem. The current practice observed in Ethiopia and particularly in Southern Nations, Nationalities and Peoples' Regional State and Gambella and Tigray regional states proves this premise.[19]

However, the practice of the Amhara region is a bit different. The region has prepared its own regional anthem and has been using it at elementary and high schools.[20] But there is inconsistency in using both the national and the regional anthems. In earlier times, the national anthem was played first and the regional anthem next. As time has passed, these high schools have been playing the national anthem in the morning session and the regional anthem in the afternoon. Currently, in some elementary schools, they use the national anthem one day and the regional anthem on the next day.[21] In

[18] Both ETV transmissions and personal observation indicate that the practice these days is to play the national anthem when the ceremony commences.

[19] Concerning the practice in SNNP Regional State, I personally have visited elementary schools and high schools. I also conducted interviews with Chini Obang, who is a resident of the Gambela region and a 5th year law student at Dilla University School of Law, and with Natanaiel Amaniel, who was a student at Nigist Saba Preparatory and High School and is a first year law students at Hawassa University School of Law.

[20] Interviews with Ayanalem Mulate, grade 10 student; Dejenie Tilahun, grade 9 student; Dagim Fikiru, grade 5 student.

[21] Interview with Ato Tesfay Beyene, Unit leader and teacher at Mezezo High School, 20 June 2014.

some high schools, they use the national anthem exclusively throughout the academic calendar.[22]

Regardless of these disparities, the practice which has developed in Amhara regional state, with necessary modifications, can become a model for other regional states that have prepared and wish to use their own regional anthems. Of course, the disparities should be addressed first. And it is appropriate to play the national anthem first and the regional anthem next, in both the morning and afternoon sessions. The national flag shall fly daily at schools, save in the case of a *force majeure* that keeps the national flag from flying.[23] In schools, the flag shall be hoisted in the morning before classes begin and lowered at 6 PM.[24] During this time, it is the national flag which flies higher than the flags of the regional states.[25] In this case, the flag which flies over the regional flag, i.e., national flag, is expected to be raised in conjunction with the national anthem. This demands that the national anthem be played first. The regional anthem may follow. In this way, students can develop the idea of the national sentiment while they cultivate regional identities too.

2. Conduct and accountability of government

The principles of transparency and accountability stand out among the five fundamental principles of the FDRE Constitution.[26] The provision of the Constitution that concerns the conduct and accountability of government not

[22] Interview with Asebae Emishaw, grade 10 student at the Debre Brihan High School on 20 June 2014.
[23] See Flag Proclamation, *supra* note 9, Article 12(1).
[24] See Flag Proclamation, *supra* note 9, Article 15(2).
[25] See Flag Proclamation, *supra* note 9, Article 18(2).
[26] Getachew Assefa, *Ethiopian Constitutional Law with Comparative Notes and Materials: A Textbook*, American Bar Association, Chicago, 2012 [hereinafter Getachew, *Ethiopian Constitutional Law*].

only demands that the conduct and affairs of government be transparent but also explains the way that public officials and elected representatives have to be accountable for any failure in their official duties.[27] It further assures how the people can recall an elected representative in case of loss of confidence. In such a way, it puts accountability not only upon political appointees or high-ranking public servants alone, but also on elected individuals such as members of parliament.[28]

However, the mechanism by which this can be achieved will be determined by law. Cognizant of this fact, the FDRE Constitution apportions this authority to the federal government to enact "all necessary laws" governing *political parties and elections*.[29] This enables us to conclude that it is the federal government that has the mandate to pass laws concerning how elections take place. The law enacted by the federal government is also expected to define how the electorate can recall their appointees at times when they lose confidence in them. The central government exercises this power by legislating electoral law, which encompasses innumerable issues.

This proclamation[30] sets forth the various types of elections that may be conducted in Ethiopia. These are general elections, local elections, by-elections, re-elections, and referendums.[31] The proclamation also defines its scope of applicability. It reads as follows: "This Proclamation shall be applicable *to general elections* and as appropriate to local elections, by-

[27] FDRE Constitution, *supra* note 8, Article 12.
[28] Getachew, *Ethiopian Constitutional Law*, *supra* note 26, p. 54.
[29] FDRE Constitution, *supra* note 8, Article 51(15).
[30] Proclamation No. 532/2007, The Amended Electoral Law of Ethiopia Proclamation, Federal Negarit Gazeta, 13th Year, No. 53, Addis Ababa, 25 June 2007 [hereinafter The Amended Electoral Law of Ethiopia Proclamation].
[31] Ibid. See Article 27 of The Amended Electoral Law of Ethiopia Proclamation.

elections, re-elections and referendums carried out in accordance with the Constitution" (emphasis is added).[32]

A general election is an election which is conducted to elect members of the House of Peoples' Representatives or State Councils simultaneously every five years throughout the country. However, where the electoral board finds it necessary, and it is decided by the House of Peoples' Representatives, a general election may be conducted at other times.[33] This means that this proclamation is equally applicable to elections conducted to the House of Peoples' Representatives or State Councils. Needless to say, the federal government has the power to decide how elections are conducted for the House of Peoples' Representative. However, when it comes to elections for the State Council, this amounts to snatching their constitutional mandate to decide when elections should be conducted. And although the proclamation leaves to the regional states the discretion to decide the number of representatives to be elected to respective state councils, it puts conditions on state councils' plans to change that number.[34] In this case, the regional states are required to give political parties sufficient time for preparation if they decide to change the number of their members.[35]

In contradistinction to general elections, the proclamation gives regional states far-reaching power with respect to local elections, which are used to elect representative to Zone, Woreda, city, municipality and sub-city or Kebele councils. Regional states shall determine by law the number of representatives elected in a constituency for a local election and the number of

[32] Ibid. The Amended Electoral Law of Ethiopia Proclamation, Article 3.
[33] Ibid. The Amended Electoral Law of Ethiopia Proclamation, Article 28 (1) (2).
[34] Ibid. The Amended Electoral Law of Ethiopia Proclamation, Article 28(4).
[35] Ibid.

seats in each council, as well as the date to hold local elections. There is one stringent requirement for local elections. They must be conducted based on regulations and directives issued by the Board in accordance with this Proclamation.[36] This is the other grey area of the proclamation. It is still the central government that can enact laws to regulate elections at the local level. The regional states, in this case, are mandated only to carry out elections in accordance with directives which are issued by the Board. This seems an unfounded intrusion into the constitutional autonomy of the regional states.[37]

Regardless of the above facts, one may find a similar provision in the regional constitutions of the member states of the federation. These provisions state that the affairs of government must be transparent and that officials must be accountable for any failure in their official duties.[38] Following the same format as that of the federal Constitution, they leave the details to be determined by law, meaning that they will define this issue via their own subsequent legislation. At this point one is tempted to inquire about the implication of this undertaking. Do the federal and the regional states enact laws on the same issues? To make the matter a little bit more clear, do regional states have the mandate to decide how the regional council is

[36] Ibid. The Amended Electoral Law of Ethiopia Proclamation, Article 29.

[37] However, some argues that this is not an intrusion per se since this power is given to the electoral board by the FDRE Constitution. They further argue that there is only one electoral board, which is established by the Constitution, and that based on this fact, there is no problem if states conduct elections as per the directives of the board.

[38] See Article 12 of Revised Constitution of Southern Nations, Nationalities and Peoples State, as well as the Oromia, Tigray and Amhara and Afar Regional State Constitutions, and Article 13 of the Revised Somali and Gambela Regional State Constitutions.

composed and how the loss of confidence of a member of a state council is to be determined?[39]

The federal Constitution recognizes the fact that composition of federal houses is re-evaluated on a periodic basis. In this regard, the maximum number of members, duration of the candidates' terms and loss of confidence, representation of minorities and other similar issues need further consideration. Hence, it seems logical to argue that federal law should regulate these matters at the federal level and the same has to be done by the states at the regional level. Unless this can be resolved, the inclusion of such provisions in regional state constitutions becomes purposeless, if not unconstitutional. Currently, most regional states in general, and the SNNP regional state in particular, have failed to enact their own laws in order to implement this constitutional provision.[40]

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[39] Some argue that regional states are entitled to decide how their councils are composed. They further argue that it is the mandate of regional state constitutions to determine how an elected representative is removed from office.

[40] I have gone through the process to check the existence or otherwise of a law that regulates composition of the regional council in this regional state. I did not find clear law in most regions that directly addresses this matter. Of course, there are laws that regulate related matters. To substantiate my argument, let me describe the SNNP regional state's experience. First, the law that relates to this case is Proclamation 42/2002, which talks about establishment of the Southern Nations, Nationalities and Peoples Regional State's Council. The proclamation explains the organization of the state council and its administration, as well as powers and duties of the office and its leadership. In addition, it explains how the office budget can be determined. Therefore this proclamation is not proper to address this matter. The other proclamation that applies is Proclamation 17/2002, which set forth the law about the electorate's loss of confidence in a member of the state zone, special wereda, wereda or kebele council and measures that shall be taken. Article 4 of the proclamation makes clear that loss of confidence can be carried out in accordance with the directive that would be issued by the electoral board. This shows that the regional states admit the fact that this is not the jurisdiction of the state. In an interview with a higher official who wishes to remain anonymous, he explained that they haven't seen whether the regional state has competence to decide loss of confidence for a member of a state council or not. I do not understand this. (Proclamation 42/2002 The Southern Nations, Nationalities and Peoples Regional States Council Establishment Proclamation, Debub Negatit Gazeta, 7th year, No. 12, Hawassa, 2[1]

3. Marital, Personal and Family Rights

The Constitution enumerates the basic and essential conditions of marriage, including consent and equality of the spouses at all stage of their relationship, nevertheless fails to specify marriageable age, leaving this to be determined by subsequent legislation.[41] The same provision is found in regional states' constitutions as well.[42] If this is so, the logical question is whose mandate it is to regulate such details by legislation.

To address the issue, one may need to focus on pertinent constitutional provisions that deal with division of powers. Thorough study reveals that the mandate to enact family law is entrusted neither to the federal government nor to the states, expressly, impliedly or concurrently.[43] However, family law matters are within the domain of regional state powers, and it is pursuant to this power that most regional states have enacted their own regional family codes.[44] Subject to the international legal instruments that have been ratified by Ethiopia, each regional state will determine the marriageable age through its respective family law.[45] If any of the regional states fail to come up with a law that regulates this matter, perhaps that region may apply the provisions of the civil code on family matters.

April 2002, and Proclamation 17/1990 A Proclamation for the Electorate for Loss of their Confidence in the Member of the State Zone, Special Wereda, Wereda or Kebele Council and Measures that shall be taken upon him/her, Debub Negatit Gazeta, 3th year, No. 9, Hawassa, 24 October 1990).

[41] FDRE Constitution, *supra* note 8, Article 34 (1).

[42] See Article 34(1) of the SNNPR, Amhara and Tigray regional constitutions.

[43] FDRE Constitution, *supra* note 8, Articles 51, 52 (2) and 55.

[44] Tilahun Teshome, Ethiopia: Reflection on the Revised Family Code of 2000, unpublished paper, EWLA, 2001.

[45] Ibid.

The other point that requires deliberation is the significance and place of the existing "Revised Family Law."[46] Paragraph five of the revised family law's preamble explains that the territorial applicability of this law is restricted to those administrations that are directly accountable to the federal government. This means that the law is only applicable in Addis Ababa and Dire Dawa City Administrations. Leaving aside the long overdue debate over the constitutionality or otherwise of Dire Dawa City Administration, the case of Addis Ababa at least needs further consideration. As a matter of fact, Addis Ababa City Administration is constitutionally recognized.[47] It has its own legislative council that has power to enact laws and other socio-economic policies.[48] These laws and policies are applicable to the residents of Addis Ababa. By logical extension, Addis Ababa City Administration's legislative council has the competence to enact family law that will be applicable to the residents of the city as well. Otherwise, the competence of the council to pass

[46] Proclamation No. 213/2000 Revised Family Proclamation, Federal Negarit Gazeta, Extraordinary Issue No. 1/2000, Addis Ababa, 4 July 2000 [hereinafter Revised Federal Family Code].

[47] See FDRE Constitution, Article 49(1).

[48] See, The Addis Ababa City Government Executive and Municipal Service Organs Reestablishment Proclamation (Proclamation No. 35/2012, The Addis Ababa City Government Executive and Municipal Service Organs Reestablishment Proclamation, Addis Negari Gazeta, 4th Year, No. 35, Addis Ababa, 9 July 2012), The Secretariat of Addis Ababa City Council, Establishment Proclamation (Proclamation No. 34/2012, The Secretariat of Addis Ababa City Council, Establishment Proclamation, Addis Negari Gazeta, 4th Year, No. 34, Addis Ababa, 9 July 2012), City Government of Addis Ababa Office of the Auditor General Reestablishment Proclamation (Proclamation No. 29/2012, City Government of Addis Ababa, Office of the Auditor General Reestablishment Proclamation, Addis Negari Gazeta, 4th Year, No. 29, Addis Ababa, 18 February 2012), A Regulation to provide for the Code of Conduct of Members of Council of Addis Ababa City (Regulation No. 1/2008, A Regulation to provide for the Code of Conduct of Members of Council of Addis Ababa City, Addis Negari Gazeta, 1st Year, No. 1, Addis Ababa, 3 July 2009), The Addis Ababa City Council Operational Procedure Regulation (Regulation No. 2/2009, The Addis Ababa City Council Operational Procedure Regulation, Addis Negari Gazeta, 1st Year, No. 2, Addis Ababa, 8 October 2009).

such laws is called into question and the full-fledged self-government of the residents of Addis Ababa betrayed.

In this sense, it is logical to argue that the federal government subjectively tips its hand and snatches away the constitutional right of full measure of government from the residents of Addis Ababa. As Wondwossen Wakene aptly stated: "Self-governance is also the liberty to experiment with ventures by way of laws and institutions. Stated otherwise, wielding a capacity to make laws and policies as well as administer and adjudicate those policies and laws implies the possession of a self-governing status."[49]

4. The Right to Property

It is the constitutional right of every Ethiopian citizen to acquire private property. This includes the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.[50] Article 40(4) of the Constitution stresses the right of Ethiopian peasants to obtain land without payment and to be protected against eviction from their possession. However, the Constitution directs the implementation of this provision to be specified by law.[51] The same provision is enshrined in the regional states' constitutions as well.[52]

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[49] Wondwossen Wakene, *Self-governing Addis Ababa, the federal government & Oromia: Bottom lines and limits in self-governance* (Unpublished LLM thesis, Addis Ababa University, 2010) [hereinafter, Wondwossen, *Self-governing Addis Ababa*].

[50] FDRE Constitution, *supra* note 8, Article 40(1).

[51] FDRE Constitution, *supra* note 8, Article 40(4).

[52] See Article 40 (4) of the Revised Constitution of Southern Nations, Nationalities and Peoples State, as well as the Oromia, Tigray and Amhara and Afar Regional State Constitutions.

The problematic part of such an expression hence stems from the difficulty of giving clear-cut jurisdiction for each level of government. As a matter of fact, the federal government is mandated to enact laws on utilization of land and other natural resources.[53] On the other hand, the same constitution empowers the regional governments to administer land and other natural resources in accordance with federal laws.[54] This model is in sharp contrast to the principle of dual federalism[55] that Ethiopia has introduced.[56] In this sense, the executive powers of the federal government are not coextensive with the legislative powers with respect to land and natural resources. To put it differently, the role of the central government is limited to enacting laws and delivering the same to the regional governments for implementation. The regional states execute the federal rural land law in their own right.

This leads us to the question of whether regional governments are competent to enact specific laws for proper enforcement of the federal rural land administration law. Since enforcement is left to the states, it is implied that the mandate to legislate about how this Federal Rural Land

[53] FDRE Constitution, *supra* note 8, Article 55(2)(a).
[54] FDRE Constitution, *supra* note 8, Article 52(2)(d).
[55] The idea of dual federalism presupposes a clear division of legislative, executive and judicial powers of the state between a central government and state governments. Each level of government enacts laws within its domain and executes its own laws through its own executive organ. Hence, each level of government does not depend on the other levels of executive organs to execute its laws. See FDRE Constitution, *supra* note 8, Article 50(2). It says that the Federal Government and the States shall have legislative, executive and judicial powers. This clearly shows the dual nature of Ethiopian federalism. Besides this, Articles 51, 55, 74, 77 and 80(1) respectively illustrate the legislative, executive and judicial powers of the federal government. On the other hand, Articles 52(2), 50(6), 50(7) and 80(2) set forth the legislative, executive and judicial powers of the states. Moreover, Article 50(8) demands that regional states respect the powers of the federal government and likewise that the federal government respect the powers of the states which are defined by this Constitution. This doesn't mean that there is no power concurrency between the federal and state governments.
[56] FDRE Constitution, *supra* note 8, Article 50(2).

Administration Proclamation is enforced is given to the states. This seems to be the reason that the proclamation empowers regional councils to enact land administration laws so long as they are not inconsistent with it.[57]

In addition, in sub-article five of the same provision of the Constitution, pastoralists have the right to free land for grazing and cultivation, as well as the right not to be displaced from their own lands.[58] Here as well, implementation shall be specified by law in due course. Provisions with similar content are included in regional states' constitutions too.[59] And it is the regional states that are competent to determine the details of the law that should be used. For the same reasons, state governments ensure that private investors use land on the basis of payment arrangements established by their own state law.[60]

The provision states that every Ethiopian shall have the full right to immovable property s/he builds and to the permanent improvements s/he brings about on the land by her/his labour or capital. Both the federal and regional constitutions state that the relevant details are to be determined by law.[61] The federal government enacts a framework power on the issue and leaves the details to the regional states. This means that the regional states,

[57] See Article 17(1) of Proclamation No. 456/2005, Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation, Federal Negarit Gazeta, 11th Year, No. 11, Addis Ababa, 15 July 2005 [hereinafter FDRE Rural Land Administration and Land Use Proclamation].
[58] FDRE Constitution, *supra* note 8, Article 40(5).
[59] See Article 40(5) of the Amhara, Tigray Oromia, SNNPR and Gambela Regional States Constitutions, and Article 38(5) of Afar and 40(4) of Harari Regional States Constitutions.
[60] FDRE Constitution, *supra* note 8, Article 40(6).
[61] See Article 40(7) of the FDRE and Revised SNNP, Oromia and Amhara and Afar Regional States Constitutions.

taking their local conditions into account, will enact laws on this matter and enforce the same in their localities.

5. The Federal Capital City: Addis Ababa

The city of Addis Ababa had served as a political center of Ethiopia from the time of Menilik II. It has been the capital city for more than a century. The inherent interest of past rulers to base their seat of power in the city made it the political, economic and social focal point of the country.[62] Successive rulers' decisions to base their seat in the city, perhaps up to and including the EPDRF's decision to make Addis Ababa its center for the transitional government, seem to have accrued. Besides this, when Ethiopia constitutionally declared the establishment of a federal political system in 1995, the federal Constitution designated Addis Ababa as the capital city of the Federal State. Unlike its predecessor, the current constitution contains a provision that speaks about the status and place of Addis Ababa in the federal set up.

A quick scan of Article 49 of the FDRE Constitution gives some idea of the particularity of the Addis Ababa City Administration. The city derives its right to self-govern and its city status from the Constitution itself. However, the Constitution gives self-governing status to residents of the in its English version and to the Addis Ababa City Administration in its Amharic version.[63] The Constitution seems to impose some sort of limitations by making the city government responsible/accountable to the federal government. Moreover, the Constitution stipulates that the special interest of Oromia shall be respected in

[62] Wondwossen, *Self-governing Addis Ababa*, *supra* note 49, p. 56.

[63] The Amharic version reads as follows: "የአዲስ አበባ ከተማ አስተዳደር ራሱን በራሱ የማስተዳደር ሙሉ ስልጣን ይኖረዋል፡፡ ዝርዝሩ በሕግ ይወሰናል፡፡" Now compare this with the English version that says: "The residents of Addis Ababa shall have a full measure of self-government. Particulars shall be determined by law."

Addis Ababa, since it is located entirely within the territorial jurisdiction of the Oromia region. In each of the sub-provisions there is a phrase that says "Particulars shall be determined by law." All of these issues need explanation and hence will be examined and clarified in the subsequent sub-topics.

5.1. Representation

Federal parliaments are generally made up of two houses,[64] one representing the people (the lower house) and the other representing member states of the federation (the upper house). The perplexing issue then is how the federal capital city is represented at the federal level. The main argument has been that the inhabitants of the city of Addis Ababa pay taxes just like other Ethiopians elsewhere and that, by virtue of this fact, they are entitled to have their concerns heard by the House of Peoples' Representatives; in other words, they should at least have representation in the House proportional to the population of the capital.[65]

With this assumption it seems that the Constitution guarantees the residents of Addis Ababa representation in the House of Peoples' Representatives. However the Constitution sees these citizens in a different light. In all parts, the Constitution uses the terminology "Nation, Nationality and People of Ethiopia," whereas when it comes to Addis Ababa, it prefers to use the term resident. The particular provision reads as follows: "Residents of Addis Ababa shall in accordance with the provisions of this Constitution, be represented in the House of Peoples' Representatives."[66] Although the

[64] FDRE Constitution, *supra* note 8, Article 53.
[65] Tadesse, Melaku, *Introduction to Constitutional Law*, Vol. I, Far East Trading, PLC, Addis Ababa, 2012 [hereinafter Tadesse, *Introduction to Constitutional Law*].
[66] FDRE Constitution, *supra* note 8, Article 49(4).

Constitution is clear about their representation in the lower house, it remains silent as to how the residents of Addis Ababa city can be represented in the House of Federation. One may argue that the interests of residents of Addis are represented in one way or another in this House, since the house reflects the ethnic composition of the country. One may also argue that due to the uniquely diverse ethnic composition of Addis Ababa, permitting members of each nation, nationality and people who resides in Addis Ababa to be represented in the house is tantamount allowing the existing numbers of members the house to be doubled. This stems from the difficult nature of quantifying the same in the case of Addis Ababa.

The case of the House of People's Representatives illustrates the fact that Ethiopia's representation draws from the ethnic composition of the country.[67] Despite this fact, residents of the city are represented at the HoPR without regard for their ethnic composition. Since the House of Peoples' Representatives is not different from the House of Federation in terms of its ethnic composition, the residents of Addis Ababa should be represented likewise as they are represented differently at the HoPR.

5.2. Self-Governance

The Constitution says the residents of Addis Ababa shall have a full measure of self-government, but with the same language: "Particulars shall be determined by law."[68] Before raising the predictable question of who shall enact this law, there is tremendous significance in reflecting on what constitutes the full measure of self-government. To identify the contents of

[67] Wondwossen, *Self-governing Addis Ababa*, *supra* note 49, p. 68.
[68] FDRE Constitution, *supra* note 8, Article 49(2).

self-government, let us look to Article 39(3) of the Constitution. It reads as follows:

> Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government *which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.* (Emphasis is added.)[69]

This provision is written to give this right to nations, nationalities and peoples of Ethiopia. Perhaps due to the difficulty of specifying their composition in the capital city, this right is given to the residents of Addis Ababa, in general. It is clear from the provision that the essence of self-government encompasses the right to establish government institutions in inhabited territory that has three branches of governments: executive, judiciary and legislative. Besides this, the right of self-governance involves the right to equitable representation in government institutions. In stating this, the Constitution gives the city more privileges and authorities, which it could exercise independent of the federal government.[70]

The other point that is worth considering is the mandate to enact a detailed law that defines and regulates the rights of the residents of Addis Ababa to a full measure of self-government. Who can do this: the federal government or the Addis Ababa City Administrative Council? Where is the status of the city of Addis Ababa in line with other regional states? On this point, Fasil Nahum argues:

> *[T]he Constitution of 1994[sic] establishes the Federal Democratic Republic of Ethiopia, which comprises of the*

[69] FDRE Constitution, *supra* note 8, Article 39(3).
[70] FDRE Constitution, *supra* note 8, Article 39(3).

> *federal government and nine member states. Nine such member states are enumerated by the Constitution.*[71] *Then there is a tenth entity, the capital city, which is entitled to "full measure of self-government" and, for all practical purposes, amounts to a state.*[72]

This articulation gives strength to the argument that the Addis Ababa City Administration can enjoy the same status and privilege as other federation units in Ethiopia. Stated otherwise, as the regional states are empowered to promulgate their own constitutions and other subsequent laws, the same logic should apply to the case of Addis Ababa. The writer of this article concurs with the opinion that Addis Ababa should be treated as the 10th member state of the Federal Democratic Republic of Ethiopia for such purposes. A plain comparison of the powers of the City Administration with those of the regional states further confirms this position.

The city's Charter forms the legal basis for the structure of the city.[73] The Charter enumerates the basic authority of the city to govern, establish government, and set up legislative, executive and judicial branches of the city government. Moreover, the Charter defines powers and functions of the City Administration. To mention a few, the city government has the power to approve and implement economic and social development plans,[74] and to determine the administration and working conditions of employees and officials of the city government as well as the staff of other organs of

[71] Article 47 of the FDRE Constitution lists the following regional states as member States of the Federal Democratic Republic of Ethiopia. These are the states of Tigray, Mar, Amhara, Oromia, Somali, Benshangul Gumuz, and the Southern Nations, Nationalities and Peoples, Gambela and Harari.

[72] Fasil, *Constitution for a Nation of Nations, supra* note 6, p. 67.

[73] Proclamation No. 361/2003, Addis Ababa City Government Revised Charter Proclamation, Federal Negarit Gazeta, 9th Year, No. 86, Addis Ababa, 24 July 2003 [hereinafter Charter].

[74] See the Charter, *supra* note 73, Article 11(2) (b).

government specified under this Charter.[75] Besides this, the city government has the power to organize Sub-Cities and Kebeles, to demarcate their borders and allocate budgetary subsidies to same;[76] and to administer, according to law, the land and the natural resources located within the bounds of the city.[77] Furthermore, the city government is empowered to prepare, approve and administer the budget of the city; to determine and collect, according to law, taxes, duties and service charges out of the sources of income specifically given hereby to the city government; to revoke taxes and penalties imposed as per the law; to participate in income-generating activities and to receive donations and gifts;[78] to borrow money from domestic sources under authorization by the Federal Government; to identify external sources of loans and request that the Federal Government borrow money on its behalf.[79]

To make the comparison tenable, it is important to mention the powers of the constituent units. The FDRE Constitution mentions the following powers as powers of the regional states in addition to the residual powers. Pursuant to the FDRE Constitution, the regional states have the power to establish a state administration that best advances self-government, to protect and defend the Federal Constitution;[80] to enact and execute the state constitution and other laws;[81] to formulate and execute economic, social and development policies, strategies and plans of the state;[82] to administer land

[75] See the Charter, *supra* note 73, Article 11 (2) (c).
[76] See the Charter, *supra* note 73, Article 11 (2) (e).
[77] See the Charter, *supra* note 73, Article 11 (g).
[78] See the Charter, *supra* note 73, Article 11(2) (j)-(k).
[79] See the Charter, *supra* note 73, Article 11(2) (j).
[80] FDRE Constitution, *supra* note 8, Article 52(2) (a).
[81] FDRE Constitution, *supra* note 8, Article 52(2) (b).
[82] FDRE Constitution, *supra* note 8, Article 52(2) (c).

and other natural resources in accordance with federal laws;[83] to levy and collect taxes and duties on revenue sources reserved to the states and to draw up and administer the state budget;[84] to enact and enforce laws on the state civil service and their conditions of work. In the implementation of this responsibility, the regional states shall ensure that educational, training and experience requirements for any job, title or position approximate national standards.[85] The regional states shall also establish and administer a state police force to maintain public order and peace within the state. [86] All of these facts show that the regional states and the Addis Ababa City Administration have more or less similar powers and functions. This equates the city with the regional states.

5.3. Accountability

The notion of accountability is a nebulous concept that is difficult to define in precise terms. It is also not the purpose of this article to present a theoretical discourse on accountability. With this in mind, it is important to note that the idea of accountability arises when decision-making power is transferred from the principal, the citizens, to an agent, the government. There must be a mechanism in place for holding the agent to account for his or her decisions and for imposing sanctions, if necessary. Ultimately, accountability may require removal of the agent from power.[87]

Accountability in democratic political systems puts the citizens and their elected representatives in a vertical relationship, with power running from the

[83] FDRE Constitution, *supra* note 8, Article 52(2) (d).
[84] FDRE Constitution, *supra* note 8, Article 52(2) (e).
[85] FDRE Constitution, *supra* note 8, Article 52(2) (f).
[86] FDRE Constitution, *supra* note 8, Article 52(2) (g).
[87] Staffan, Lindberg I., Accountability: The Core Concept and Its Subtypes, working paper no. 1, Overseas Development Institute

bottom up. The degree of control is relatively high. Several forms of participation are available to citizens for the purposes of requiring information and holding elected leaders accountable. Voting is one mechanism that can have dramatic consequences for representatives, but it is not continuous between electoral periods. Other means are more effective: calls, meetings, demonstrations, and writing to newspapers are just a few of them.[88]

With the same orientation, the Addis Ababa City Charter declares that elections for the councils at all levels of the city government shall be conducted in accordance with the electoral law of the country.[89] It is emphasized in the Charter that members of the council shall be elected from candidates in each electoral district by a plurality of the votes cast.[90] The corollary effect of conducting election is to form a government and lead that entity. To this effect, Addis Ababa city's revised Charter declares that a political party or a coalition of political parties that occupy the majority of seats of the Council shall form the executive organ of the city and undertake its leadership.[91]

On the other hand, the City Council is accountable to the Federal Government and to the residents of the city.[92] The accountability of the council to the residents articulates the principle of rule of the people and seems sound and valid. The responsibility of the City Council to the federal government, however, appears uncertain. At the least it raises the following questions: Does this mean that the federal government has the mandate to

[88] Ibid.
[89] See the Charter, *supra* note 73, Article 8.
[90] See the Charter, *supra* note 73, Article 12 (1).
[91] See the Charter, *supra* note 73, Article 13.
[92] See the Charter, *supra* note 73, Article 17.

appoint and remove City Administrative cabinets? Does it allow the intervention of the central government when the City Administration fails to undertake its routine activities for any cause? Does the central government have a say in the city's budget allocations? The Charter tries to answer these questions in a determined manner.

In the first place, the Charter makes the city government a component of the Federal Government.[93] In addition, it allows the dissolution of the City Council by the House of Peoples' Representatives.[94] The issue here is how the HoPR can dissolve a City Council which has been legitimately formed by the residents and not constituted by the House. This is simply against the principles of democracy. In fact, it is very difficult to demarcate the authority of the federal government versus that of the residents in deciding who may run for government offices. And it is also difficult to determine via the Charter's provisions whether the federal government or the residents may decide when and how elected representatives can leave their offices with respect to the Addis Ababa City Administration. How does a House acquire the right to dissolve City Councils that it does not get from a constitution?

It is true that the city may be accountable to the Federal Government concerning security and diplomatic relations, as well as associated policies, laws and standards.[95] It is unobjectionable to give the Federal Government power to dissolve the city government and to constitute a transitional government where an act endangering the Constitution is committed by the City Council or where the city government fails to manage security matters and is in an emergency situation. Strangely, the Charter empowers the

[93] See the Charter, *supra* note 73, Article 61 (2).
[94] See the Charter, *supra* note 73, Article 61 (3).
[95] See the Charter, *supra* note 73, Article 61 (2).

Ministry of Federal Affairs, representing the Federal Government, to monitor the activities of the city government and support the capacity-building undertakings of the city.[96] Moreover, the city government is required to submit to the Ministry of Federal Affairs annual and periodic performance reports on its plan, budget and the overall state of the affairs of the city.[97] It should be noted that self-governance is conveyed in the way in which an entity is constituted and dissolved. Empowerment of a third party to constitute and dissolve a self-governing unit puts the fate of that unit solely in the hands of such external forces.[98] It seriously erodes the right to self-governance of the residents of the city.

A capital's source of funding can say a lot about the extent of its independence. Thus, if the federal government plays a part in setting or managing the city's budget, it can, in return, demand a say in how resources are allocated. If, on the other hand, the federal government gives no money to the capital, the city has to cover all of its expenses by itself, but the federal government will not have any veto power over the capital's budget. Thus, the question of financial independence has two sides. Does the capital receive federal transfer payments to defray its costs, and is it free to draw up its own budget? True, the Charter specifies the tax sources of the city.[99] However, like all regional states, Addis Ababa City Administration has budget constraints so that in one way or another it becomes financially dependent on grants from

[96] See the Charter, *supra* note 73, Article 61(5).
[97] See the Charter, *supra* note 73, Article 61 (6).
[98] Wondwossen, *Self-governing Addis Ababa*, *supra* note 49.
[99] See the Charter, *supra* note 73, Articles 57 and 58.

the central government. The corollary effect is that this gives room for the federal government to intrude in the affairs of the City Administration.

5.4. The Interest of Oromia Region in Addis Ababa

Due to the geographic coincidence of the location of the Oromia region with the Addis Ababa City Administration, the Constitution includes a preemptive solution for potential conflicts that could arise between the two. It acknowledges the special interest of the State of Oromia in Addis Ababa, with regard to the provision of social services or the utilization of natural resources and other similar matters, and states that this interest shall be respected.[100] Of course, the details of these matters require further legislation, as the Constitution pronounces that the particulars will be determined by law.[101] As the matter involves or touches on the interests of more than one self-governing entity, the power to promulgate laws on this issue should be left to the central government.[102]

6. Minority Representation

In any democratic political system, the existence of minorities as well as allowance for their special representation is a reality. Given the importance of a federal system in enhancing public participation, its institutional development should mirror the entire community in its legislature, executive and judiciary, including minorities.[103] In other words, the system of law and justice derives its legitimacy from the fundamental proposition that no one group should eliminate and overshadow the needs of others. Cognizant of this

[100] FDRE Constitution, *supra* note 8, Article 49 (5).
[101] FDRE Constitution, *supra* note 8, Article 49 (5).
[102] FDRE Constitution, *supra* note 8, Article 55 (2)(a).
[103] Kymlicka, Will, *Finding Our Way: Rethinking Ethnocultural Relations in Canada*, Oxford University Press, Toronto, 1998 [hereinafter Kymlicka, *Finding Our Way*].

fact, in Ethiopia the federal Constitution and several regional state constitutions acknowledge the existence of minorities to preemptively deal with this matter.[104] The idea behind this is that minority participation in legislative institutions provides the greatest potential for these minorities to influence the decisions of government, as policymaking is a legislative function.[105]

The House of Peoples' Representatives is composed of members who are elected by the people for a term of five years on the basis of universal suffrage and by direct, free and fair elections held by secret ballot.[106] Furthermore, the Constitution specifies the maximum number of seats in the House of Peoples' Representatives and how many of these go to national minorities. The provision of the Constitution reads as follows:

> Members of the House, on the basis of population and special representation of minority Nationalities and Peoples, shall not exceed 550; of these, minority Nationalities and Peoples shall have at least 20 seats. Particulars shall be determined by law.[107]

It is clear that subsequent legislation enacted to enforce this part of the Constitution should tell us who are qualified to have seats in the House, and how seats reserved for minorities are allocated among the national minorities

[104] See FDRE Constitution, *supra* note 8, Article 54; Article 43(2) of the Somali Regional State Constitution and Article 46 of the Gambela Regional State Constitution.
[105] Walsh, Niamh, Minority Self-government in Hungary: Legislation and Practice, *Journal on Ethnopolitics and Minority Issues in Europe*, Summer 2000, p. 1-73. [hereinafter Walsh, Minority Self Government]
[106] FDRE Constitution, *supra* note 8, Article 54(1).
[107] FDRE Constitution, *supra* note 8, Article 54(3).

themselves. Since the representation takes place at the federal level, it is the central government that is competent to decide this matter through legislation.

It is self-evident that there are also minorities at the state level. Minorities are a possibility at zonal and Woreda levels as well. In his proposal for multilevel government, Musgrave argues that "if the jurisdiction is small enough to include one voter, no one can be in a minority."[108] Due to the impracticality of such kind of arrangement in the real world, political systems design their own mechanisms to accommodate minorities in the decision-making process. In this regard, the federal arrangement gives room to consider special protection of minorities at all levels.

As a result, most regional states have designed the same types of arrangements for regional minorities' representation in their respective state councils, with slight qualification as to the method of minorities' representation. Let us look at two regional state constitutions to explore this idea. The SNNPR regional state constitution acknowledges the existence of minorities within the state in the following provision, concerning representation minorities in the state council: "[T]he minority Nationality and people shall have seats in the states council on the basis of special representation. "Particular shall be determined by law."[109]

The Constitution is silent as to the maximum number of seats allocated for the minorities out of the total number of seats in the council. In addition, who can qualify for such representation and how their population size connects with this privilege is not answered. The Constitution systematically escapes these issues by incorporating this phrase: "Particulars

[108] Musgrave, R. A. and Musgrave, P. B., *Public Finance in Theory and Practice*, 5th ed., McGraw-Hill, New York, 1989, p. 523.
[109] See Article 50 (2) of the Revised SNNPR Constitution.

shall be determined by law." One may also find an equivalent provision in the Amhara Regional State Constitution: "[T]he minority Nationalities and People that are believed to deserve special representation shall be represented in the council through an election. Particulars shall be determined by law."[110]

Like the SNNPR state constitution, the Amhara Regional State constitution is silent as to the number of council seats to be allocated to minorities. Moreover, all minorities who are residing within the region do not deserve special representation; rather, it is those minorities who are believed to merit special representation who qualify for such seats. Again, the constitution escapes this issue with the phrase: "Particulars shall be determined by law."

The forthcoming legislation is not only required to define the number of seats that minorities will possess but also indicate who is qualified to have special representation among the minorities in the region. This wording highlights the understanding that all minorities do not deserve special representation: *'the minority Nationality* and *people that are believed to deserve special representation*." Thus the Amhara regional state recognizes and provides self-government at the zonal level for three non-Amhara ethnic groups who are residing in the region. These are the Agaw-Awi, the Agaw-Hemra and the Oromos.[111] But even this arrangement fails to ensure such groups' right to representation in the regional state institutions.[112] These minority ethnic groups are represented only in the regional state constitutional

[110] See Article 48 (2) of the Amhara Regional State Constitution.
[111] See Article 5 of the Revised Amhara Regional State Constitution.
[112]Assefa Fiseha, Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet, *Regional & Federal Studies*, vol. 22(4), p. 435-473 at 455.

interpretation commission, which to date, is not operative.[113] Moreover, although in theory, they are entitled to enact laws and design policies on their own matters, including the use of their language in public institutions, in practice, these minority nationalities have not exercised much of their powers.[114] In this regard, one may argue that there is limited opportunity available to minority groups to have a measure of control over issues that directly affect them.[115] Their issues and concerns may not be adequately addressed. In this sense, Majeed and others argue, "[I]f vital issues concerning minorities are decided upon without the participation of the minorities in the decision making process, then the minority group becomes losers likely to reject the legitimacy of the polity."[116]

There is also one additional question that needs to be addressed here: Can regional states deny special representation to those ethnic groups who are considered to be minorities at the federal level and bestowed special representation in the HoPR? The answer should be in the negative, for the following reasons. In the first place, the regional state constitution must conform to the federal constitution, which means that if the federal government provides recognition to certain ethnic groups as minorities then states do not have the competence to deny this. Equally important, whose mandate is it to define who is minority and to whom the reserved seats at the state council belong? As states have the power to decide the maximum

[113] Ibid.
[114] Ibid.
[115] Walsh, Minority Self-Government, *supra* note 105, p. 1-73.
[116] Majeed Akhtar, 'Introduction' in Majeed, Akhtar, Watts, Ronald and Brown, Douglas (eds.), *Distribution of Power and Responsibilities in Federal Countries*, McGill-Queen's University Press, Montreal, 2006.

number of seats in their own that state councils,[117] by implication, the state also has the power to decide how many of the total seats will go to minorities.

7. Concluding Remarks

In a federation, owing to difficulty of having watertight divisions of powers between tiers of government and generality of the constitutional provisions, there may be matters that are not clearly mentioned in the constitution as to which levels of government they may belong. In such instances, it is imperative to refer to the list of powers enshrined in the constitutions of the two tiers of government. By referring to provisions of the constitution one may decide to whom a matter accrues and who has the mandate to determine particulars by law. Constitutions endeavor to set out major tasks of the different levels of governments in a holistic manner. Structure should be incorporated into the Constitution, leaving the remaining details to subsequent ordinary laws. Therefore, the issue here is who has the mandate to enact subsequent legislation. From this perspective, this article has analyzed several specific issues, including the national anthem, transparency and accountability of government, property rights, family matters, the status and administration of Addis Ababa city and minority representation.

The author of this piece has argued that the mandate to determine the details of a national anthem by law should be left to the federal government. On the other hand, family law matters are in the domain of regional state power. If any of the regional states fail to develop a law that regulates family matters that particular region may apply the provisions of the Civil Code.

[117] The Amended Electoral Law of Ethiopia Proclamation, Article 28(4).

In the opinion of this author, the same logic should apply to the Addis Ababa City Administration as well. Residents of Addis Ababa are represented at the HoPR, regardless of ethnic compositions. Likewise, the residents of Addis Ababa should be represented in the House of Federation. It should be noted that self-governance allows dissolution of the City Council by the electorate and not by another external entity. Concerning the relation between the Oromia Regional State and Addis Ababa City Administration, the power to promulgate laws on issues of relationships should be left to the Federal Government as the matter involves the interests of two self-governing entities. Insofar as minority representation is concerned, given the importance of a federal system in enhancing public participation, government institutions should mirror the entire community, including minorities. The mandate to define who is a minority and to whom the reserved seats belong to can be ascertained by both the Federal and state governments. If the representation takes place at the Federal level, it is the Federal government that is competent to decide the matter through legislation. Likewise, regional states will have the power to decide on issues relating to matters who are minorities at the regional state level.

Joint Venture under the 1960 Commercial Code of Ethiopia: A Comparative Analysis with the UK and German Legal Systems

Seid Demeke Mekonnen[♠]

Abstract

The Ethiopian joint venture law is comparable with German and English laws in respect of confidentiality. In relation to nature, transfer of shares, liability of partners, and profits and losses distribution policy, the Ethiopian joint venture law is more related with the English one. Whereas, with regard to the requirement of written agreement, the Ethiopian law is more parallel with that of the German silent partnership since in both countries such requirement is waived by their respective laws. Additionally, concerning the "who manages" issue, it can be said that at least in terms of composition and structure, the Ethiopian law is more comparable with the German silent partnership. This Article comes up with some best experiences to Ethiopia drawn from the comparative analysis. It urges some prudent legal framework to be espoused for the proper practice of joint ventures, i.e. in the way it addresses the ever more pressing needs for joint venture engagements in Ethiopia. Accordingly, some legal improvements will be suggested, mainly, on issues of confidentiality, dissolution, and the need for written agreement.

Key Terms: Commercial Code, Confidentiality, Dissolution, Joint Venture, Joint Venture Agreement, Partners, Silent Partnership

Introduction

The recent trends of global business and the Ethiopian as well, have inspired the writer of this article to carry out a comparative research on phenomena known as Joint Ventures. Nowadays global economy is complex, as companies and corporations with gorgeous experience and power overload

the market.[1] The keen rivalry between the corporate entities builds insurmountable obstacles not only for individual persons or for novice companies with less competitive strength, but also for big companies intending either to enter a new market or to make a debut into the new product development.[2] The most efficient tool, in case individual person or company is not capable of solely handling the successful accomplishment of a business objective, is to constitute alliance with another company or person, in other words, to acquire the urgent help.[3]

Joint ventures continue to increase in popularity but in some jurisdictions mystery still surrounds the concept of joint venture and the obligations of a joint venturer. The structure of the joint venture can take a number of forms. It can be structured as a company and it becomes a separate entity, covered by statute. It is the unincorporated joint venture which generally poses the problems and questions. A major pitfall is the lack of a contract, or an agreement which is inadequate.

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[1]Sornarajah M., *Law of International Joint Ventures*, Longman, Singapore, 1992, p. 119. Joint ventures by business entities have become increasingly common and increasingly important to the economic life of many countries in the world. They are prevalent in the construction industry for large projects such as dams, road works and public buildings (Yoshino M. Y and Rangan U.S., *Strategic Alliances: An Entrepreneurial Approach to Globalization*, Harvard University Press, Cambridge, 1995, p. 136.)

[2]Lim E. C and Liu Y., International Construction Joint Venture as a Market Penetration Strategy? Some case studies in developing countries. In Proc., 3rd Int. Conf. on Construction Project Management, Nanyang Technological Univ., Singapore, 2001, pp.377-389.

[3]Lawarree J. and Audenrode M. V., *Moral Hazard and Limited Liability*, 1999, P. 44, at http://www.econometricsociety.org/meetings/wc00/ pdf/0971.pdf.

Under the Ethiopian Commercial Code, joint venture refers to contractual joint venture[4] and is expressly provided not to be a separate legal entity, but instead is intended to be a separate economic entity only. The joint venture is created by an agreement between its owners who are often referred to as the joint venturers and; hence, is a legal relationship and not a legal entity and perhaps not even a person. Under the Commercial Code, joint venture is not required for registration in any governmental registry such as those which register and provide public information in respect of the legal existence of companies and partnerships.

This work attempts to construct an academically coherent and predictable analysis of joint venture, an undertaking which faces some problems under Ethiopian legal framework. The article goes beyond the common definitions and reviews of the subject in general, including drawing some best experiences for Ethiopia. This will be attaining by conducting detailed comparative analyses with the German and the English jurisdictions in range of the regulatory legislation for joint ventures/silent partnership. The reasons behind the decision to view mentioned systems are, on the one hand, the diversification between these two jurisdictions and on the other hand the fact that both are the major representatives of their law systems. Generally, therefore, the aim while making the comparison with the two jurisdictions is to demonstrate each possible portrayal of the subject and then to draw best experiences that could rectify legal problems of joint venture in Ethiopia.

[4] When the author concludes joint venture under Ethiopian Commercial Code is a contractual agreement, it is to refer that no formation of institution or association will occur; rather it is a relationship of persons connected by a mutual agreement.

1. Preliminary Remarks: Joint Venture from a Global Perspective

1.1. A Conceptual Overview of Joint Venture

There are various definitions of joint ventures that depict some features of this business arrangement. Some definitions delineate a broad range of cooperation as joint ventures; whereas, some others define a narrow range of cooperation as joint ventures.[5] The most familiar two are the definitions depicted by Lynch and Norwood. For Lynch, a joint venture can be defined as a cooperative business activity formed by two or more separate organizations that creates an independent business entity and allocates ownership, operational responsibilities, and financial risks and rewards to each member, while preserving their separate identity/autonomy.[6] Norwood on his part, defined joint ventures as the commercial agreements between two or more companies in order to allow greater ease of work and cooperation towards achieving a common aim, through the manipulation of the

[5]In an informal sense joint ventures are business arrangements whereby parties collaborate in a one-off enterprise usually (but not necessarily) contributing, money, property or skill in a particular trading, commercial, mining or other financial undertaking to achieve certain outcomes which might include containing costs, limiting exposure to risk, increasing market strength, generating a product which will yield each party a separate profit or otherwise more generally sharing profits, whether equally or not. The term joint venture is itself a vague one, capable of a range of applications… often used to bolster a conclusion that a fiduciary relationship exists. See *United Dominion Corporation Ltd v Brian Pty Ltd* , High Court of Australia , Judgment, 1985, Para. 157.

[6] Lynch R.P, *The Practical Guide to Joint Ventures and Corporate Alliances*, Wiley, New York, 1989, P. 83.

appropriate resources.[7] Other definitions are almost same as the two definitions mentioned above.[8]

In a narrow sense, a joint venture is defined as: two or more parties (they may be individuals, companies, corporation, or others) combine their resources to create a new company to carry out a special transaction/project according to their agreement. They will share the ownership, operational responsibilities, and the profits and the losses of the new company, and the new company as a separate entity undertakes liability for the debts and the third parties.[9]

Generally, the definitions can be classified into two groups: one group defines joint ventures as a separate entity created by two or more than two partners who bring together their resources and share the control right and profits. Whereas, the other group defines joint ventures as any cooperation between two or more than two companies.[10]

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[7] Norwood S. R and Mansfield N. R., Joint Venture Issues Concerning European and Asian Construction Markets of the 1990's, *International Journal of Project Management*, Vol.17 No. 2, 1999, p. 96.

[8] Authors such as, Johnson defined joint ventures as the separate entities owned jointly by two or more firms that represent a partial combination of their resources entity. See Johnson S. A and Houston M. B., A re-examination of the motives and gains in joint ventures, *Journal of Financial and Quantitative Analysis*, Vol.35, No. 34, 2000, p. 64. His definition is almost same as the one defined by Harrigan, joint ventures involve two or more legally distinct organizations, each of which invests in the ventures and actively participates in the decision-making activities of the jointly owned entity. See Harrigan K. R., *Strategies for Joint Ventures*, Lexington Books, Lexington,1985, p. 49.

[9] Geringer J. M and Hebert L. Control and Performance of International Joint Ventures. *Journal of International Business Studies*, Vol.20, No. 3, 1989, p. 41.

[10] Just as Hennart summarized, joint ventures can be distinguished into equity joint ventures and non-equity joint ventures. Equity joint ventures arise whenever two or more sponsors bring given assets to an independent legal entity and are paid for some or all of their contributions from the profits earned by the entity, or when a firm acquires partial ownership of another firm. The non-equity joint ventures describe a wide array of contractual arrangements, such as licensing, distribution and supply agreements, or technical assistance

1.2. Types of Joint Ventures

Globally, the issues that affect the form of joint venture are among others- tax, limited liability, regulatory, banking, labor and employment, benefits, third party consents and exit strategies.[11] Generally, joint ventures in a broad sense can be categorised as i) contractual joint venture; ii) corporate joint venture; and iii) unincorporated joint venture.

1.2.1. Contractual Joint Ventures

The contractual or non-equity joint venture can either be a co-ownership model or simply a contract between the parties whereby they retain all their own assets and agree as to their separate rights and obligations.[12] Most partnering arrangements, strategic alliances and outsourcing services arrangements fall into this category. It is this category that also gives rise to structuring concerns to ensure that the actions of the parties do not result in it being, in fact, a partnership.[13] A contractual joint venture may be a good choice for a short-term relationship between two businesses. Particularly, if the relationship will be focused on combined services, sales, or marketing,

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and management contacts . See Hennart J., Transaction Costs Theory of Equity Joint Ventures. *Strategic Management Journal*, Vol.9, No. 4, 1988, p. 53.

[11] Structuring a joint venture, particularly a global joint venture, can have a substantial impact on its economic success. A threshold decision focuses on the type of joint venture: (i) contractual joint venture; (ii) corporate joint venture; or (iii) unincorporated joint venture. This joint venture or partnership decision impacts the joint venture structure. The management of a joint venture, how it is capitalized, and joint venture taxation all play a role in joint venture structures. Additionally, how one exit the business, or joint venture dissolution, can also affect its economic success. See Child, J., D. Faulkner, and Tallman S., *Strategies of Cooperation: Managing Alliances*, Networks, and Joint Ventures, Oxford University Press, Oxford, 2005, p.9.

[12]Kogut B., Joint Ventures and the Option to Acquire, *Journal of Management Science*, Vol.37, 1991, p. 71.

[13]Peter Nayler, *Business Law in the Global Marketplace*, Butterworth-Heinemann, Oxford, 2006, P. 181.

and few if any hard assets are involved, co-venturers may prefer a contractual joint venture.[14]

1.2.2. Corporate Joint Ventures

A corporate joint venture involves the set-up of a new corporation that is separate and independent from the co-venturers respective businesses. The new corporation will be the legal and business vehicle through which the co-venturers grow the business joint venture.[15] A corporate joint venture involves the creation by the participants of a separate legal entity through which to pursue the venture. The parties to the joint venture will be the parent shareholders in the entity.[16]

1.2.3. Unincorporated Joint Ventures

Unincorporated ventures are similar to corporate joint ventures in that they involve the set-up of a legal entity that is separate and independent from the co-venturers' respective businesses. They differ from the corporate joint venture in the type of legal entity they are.[17] An unincorporated joint venture is typically structured as limited partnership or possibly a limited liability

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[14] Ibid, P. 182.

[15] Robert Wallace L., *Strategic Partnerships: An Entrepreneur's Guide to Joint Ventures and Alliances*.
New York: Kaplan Publishing, 2004, p. 18.

[16] Bamford, James, David Ernst, and David G. Fubini, Launching a World-Class Joint Venture. *Harvard*
Business Review, Vol. 3, 2004, P. 95, at: hbr.harvardbusiness.org/2004/02/launching-aworld-class-joint-venture/ar/1.

[17] Shishido Z., Conflicts of Interests and Fiduciary Duties in the operation of a Joint venture November, 1987, 39 *Hastings Law Journal, Vol.* 63 No. 4, 1987, P. 39.The various approaches to a definition of a joint venture are discussed, including that of an economist and that used in the antitrust context. See Duncan W.D., *Joint Ventures Law in Australia*, 2nd edition, the Federation Press, Australia, 2005, P. 28.

partnership. With sufficient safeguards, the general partnership may also be employed as a vehicle in lieu of the corporate joint venture.[18]

Generally, it is possible to say that no particular business structure is mandated for joint ventures. They are implemented through any of a series of interlocking contracts, partnerships, companies, or trusts, or by way of agency or joint ownership.[19] There is usually some form of contractual arrangement that governs the way the joint venture is to be carried out but the absence of a formal agreement is not fatal to the existence of a joint venture.[20] Ultimately, whether a joint venture can (or indeed should) ever be classified as a discrete form of legal relationship which has its own particular rights and duties, distinct from a contract, partnership or any other form of established and recognised legal relationship, depends on the nature of the obligations that the joint venture parties have assumed. If such obligations or duties require the parties to act at most only with due care and/or in good faith towards each other that puts an end to further enquiry.[21]

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[18] Unincorporated Joint Ventures include Unit Trusts, Partnerships, and Unincorporated Joint Ventures which are not Partnerships. See Marcus Beveridge, Joint Ventures in their most Narrow Sense, Queen City Law, Auckland, New Zealand, 2011, p.3.

[19] *United Dominion Corporation Ltd v Brian Pty Ltd, supra note 5.*

[20] *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd,* High Court of Australia , Judgment, 2010, Para. 241.

[21] If an examination of the duties that the parties have assumed reveals that, in addition to any duties of care and/or good faith, they are mutually required to put the other's or their joint interest ahead of their own individual interest (in other words, that their duty is to act with utmost loyalty towards their fellow venturer/s), then their relationship will be a joint venture that involves fiduciary duties. The issue in that context will be to determine to which aspect of the parties' joint venture such fiduciary duties extend. See *Chirnside v Fay* , New Zealand, Supreme Court, 2007, Para. 68. For a discussion of this decision, together with *Paper Reclaim Ltd v Aotearoa International Ltd, New Zealand, Supreme Court*, 2007, Para. 26 and *Amaltal Corporation Ltd v Maruha Corporation*, New Zealand Supreme Court, 2007, Para.40; See also Maree Chetwin and Phillip Joseph *Joint Ventures Law, eds*, Centre for Commercial and Corporate Law Inc, University of Canterbury, 2008, p. 81; The content of the fiduciary duty compels complete loyalty. The high court of Australia described it in the

1.3. Features of Joint Ventures

1.3.1. Sharing Rights between the Partners

Joint ventures will share the ownership, operational responsibilities, and the control right, the profits and the losses of the entity, and the entity as a separate entity undertakes liability for the debts and the third parties.[22] This characteristic of sharing risks, profits and rights makes joint venture very difficult to manage and bring many conflicts during the operation of the joint venture.[23] To which degree that each partner can achieve his/her goals depends on the shares of each partner in the joint venture. The partners define how to share the risks, the profit and control right by negotiating with each other. The result of the negotiation depends on the relative bargaining power of the partners.[24]

1.3.2. Quasi-Hierarchies

All forms of cooperative arrangement represent a middle ground between market and hierarchy.[25] Joint venture structure can be viewed as

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following way: The distinguishing obligation of the fiduciary is loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or for the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. See *Bristol and West Building Society v Mothew*, High Court of Australia, 1998, para. 18.

[22] Lynch, supra note 6, p. 83.

[23]Rugman A. M., *Internalization and Non-equity Forms of International Involvement, New Theories of the Multinational Enterprise*. New York: St Martin's Press, 1981, p. 112.

[24] Harrigan, supra note 8, p.4.

[25]Buchel B., Prange C., Probst G. and Ruling C., *International Joint Venture Management Learning to Cooperated and Cooperation to Learn,* John Wiley and Sons (Asia) Pte Ltd, Singapore, 1998, P. 23.

quasi- hierarchical structure.[26] Hierarchical internal organization will become the preferred operating mode under conditions of substantial uncertainty and complexity. Hierarchical organization is less flexible and it is very difficult to adjust with the change of the market.[27] However, it is more efficient to deal with complex conditions and uncertainties, because it can make decisions by authority.[28]

Parties' sharing in the profits or losses attained through the venture's performance serves to align the interests of the parent firms, reducing the opportunism that may arise in contractual agreements.[29] The joint venture form may also allow for a superior monitoring mechanism, since joint venture owners may be legally entitled to independently verify financial information as well as information acquired through direct observation.[30]

1.3.3. Relations between the Partners

Joint venturers cooperate with each other to achieve certain goals that neither partner can achieve on their own.[31] The two kinds of relations between

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[26]Osborn N. and Baughn C., Forms of Interorganizational governance for Multinational Alliances, *Academy of Management Journal,* Vol.33 No.3, 1990, p. 100.

[27]Williamson E., Transaction-Cost Economics: the Governance of Contractual Relations, *Journal of Law and Economics,* University of Chicago Law School, Vol.22, 1979, p. 245.

[28] Ibid (as of Williamson, the contractual agreements cannot solve the problems which are called moral hazard or adverse selection. Joint ventures, on the other hand, can be seen as quasi-hierarchies. Joint ventures provide joint ownership and control over the use and the fruits of assets. They may be used to bypass market inefficiencies due to uncertainties or complexity).

[29] Hennart J., Transaction Costs Theory of Equity Joint Ventures. *Strategic Management Journal,* Vol.9, 1988, p. 52.

[30] Stuckey J., *Vertical Integration and Joint Ventures in the Aluminum Industry,* Cambridge, Mass: Harvard University Press, 1983, p. 122.

[31]Kogut B., Joint ventures: Theoretical and empirical perspectives. *Strategic Management Journal*, Vol. 6, No. 3, 1988, p.71; On the other hand, the difference of parties own goals or their own self-interest will make them to compete with each other. See G. Hamel G., Competition for competence and inter-partner learning within international strategic alliances. *Strategy Management Journal,* Vol.12, 1991, p. 48.

the joint venture partners are called as cooperative dilemma or joint venture dilemma.[32] Many researchers have used prisoners' dilemma to model cooperative and competitive behaviour in both economics and psychology.[33] Because of the characteristics of the special relations between the partners in the joint venture, it also brings about some special problems. Instability or high failure rate is one of the most important problems.[34]

1.4. The Joint Venture Agreement

The joint venture partners enter into a joint venture agreement - a contractual agreement that is very often the only document governing the relationship between the partners. The purpose of the joint venture agreement is for the joint venture partners to set out their understanding of how the relationships in the joint venture will be governed.[35]

In a well-drafted joint venture agreement, it is usual to provide a clause to the effect that the joint venture partners' positions are defined in the event that unexpected circumstances arise.[36]

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[32]Tiessen H., The joint venture dilemma: Cooperating and competing in Japanese- North American and Japanese-Japanese joint ventures. Unpublished PHD Thesis, York University, Canada, 1996, p. 125.

[33]Axelrod R., *The Evolution of Cooperation*, New York, 1984, p.6; Dawes M., Social Dilemmas, *Annual Reviews Psychology*, Vol.31, 1980, p. 32; Rapport A and Chammah A., *Prisoners' Dilemma: a Study in Conflict and Cooperation*. University of Michigan Press, Ann Arbor, 1965, p. 107.

[34] Millington I. and Bayliss T., Instability of Market Penetration Joint Ventures: A Study of UK Joint Ventures in the European Union. *International Business Review*, Vol.6, No.1, 1997, p.92; Gill J. and Butler J., Managing Instability in Cross-Cultural Alliances. *Long Range Planning*, Vol.36, 2003, p. 42; Pekar P. and Allio R., Making Alliances Work Guideline for Success. *Long Range Planning*, Vol.127, 1994, p. 102.

[35]Omalu K, Pre-contractual Agreements in the Energy and Natural Resources Industries – Legal Implications and Basis for Liability, *Journal of Business Law*, Vol. 303 2000, p. 312.

[36]Whilst it appears, in some ways, to contradict the joint venture agreement in respect of their respective financial interests in the joint venture, it nevertheless provides a safeguard for the injured partner(s) in the event of default by another of the partners. In addition, matters such

Joint venturers must be in agreement as to which structure is appropriate if they are to reach the consensus necessary for a contract, since very different legal and financial outcomes may result from the structure adopted. If there is a well drafted agreement, it is straight forward as to the type of structure which governs the relationship and the rights and obligations of the parties.[37]

There is no single standard form of joint venture agreement because there can be a range of characteristics.[38] But general consideration of joint venture agreement should bear in mind important issues as follows:[39] defines the parties to the agreement; defines the purposes and objectives of the joint venture; defines the monetary and non-monetary contributions to be made by each of the parties; defines the management and structure of the joint venture and the associated appointment mechanism; defines the vehicle under which the joint venture will be carried on; defines the basis on which the participants share in the profits and losses of the joint venture; defines the liabilities of the joint venture partners; provides for a conflict resolution mechanism, and

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as bonds and insurances arrangements may be dealt with, identifying which party is to be responsible and to what extent. See McPherson J, Joint Ventures as cited in Finn D., *Equity and Commercial Relationships*, Sydney: Law Book Company,1987, p 21.

[37] Maree Chetwin, The Broad Concept of Joint Venture: Should It Have A Fixed Legal Meaning? University of Canterbury, New Zealand, EABR (Business) & ETLC (Teaching) Conference Proceedings Ljubljana, Sloveniap, 2007, p.3.

[38]Thwala, W.D., A study of joint venture formation between construction organization in Tanzania, Australasian Journal of Construction Economics and Building, Conference Series, Vol. 1 No. 2, 2012, p. 34.

[39]Rowan, V., How joint ventures are organized, operated on international construction projects, An outline used in the presentation to the Overseas Construction Association of Japan, Inc. 2005.

provides for termination mechanisms. Here, it should be known that joint venture agreements depend on the form of joint venture adopted.[40]

1.5. Benefits and Risks of Joint Ventures

1.5.1. Benefits of Joint Ventures

There are many good businesses and accounting reasons to participate in a joint venture. Partnering with a business that has complementary abilities and resources, such as finance, distribution, channels, or technology, make good sense. These are just some of the reasons partnerships formed by joint venture are becoming increasingly popular.[41] Joint ventures can offer an array of benefits to partner firms through access to new and/or greater resources including markets, distribution networks, capacity, staff, purchasing, technology/intellectual property, and finance. Often, one firm supplies a key resource such as technology, while the other firm(s) might provide distribution or other assets.[42]

A joint venture can also be very flexible. For example, a joint venture can have a limited life span and only cover part of what to do; thus, limiting the commitment for both parties and the business' exposure.[43] Joint ventures

[40]Ibid, Rowan indicates three forms of joint ventures which are: joint venture in form of company; joint venture in form of partnership; and joint venture on contractual basis (unincorporated joint venture).

[41] Ian Hewitt, *Joint Ventures*, (4th ed.), Sweet & Maxwell, August 2008, P.41.

[42] Ibid; Chi T. and McGuire J., Collaborative ventures and value of learning: Integrating the transaction cost and strategic option perspectives on the choice of market, *Journal of International Business Studies*, Vol.28 No.2, 1996, p. 28.

[43] In short, the following are key resources that can be shared: access to new markets and distribution networks; increased capacity; sharing of risks and costs with a partner; access to greater resources, including specialised staff, technology and finance. And when explained- Access to markets: Joint Venturs (JVs) can facilitate increased access to customers. One JV partner might, for example, enable the partner to sell other goods/services to their existing

are especially popular with businesses in the transport and travel industries that operate in different countries.[44]

1.5.2. The Risks of Joint Ventures

There are a number of risks related to joint ventures that can result in loss of control, lower profits, and conflict with partners, and transferability of key assets.[45] Problems are probable to arise if, for instance: the objectives of the venture are not totally clear and communicated to everyone involved; the partners have different objectives for the joint venture; there is an imbalance in levels of expertise, investment or assets brought into the venture by the different partners; different cultures and management styles result in poor integration and co-operation; and the partners don't provide sufficient leadership and support in the early stages.[46]

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customers. International JVs involve partners from different countries, and are frequently pursued to provide access to foreign markets. Distribution networks: Similarly, JV partners may be willing to share access to distribution networks. If one partner was previously a supplier to the other, then there may be opportunities to strengthen supplier relationships. Capacity: JV partners may take advantage of increased capacity in terms of production, as well as other economies of scale and scope. Staff: JVs may share staff, enabling both firms to benefit from complementary, specialized staff. Staff may also transfer innovative management practices across firms. Purchasing: As a result of their increased resource requirements, JV partners may be able to collectively benefit from better conditions (for example, price, quality, or timing) when purchasing. Technology/intellectual property: As with other resources, JV partners may share technology. A JV may also enable increased research, and the development of new innovative technologies. Finance: In a joint venture, firms also pool their financial resources, potentially eliminating the need to borrow funds or seek outside investors. See Milton R. Stewart and Ryan D., *International Joint Ventures*, a Practical Approach, Davis Wright, 2011, p.3.

[44] Deborah E. Bouchoux, *Business Organizations for Paralegals*, 3rd ed., Aspen Publishers, New York, 2004, P. 41.

[45]Peter Nayler, *Business Law in the Global Marketplace*, Butterworth-Heinemann, Oxford, UK, 2006, P. 183.

[46] Scott V. Derco, *The Benefits and Pitfalls of the Joint Venture*, Sax Macy Fromm & Co., 2010, p3.

2. Joint Venture under the 1960 Commercial Code of Ethiopia: A Comparative Analysis with the Laws of UK Joint Venture and Germany Silent Partnership

2.1. Definition and Nature

As per the 1890 Partnership Act of England and Wales, a joint venture is a way of structuring a business venture. It is a contractual relationship and involves two or more businesses pooling to carry out an entrepreneurial plan and achieve a particular goal.[47] Correspondingly, as per the Commercial Code of Ethiopia, a joint venture is an agreement between/among partners on terms mutually established.[48] Hence, comparably with that of England, joint venture in Ethiopia is a contractual relationship between/among individuals or entities.

Whereas under the German law, unlike the English and Ethiopian laws of joint ventures, there is no business organization that is named as joint venture. Rather the organization that has some shared attributes with the Ethiopian and English joint ventures is known as silent partnership. Silent partnership is defined in the Commercial Code of Germany as a *personalistic* entity in which the silent partner participates in the commercial enterprise conducted by the active partner in such a way that an investment is made by it in the assets of the active partner, and the silent partner participates in the profits of that undertaking.[49] Therefore now, it is possible to draw that,

[47]England and Wales, Partnership Act, 1890, CH. 39, S. 1.

[48]Commercial Code of Ethiopia, Proclamation No. 166 of 1960, Negarit Gazeta, Extraordinary Issue, No. 3, Addis Ababa, 1960, Article 271.

[49] German Commercial Code, Paras. 230(1) and 231(2), Translated And Briefly Annotated By A. F. Schuster, of the Inner Temple, Barristek-At-Law. With An Introduction by E. J. Schuster (L l.D. Munich), of Lincoln's Inn, Baeeistee-At-Law, London: Stevens And Sons,

principally in terms of nature, no such (a silent partnership) corresponding entity is provided for under the English and Ethiopian legal frame works.

2.2. The Requirement of Written Agreement

Under the German law, silent partnership need not be in writing.[50] It is because as it has no external relations, such entitles are not entered in the commercial registry. Equally, this requirement has also waived in Ethiopia. As provided in the Commercial Code, a joint venture agreement need not be in writing.[51] Whereas, under the English law, a joint venture needs to file its articles of association and the constitution of the entity in the registrar of companies; and it is also a legal requirement to put the agreement in writing.[52] Here, the writer of this article suggests to Ethiopia that the English experience should be taken as an important lesson to improve legal problems on joint venture arrangement. Accordingly, the suggestion is that the requirement of written agreement should be contained in the draft commercial code of Ethiopia.

The Commercial Code of Ethiopia provides a clue as to the existence of memorandum of association. It states that "the powers of the manager shall

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Limited, 119 & 120, Chanceey Lane, 1911. It is sometimes difficult to distinguish a silent partnership from a contractual arrangement involving the exchange of benefits (*Austauschvertrag*). However, if a natural person, a legal person or an entity which is collectively owned by its members participates in the profits or losses of the relevant undertaking, the arrangement will be treated as a silent partnership. A similar approach may be taken where the relevant person or entity is given extensive rights of supervision or control over, or the right to give assent to changes in the objects of, the undertaking. The relevant contract has to be considered as a whole in order to determine its nature. A distinction is often made between typical and atypical silent partnership. A typical silent partnership is thought of as having only two members, the undertaking or active partner and the silent partner. Such an arrangement only gives the silent partner the right contained in paragraphs 230-37 of the Commercial Code.

[50] Germany Commercial Code, supra note 49.

[51] Commercial Code of Ethiopia, supra note 48, article 272(2).

[52] UK Company Act, 2006, S. 18 and 14.

be specified in the memorandum of association. [And] the provisions relating to these powers may not be set up against third parties."[53] Moreover, while dealing about expulsion of partner, the law provides that "the memorandum of association may provide for expulsion." [54] Likewise, articles 278(1) (a) of the draft commercial code appears to suggest that there is a memorandum of association. It is thus important to clarify this matter and make it mandatory that a joint venture agreement be in writing.

It is obvious that lack of written agreement, eventually, can be a cause of disagreement between/among partners because one cannot produce written evidence as to the terms of the agreement.[55] Hence, whatever the size and nature of the proposed venture, it is desirable to commit to writing at the outset what the aims of the venture will be, how these are achieved, what each party is to put into the venture and how any profits derived from the venture are to be disposed of, how the proposed venture is to begin, how it is to be operated and how certain likely eventualities are to be dealt with; for example termination. The exercise of formulating such a mechanism and committing it to writing very often disciplines the parties to turn their mind to a number of points about their proposed relationship which they had not previously considered. This document is intended as a useful check list of some of the points which might ordinarily be expected to be covered in a joint venture

[53]Commercial Code of Ethiopia, supra note 48, article 275(4).
[54]Commercial Code of Ethiopia, supra note 48, article 279(2).
[55]A Team of Fourteen National Experts, Recommendations And Position Paper of the Business Community on the Revision of the Commercial Code of Ethiopia, Addis Ababa Chamber of Commerce & Sectoral Associations, July 2008, p. 22. The team suggested that "the question whether the agreement should be attested by two witnesses which will be repugnant to the secret nature of the agreement or organization. The ripple effects of the change to be made would need to be examined carefully."

agreement and to which parties proposing to enter into such a relationship ought to apply their minds.[56]

The fact that the joint venture agreement is in writing may, of course, compromise the secret nature of the joint venture but does not cause it to be so much public as it would be, were it to be registered as required by Article 219 of the Commercial Code.[57]

2.3. Confidentiality

In all of the three jurisdictions, joint ventures/silent partnerships are not made known to third parties.[58] Under Ethiopian law, we can simply understand that secrecy is one legal attribute of joint venture. This is because the Commercial Code clearly states that joint venture should not be disclosed to third parties.[59] The code also provides that if a joint venture is disclosed to third parties then it is no more joint venture but will be considered as actual

[56]A written Joint Venture Agreement should cover: The parties involved, The objectives of the joint venture, Financial contributions each make whether to transfer any assets or employees to the joint venture, Intellectual property developed by the participants in the joint venture, Day to day management of finances, responsibilities and processes to be followed., Dispute resolution, how any disagreements between the parties will be resolved, How if necessary the joint venture can be terminated. The use of confidentiality or non-disclosure agreements is also recommended to protect the parties when disclosing sensitive commercial secrets or confidential information.

[57] A Team Of Fourteen National Experts , supra note 55. The team added that "As such, the Ethiopian joint venture would be likened to what is called "Société en participation" under Organization for the Harmonization of Business Law in Africa, which is not secret like our joint venture, but which has almost the same characteristics as ours."

[58]Frank Wooldridge, *The German Limited and Silent Partnerships ,* Amicus Curiae Issue 80, 2009, pp. 30-32*;* Ashurst, Joint Ventures in England and Wales, International Investor Series No. 6, February 2012, p4.Ashurst LLP and its affiliates operate under the name Ashurst. Ashurst LLP is a limited liability partnership registered in England and Wales under number OC330252. It is a law firm authorised and regulated by the Solicitors Regulation Authority of England and Wales under number 468653. The term "partner" is used to refer to a member of Ashurst LLP or to an employee or consultant with equivalent standing and qualifications or to an individual with equivalent status in one of Ashurst LLP's affiliates. Further details about Ashurst can be found at www.ashurst.com.

[59] Commercial Code of Ethiopia, supra note 48, article 272(1).

partnership.[60] Here, the reason of the law may be as much of the information sought through the due diligence process will be commercially sensitive, the parties may not be prepared to make it available to each other without confidentiality undertakings being given. There may be some market or other information which the other parties are not prepared to make available at all.

From the above paragraph one can comprehend that the Commercial Code gives more weight to the confidentiality element of joint venture. This obviously paves a way for any aspect of subversive dealings between/among individuals devoid of fulfilling required legal duties from business people. Therefore, there must be a re-consideration on the law regarding the strict secrecy approach resting on joint venture arrangements. Put it in other words, a wise approach should be followed to strike a balance between the need for secrecy of a joint venture entity and the mandatory legal obligations that should be discharged by every business person.

2.4. Transfer of Share

In English law, it is possible for the parties to prohibit the other parties from transferring their shares in the joint venture vehicle to a third party without first obtaining their consent.[61] Otherwise, if the shares were freely transferable, a party may find itself participating in a joint venture with a third party on whom it has not had an opportunity to carry out due diligence.[62] Under the Ethiopian law, transferability of shares is generally restricted.

[60] Commercial Code of Ethiopia, supra note 48, article 272(4).
[61] England and Wales Partnership Act, supra note 47, S.31.
[62] Ibid*;* parties will often want to retain some flexibility. For example, it is common to find provisions which allow exceptions to the absolute restriction on the transfer of shares by allowing transfers to other members of the same group of companies or transfers to third parties after the shares have been offered to the other joint venture parties on a pro rata basis.

According to the Commercial Code, shares may be assigned only with the agreement of all the partners in the absence of an agreement to the contrary.[63] Whereas, in the case of German law, since the assets are owned by the active partner, the right of transfer of share is not entitled to the silent partner rather it is the right of the former in the part of his contribution, that is, without demanding the consent of the other partner.[64]

Generally, with regard to transfer of share, the Ethiopian joint venture law is more related with that of the English one since in both countries' legal frameworks the consent of the other partners is required to transfer once share. In this connection, the positions of those two countries' laws appear to be better. Since joint ventures are associations of persons instead of being associations of capital, the withdrawal and coming in of a partner is very essential for the performance and even existence of the partnership. Hence, some critical issues, like transfer of one's share, should get the consent of the others members.

2.5. Management

In case of the English law, the responsibility for the supervision and management of the venture and its business lies with the joint ventures's Board, except for those matters which UK company law requires to be decided by participants or which the venture has reserved for its participants.[65] Decision will need to be made as to whether the Board is to be

[63] Commercial Code of Ethiopia, supra note 48, article 274(2).
[64] Germany Commercial Code, supra note 49, Para. 230.
[65]UK Company Act, supra note 52, S 154-156. In English law, since all the parties to the joint venture will probably have contributed valuable assets in one way or another and will be making a commitment to contribute resources throughout the lifetime of the joint venture, each of them may want to be able to influence the ongoing management of the venture. It is usual to include, in the joint venture agreement, a list of actions which cannot be taken by the

actively involved in the managerial decisions of the venture or operating in a more strategic/supervisory role.[66]

Under the German law, the management of the partnership is entrusted to the active partner: according the Commercial Code, the silent partner has only a limited right to receive information.[67] However, in certain untypical silent partnerships the silent partner is given the right to object to or approve proposed actions of the management, and give instructions to the managers.[68] An active partner in a silent partnership is only required to exercise the same degree of care as that a partner would exercise in the conduct of its own affairs.[69]

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company without the approval of each of the parties. These matters are usually those things which would change the nature or scope of the joint venture or which would involve financial exposure in excess of that which would be expected in the ordinary course of business. See Ashurst supra note 58.

[66] UK Company Act, supra note 55, 171-77. If the Board is to have an active executive role, then it should need to include individuals with the appropriate skills. If however the board is to have a supervisory role, reviewing overall strategy and key decisions, it will consist mainly of representatives of the participants. An executive management committee may need to be established to whom the supervisory Board can delegate conduct for the day-today running of the joint venture. The structure of the venture will influence how it is to be managed. For example, a 50:50 JV is often deliberately structured so that both parties have equal representation on the board and equal voting rights. This structure has inbuilt potential for deadlock where no decision can be made if each party takes an opposing view. Where the participants hold unequal shares, a majority shareholder will usually expect to have a final say on matters to be decided at the board and may have greater reserved decision making-rights, whilst a minority shareholder will have more limited rights as appropriate in order to protect its position, at Public Sector Business Cases using the Five Case Model available at: www.hm-treasury.gov.uk/d/1(3).pdf.
And; www.hm-treasury.gov.uk/d/2(3).pdf.

[67] Germany Commercial Code, supra note 49, Para. 233.

[68] Ibid.

[69] Sometimes the silent partner is entrusted with management functions itself. An active partner in a silent partnership is only required to exercise the same degree of care as that which that partner would exercise in the conduct of its own affairs (see Germany Civil Code, para 708). It is doubtful however whether this rule would apply where the silent partnership had the character of a large entity inviting subscriptions from the public.

With regard to the management aspect of Ethiopian law of joint venture, as provided under the commercial code, a joint venture may be managed by one or more managers, who need not be a party to the venture.[70] However, in the absence of a selected manager, each partner shall have the position of a manager.[71]

When the management aspect of the three jurisdictions' joint venture/silent partnership laws is compared, the governance composition and the who manages issues somewhat contrast in those jurisdictions. In Germany, the management of the partnership is mainly entrusted to the active partner. This is a different approach from that of the Ethiopian law because, according to the Commercial Code, each partner shall have the status of manager in the absence of an appointed manager. Besides, unlike the German silent partnership, under the Ethiopian law, manager can be from outside the partners. With regard to the English law, unlike both under the Ethiopian and German laws, the governance composition can constitute board and executive management committee.[72]

Generally, the writer of this article concludes that the approach taken in the management of joint venture under Ethiopian law is different from that of the English and German laws. Nonetheless, at least in terms of

[70] Commercial Code of Ethiopia, supra note 48, article 275(1).

[71] Commercial Code of Ethiopia, supra note 48, article 275(2). The law further provides that where there is a statutory manager, his/her powers should be specified in the memorandum of association. Nonetheless, a statutory clause restricting the powers of the manager may not be set up against third parties. This is so, because the memorandum of association, otherwise known as joint venture agreement, is not required to be registered. Besides, third parties are divested of the opportunity to have access to such information. And, a statutory manager may not be revoked without good cause. See Commercial Code of Ethiopia, supra note 48, article 275(3-4).

[72] UK Company Act, supra note 52 (an executive management committee may need to be established to whom the supervisory Board can delegate conduct for the day-today running of the joint venture).

composition, there is a minor similarity with that of German silent partnership since both countries' laws provide for the governance matters to be by managerial set up. In relation to the who manages issue, the approach of our law could be valued more. It is because, specially, unlike that of the German one, the Ethiopian law of joint venture allows the partners to appoint a manager outside the members. This obviously enables the partners to appoint a more qualified professional than the members, if needed.

2.6. Liability of Partners

Both in Ethiopian[73] and English[74] laws, partners are jointly and severally liable. Yet, as a slight difference under the Ethiopian joint venture law, liability of non-manager partners may be limited in the memorandum.[75] Conversely, in the case of the German silent partnership, the partners are not jointly and severally liable. The active partner, as opposed to the silent partner, is liable for the trade debts.[76] The active partner is required to conduct the business in the general interest and to pay the silent partner an annual dividend; and when the partnership has terminated this active partner has to pay the silent partner the appropriate credit balance.[77]

Generally, in relation to liability, all of the positions of the legal frameworks are convincing. In case of the Ethiopian and English laws, since all of the partners can involve in the transaction of the venture and in decision making process, it is appropriate to make them jointly and severally liable.

[73]Commercial Code of Ethiopia, supra note 48, article 276(4).
[74] England and Wales Partnership Act, supra note 47, S. 12.
[75] Commercial Code of Ethiopia, supra note 48, article 276(2)
[76] Germany Commercial Code, supra note 49, Para. 232(1). A silent partnership in essence involves contractual relationships between the participants. It is required to make the promised contributions to the assets of the active partner.
[77] Germany Commercial Code, supra note 49, Para. 235(1)).

Whereas, with regard to the German law, it will not be fair if the silent partner is made jointly and severally liable for the silent partnership where only the active partner runs the entity's transactions without the involvement of the former, i.e. mainly in decision making.

2.7. Profits and Losses Distribution Policy

In English law, the parties will need to decide a general policy for how any available profits and losses of the venture are to be distributed.[78] The joint venture agreement should include a provision setting out the principles of the distribution policy.[79] Comparably, also under the Ethiopian law, profits and losses distribution is mandatory. As provided in the Commercial Code, "any provision giving all the profits to one partner shall be of no effect; and any provision relieving one or more of the partners of his share in the losses shall be of no effect."[80]

Under the German law, the silent partner must participate in the profits of the partnership, and in its losses, unless there is an agreement to the contrary.[81] Hence, in opposite to what the Ethiopian and English laws provide, under the German law, the partnership agreement may provide that the silent partner shall not participate in losses; however, his share in profits cannot be excluded.[82]

When the distribution policies are analysed, unlike the German law, the Ethiopian and English laws appear to be more logical. If one of the

[78] England and Wales Partnership Act, supra note 47, S. 24 (In forming a joint venture, not only are the resources and expertise of the businesses shared, but the risks and rewards are also shared).
[79] Ibid.
[80] Commercial Code of Ethiopia, supra note 48, article 215.
[81] Germany Commercial Code, supra note 49, Para. 251 (1).
[82] Ibid.

partners waived from sharing of losses, and unfortunately when maximum losses face the entity, this may paralyse the economic capacity of the other partner who shoulders the whole losses. Such partner may be forced to withdraw from the membership and ultimately discouraged from entering into an agreement of a joint venture. The consequence may also wind up the entity before achieving its objectives. Hence, to the opinion of the writer, it is the above justification why profits and losses sharing policy are made mandatory in the joint venture laws of Ethiopia and England.

2.8. Dissolution

As of the English law, the ground of dissolution of joint venture is mainly by the parties' decision at any time and when the duration and expiry issues related to any contract(s) come to an end.[83] The parties will often wish to lock each other into the joint venture for at least a limited period by restricting the transfer of shares. However, it is likely that they will each want to be able to bring the joint venture to an end in certain circumstances in accordance with an agreed exit strategy.[84] By way of example, the following

[83] England and Wales Partnership Act, supra note 47, S. 12. All joint ventures come to an end at some point when the original purpose for which the entity was established is complete, or as a result of differences between the joint venture participants. Unless it is clear that there is such policy and commercial stability that commonality of interests will be sustained on a long-term basis, the public sector should contemplate an end state where it is no longer involved in the entity, where either the joint venture has been successful in its own right or its job is done. See Guide to the establishment and operation of Trading Funds, Treasury Central Accountancy Team, January (2001), available at: www.hml treasury.gov.uk/d-Guide_to_the_Establishment_and_Operation_of_Trading_Funds.pdf.

[84] In contemplation of the termination of the joint venture agreement, provisions will often be included to determine the distribution of the assets (including any intellectual property) of the

types of provision may be included:[85] the parties may agree that the joint venture will continue for a fixed period of time, perhaps until a one-off project is completed; and one party may have the right to buy out another party, or to sell its shares to another party at a pre-determined price or at fair value determined by an expert using agreed valuation parameters. The parties should also plan what to do in the event that the joint venture is not working out as they intended.[86]

Under the German Commercial Code, if insolvency proceedings are begun against the assets of a partner, the silent partnership is treated as dissolved. If the active partner becomes insolvent, the Commercial Code provides that the silent partner may prove for his credit balance (which is likely to have been diminished through losses) in its insolvency, and that partner will have the same rank as the other creditors who do not have preferential claims and will be entitled to the same insolvency quota as such creditors.[87] The partnership is not dissolved by the death of the silent partner. Moreover, termination may be made by request of one of the partners or by the creditors of a silent partner and any important reason can be a ground.[88]

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joint venture vehicle and the discharge of any of its outstanding obligations. See UK Public Sector Business Cases using the Five Case Model, at www.hm-treasury.gov.uk/d/1(3).pdf ; and, www.hm-treasury.gov.uk/d/2(3).pdf).

[85] England and Wales Partnership Act, supra note 47, S. 32-35.

[86]For example: there may be circumstances where the joint venture will automatically terminate, perhaps where an essential regulatory approval is withdrawn or if one of the parties gets into financial difficulties; and each party may have the right to terminate the agreement if the other party commits a default by breaching a condition of the joint venture agreement or where there has been a change of control of a party. See Guide to the establishment and operation of Trading Funds, supra note 103.

[87] Germany Commercial Code, supra note 49, Para. 236 (1).

[88] Germany Commercial Code, supra note 49, Para. 234.

The issue of dissolution is also provided under Ethiopian commercial law. Accordingly, the commercial code mentioned different grounds for the dissolution of joint ventures.[89] These are:

a) the expiry of the term fixed by the memorandum of association unless there is provision for its extension;
b) the completion of the venture:
c) failure of the purpose or impossibility of performance;
d) a decision of all the partners for dissolution taken at any time;
e) a request for dissolution by one partner where no fixed term has been specified;
f) dissolution by the court for good cause at the request of one partner;
g) the acquisition by one partner of all the shares;
h) death, bankruptcy, or incapacity of a partner, unless otherwise lawfully agreed; and
i) a decision of the manager, if such power is conferred upon him in the memorandum of association.

When the grounds of dissolution under the three countries' laws are compared, it is feasible to find some common elements. These are like for instance: the possibility of dissolution by decision of the partners; expiry of the duration of the contract; bankruptcy; and when the establishing purpose of the entity is achieved.

The Ethiopian law has provided more detailed grounds of dissolution that are not mentioned in the rest of two countries' laws. Particularly, as a clear discrepancy from the German law, our law provides death of a partner to be a

[89] Commercial Code of Ethiopia, supra note 48, article 274.

ground for dissolution as far as any agreement is not entered to the contrary. In sum, it can be said that the Ethiopian law of joint venture has some common grounds of dissolution with that of the German and English laws with an addition of some other detailed grounds.

In relation to providing grounds of dissolution, unlike the Ethiopian law, the English law approach seems sound because the law leaves to the parties' agreement to specify the detail grounds of dissolution. Here, the lesson to Ethiopia is, since a joint venture entity is established by mutual agreement, it is more appropriate to let the parties to agree on the detail terms of dissolution rather than enumerating by the law. Possibly the most important parts that should be addressed by parties' agreement are the provisions relating to how the agreement can be terminated and what is to happen after termination. Particular attention should be paid to this right at the outset especially since this is often the last thing which parties consider when they are in the full flush of optimism over the founding of a new venture.[90]

2.9. Expulsion of Partner

Expulsion of a partner is permitted under the laws of all the three jurisdictions. In case of English law, a prior agreement is needed to expel a partner.[91] Yet, the German law, without the need to have a prior agreement,

[90] Questions which ought to be answered in the joint venture agreement include the following: can the agreement be terminated if one party is in breach of its obligations and if so how? Is the venture such that one party should be able to terminate leaving the others to continue the venture or if one party wishes it to end it should this be binding on all? What happens if one of the parties becomes bankrupt or is liquidated? Are there to be any provisions whereby a party wishing to terminate the agreement is able to sell its share of the joint venture company to the remaining parties and if so on what terms? What is to happen if the joint venture becomes insolvent.

[91] England and Wales Partnership Act, supra note 47, S. 25. The act provides that no majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

permits one party just to expel the other provided that circumstances arise with respect to one of them, would give the remaining partners the right to expel the other.[92]

Under the Ethiopian law, judicial expulsion is clearly provided in the commercial code. According to the commercial code, the court may grant an order for the expulsion of the wrongful venturer in lieu of dissolution upon application by the other venturers, where dissolution is requested for reasons attributable to one venturer.[93] Such expulsion could also be provided for in the memorandum of association.[94]

Generally, the English law made the expulsion through parties' prior agreement; whereas, in Germany, the law itself allows expulsion of a partner. Unlike those two countries' laws, the Ethiopian law has set out different mechanisms, i.e. judicial expulsion and parties can also agree to provide the issue of expulsion under their memorandum of association. Here, to the opinion of the writer, the approach taken by the Ethiopian law is more appropriate since widening the ways of expulsion secures the durability and efficient performance of a joint venture arrangement. This is mainly because a hostile partner may not be tolerated until he/she adversely affects the business of the venture.

Conclusion

[92] Germany Commercial Code, supra note 49, Para. 242. The paragraph further provides that the other partner can upon application to the court obtain an order authorising him to take over the business with all its assets and liabilities without any process of liquidation.
[93]Commercial Code of Ethiopia, supra note 48, article 279(1).
[94] Commercial Code of Ethiopia, supra note 48, article 279(2).

From the aforementioned comparative analyses, the writer of this article found that the Ethiopian joint venture arrangement has more comparable features with that of the English one. This comparability may be, mainly, due to the similarity in the nature of the joint ventures and the role of the partners in the entity they created. While the difference in such nature and the role of the partners can be regarded as the reason for the ample deviation between the Ethiopian joint venture law and the German silent partnership.

Generally, discovering the different legal approaches of those compared jurisdictions is very important for Ethiopia to improve legal problems facing the joint venture arrangements. Accordingly, the following summarised areas can be mentioned as best experiences to be drawn from those compared jurisdictions. These are the need for: written agreement; a moderate approach for the requirement of confidentiality; and in case of dissolution, the law rather than enumerating detailed grounds of dissolution, should leave this task to the parties' agreement.

Regulating the Environmental Impact of Direct Investment in Developing Countries: The Need to Shift from a Command-and-Control Mechanism to a Multi-stakeholder Approach

Mekdes Tadele Woldeyohannes*

Abstract

Investment promotion occupies a prominent place in the development policies of developing and least developed countries. Yet it poses challenges to the achievement of sustainable development by undermining social development and exposing the environment to degradation. This article discusses the links between investment and the environment and the dilemma facing developing countries in their efforts to regulate the environmental impacts of investment more strictly. More specifically, it explains how countries' interest in remaining competitive in attracting investment affects the integrity of the environment. It also indicates a lack of institutional capacity to regulate investment, and the existence of a power imbalance between developing counties and companies (particularly multinationals) as factors jeopardizing the environment. It highlights the importance of effective policy measures to reap the benefits of investment and protect the environment at the same time. Finally, the article argues that countries need to introduce environmental regulatory systems that give room for different actors—governments, NGOs, the community, and business enterprises—to work together to control the environmental impacts of investment, presenting an alternative to the conventional command-and-control approach. It elaborates how stakeholders' involvement, and specifically that of companies, is vital to ease developing countries' anxiety about losing the inflow of

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direct investment due to strict environmental regulation.

Key Terms: Direct investment, developing countries, environmental impact, environmental Protection

Introduction

Developing and Least-developed countries' urgent need to alleviate poverty requires the mobilization of resources towards achieving this goal. In these countries, limitation in the availability of financial and other resources affects development and economic growth. Countries encourage inflow of foreign capital with the view that it is one of the means to triumph over shortage of capital, foreign exchange, and skill – all are important inputs for development.[1] Induced by these and other benefits that investment is believed to bring for domestic development, both developing and least-developed countries put its promotion at the centre of their development strategies. Accordingly, China, Brazil, Singapore, India, Chile, Hong Kong, British Virgin Islands, Indonesia, and Colombia have been able to become among the top 20 recipient economies.[2] As countries promote inflow of investment, the surge in foreign direct investment (hereinafter FDI) is increasing. The global flow of FDI, which was $207 billion in 1990, grew to $1,472 billion on

[1] Moran, T. H., *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition*, Institute for International Economics, Washington, D.C, 1998 [hereinafter Moran].

[2] In 2012, there was greater FDI flow to developing economies than to developed countries. During this year, nine developing economies ranked among the 20 largest recipients in the world. See UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, United Nations, New York and Geneva, 2013, pp. 2-3, [hereinafter UNCTAD, *World Investment Report 2013*].

average between 2005 and 2007.[3] Its flow was affected by the economic and financial crises that the world has been witnessing. The crises curtailed multinational companies' access to financial resources and market opportunity, leading the global flow of FDI to decline in 2008 and 2009.[4] However, the economy began to recover, and in 2012 the global flow of FDI rose to $1.45 trillion.[5] It is expected to reach $1.6 trillion in 2014 and $1.8 trillion in 2015.[6] More specifically, FDI flow to developing economies reached more than $700 billion in 2012.[7]

The benefits that governments hope to acquire from inflow of direct investment may not be as desired. This is attributable to a number of factors. The skepticism about the role FDI plays in a host state's development relates to the existence of differences in the interests of foreign investors and host governments.[8] While foreign companies' interest involves profit maximization, competitiveness and access to international markets, host governments are concerned about economic development. In countries that lack effective polices to create common ground for the two interests, FDI may

[3] UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development*, United Nations, Geneva, 2011, pp. 24-25, [hereinafter UNCTAD, *World Investment Report 2011*].

[4] UNCTAD, *World Investment Report 2013, supra* note 2, pp. 19- 32.
[5] *Id.*, p. ix.
[6] *Ibid.*
[7] See *Ibid*. It is important to note, however, that there is weak FDI flow to least developed countries, Africa, landlocked developing counties and small island developing countries, while its flow to East and Southeast Asia and Latin America is strong. UNCTAD, *World Investment Report 2011, supra* note 3, pp. 40-87.
[8] Kehl, J. R., *Foreign Investment and Domestic Development: Multinationals and the State*, Lynne Rienner Publishers, 2009, pp.1-2, [hereinafter Kehl].

not contribute positively to development.[9] Apart from this, the unequal negotiating power between least developed counties and investing companies, a lack of institutional capacity to negotiate mutually beneficial investment arrangements, and weak political commitment diminish the contributory role of FDI for domestic development.[10] Host countries' ambition to achieve development may lead them to accept and submit to the conditions set by foreign companies.

In recent decades, the world has been witnessing multiple facets of environmental degradation, including greenhouse gas emissions, deforestation and loss of biodiversity.[11] Such patterns of environmental destructions have partly been created and further exacerbated by economic activities.[12] Direct investment, as an engine for economic growth, involves resource utilization and extraction as well as manufacturing operations. This triggers considerable debate about the impact of investment on the environment. FDI, as one form of economic activity, has contributed significantly to the environmental

[9] *Ibid*. See also Moran, *supra* note 1.

[10] Zarsky, L., *International Investment for Sustainable Development: Balancing Rights and Rewards*, Earthscan, London, 2005, p. 28 [hereinafter Zarsky].

[11] OECD, *The Impact of Foreign Direct Investment on Wages and Working Conditions*, OECD-ILO Conference on Corporate Social Responsibility, OECD Conference Centre, Paris, 2008, www.oecd.org, [hereinafter OECD, The Impact of Foreign Direct Investment]; UNEP, Global Environmental Outlook 2000, UNEP, Nairobi, 1999, [hereinafter UNEP, Global Environmental Outlook 2000]; UNEP, Global Environmental Outlook GEO4, Environment for Development, UNEP, Nairobi, 2007, [hereinafter UNEP, Global Environmental Outlook GEO4]; Ekins, P., *Economic Growth and Environmental Sustainability: The Prospects for Green Growth*, Routledge, 2000, pp. 8-9, [hereinafter Ekins].

[12] Our Common Future 1987, Chapter one, Par. 9; Prizzia, R., The Impact of Development and Privatization on Environmental Protection: An International Perspective. *Environment, Development and Sustainability*, Vol. 4, 2002, [hereinafter Prizzia]; Ekins, *supra* note 7, pp. 6-20.

destruction the world has been experiencing.[13] Because of inadequate international and national environmental standards and the non-enforcement of regulations, the actual contribution that investment brings for sustainable development is seriously in question.

Needless to say, if well regulated, investment can positively contribute to the achievement of sustainable development. States hosting direct investment need to introduce policies and legal measures with a view to minimizing its negative impact on the environment and maximizing its positive contribution to sustainable development.[14] National minimum environmental standards and voluntary codes of conduct are among the possibilities that states should consider. There should be also adequate room for input from the public and civil society. Civil society's role in this regard is multifaceted, as it represents the interests of local communities, shapes host countries' development strategies, and helps to change international investment regimes and influence compliance with codes of conduct.[15]

This article aims to discuss the links between investment and the environment, and the dilemma facing developing countries in their efforts to regulate the environmental impact of investment. Accordingly, after discussing the nexus between investment and development, it offers a brief discussion of the opportunities that investment brings for environmental

[13] Mabey, N. and McNally, R., *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development,* A WWF-UK Report, 1999, p. 3, [hereinafter Mabey & McNally].
[14] Gentry, B., Foreign Direct Investment and the Environment: Boon or Bane?, in OECD, *Foreign Direct Investment and the Environment , OECD Proceedings,* OECD, Paris, 1999, [hereinafter Gentry].
[15] *Id., pp. 34-35.*

protection, and the challenges it poses as well. The last section focuses on explaining the respective responsibilities of the various stakeholders in environmental regulation of direct investment. It elaborates on how this is vital to achieve environmental protection without compromising host states' interest in enhancing investment and thereby achieving development.

1. Attracting Investment: A Means to Achieve Development

The promotion of investment occupies a significant place in the development strategies of most developing countries. It can be said that it is an engine for economic growth and development. Through promoting investment, countries strive to acquire a number of benefits, such as new and better technologies, skills and employment opportunities.[16] The know-how and skills provided by direct investment can be transferred to domestic firms and, through this, investment can improve a host country's stock of knowledge. Technological transfers and spillovers to local firms may improve domestic production.

These may contribute to transform the host country's economy. Inflow of investment may increase the demand for labor. Foreign direct investment presents the prospect of integration into the international trading system; increases access to international markets; contributes to national revenue generation and infrastructure development; and helps to create a more competitive business environment.[17] The cumulative effect of all of these can

[16] *Id*., p. 21; Moran, *supra* note 1; Gallagher, K. P. and Zarsky, L., No Miracle Drug: Foreign Direct Investment and Sustainable Development, in Zarsky, L. (ed.), *International Investment for Sustainable Development: Balancing Rights and Rewards,* Earthscan, London, 2005, [hereinafter Gallagher & Zarsky].

[17] OECD, *Foreign Direct Investment, Development and Corporate Responsibility*, OECD Proceeding, OECD, Paris, 2000, [hereinafter OECD, *Foreign Direct Investment*]; Moosa, I. A., *Foreign Direct Investment: Theory, Evidence and Practice*, Palgrave, New York, 2002,

be economic growth and the development of host states. Investment by foreign companies may also improve host states' environmental and social conditions through, for example, transferring cleaner technology and encouraging domestic firms to adopt better environmental management practices. Inspired by these and other advantages, developing and least developed countries open their doors to both domestic and foreign investors; they liberalize investment regimes and create policies designed to attract as much investment as possible into their jurisdictions.[18]

Nevertheless, there are doubts about the ways in which investment fosters domestic development. Moran notes:

> "There is a common assumption that if international companies conduct their activities with the same good citizenship standards abroad that they do at home, their contribution to the host economy can only be positive. But this reasoning hinges, implicitly, on the presence of highly competitive conditions that are fundamentally at odds with both theory and evidence about FDI behaviour. [...] [T]he possibility that FDI might lead to fundamental economic distortion and pervasive damage to the development prospects of the country is ever present."[19]

The risks associated with FDI may outweigh the benefits acquired from it. Possible negative impacts on host counties' economies and citizens are

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pp. 68-95, [hereinafter Moosa]; Jones, J. and Wren, C., *Foreign Direct Investment and the Regional Economy*, Ashgate Publishing, Hampshire, 2006, pp. 72-76, [hereinafter Jones & Wren].

[18] UNDP, *World Investment Report. FDI Policies for Development: National and International Perspectives*, UNDP, Geneva, 2003, pp. 86-91, [hereinafter UNDP]; Mabey & McNally, *supra* note 13, p. 11.

[19] Moran, *supra* note 1, p. 2.

highlighted.[20] First, FDI may impinge on a host state's balance of payments through increasing imports, as host states grant foreign investors incentives such as tax allowances, thereby reducing government revenues. Second, FDI can have a potential negative impact on domestic investment and industrial growth. FDI liberalization may make domestic firms less competitive and lead them to impoverishment. In other words, it may cause the crowding out of domestic investment where local firms cannot compete with foreign companies. Local firms may not be capable of competing with foreign companies which are better equipped financially and with skilled personnel. Thus entry costs may increase or local companies' competitiveness may be otherwise affected. And the crowding out of domestic investment may affect a host country's economy in the long run. In countries where the population is highly engaged in small-scale or peasant agriculture, the outcome might be migration to urban areas where there is no stable employment. Third, FDI may endanger national sovereignty by increasing dependency and external influence. It may limit domestic control over resources. Fourth, the social and environmental costs of FDI can be high. Foreign investment may lead to widespread environmental degradation and exploitation of low-paid workers. Irrespective of all these concerns, FDI continues to have a prominent place in the development strategies of developing countries.[21]

Countries introduce different policies and strategies aimed at promoting the

[20] *Id*., pp. 10-22; Kahai, S., The Role of Foreign Direct Investment and Its Determinants, in Kehal, H. (ed.), *Foreign Investment in Developing Countries*, Palgrave Macmillan, New York, 2004, [hereinafter Kahai]; Moosa, *supra* note 17, pp. 68-98; Mabey & McNally, *supra* note 13; OECD, The Impact of Foreign Direct Investment, supra note 11.

[21] Kumar, N. and Prandhan, J. P. in Graham, E. M., *Multinationals and Foreign Investment in Economic Development*, Palgrave Macmillan, New York, 2005, pp. 42-52, [hereinafter Kumar & Prandhan]; Kehal, H., *Foreign Investment in Developing Countries*, Palgrave MacMillan, New York, 2004, pp. 11-18, [hereinafter Kahal].

inflow of investment and maximizing the benefits that it provides for development. Some of these policies aim at bringing macroeconomic stability, infrastructure improvement, and transparency within the political and regulatory environment. Some countries pursue policies that liberalize the FDI regime, exempt investors from paying taxes for a specified period, and allow profit repatriation.[22] For instance, according to the World Investment Report 2011, in 2010 some 149 policy measures affecting foreign investment were adopted by 74 countries.[23] Among these measures, 101 relate to investment liberalization and promotion.[24] In addition, countries conclude bilateral investment agreements (BITs) with major capital exporting countries. BITs normally extend rights and protections to foreign investors.[25] More specifically, however, there is strong support in favor of the argument that countries should make appropriate decisions about the nature of the policy measures they take in order to fully benefit from investment.[26] As the Organization for Economic Co-operation and Development (OECD) report notes:

> "[N]ational policies and international investment architecture matter for attracting FDI to a larger number of developing countries and for reaping the full benefits of FDI for development. […] [H]ost countries […] need to establish a transparent, broad and effective enabling policy environment for investment and to build the human and institutional capacities to

[22] Kahal, *supra* note 21.
[23] UNCTAD, *World Investment Report 2011*, *supra* note 3, p. 94.
[24] *Ibid.*
[25] The number of BITs signed by the end of 2002 was 2181. See UNDP, *World Investment Report. FDI Policies for Development: National and International Perspectives*, UNDP, Geneva, 2003, p. xvi, [hereinafter UNDP, *World Investment Report 2003*].
[26] Zarsky, *supra* note 10, p. 26.

implement them."[27]

Components of good governance such as transparency, credibility, accountability and participation are important tools to encourage investment. Eliminating barriers that affect entrepreneurship, competition and trade, restrictions on foreign investment, and administrative barriers to entry and exit is said to be important to enhance investment.[28]

2. Opportunities and Challenges of Direct Investment for Environmental Sustainability

The growth of investment engenders considerable debate among policymakers and activists concerning the implications that this trend has for the environment. The main anxiety relates to the issue of how a particular investment will affect a host country's environment.[29] Investment often involves activities with potential environmental impacts, including resource extraction and infrastructure or manufacturing operations. In countries without effective regulatory frameworks, investment may cause devastating environmental problems, such as loss of biodiversity, resource depletion, pollution, and soil degradation.[30] Particularly, investments in resource extraction industries such as mining and logging can lead to serious and sometimes irreversible environmental degradation. Apart from its direct

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[27] OECD, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs*, OECD Publications, Paris, 2002, pp. 37-40, [hereinafter OECD, *Foreign Direct Investment for Development*].

[28] *Ibid.*

[29] Gray, K. R., Foreign Direct Investment and Environmental Impacts- Is the Debate Over?, *RECIEL*, Vol. 11, No. 3, 2002, [hereinafter Gray]; Gentry, *supra* note 14; Zarsky, L., Havens, Halos and Spaghetti: Untangling the Evidence about Foreign Direct Investment and the Environment, in OECD, *Foreign Direct Investment and the Environment*, OECD, Paris, 1999, [hereinafter Zarsky *et al.*].

[30] Mabey & McNally, *supra* note 13; Zarsky *et al.*, *supra* note 29, p. 50.

impact on the environment, investment may jeopardize indigenous rights and community health.[31]

The second issue of debate relates to competition among countries to attract investment and the resulting implications for the environment. With a view to remaining competitive in attracting investment, states tend to become reluctant to regulate the environmental impacts of investment strictly.[32] Countries' ambition for investment may lead their governments to undervalue their environment and engage in a "race to the bottom." There is a perceived attitude that environmental regulation impedes economic growth.[33] The traditional assumption holds that jurisdictions with stringent environmental standards are at a disadvantage in competing with those whose standards are less stringent. The assumption is based partly on the conviction that compliance with environmental regulations will add production costs for companies and affect their overall income.[34] To minimize these costs and remain competitive in the market, companies may prefer to invest in or

[31] *Ibid.*

[32] Oman, C., *Policy Competition for Foreign Direct Investment: A Study of Competition for Foreign Direct Investment*, OECD, Paris, 2000, pp. 91-94, [hereinafter Oman]; Prizzia, R., The Impact of Development and Privatization on Environmental Protection: An International Perspective, *Environment, Development and Sustainability*, Vol. 4, 2002, [hereinafter Prizzia].

[33] Feiock, R. C. and Stream, C., Environmental Protection Versus Economic Development: A False Trade-Off? *Public Administration Review*, Vol. 61, No. 3, 2001, pp. 313-314, [hereinafter Feiock & Stream].

[34] Environmental regulation may impose duties that can potentially increase costs for industrial firms, such as "absorbing some or all of the costs of installing pollution abatement equipment, disposing of hazardous waste, and cleaning up after industrial accidents." Williams, E., Macdonald, K., and Kind, V., Unravelling the Competitiveness Debate, *European Environment*, Vol. 12, 2002, p. 284, [hereinafter Williams *et al.*]; Feiock & Stream, *supra* note 33, pp. 314-315.

relocate to states with less stringent environmental standards.[35] Based on this assumption, states may make relentless efforts to reduce the costs of doing business, attempting to ensure a continuous flow of investment. One of the actions they take in this regard is to reduce regulatory stringency.[36] This, however, may lead to massive pollution and environmental degradation.

In response to differences in regulatory stringency, firms may relocate or expand to jurisdictions with lax environmental regulation, leading those places to become "pollution havens" for "dirty" industries.[37] Resource and pollution intensive industries or companies that are required to comply with strict pollution control requirements may move to places where compliance costs are lower.[38] These companies may also take such costs as pollution abatement into account when they make decisions about where to invest. As most developing counties are desperate to secure a continuous flow of investment, the possibility of setting or implementing strong environmental standards will be constrained. This issue will be discussed further in the next section.

On the positive side, investment may bring opportunities to strengthen environmental protection. Depending on various circumstances, the contributions of investment can be beneficial in this regard. Companies may promote basic environmental goals by creating awareness about environmental factors, bringing efficiency in resource use, and addressing

[35] Gray, *supra* note 29, pp. 307-308.
[36] *Id.*, pp. 308-309; Woods, N. D., Interstate Competition and Environmental Regulation: A Test of the Race-to-the-Bottom Thesis, *Social Science Quarterly*, Vol. 87, No. 1, 2006, pp. 175-176, [hereinafter Woods].
[37] Zarsky *et al.*, *supra* note 29, p. 53.
[38] Mabey & McNally, *supra* note 13.

existing environmental problems. As Araya notes: "[T]he prospects of clean technology diffusion, by way of direct transfer and spillovers, is a key motivation for host-nations—especially in developing countries—to attract FDI."[39] FDI may "help to drive up standards in developing countries by transferring both cleaner technology and/or better environmental management practices."[40] This, however, depends on a firm's technology choices. The presence of foreign firms in host states may improve environmental protection standards if they employ better techniques that reduce pollution and minimize resource depletion, or if they implement effective environmental management systems.[41] Spillover depends on local firms' keenness to adopt or imitate clean technologies, as well as the availability of skilled labor. In some cases, it may require collaboration between foreign investors and local firms, for example, to arrange training programs. Multinational companies (hereinafter MNCs) sometimes facilitate spillover through requiring their local suppliers to apply better and more environmentally friendly technologies and management practices.[42] Apart from this, foreign direct investors my prompt host governments to implement environmental regulation in a predictable, transparent and consistent manner, including against local firms.[43]

Nevertheless, there is no consistency in research findings about the existence

[39] Araya, M., FDI and the Environment: What Empirical Evidence Does and Does Not Tell Us?, in Zarsky, L., *International Investment for Sustainable Development: Balancing Rights and Rewards*, Earthscan, London, 2005, p. 54, [hereinafter Araya].
[40] Zarsky, *supra* note 10, p. 27.
[41] Araya, *supra* note 39, p. 59.
[42] Gentry, *supra* note 14, p. 36; Zarsky *et al.*, *supra* note 29, p. 57.
[43] Gentry, *supra* note 14, p. 40.

of a positive link between foreign firms and environmental performance in host states. Some of the literature suggests that FDI promotes better environmental management practices, but some suggests otherwise.[44] As Gentry argues, "FDI is neither a boon nor a bane for the environment; it is both. Because of the huge differences among the locations, sectors and investors involved in FDI, examples can be found to support both positions."[45]

At a minimum it can be said that the presence of foreign firms will not improve the environmental performance of host states automatically. This depends on a number of factors. In order to avoid the risk and optimize the benefits of FDI for environmental protection, a host state's policies and institutional capacities play a significant role as "government regulation, the rate of economic growth, company culture, the particular industry in which the FDI takes place and the rules that govern FDI are key variables."[46]

3. Regulating the Environmental Impact of Investment: Host Countries' Anxiety about Losing Investment

There has been heated debate about whether countries remain competitive in

[44] Lagos, G. and Velasco, P., Environmental Policies and Practices in Chilean Mining, in Warhurst, A. (ed.), *Mining and the Environment: Case Studies from the Americas*, IDRC, 1999; and Gentry, B. (ed.), *Private Capital Flows and the Environment: Lessons from Latin America*, Edward Elgar, 1998 - indicate cases where FDI promotes better environmental management in host states. On the other hand, Dasgupta, S., Hettige, H. and Wheeler, D., *What Improves Environmental Performance? Evidence from Mexican Industry*, Policy Research Working Paper 1877, World Bank, Washington, D.C., 1997; and Hettige, H., M. Huq, S. Pargal and D. Wheeler, Determinants of pollution abatement in developing countries: Evidence from South and Southeast Asia, *World Development*, Vol. 24, No. 12, 1996 - did not find any significant change in relation to environmental management due to the existence of foreign capital.

[45] Gentry, *supra* note 14, p. 21.

[46] Zarsky, *supra* note 10, p. 31.

attracting investment if they strictly regulate the environment. As noted in the previous section, countries seeking investment are also concerned to gain competitive advantage over others. The assumption that companies prefer to invest in countries with lax environmental regulation restricts developing countries from introducing strict environmental regulation. The traditional view on the nexus between environmental regulation and industrial competitiveness asserts that strict regulation leads inevitably to less competitiveness through impeding firms' productivity and reducing profit. Environmental regulations such as technology standards, environmental taxes, or tradable emission permits increase production costs, as they require firms to allocate additional resources in order to reduce pollution.[47] Nevertheless, the literature challenges this underlying assumption. Michael Porter and Claas van der Linde developed a theory known as the Porter Hypothesis that stresses the correlation between environmental regulation and firms' productivity.[48] They argue:

> "[P]roperly designed environmental standards can trigger innovation that may partially or more than fully offset the costs of complying with them. Such 'innovation offsets,' as we call them, can not only lower the net cost of meeting environmental regulations, but can even lead to absolute advantages over firms in foreign countries not subject to similar regulations. Innovation offsets will be common because reducing pollution is often coincident with

[47] Ambec, S., Cohen, M. A. and Paul Lanoie, S. E., The Porter Hypothesis at 20: Can Environmental Regulation Enhance Innovation and Competitiveness?, Scientific Series, 2010, p. 2, [hereinafter Ambec *et al.*].

[48] Porter, M. E. and Van der Linde, C. N. D., Toward a New Conception of the Environment-Competitiveness Relationship, *Journal of Economic Perspectives,* Vol. 9, No. 4, 1995, [hereinafter Porter & Van der Linde].

improving the productivity with which resources are used. In short, firms can actually benefit from properly crafted environmental regulations that are more stringent (or are imposed earlier) than those faced by their competitors in other countries. By stimulating innovation, strict environmental regulations can actually enhance competitiveness."[49]

According to Porter and Van der Linde, pollution is often a waste of resources. Through reducing pollution, it is possible to make use of resources more effectively and cut costs. This can ultimately improve the overall productivity and performance of a firm. If a state employs stringent and properly designed environmental regulation, firms will be stimulated to innovate technologies that can reduce pollution and resource inefficiencies.[50] In other words, regulation puts pressure on companies to innovate and come up with better technologies that reduce environmental footprints. Porter and Van der Linde note that regulation, in addition to leveling playing fields for companies, can potentially raise corporate awareness and reduce uncertainties about the need to give attention to the environment.[51] Apart from this, since regulation improves production process and/or product quality, firms will be able to offset regulatory costs and become more competitive than those not subject to the same standards. In short, well-designed environmental regulations can lead to a "win-win situation," both protecting the environment and enhancing profit and competitiveness.

However, there is a lack of conclusive empirical evidence that confirms the validity of the Porter Hypothesis. While some of the literature concludes that

[49] *Id*., p. 98.
[50] Porter and Van der Linde stated that innovation is not limited to technological change but includes "a product's or service's design, the segments it serves, how it is produced, how it is marketed and how it is supported." *Ibid*.
[51] Ambec *et al.*, *supra* note 47, p. 2.

environmental regulations indeed increase both environmental and business performance, others argue to the contrary. Lanoie *et al.* conducted research on 17 Quebec manufacturing industries and concluded that environmental regulation has had a significant positive impact on productivity, especially for those industries most exposed to outside competition.[52] On the other hand, the findings of a survey of more than 4000 manufacturing companies located in seven industrialized countries, conducted to investigate the effect of environmental regulation on innovation and industrial productivity, suggest that though environmental regulation spurs innovation, which enhances business performance, innovation cannot fully offset the costs of complying with environmental policies.[53] Similarly, Rassier and Earnhar found out that clear water regulation lowered the profitability of 73 United States chemical firms.[54]

Kriechel and Ziesemer associate 'anti-Porter' results with three factors: (i) the research was conducted on small firms in terms of low numbers of employees and with no management problems as well as international strategic competition; (ii) the methods applied were short-run; or (iii) the environmental policies employed by the firms were command-and-control.[55]

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[52] Lanoie, P., Party, M. and Lajeunesse, R., Environmental Regulation and Productivity: New Findings on the Porter Hypothesis, *Scientific Serious*, 2001, [hereinafter Lanoie *et al*, 2001].

[53] Lanoie, P., Lucchetti, J., Johnstone, N. and Ambec, S., Environmental Policy, Innovation and Performance: New Insights on the Porter Hypothesis, *Scientific Series*, 2007, [hereinafter Lanoie *et al*, 2007].

[54] Rassier, D. G. and Earnhart, D., The Effect of Clean Water Regulation on Profitability: Testing the Porter Hypothesis, *Land Economics*, Vol. 86, No. 2, 2010, [hereinafter Rassier and Earnhart].

[55] Kriechel, B. and Ziesemer, T., *The Environmental Porter Hypothesis: Theory, Evidence and a Model of Timing of Adoption*, United Nations University - Maastricht Economic and

The Porter Hypothesis is premised on the following: (i) environmental regulation may not have immediate effect on firm productivity and performance; (ii) the positive effect of regulation on productivity is more observable on firms that are initially more polluting; and (iii) firms exposed to foreign competition are more likely to be stimulated to innovate and reduce costs.[56] In addition to this, the hypothesis states that market-based and flexible instruments, such as emissions taxes or tradable allowances, may encourage innovation and productivity more than command-and-control regulation.[57] A regulation should not only be stringent but also effective enough to lead firms to innovate and improve productivity.

Some argue that the cost that companies incur to comply with regulations is not significant when compared with a company's overall production costs.[58] Companies will not move to other jurisdictions based on regulatory variations alone. This view is supported by others who point out that environmental regulation does not play a major role in companies' investment decisions. As Zarsky suggests:

> "[T]he effects of environmental regulation might be small or irrelevant compared to other determinants of industry location, such as transport costs and wage rates; and other determinants of environmental performance, including governmental regulation, income and community pressure, might

Social Research and Training Centre on Innovation and Technology, 2007, [hereinafter Kriechel & Ziesemer].

[56] Porter, G., Trade Competition and Pollution Standards: "Race to the Bottom" or "Stuck at the Bottom"? *Journal of Environment & Development*, Vol. 8, No. 2, 1999, p. 133, [hereinafter Porter].

[57] Ambec *et al.*, *supra* note 47, p. 2.

[58] Woods, *supra* note 36, p. 176; Brunnermeier, S. B. and Levinson, A., Examining the Evidence on Environmental Regulations and Industry Location, *Journal of Environment & Development*, Vol. 13, No. 1, 2004, p. 7, [hereinafter Brunnermeier & Levinson].

matter much more than foreign ownership or links to OECD markets."[59]

The decision to invest in a certain state is more influenced by taxation, domestic market conditions and foreign exchange restrictions.[60] The availability of large markets; prospects for market growth; and per capita incomes of host states are among the determinant factors in a company's decision about location.[61] These factors provide better opportunities for enterprises to exploit their ownership advantages and create possibilities for economies of scale.[62] A country with abundant natural resource and low labor costs has an advantage in catching the attention of foreign investors. Apart from low costs, companies will take into account the productivity and availability of both natural and human resources.

The levels of infrastructure development, including quality highways, railways, seaports and airports as well as telecommunication services, are other determinant factors in location decisions.[63] "FDI is most likely to flow to those areas with good accessibility and lower transportation costs."[64] Openness to international trade and access to international markets have particular importance for export-oriented investments. Furthermore, home states' FDI policies, the transparency and effectiveness of the legal framework, political stability, and availability of reliable investment

[59] Zarsky & *et al*, *supra* note 29, p. 54.
[60] Gray, *supra* note 29, p. 308; Gentry, *supra* note 14, p. 32.
[61] UNCTAD, *World Investment Report 1998: Trends and Determinants*, United Nations, New York and Geneva, 1998, [hereinafter UNCTAD, *World Investment Report 1998*]; OECD, *Foreign Direct Investment for Development*, *supra* note 27, pp. 37-40.
[62] OECD, *Foreign Direct Investment for Development*, *supra* note 27, p. 38.
[63] *Ibid.*
[64] *Ibid.*

protection are significant factors in attracting FDI.[65] This does not mean, however, that all these factors can equally influence location decisions irrespective of the nature of the investment. For instance, resource-seeking firms particularly focus on the availability of skilled and inexpensive labor.[66]

4. Reconciling Environmental Protection and Economic Development in Relation to Direct Investment

The issue of how a country should deal with the twin goals of environmental protection and economic development attracts the attention of many scholars. Some argue that a country should give priority to economic development over environmental protection.[67] Since a state's ability to solve environmental problems increases as it reaches a certain level of development, resources should be channeled first into achieving economic development.[68] The focus must be on designing policies aimed at bringing the maximum utilization of resources and economic prosperity. According to this view, ecological preservation presupposes growth, and it is only when a country achieves a

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[65] UNCTAD, *World Investment Report 1998, supra* note 61; World Bank, *Global Economic Prospects and the Developing Countries 2003*, World Bank, Washington, DC, 2003, p. 66, [hereinafter World Bank, *Global Economic Prospects 2003*].

[66] UNDP, *World Investment Report 2003, supra* note 25, p. 85.

[67] Panayotou, T., *Empirical Tests and Policy Analysis of Environmental Degradation at Different Stages of Economic Development*, Working Paper WP238 Technology and Employment Programme, International Labor Office, Geneva, 1993; Grossman, G. and Krueger, A., *Environmental Impacts of a North American Free Trade Agreement, The U.S. Mexico Free Trade Agreement*, 1993; for arguments on the nexus between economic development and environmental protection see Panayotou, T., *Economic Growth and the Environment*, Harvard University and Cyprus International Institute of Management, Paper prepared for and presented at the Spring Seminar of the United Nations Economic Commission for Europe, Geneva, March 3, 2003, [hereinafter Panayotou], available at http://www.unece.org/fileadmin/DAM/ead/sem/sem2003/papers/panayotou.pdf [accessed 13/9/2013].

[68] See Panayotou, *supra* note 67; Grossman, G and Krueger, A., Economic Growth and the Environment, *Quarterly Journal of Economics*, Vol. 110, 1995, pp. 353-377.

certain level of economic development that it can protect the environment.[69] However, pursuing a policy that prioritizes economic development over environmental protection is not in line with the principle of sustainable development. This principle requires a country's aspiration to achieve economic development to be reconciled with environmental protection interests.[70] It is based on the assumption that the two goals can be achieved simultaneously. The questions that must be addressed include how a country can reconcile and achieve both interests; what should be done to protect the environment from the impacts of development; and what policies a country should adopt in order to enhance development without compromising its interest in protecting the environment.

The environment is at risk due to the urgent need to alleviate poverty in developing and least developed countries, on the one hand, and the acute shortage of resources, on the other, coupled with governments' capacity to regulate investment. States may fail to give equal attention to both environmental concerns and economic development. Yet as Dernbach argues:

> "[B]y ignoring the environment, governments make it harder, more costly, or even impossible to do the other things they have committed to doing: providing peace and security for their citizens, fostering economic development, and providing conditions for social

[69] *Ibid.*

[70] Redclift, M., *Sustainable Development: Exploring the Contradictions*, Methuen & Co. Ltd., London, 1987, p. 59; Haq, M. U., *Reflections on Human Development*, Oxford University Press, Oxford, 1995, p. 79; Dernbach, J. C., Sustainable Development: Now More than Ever, *Environmental Law Reporter* , Vol. 32, 2001, pp. 1002-1003.

development and human rights."[71]

The repercussions for the environment will be intense and irreversible if a state fails to regulate the environmental impacts of investment in an effort to guarantee a continuous flow of investment. As there are limits to the carrying capacity of Mother Earth, as well as natural resources, economic growth and development are not necessarily sustainable, even if both are achieved. If states fail to give the required attention to the environment, the continued existence of life on Earth becomes uncertain. Since every human activity, in one way or another, depends on the environment, the quest for human development requires preservation of the environment. The issues raised here are how host countries can attract and benefit from investment without needing to compromise their interest in protecting the environment, and what sort of environmental regulations should be introduced in order to balance these two interests.

Activists of early environmental movements paid special attention to identify the root- causes of prevalent environmental problems.[72] There was considerable debate about whether the goals of economic development and environmental protection were reconcilable.[73] Some environmentalists proposed de-industrialization as a solution.[74] With the assumption that there is a zero sum relationship between the two interests, any expenses incurred to

[71] Dernbach, J. C., Achieving Sustainable Development: the Centrality and Multiple Facets of Integrated Decision making, *Indiana Journal of Global Legal Studies*, 2003, p. 252, [hereinafter Dernbach].
[72] Adams, W. M., *Green Development: Environment and Sustainability in the Third World*, London, Routledge, 2001, 2nd ed., pp. 12-13; Elliott, J. A., *An Introduction to Sustainable Development*, London, Routledge, 2006, 3rd ed., p. 27, [hereinafter Adams].
[73] Fiorino, D. J., *The New Environmental Regulation*, The MIT Press, Cambridge, 2006, pp. 15-16, [hereinafter Fiorino].
[74] Adams, *supra* note 72, pp. 148-149.

preserve the environment were seen to have a corresponding impact on economic competitiveness and growth.[75] It was only with the emergence of the principle of sustainable development[76] that many started to believe in the possibility of achieving the two goals simultaneously. Building on the sustainable development principle, scholars came up with valuable ideas and theories on how to minimize and avert the impact of development on the environment. Ecological modernization is one such theory. This theory emerged in the 1980s and 1990s in the writings of scholars in the social sciences, especially political science and sociology.[77]

4.1. Ecological Modernization

Ecological modernization mainly focuses on environmental reform processes such as restructuring of processes of production and consumption. It takes policies that encourage the adoption of certain techniques and principles as important requirements in the transition towards sustainable development.[78] For instance, the precautionary principle demands that governments take appropriate action with a view to minimizing or averting potential harm to the

[75] Kirkby, J., O'Keefe, P., and Timberlake, L., *Sustainable Development*, Earthscan, London, 1995 [hereinafter Kirkby *et al.*].

[76] Sustainable development is defined as "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs." See *Report of the World Commission on Environment and Development: Our Common Future*, U.N. GA Res. A/42/427, 1987.

[77] Hajer, M. A., Ecological modernisation as cultural politics, pp. 246–268, in Lash, S., Szerzynski, B. and Wynne, B., (eds.) *Risk, Environment and Modernity: Towards a new ecology*, Sage, London, 1996, [hereinafter Hajer].

[78] Pepper, D., Ecological modernisation or the 'ideal model' of sustainable development? Questions prompted at Europe's periphery, *Environmental Politics*, Vol. 8, No. 4, 1999, p. 3, [hereinafter Pepper]; Christoff, P., Ecological modernisation, Ecological modernities, in Stephens, P. H. G., Barry, J. and Dobson, A., *Contemporary Environmental Politics from Margins to Mainstream*, Routledge, 2006, pp. 184-185, [hereinafter Christoff].

environment before they actualize.[79] The theory of ecological modernization favors those policies that are believed to enable governments and companies to anticipate environmental risks before they materialize. This theory proposes the application of "economical rationality" criteria in the process of social reform of the practices of consumption. This approach may not necessarily imply reduction of consumption, but deals with "what consumption is environmentally sustainable and how can we turn unsustainable consumption practices into environmentally more sound ones."[80] The processes of transformation into a sustainable way of consumption start with the assessment of existing institutions and lifestyles.

Ecological modernization asserts the possibility of achieving economic growth and environmental protection simultaneously. Economic development and ecological quality are interdependent and compatible; "[e]conomic growth can be environmentally efficient, thus generating an apparent 'win-win' situation in which the benefits of contemporary industrial society are retained while its burdens on the environment are progressively dispelled."[81] The key idea is that it is possible to achieve ecologically sustainable economic development through the means of environmental technologies, transformation of modern institutions, and changes in values and practices.[82] These and other strategies enable the reconciliation of economic growth with

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[79] Harremoes, P et al., *The Precautionary Principle in the 20th Century: Late Lessons From Early Warnings*, Earthscan Publications, London, 2002, p. 4, [hereinafter Harremoes *et al.*].

[80] Mol, A. and Spaargaren, G., Ecological Modernization and Consumption: A Reply, *Society & Natural Resources* , Vol. 17, No. 3, 2004, p. 264, [hereinafter Mol & Spaargaren]

[81] Connelly, J. and Smith, G., *Politics and the Environment: From theory to practice, Second ed.*, Routledge, New York, 2003, p. 5, [hereinafter Connelly & Smith]. See also, Mol, A. and Spaargaren, G., Ecological modernisation theory in debate: A review, *Environmental Politics*, Vol. 9, No. 1, 2000, p. 22, [hereinafter Mol & Spaargaren].

[82] Gibbs, D., *Local Economic Development and the Environment*, Routledge, New York, 2002, pp. 7-8, [hereinafter Gibbs].

the requirements of ecological sustainability. Improved environmental technologies may help to minimize resource inefficiency. Because of this, ecological modernization theorists see environmental protection as a source of growth. As Paper points out:

> "[Ecological modernization] discourse sees environmental protection not as an impediment to capital accumulation but as a potential source of further accumulation; economic benefits and competitive advantage being said to accrue from preserving genetic diversity and from anticipatory environmental protection rather than paying out to clean up a mess. In this positive-sum game, technological and managerial experts, business and industry all become key actors in fulfilling the environmental agenda, rather than its enemy."[83]

The business sector can benefit from policy approaches offered by ecological modernization.[84] Firms that adopt clean technologies can save costs in production. They can also benefit from market opportunities in pollution-control equipment and other green production.[85]

The theory gives recognition to the important role innovators, entrepreneurs and other economic agents play in environmental reform processes.[86] Although the role of the state remains central in environmental reforms and management, actors other than the state, including the business sector and environmental NGOs, play a fundamental role in bringing behavioral changes.

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[83] Papper, *supra* note 78, pp. 2-3.
[84] Gibbs, *supra* note 82, pp. 9-10.
[85] *Ibid.*
[86] Papper, *supra* note 78, pp. 3-5. See also, Mol, A. P., Ecological modernization as a social theory of environmental reform, in Redclift, M. and Woodgate, G., *The International Handbook of Environmental Sociology, Second ed.*, 2010, p. 68, [hereinafter Mol, 2010].

In relation to the role states should play in environmental reform and management, Mol argues that "... the role of the state in environmental policy is changing, or will have to change, from curative and reactive to preventive, from 'closed' policy making to participative policy making, from centralized to decentralized, and from dirigistic to contextually 'steering.'"[87]

The theory favors more decentralized, flexible and consensual styles of national environmental governance, rather than top-down hierarchical command-and-control regulation.[88] It places great emphases on the roles different actors have in integrating environmental considerations within economic and social decision-making processes.[89] This gives opportunities for non-state actors to engage in environmental protection initiatives through, for example, the adoption of voluntary environmental protection standards. This relatively new form of environmental governance and regulation creates partnerships between the state and private enterprises, the state and citizens, and citizens and business, all working towards a sustainable economy and environment.[90]

The theory of ecological modernization provides valuable insights about how to bring proper balance between a country's interests in protecting the environment and enhancing investment. As the theory holds, it is important to introduce a framework within which governments and private actors share responsibility for protection of the environment and thereby minimize impacts in host countries. From this perspective, Goldenman argues that "the rapid

[87] Mol, A. P., Ecological modernization: industrial transformations and environmental reform, in Redclift, M. and Woodgate, G., *The International Handbook of Environmental Sociology*, Edward Elgar Publishing Limited, 1997, p. 141, [hereinafter Mol, 1997].
[88] Mol, 2010, *supra* note 86, p. 68.
[89] Christoff, *supra* note 78.
[90] Adams, *supra* note 72, p. 112.

pace of globalization, the competition for FDI, and the sheer size of many multinational enterprises can make it difficult for a host country acting alone to set in place adequate environmental controls over incoming FDI."[91] Traditionally, the responsibility to steer socially undesirable behavior rests with governments, but this has been found to be ineffective.[92] Pressure and changes brought by other organizations on environmentally harmful behavior are being noticed.[93] The motivation that business entities show towards implementing voluntary environmental standards and programs creates the opportunity for a new form of governance in the realm of sustainable development. A system of governance that suits this growing demand involves different actors working together for the same goal.[94] A country, rather than sticking to the conventional command-and-control approach, needs to introduce environmental regulatory mechanisms, which give more room for non-governmental actors to participate in the process of managing the environmental impacts of investment.[95] Involving actors other than the government in environmental regulatory actions can ease developing countries' anxiety about losing inflow of direct investment. But the question of what role each actor should play in averting and controlling investment-related environmental problems remains.

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[91] Goldenman, G., The Environmental Implications of Foreign Direct Investment: Policy and Institutional Issues, in OECD, *Foreign Direct Investment and the Environment*, OECD, Paris, 1999, p. 85, [hereinafter Goldenman].
[92] Wapner, P. K., *Environmental Activism and World Civic Politics*, State University of New York Press, 1996, pp. 17-18, [hereinafter Wapner].
[93] *Ibid.*
[94] Delmas, M. A. and Young, O. R., *Governance for the Environment: New Perspectives*, Cambridge University Press, 2009, pp. 6-9, [hereinafter Delmas & Young].
[95] *Ibid.*

4.2. The Role of the State in Ensuring Environmentally Sound Investment

The first action towards regulating the environmental impacts of investment is expected to come from countries hosting investment. States must introduce appropriate policy frameworks and strengthen their institutional capacity both at national and local levels in order to ensure the contribution of investment for sustainable development. It is the responsibility of the state to establish a broad development policy with social, ecological and economic objectives. The principle of integrated decision-making requires that states pay equal attention to and consider each goal (i.e., environmental protection, economic development and social development) in development related decision-making processes. The Rio Declaration reinforced this principle in its statement: "[I]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[96] Such integration must be achieved "through appropriate legal and regulatory policies, instruments and enforcement mechanisms."[97]

Since the problems of environmental degradation and poverty are interrelated, during early stage of policy drafting it is essential to consider both interests together.[98] This helps to minimize potential environmental harms and to relate environmental protection measures to the intended

[96] Rio Declaration, principle 4. In the same vein, Agenda 21, under Par. 8.4, states that national governments need to "integrate environmental and development decision-making processes."

[97] Agenda 21, Paragraph 8.16.

[98] Gentry, *supra* note 14. See also, Johnston, D., Foreign Direct Investment and the Environment: Challenges and Opportunities, Secretoru-General, OECD, in OECD, *Foreign Direct Investment and the Environment , OECD Proceedings*, OECD, Paris, 1999, pp. 9-13.

development project. Sustainable development demands not only that environmental and social goals be integrated into a county's economic development policies but also that the goals in a particular decision-making processes be considered simultaneously. This requirement helps to bring environmental and/or social issues to the attention of the decision maker.

Governments are advised to perform three important tasks in regulating the environmental impacts of investment. They must: (i) determine what society's goals should be; (ii) decide what specific steps should be taken to achieve them; and (iii) ensure that large numbers of companies are complying with the requirements set in the regulations.[99] It is possible to use different approaches to determine the environmental goals of the society in question. Government can use market-based mechanisms, employ environmental regulations and/or engage the public.[100] They can adopt a mixture of these approaches to safeguard the environment against harms caused by economic activities. There are several different categories of market-based approaches, ranging from subsidy reduction, environmental taxes, and user fees to target subsidies.[101] These policy tools help to reduce environmental impacts generated by economic activities, including private investment.[102] For example, removing subsidies from environmentally damaging activities may help to reduce environmental harms. When individuals use resources and pay little or nothing for the rights to do so, it may lead to overexploitation of resources.

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[99] Fiorino, *supra* note 73, pp. 190-191.
[100] World Bank, *Five Years after Rio: Innovations in Environmental Policy*, World Bank, Washington, D.C., 1997, pp. 5-14, [hereinafter World Bank].
[101] *Ibid.*
[102] *Ibid.*

The literatures highlight the need to put in place stronger and more comprehensive regulatory standards in order to bring about improved environmental performance.[103] Regulatory frameworks must be predictable and applied consistently to all investors without discrimination. In relation to this, it is desirable to preserve some discretionary power about how to achieve those standards with regulated companies. This can enhance the role of regulation in bringing about a win-win solution through "granting firms the flexibility to discover least-cost solutions, keeping the transaction costs of permitting and documentation to a minimum, and promoting the integration of environmental decision making into long-term business planning."[104] Companies may agree to more stringent performance standards if they have the discretion to decide how to meet those standards.

Rules define the basic framework within which investors must operate when producing and selling their goods and services. Regulations need to be designed to encourage behavior by providing positive as well as negative incentives.[105] The methods that a government applies to enforce regulations should not be limited to penalties and sanctions. The assertion that industries will only act in line with a society's interest where there is a legal sanction does not always hold true as firms now show efforts to go beyond legal compliance.[106] Positive reinforcement mechanisms, such as giving recognition and different treatment such as tax exemption for good performance, help to avoid adversarial relationships between the government and regulated companies, and build regulatory environments that promote

[103] Gentry, *supra* note 14; Fiorino, *supra* note 73.
[104] Fiorino, *supra* note 73, pp. 222-223.
[105] *Id*., pp. 193-194.
[106] *Ibid.*

solutions through cooperation, responsibility sharing, and collaboration.[107] Collaboration plays a significant role in promoting dialogue, trust and mutual learning. Similarly, strategies based on learning are preferred over bureaucratic control. Incentives encourage actors to evaluate and improve their performance.

The capacity of a state to formulate, implement and enforce effective environmental regulations on any form of investment, whether domestic or foreign, is important.[108] The legal authority and enforcement capacity of a government is essential to hold firms accountable where they fail to meet standards. Depending on circumstances, a government may need to use coercive action against companies that fail to obey regulations. Some firms that seek short-term advantages may become reluctant to comply with regulations. In such cases, the government may need to hold them responsible for the harm they cause to the environment.

As noted above, efforts to balance development objectives with environmental protection goals require cooperation between the government, the business sector and NGOs. There are multiple actors, such as communities and NGOs, which exert pressure on firms to act responsibly towards the environment. "Regulatory pressure from government is necessary, but it is not the only influence on firms."[109] For example, activists pressure industries to improve their environmental performances. NGOs historically have played a significant role in changing behaviors towards the environment. "They constitute an independent voice for bringing environmental issues to public

[107] *Id*., p. 223.
[108] Zarsky *et al.*, *supra* note 29, p. 49.
[109] Fiorino, *supra* note 73, p. 193.

attention and holding government as well as industry accountable."[110] A government needs to establish and maintain an enabling framework that allows other actors to play their parts in investment regulation.

4.3. Corporate Self-Regulation

Currently, large firms, especially multinational corporations (hereinafter MNCs), are adopting codes of conduct in order to minimize the environmental and social impacts of their undertakings. Codes of conduct, mostly issued by individual corporations, industry associations, or international organizations, incorporate environmental and labor standards and a commitment to protect human rights as well as to refrain from bribery.[111] Corporate initiatives towards self-regulation of environmental and social impacts are often expressed in the form of corporate social responsibility (hereinafter CSR) initiatives. CSR refers to "greater responsiveness on the part of companies to societal and stakeholder concerns; integration of social and environmental considerations in business operations; voluntary initiatives that go beyond both philanthropy and standards embodied in law; and 'doing no harm."[112]

The presence of MNCs in developing countries inspires both hope and fear. MNCs can create employment opportunities and help generate government revenues. However, in most circumstances, governments in these countries have limited capacity to regulate investment. They refrain from regulating

[110] *Id*., p.192.
[111] For example, the OECD Guidelines for Multinational Enterprises; Sustainable Reporting Guidelines; United Nations Global Compact Principles.
[112] Utting, P. and Marques, J. C., *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?, UNRISD,* Palgrave Macmillan, 2010, p. 2, [hereinafter Utting & Marques].

MNCs for fear of losing their investment to other countries, even where they have the capacity. However, if companies accept responsibility about the environment and implement similar rules and procedures across their affiliates, their contributory role for national development will be elevated. The adoption of voluntary standards can help to allay the anxiety that companies will move to countries with lower standards in order to avoid tough environmental regulation.

Different from environmental regulations, voluntary environmental programs offer flexibility in addressing environmental problems. Participants are free to decide about the methods that they apply to meet the goals. Compared with traditional command-and-control regulation, voluntary environmental initiatives are more cost-effective, "because they provide firms with the flexibility to tailor their pollution control strategies to meet the needs of their operations."[113] Apart from this, the initiatives are advantageous for government authorities as they help to create a sense of shared responsibility among different actors. As Fiorino notes, they "allow policy makers to adapt more quickly to new issues than a conventional regulatory approach would […] when combined with either the right sticks or carrots […] and designed properly, they offer a valuable and effective addition to conventional regulation."[114] The method becomes more effective if used in combination with other instruments.

Firms that implement voluntary CSR can be advantageous from different

[113] Khanna, M. and Brouhle, K., The effectiveness of voluntary environmental initiatives, in Delmas, M. A. and Young, O. R., *Governance for the Environment: New Perspectives*, Cambridge University Press, 2009, p. 145, [hereinafter Khanna & Brouhle].
[114] Fiorino, *supra* note 73, p. 126.

perspectives.[115] Better environmental performance, with improved quality control of final products, efficient use of resources, and waste minimization can lead to increased profitability.[116] Environmentally responsible business practices create opportunities to reduce costs and increase market share. Firms that implement environmental management systems can have better access to export markets. They can improve their public relations, image and reputation. A company's widespread acceptance and the possibility of winning more customers can increase with improved environmental responsibility.[117] Firms with good environmental performance can establish good relationship with the community within which they operate. Compliance with voluntary environmental responsibility programs also helps companies to check their own actions and avoid future liability.[118]

However, voluntary environmental programs should not completely replace government policies and regulations. Self-regulatory efforts can only supplement a state's actions in regulating investment. "Self-regulation is not a panacea […] it is at most just a partial solution, and that only if accompanied by robust disclosure and enforcement backed by social actors and governments."[119] The effectiveness of self-regulation depends on the possibility of overcoming problems associated with compliance, and this calls for the involvement of the state and other actors. Some voluntary programs require that companies go beyond compliance with government regulatory

[115] *Id*., p. 16; Utting and Marques, *supra* note 112, p. 2; Huber, J., Towards Industrial Ecology: Sustainable Development as a Concept of Ecological Modernization, *Journal of Environmental Policy and Planning*, Vol. 2, No. 4, 2000, [hereinafter Huber].
[116] *Ibid.*
[117] Huber, *supra* note 115.
[118] Khanna and Brouhle, *supra* note 113, p. 145.
[119] Brown, D. L. and Woods, N., *Making Global Self-Regulation Effective in Developing Countries*, Oxford University Press, New York, 2007, p. 5, [hereinafter Brown & Woods].

requirements, but host country regulations remain important as they set minimum social and environmental protection standards.

Although CSR initiatives are voluntary in their nature, there are factors that induce firms to comply with their requirements.[120] Most CSR instruments demand that firms act in accordance with the law.[121] Apart from this, the community, consumers, and activists can influence companies to undertake self-regulatory activities. Firms may improve their environmental performance as a response to the demands of these actors. Information disclosure to stakeholders (regulators, impacted communities, and the public) about environmental practices and performance by firms serves as a compliance mechanism.[122] Based on released information, the public can, for example, bring legal action before a court of law or other law enforcing institutions. In order to protect their reputation, firms evaluate and improve

[120] European Commission, *Promoting a European Framework for Corporate Social Responsibility, Green Paper*, *COM(2001)366*, 18 July 2001, p. 7; Donaldson, T. and Preston, L. E., The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications, *Academy of Management Review*, 1995, Vol. 20, pp. 65–91; Buhmann, K., Corporate social responsibility: What role for law? Some aspects of law and CSR, *Corporate Governance*, 2006, Vol. 6, No. 2, pp. 188-202, [hereinafter Buhmann]; Porter, M. E. and Kramer, M. R., The Link Between Competitive Advantage and Corporate Social Responsibility, *Harvard Business Review*, 2006, p. 82, [hereinafter Porter and Kramer]; Hopkins, M., *The Planetary Bargain: Corporate Social Responsibility Matters*, Earthscan, 2003.

[121] Hopkins, M., *Corporate Social Responsibility: An Issue Paper*, Working Paper No. 27, Policy Integration Department, World Commission on the Social Dimension of Globalization, ILO, 2004, p. 6.

[122] Porter and Kramer, *supra* note 120, p. 82; Heal, G., *Corporate Social Responsibility: An Economic and Financial Framework*, paper presented at the 2004 Annual Conference of the Monte Paschi Vita, organized around the topics of corporate governance and corporate social responsibility, 2004, p. 13. Heal notes that "the role of [CSR] is to anticipate and minimize conflicts between corporations and society and its representative, aligning private and social costs if differences are the source of the conflict, or minimizing distributional conflicts […] avoidance or reduction of conflicts is indeed a major contribution of effective corporate CSR programs."

their behavior towards the environment and the society.[123] The government can strengthen the effectiveness of voluntary environmental performance programs by requiring information disclosure to the public and putting in place an appropriate policy framework to uphold the functionality of social mobilization.[124] In addition, internal governance tools such as environmental auditing and reporting, environmental management systems and independent certification give force to voluntary self-regulation programs.

4.4. The Role of Civil Society

Environmental activists, non-governmental organizations (NGOs) and communities play a crucial role in environmental protection initiatives. "NGOs appear to be key actors in moving societies away from current trends in environmental degradation and toward sustainable economies."[125] They pressure government authorities to work for environmental well-being in various ways, such as through demanding disclosure of environment-related information to the public.

NGOs can influence environmental policies through promoting support or opposition.[126] They can promote communication, monitor information, and publicize non-compliances. They easily catch media attention, create networks with organizations working for similar objectives, and lobby for policy change. Moreover, international environmental activists try to put pressure on state officials at international conferences in support of

[123] Buhmann, *supra* note 120.
[124] See Brown & Woods, *supra* note 119.
[125] Princen, T. and Finger, M., *Environmental NGOs in World Politics: Linking the local and the global,* Routledge, New York, 1994, p. 11, [hereinafter Princer & Finger].
[126] Princen, T., NGOs: Creating a niche in environmental diplomacy, in Princen, T. and Finger, M., *Environmental NGOs in World Politics: Linking the local and the global,* Routledge, New York, 1994, p. 34, [hereinafter Princen].

environmental protection measures.[127]

Environmental activists' focus is not limited to the actions of governmental authorities. They watch over business entities and expose the social and environmental externalities of their activities to the public.[128] NGOs raise public awareness about the trends and consequences of economic activities, including investment. When companies fail to comply with their own codes of conduct, they influence them to work for improvements.[129] In response to pressure from activists, companies scrutinize their undertakings with a view to preserving their reputation.

Princen and Finger label NGOs "agents of change" for two reasons.[130] First, organizing provides the opportunity to effectively challenge the actions of government authorities as well as companies, and to come up with creative solutions. Second, the failures of governments to undertake the responsibility to steer companies away from environmentally harmful behaviors provides NGOs with the opportunity to assume this critical role.

There are times when the state, instead of governing environmental effects properly, becomes an agent of environmental degradation and creates obstacles for behavioral changes. "Relative to actors in the governmental and business sectors, in the environmental realm NGOs are perceived as defenders of values that governments and corporations are all too willing to compromise."[131] In this respect, NGOs must act independently and free of interference. As Princen and Finger explain, "[T]o simultaneously reach up to

[127] Wapner, *supra* note 72, p. 3.
[128] Buhmann, *supra* note 120, pp. 188-202.
[129] *Id*., pp. 189-190.
[130] Princen and Finger, s*upra* note 125, p. 11.
[131] Princen, *supra* note 126, pp. 34-35.

the states and international institutions and down to the local communities, such agents must establish themselves as independent actors."[132]

Environmental impact assessment (hereinafter EIA) is another important tool that allows the public to engage in regulating the environmental impacts of investment. This policy measure helps to control the adverse environmental impacts of investment. By requiring proposed investment projects to pass through the process of EIA, states will be able to know potential impacts and decide whether to grant or deny permission for particular projects. It helps to take precautionary measures: "[T]he EIA process can encourage consideration of less environmentally harmful alternatives, or identify ways in which a project's design may be altered in order to lessen environmental impact."[133] Based on the information acquired during the assessment, states determine whether there is a need to place conditions on the project's operation. Government authorities entrusted with the power to handle EIA process are required to inform the public that may be affected about the proposed project and its potential impacts. The authorities also provide the public with an opportunity to give comments, which provides a way for the public to put forward suggestions for improvements. Before making a final decisions on the project, the authorities must take into account the comments made by the public. If there is procedural irregularity, for example a failure to inform the public about potential environmental effects, decision makers will be held accountable.

Public participation is a basic principle in environmental protection efforts. It requires that environmental decision makers consult and engage the

[132] Princen and Finger, *supra* note 125, p. 11.
[133] Goldenman, *supra* note 91, p. 80.

community whose interests might be affected in the decision making process. Principle 10 of the Rio Declaration underscores that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level."[134] The role that public participation plays in environmental protection and development initiatives can be considered from three perspectives.[135] First, it helps to legitimize decision-making, and thereby reduces the level of conflict. Second, it gives the government the opportunity to obtain additional ideas and information directly from the public and this may contribute to the quality of the decision. Informed and accountable environmental decision-making requires the integration of expert opinions and public views. This helps to overcome uncertainties and limitations in scientific knowledge. "Including the views of ordinary citizens in environmental policy-making helps to avoid the dangers of 'technocratic decision-making', where policy formation is based on expert assessment only, rather than on expert knowledge combined with stakeholder views."[136] Third, it enables citizens to learn about the environmental problems that they might face. Thus, public participation serves as an instrument to protect the interest of stakeholders.

The functionality of public participation depends on several factors. First, the law must guarantee the right of the public to participate in environmental decision-making and describe the duties of public authorities.

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[134] Rio Declaration, Principle 10.

[135] Coenen, F. H., *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision-making*, Springer, 2008, p. 2.

[136] Welp, M., Kasemir, B. and Jaeger, C., Citizens' Voices in Environmental Policy: The Contribution of Integrated Assessment Focus Groups to Accountable Decision-Making, in Coenen, F. H., *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision-making*, Springer, 2008, p. 22.

Public participation presupposes the availability of information concerning the environment and the planned activities. Principle 10 of the Rio Declaration requires states to "facilitate and encourage public awareness and participation by making information widely available." Apart from this, states must guarantee citizens' right to have access to justice where there are irregularities. Governments must also put in place a supportive legal environment to allow NGOs and the community to engage in regulating the environmental impacts of investment. Where there is suitable environment, they can act as constructive and independent partners in the effort to achieve sustainable development. National laws must also guarantee freedom to organize and the right to free speech.

Conclusion

Most developing countries aspire to achieve development through attracting investment. Investment promotion now occupies a prominent place in the development policies of many countries. Countries put in place incentives in various forms in order to guarantee the continuous flow of investment. Though investment can serve as one potential source of funds for development, it may also pose challenges for the achievement of sustainable development through increasing over-exploitation of natural resources as well as pollution. Lack of institutional capacity to regulate investment in developing countries exacerbates the problem. Moreover, competition among countries to attract investment may result in weak environmental protection standards in these countries. A development policy that targets only economic development, through attracting investment, cannot be sustainable. The quest for sustainability necessitates that a country's interest in economic development be reconciled with environmental protection goals, and that the

government should strive to achieve these two objectives simultaneously. For this reason, effective regulatory mechanisms must be put in place.

This article highlighted the challenges that direct investment poses for the environment, and major factors that create difficulties for certain governments to effectively regulate the environmental impacts of investment. Countries' anxiety about remaining competitive in attracting foreign investment, coupled with the assumption that companies always prefer to invest in jurisdictions with lax regulation, leads them to disregard the protection they should accord to the natural environment. But as the discussion about the correlation between strict environmental regulation and firm competitiveness indicated, it is not appropriate to conclude that firms' economic performance is always negatively affected by environmental regulation. A legal duty may encourage firms to engage in innovation that enables them to use resources more efficiently and appropriately and thereby enhance their performance. Furthermore, it is simply a fact that less strict legal regulation is not among the major considerations for firms' decisions about where to invest—although there are exceptions here, for instance, with companies that are reluctant about environmental and social impacts of their operations. It is important to remember that an investment that is attracted by a weak environmental regulatory system will not bring sustainable development to the host country.

Finally, this article has pointed out the importance of introducing an environmental governance framework that allows different actors—governments, NGOs, the community, and business firms—to work towards the goal of environmental protection in developing and least developed countries. Within this framework, all of these actors must have a role in

changing environmentally harmful behaviors into environmentally responsible ones. Environmental protection policies that encourage companies (investors) to take part in environmental protection efforts and minimize the impacts of their operations can ease developing countries' stress. Collaboration between different actors, more than unilateral action, helps to achieve the goal of environmental protection. The effectiveness of governmental environmental regulations and voluntary programs can be enhanced through creating conducive environment for the involvement of NGOs and communities. Host countries, in addition to strengthening their environmental laws and enforcement systems, need to create a legal environment that ensures the participation of NGOs as partners in the effort to achieve sustainable development. In addition, states must encourage flexibility, rather than sticking to the traditional command-and-control mechanisms, in order to allow companies to regulate themselves.

Some Worrisome Issues Surrounding the Ambit of the Copyright and Neighboring Rights Law of Ethiopia: A Comparative Legal Analysis

Aschalew Ashagre[♣]

Abstract

In 2004, Ethiopia proclaimed the Copyright and Neighboring Rights Protection Proclamation, which is still operational, to give adequate safeguards to copyright and neighboring rights in the country. To this end, the law made several commendable departures as compared to the provisions of the 1960 Civil Code of Ethiopia (which were meant to regulate the rights of authors of artistic and literary works). One of the conspicuous improvements the Copyright Proclamation made is determining its scope of application (defining the ambit of the law), since doing so is instrumental for the proper implementation of the law which in turn helps to furnish proper protection to the rights of authors and owners of neighboring rights recognized under the law. Nonetheless, a close examination of the of the relevant provisions of the law under consideration reveals that there are certain critical problems in relation to its scope of application which may overshadow the apt enforcement of the law. Hence, this author feels that it is time to analyze the problems and suggest relevant remedies that may be utilized by the Ethiopian legislature in the course of amending the law. This piece is aimed at making a thorough analysis of the provisions of the Copyright Law germane to the agenda under

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discussion, and forwarding possible recommendations to the problems so identified in the course of this research.

Key Words: Copyright, neighboring rights, audiovisual works, performers, sound recording, broadcasts, broadcasting organization

Introduction

Copyright and neighboring rights (otherwise known as related rights) are among the most important intellectual property rights, playing a remarkable role in the cultural, social, economic and scientific progress of individual countries and the world. On account of this, various countries have put in place both legal and institutional frameworks to accord adequate protection to copyright and neighboring rights.[1] At the international level, there are several international conventions[2] that are designed to safeguard these rights.

[1]Goldstein, P., *International Copyright: Principles, Law and Practice,* Oxford University Press, 2001, pp 3-44. *See also* McKeown, J. S., *Canadian Intellectual Property Law and Strategy*, Oxford University Press, 2010; Chafee, Z., Reflections on the Law of Copyright, *Columbia Law Review*, Vol. 45, No. 4, July 1945, pp. 503-529; Darmstadt, B. G., Limiting Locke: A Natural Law Justification for the Fair Use Doctrine, *Yale Law Journal*, Vol. 112, No. 5, March 2003, pp. 1179-1221.

[2]Relevant in this regard are: Agreement on Trade-Related Aspects of Intellectual Properties, which was adopted in 1994 [hereinafter the TRIPS Agreement]; Berne Convention for the Protection of Literary and Artistic Works, which was originally adopted in 1886,[hereinafter the Berne Convention]; World Intellectual Property Organization (WIPO) Copyright Treaty, which was adopted in Geneva on 20 December 1996 and entered in force in March 2002; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted on 26 October 1961 [hereinafter the 1961 Rome Convention]; WIPO Performances and Phonograms Treaty, which was adopted in December 1996 and entered into force in May 2002; and the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, adopted in Brussels on 21 May 1974 [hereinafter the 1974 Brussels Convention].

In Ethiopia, the 1960 Civil Code broke new ground as far as protection of literary and artistic works was concerned[3] despite the fact that the Code did not cover what we call neighboring or related rights such as the rights of performers, producers of sound recordings, broadcasts of broadcasting organizations and the like. Also, the 1995 FDRE Constitution declared the right to property in general and copyright and neighboring rights in particular to be fundamental constitutional rights.[4] In addition to the general principles of the Constitution, in 2004 Ethiopia put in place a relatively modern and comprehensive proclamation, the Copyright and Neighboring Rights Protection Proclamation (hereinafter the Ethiopian Copyright Proclamation).[5] This proclamation has made certain improvements which are expected to ensure adequate protection and enforcement of copyright and related (neighboring) rights in the country. The Copyright Proclamation has, *inter alia*, defined its scope of application with respect to the protection of copyright *per se* and neighboring rights by incorporating

[3]The Civil Code of the Empire of Ethiopia, 1960, Proclamation No 165, *Negarit Gazeta*, Year 19, No. 2. Title XI (11) under book three of the Code was devoted to regulation of literary and artistic ownership. See Arts. 1647-1674 of the Civil Code. Regarding history of copyright in Ethiopia, see the following works: Sileshi Zeyohannes, *The Ethiopian Law of Literary and Artistic Property*, unpublished, Faculty of Law, Addis Ababa University, 1983; Molla Mengistu and Mandefro Eshete, Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact on Expansion of Education*, Journal of Ethiopian Law*, Vol. 25(1), September 2010, pp 160-168.

[4] The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 40, Proclamation No. 1/1995, *Federal Negarit Gazeta*, Year 1, No. 1. This constitution was approved on December 8, 1994 by a Constitutional Assembly and entered into force as of 21 August 1995.[hereinafter the FDRE Constitution]. Part two of chapter three of the Constitution has embodied what are called fundamental rights and freedoms, to which the right to property, including copyright and neighboring rights, belong.

[5]Copyright and Neighboring Rights Protection Proclamation, 2004, Proclamation No. 410/2004, *Federal Negarit Gazeta*, Year 10, No. 55 [hereinafter the Copyright Proclamation].

general and specific criteria for the qualification of works (copyright and neighboring rights) to be protected in Ethiopia. The general grounds of qualification are nationality or residence of the author(s), but there are specific grounds of qualification for audio-visual works, works of architecture, performances, sound recordings and broadcasts of broadcasting organizations.

In spite of this, the author argues that there are several critical problems surrounding the scope of application of the Ethiopian Copyright Proclamation that will lead to unwanted controversies in the course of implementation of the Proclamation. Because of this, the author has embarked on this modest research work to analyze the problems and put forward some recommendations that will have significant importance for the amendment of the Proclamation and/or filling the gaps through secondary legislation-regulations and directives.

This piece is, therefore, meant to answer the following general research questions: What are the grounds of qualification for the protection of copyright and neighboring rights in Ethiopia? Are there clear criteria of eligibility (qualification criteria) for both copyright and neighboring rights under the proclamation? Has the Ethiopian Copyright Proclamation dealt with issues surrounding its scope of application as exhaustively as possible? What solutions might remedy any problems in the Copyright Proclamation with regard to its scope of application?

In order to furnish answers to these queries, the principal method of research employed by the author is legal analysis (doctrinal analysis), as there are no court decisions in Ethiopia on the scope of application of the Ethiopian Copyright and Neighboring Rights Law to the best of the author's knowledge.

To this end, the author consulted works of various writers (books and journal articles) and selected copyright laws of foreign jurisdictions such as Germany, Italy, the Netherlands, Norway, USA, UK and Tanzania. Pertinent international conventions such as the Berne Convention on the protection of literary and artistic works, the TRIPS Agreement, the 1961 Rome Convention on the rights of performers, producers of phonograms (sound recordings) and broadcasts of broadcasting organizations, the World Intellectual Property Organization's Performance and Phonographic Treaty and Convention relating to the Distribution of Program- Carrying Signals Transmitted by Satellite have also been utilized as appropriate. The author used these conventions extensively because they help us to understand the spirit of the provisions of the Ethiopian Copyright Proclamation. This is so because the Copyright Proclamation was, in one way or another, influenced by these conventions,[6] despite the fact that Ethiopia is not yet a member of most international intellectual property protection conventions.[7]

With regard to its organization, this piece contains three parts. Part one examines the essence of copyright and neighboring rights, believing that this discussion will help us properly understand the discussion and analyses that follow. Part two of the paper is devoted to the analysis of the general and specific criteria for qualification of works to be protected by the Copyright Proclamation of Ethiopia. This part investigates points of attachment of works

[6]Telephone Interview with Ato Getachew Mengistie, former Director General of the Ethiopian Intellectual Property Office, EIPO, 27 April 2012.

[7]See Getachew Mengistie, *Intellectual Property Assessment in Ethiopia*, December 2006, p.28. Ethiopia has been working towards acceding to the WTO for the last ten years. If her accession appeal is accepted, accepting international conventions dealing with copyright will be automatic.

with the Ethiopian Copyright Law such as nationality, residence, publication of the work in Ethiopia and erection of architectural works in Ethiopia. Under Part three of the paper, attempt has been made to analyze the criteria of protection for neighboring rights- performances, sound recordings and broadcasts. In so doing, territoriality of performance, fixation and publication of sound recordings, location of headquarters in Ethiopia and the transmission of broadcasts from a transmitter located in Ethiopia have been touched discussed as critically as possible. Finally, the works comes to an end with brief concluding remarks and recommendations to the problems identified in the course of conducting this research work.

1. The Conceptual Underpinning of Copyright and Neighboring Rights: An Overview

Because copyright and neighboring rights are closely related intellectual properties, they are generally treated together. The former are termed "primary works" while the latter are referred to as "derivative works." As the focus of this article is on both copyright and neighboring rights, this section of the article is meant to frame and elucidate these two concepts very briefly.

Furnishing a universally accepted definition of the term "copyright" has proven an arduous task. For this reason, the nature of copyright has remained a source of doctrinal controversies and there is no authoritative definition to serve all purposes. This is because each and every legal system provides different conditions and procedures that pertain to the definition of

the term.[8] Nevertheless, certain definitions shed light on the concept. According to Black's Law Dictionary,[9] copyright pertains to:

> the right to copy; specifically, it is a property right in original work of authorship, including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, architectural, motion pictures, audio-visual works and sound recordings, fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the works.

From the above definition, it is possible to understand that copyright is a right to property, which confers upon the author exclusive rights over this property. The exclusive rights of the author extend to reproduction, adaptation, distribution, performance, display of the work and the like. This definition enumerates the works that are covered by copyright. However, it should be borne in mind that the enumeration made by the dictionary is not exhaustive, although it incorporates the major works that have been copyrightable in many jurisdictions,[10] including the Ethiopian legal system.[11] The other important matter that this definition addresses is the fact that copyright subsists in an original work, which is fixed in any tangible medium

[8]Ploman, E. W. and Hamilton, L. C., *Copyright: Intellectual Property in the Information Age*, Routledge, London, 1980, p. 26.

[9]Garner, B. A. (ed.), *Black's Law Dictionary*, 8th ed., West Academic, 2008, p. 361.

[10]Works enumerated by *Black's Laws Dictionary* are commonly protected in other jurisdictions. *See* Prime, T., *The Law of Copyright*, Tolley Publishing, 1992, pp. 20-41. *See also,* Bainbridge, D. I., *Intellectual Property,* 7th ed., Longman, 2009, pp. 31-82.

[11]*See* Art. 2(30) of the Ethiopian Copyright Proclamation, *supra* note 5.

of expression. Thus the definition in Black's Law Dictionary includes the two cornerstones of the protection of copyright, i.e., originality and fixation.[12]

According to Bainbridge, copyright is a property right that subsists (exists) in various composition works such as literary, artistic and musical works, sound recordings, films and broadcasts.[13] Like Black's Law Dictionary, Bainbridge tries to explain the term by enumerating copyrightable works although the enumerations here are more general. At this juncture, it should be clear that the dictionary definition of copyright and the list of works provided are based on the American legal system,[14] whereas Bainbridge's list is based on the British legal system. A comparison of these lists reveals the similarities of the two legal systems with regard to copyright and its coverage. Thus, the author will henceforth refer to the Anglo-American systems, as these two systems are essentially the same with minor exceptions.[15]

The laws of countries with civil law legal systems do not as such try to define copyright directly. Rather the laws try to show what copyrightable works are by providing extensive enumeration of the works. For instance, Article 1(1) of the Italian Copyright Statute[16] provides copyright pertains to:

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[12]These are two tests of copyrightability of a work under the Ethiopian Copyright Proclamation. *See* article 6 of the Ethiopian Copyright Proclamation, *supra* note 5.

[13]Bainbridge, *supra* note 10 at 5.

[14]*Black's Laws Dictionary* is acclaimed worldwide. However, the dictionary provides meanings of legal terminology predominantly on the basis of the America legal system, while Professor David I. Bainbridge essentially gives his analysis based on the UK Copyright, Design and Patent Act of 1988.

[15]In order to understand the conspicuous similarities between the American Copyright Law and the English Copyright law, refer to Miller, A. R. and Davis, M. H., *Intellectual Property: Patents, Trademarks and Copyright in a Nutshell*, West Group, 2000, pp. 285-422. *See also* Bainbridge, *supra* note 10, and Prime, *supra* note 10.

[16]Italian Copyright Law for the Protection of Copyright and Neighboring Rights, 1941, Law No. 633 of April 22, as last amended by Legislative Decree No. 68, of April 9, 2003 [hereinafter the Italian Copyright Law].

> works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theatre or cinematography, whatever their mode or form of expression, shall be protected in accordance the law.[17]

Article 2 of the statute declares that copyright protection shall extend to:

> 1) literary, dramatic, scientific, didactic and religious works, whether in written or oral form;
>
> 2) musical works and compositions, with or without words, dramatic-musical works, and musical variations that themselves constitute original works;
>
> 3) choreographic works and works of dumb show, the form of which is fixed in writing or otherwise;
>
> 4) works of sculpture, painting, drawing, engraving and similar figurative arts, including scenic art;
>
> 5) architectural plans and works;
>
> 6) works of cinematographic art, whether silent or with sound form, provided they are not mere documentaries protected in accordance with [this law];
>
> 7) works of photographic art and works expressed with processes analogous to photograph;

[17] *Ibid.* Sub-article 2 of the same law states that computer programs shall also be protected as literary works, within the meaning of the Convention for the Protection of Literary and Artistic Works, ratified and enforceable pursuant to Law no. 399 of June 20, 1978, as well as databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright.

8) databases meant as collections of works, data or other independent materials which are systematically or methodically arranged and can be individually accessed by electronic or other means;

9) works of industrial design which themselves have a creative and artistic value.

According to Article 1 of the Copyright Law of the Netherlands,[18] copyright is the exclusive right of the author of a literary, scientific or artistic work, or of his assignees, to make such work public and to reproduce it, subject to the limitations provided in the law. Article 10 of the same law provides that copyrightable works include books, pamphlets, newspapers, periodicals and all other writings, dramatic and dramatic-musical works, lectures, choreographic works and entertainments in dumb show, the acting form of which is fixed in writing or otherwise, musical works, with or without words, drawings, paintings, works of architecture and sculpture, lithographs, engravings and the like, geographical maps, plans, sketches and three-dimensional works relating to architecture, geography, topography or other sciences, photographic and cinematographic works, and works produced by analogous processes, works of applied art and industrial designs and the like.[19]

When we come to the notion of neighboring rights, the notion is not used expressly in common law legal systems, although their laws have accorded protection to the rights which are commonly called neighboring

[18]Copyright Act of the Netherlands, 1912, as last amended by the Law of October 27, 1972 [hereinafter the Copyright Act of the Netherlands].
[19]*Ibid.*, Art. 10.

rights in civil law countries. Giving a comprehensive definition to these rights is not possible.[20] However, it is not difficult to understand what neighboring rights are when we have a close look at the enumerations made by various national as well as international legal instruments dealing with them. For instance, Part Two of the 1965 Copyright Law of the Federal Democratic Republic of Germany, which was amended in 1998,[21] deals with neighboring rights which include rights of performers, producers of audio recordings, photographs, broadcasts of broadcast organizations, scientific editions, databases and the like.[22] By the same token, Part II of the Italian Copyright Statute,[23] which includes eight chapters, is devoted to the recognition and protection of neighboring rights. According to this law, these rights include the rights of producers of phonograms, producers of cinematographic works, producers of audio-visual works, rights of radio and television broadcasting, rights of performers, rights in works published or communicated to the public after the author's economic rights have expired, rights in critical and scientific editions of works in the public domain, rights in the public domain, rights for designs in stage sets, rights in photographs, and so forth.[24]

At the international level, some important conventions have been devoted to various types of neighboring rights. The first organized international response to the need for the legal protection of neighboring

[20]For a detailed account of neighboring rights, see Bodenhausen, G. H. C., *Protection of Neighboring Rights*, Contemporary Problems, Vol. 19, No. 2, Spring 1954, pp. 156-171.
[21]Copyright Law of the Federal Democratic Republic of Germany, 1965, as last amended in 1998 [hereinafter the German Copyright Law].
[22]*Id.*, See part two of the law which covers Arts. 70-87, dealing with neighboring rights.
[23]Italian Copyright Law, *supra* note 16.
[24]*Id. See* Arts. 72-102 of the law, which has incorporated various neighboring rights in a very detailed fashion.

rights was the conclusion of the 1961 Rome Convention, the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations.[25] Unlike most international conventions, which follow in the wake of national legislation and are intended to synthesize existing laws, the Rome Convention was an attempt to establish international regulations in a new field where few national laws existed at that time. This means that most states would have to draft and enact new laws before adhering to the convention. Since the adoption of this convention, a large number of states have legislated on related matters.[26] Other relevant international conventions in the field of neighboring rights are the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, Geneva 1971;[27] the Convention Relating to Distribution of Program-Carrying Signals Transmitted by Satellite, Brussles1974;[28] and the TRIPS Agreement, which also contained provisions on neighboring rights.[29]

The purpose of neighboring rights is to protect the legal interests of certain persons and legal entities that either contribute to the making of works available to the public or produce subject matter which expresses creativity or technical and organizational skill sufficient to justify recognition of copyright-like property rights. The law of neighboring rights deems that productions which result from the activities of such persons and entities

[25]The 1961 Rome Convention, *supra* note 2.

[26]*See* WIPO, *WIPO Academy on Intellectual Property*, 1999, pp.95-118.

[27]Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, Geneva, 1971, [hereinafter the Convention for the Protection of Producers of Phonograms].

[28]Convention Relating to Distribution of Program-Carrying Signals Transmitted by Satellite, *supra* note 2.

[29]The TRIPS Agreement, *supra* note 2.

deserve legal protection in and of themselves, as they are "neighbors" to the protection of authorship under copyright.[30]

Although literary and artistic works have had long historical significance in the religious and secular life of the Ethiopian people, copyright was dealt with for the first time, in Ethiopian legal history, under the 1960 Civil Code.[31] However, the Civil Code did not try to define the term under consideration except by enumerating copyrightable works.[32] As explained previously, because the Civil Code was not comprehensive, the Ethiopian government made a new proclamation, the Copyright and Neighboring Rights Protection Proclamation, Proc. No. 410/2004. The title of the Proclamation indicates that it has given recognition to both copyright and neighboring rights, following the civil law tradition, as civil law countries invariably use both copyright and neighboring rights.[33] Moreover, although Ethiopia is not yet a party to any of the international conventions dealing with neighboring rights, our law seems to have been influenced by these conventions as it has given recognition to some of the major neighboring rights which are internationally recognized. Article 2(8) of the Proclamation defines copyright as an economic right subsisting in a work and where appropriate includes moral rights of an author.

[30] *See* WIPO Academy, *supra* note 26 at 95.

[31] *See* Arts. 1647–1674, book three of the 1960 Civil Code, *supra* note 3. *See also* the discussions by Mengistu and Eshete, *supra* note 3 at 160-168.

[32] *Id. See* Art. 1648 of the Civil Code of Ethiopia, *supra* note 3, which has enumerated several artistic and literary works such as books, booklets, articles in review, newspapers, lectures, speeches, sermons, theatrical and other dramatic works, musical compositions with or without text, dramatic-musical works, radio phonic or radio visual works, choreographic works or pantomimes, drawings, paintings, engravings and sculptures, photographic and cinematographic works, illustrations, maps, plans, sketches, and plastic works pertaining to geography, topography, architecture or other sciences.

[33] *See, e.g.,* Italian Copyright Law, the Copyright Act of the Netherlands and the German Copyright Law, *supra* notes 16, 18 and 21, respectively.

While the approach followed by the aforementioned copyright laws of different countries is enumeration of works which are subsumed by the term copyright, under the Ethiopian Copyright Proclamation the definition accorded to the term has capitalized on the term "work" which is one of the core elements of copyright since copyright is not conceivable without work.[34] However, it is understandable that the enumerations in various laws regarding copyright and the copyrightable works included in the term work under the Ethiopian Copyright Law are similar, if not identical in all respects.

Therefore, it is necessary to understand the term work in the context of this proclamation. Work has been defined under Article 2(30) of the same Proclamation as:

> a production in the literary, scientific and artistic fields and includes works such as books, booklets, articles in reviews, newspapers, computer programs, speeches, lectures, addresses, sermons, and other oral works, dramatic works, dramatic-musical works, pantomime, choreographic works, works created for stage production, musical compositions, audiovisual works, works of architecture, works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art, photographic works, illustrations, maps, plans, sketches, three-dimensional works related to geography, topography, architecture or science.

The above enumeration indicates that copyright relates to various artistic, literary and scientific works of the mind. In addition, we can safely conclude that because defining copyright is a tough task, the Ethiopian lawmaker has tried to make clear what copyright is by making an extensive

[34] *See* Colston, C., *Principles of Intellectual Property Law,* Routledge, 1999, pp. 167-168.

list of copyrightable works. The point, however, is whether neighboring rights incorporated under the Ethiopian law are works. In other words, isn't a performance, a sound recording or a broadcast a work? If we stick to Bainbridge's explanation of the term copyright,[35] which reflects the English legal system, we can contend that what are called neighboring rights under the Ethiopian Copyright Proclamation are definitely works. In this regard, the Ethiopian Intellectual Property Establishment Proclamation[36] is relevant because Article 2(4)[37] of the proclamation stipulates that copyright pertains to a right over creative works such as literary and artistic works and includes neighboring rights. Article 2(5)[38] of the same proclamation has provided that neighboring rights are the rights of performers, printers of phonograms and producers of audio-visual and broadcasting cable distributions over their works. We have already said that copyright is unthinkable without works of the mind. Under this proclamation, the term work has also subsumed neighboring rights. If that is the case, it is possible to argue that neighboring rights are also works under the proclamation that established the Ethiopian Intellectual Property Office. However, this argument may not be acceptable in light of the definition given to work under Article 2(30) of the Copyright Proclamation, as the latter law does not seem to have covered neighboring rights.

[35] *See* Bainbridge, *supra* note 10 at 31-82. Refer also to Miller and Davis, *supra* note 15 at 285-322.
[36] *See* Ethiopian Intellectual Property Office Establishment Proclamation, 2003, Proc. No. 320/2003, *Federal Negarit Gazeta*, Year 9, No. 40.
[37] *Ibid.*
[38] *Ibid.*

In any case, according to Article 2(14) of the Copyright Proclamation, neighboring rights pertain to the rights of performers,[39] producers of sound recordings[40] and broadcasts of broadcasting organizations over their works.[41] Besides, the Ethiopian Copyright Proclamation has devoted some provisions pertinent to the scope of its application to neighboring rights.[42] Moreover, Part Five of the same Proclamation deals with the protection of the rights of performers, producers of sound recordings and broadcasting organizations.[43] To sum up, though copyright and neighboring rights are related, they are distinct. That is why the Ethiopian Copyright Law of 2004 has given recognition to neighboring rights. The stance taken by the Ethiopian Copyright Proclamation in this regard is the same as countries with civil law legal system.[44]

2. Analysis of the Scope of Application of the Ethiopian Copyright Law

2.1. General Remarks

Any legislation is expected to clearly define its scope of application so that it is possible to properly enforce the law. This is true in all jurisdictions. However, since national copyright law is territorial in nature, every author

[39]As per Art. 2(19) of the Copyright Proclamation of Ethiopia, *supra* note 5, the term pertains to actors, singers, musicians, dancers and other persons, who act, sing, deliver, declaim, play in or otherwise perform literary and artistic works. The enumeration in our law is exactly the same as the list in Art. 3(a) of the 1961 Rome Convention, *supra* note 2.

[40]This phrase, pursuant to Art. 2(21) of the Ethiopian Copyright Proclamation, *supra* note 5, means a person that takes the initiative and the responsibility for the making of sound recordings.

[41]*Id.* According to Art. 2(4) of the Copyright Proclamation, *supra* note 5, the term refers to a radio, television, and cable television station or satellite.

[42]*Id.* at Art. 3 sub-articles 4, 5 and 6.

[43]*Id.* See Arts. 26-32.

[44]*See* the copyright laws of Italy, the Netherlands and Germany, *supra* notes 16, 18 and 21, respectively.

and/or owner of copyright on earth, be it a physical person or a legal person, cannot be protected. Therefore, the scope of application such law needs to be defined, as doing so is instrumental to differentiate works which are protected by the copyright law of a given country from those works which are not protected by the same law. For instance, when we look at the UK Copyright Act,[45] US copyright law[46] and German copyright law,[47] we realize that these laws have carefully defined their scope of application. By the same token, the 2004 Ethiopian Copyright Proclamation of Ethiopia, unlike the 1960 Civil Code of Ethiopia, has tried to define its scope of application by providing criteria of eligibility for works to be protected by this law. The question, therefore, is as to why we worry about the scope of application of the Ethiopian Copyright Law.

We must be cognizant of its scope of application because without this knowledge, we cannot properly enforce the proclamation. The corollary to this is that if we are not able to clearly understand the scope of application of the law, we may consider third parties who use the works of all copyright holders in the whole world to be violators of copyright, and we may compel them to pay compensation and we may expose them to criminal liability. For this reason, the following sub-sections are meant to analyze the scope of application of the Ethiopian Copyright Proclamation with regard to the protection of copyright *per se* as the relevant provisions of the law dealing

[45] Copyright, Designs and Patent Act of the United Kingdom, 1988 [hereinafter the UK Copyright, Designs and Patent Act].
[46] Copyright Act of the United States of America, 1976.
[47] German Copyright Law, *supra* note 21.

with the scope of application of neighboring rights will be dealt with under part three of this paper.

2.2. Nationality of Authors as a Connecting Factor

The concept of nationality is important because it determines the benefits to which persons may be entitled and the obligations they must discharge, as there is a strong link between a country and its nationals.[48] Because of this connection, nationals owe a duty of allegiance to their country and the country has a corresponding duty to bestow wide-ranging protections to its nationals. Accordingly, copyright laws of different countries provide protection to their nationals when they come up with a copyrightable work. For instance, under UK law, a work is protected if it comes from a British citizen.[49] By the same token, section 104 of the 1976 USA Copyright Code makes it clear that nationals (citizens) of the USA are protected by the law.[50] And Article 185 of the Italian Copyright Statute[51] protects authors who are Italian nationals. The same thing is true under the copyright laws of Germany[52] and the Netherlands.[53] By the same token, Article 3(1)(a) of the Tanzanian Copyright and Neighboring Rights Act[54] provides that works whose authors are Tanzanian nationals are protected by the law.

In Ethiopia, works created by nationals are protected by virtue of Article 3(1)(a) of the Copyright Proclamation. Therefore, knowledge as to

[48] *See* Shaw, M. N., *International Law*, 5th ed., Cambridge University Press, 2003, p. 584.
[49] UK Copyright, Designs and Patent Act, *supra* note 45.
[50] The Copyright Act of USA, *supra* note 46.
[51] Italian Copyright Law, *supra* note 16.
[52] See German Copyright Law, *supra* note 21.
[53] See the Copyright Act of the Netherlands, *supra* note 18.
[54] The Copyright and Neighboring Rights Act of Tanzania, 1999 [hereinafter the Copyright Act of Tanzania].

who are nationals of Ethiopia is a prerequisite to fully understand works protected by the Ethiopian Copyright Proclamation. In this regard, the 1995 Constitution of the Federal Democratic Republic of Ethiopia and the Ethiopian Nationality Proclamation are relevant. According to Article 6(1) of the FDRE Constitution, any person of either sex shall be an Ethiopian national where both or either parent is an Ethiopian. In addition, by virtue of Article 6(2) of the Constitution, foreign nationals may acquire Ethiopian nationality. These constitutional principles have been further supplemented by the Ethiopian Nationality Proclamation, which declares that irrespective of the mode of acquisition of Ethiopian nationality, every Ethiopian national has a right to the enjoyment of all rights, protections and benefits derived from Ethiopian nationality as preserved by law.[55] Therefore, one of the protections accorded to national is protection of copyright as this is a fundamental constitutional right entrenched under the FDRE Constitution.[56]

To sum up, the Ethiopian Copyright Proclamation accords protection to works whose authors are nationals of Ethiopia irrespective of where they (the nationals) come up with the copyrightable works. Yet, it must be clear

[55]Ethiopian Nationality Law, 2003, Proc. No 378/2003, *Federal Negarit Gazeta,* Year 10, No. 13. This proclamation contains detailed provisions regarding modes of acquisition of Ethiopia nationality, right of nationality, loss of Ethiopia nationality and the like.

[56]*See* Art. 40(2) of the FDRE Constitution, *supra* note 4, in which tangible as well as intangible property such as patents, copyrights, trademarks, industrial designs and the like are envisaged. The rights of persons to property in general and to intellectual property rights in particular were recognized by the Universal Declaration of Human Rights (UDHR), 1948, in Art. 17. The UDHR has become an integral part of the laws of Ethiopia since the adoption of the 1991 Transitional Period Charter of Ethiopia. *See* the Transitional Period Charter of Ethiopia, 1991, Art. 1, Proc. No 1, *Negarit Gazeta*, Year 50, No. 1. *See also,* Art. 13(2) of the FDRE Constitution, *supra* note 4, which stipulates that chapter three of the FDRE Constitution (which includes tangible and intangible properties), should be interpreted in light of international human right conventions including the UDHR.

that the Ethiopian Copyright Proclamation cannot give protection extra-territorially to works of authors who are nationals of Ethiopia. Rather, it means that the Ethiopian Copyright Proclamation accords protection to works of Ethiopian nationals in the Ethiopian territory, regardless of the country where the work is created and regardless of the author's country of residence.

One question worth raising here is whether or not an individual who has co-authored a work with an Ethiopian national is protected by our law although such person does not have any nexus whatsoever with Ethiopia. In other jurisdictions, this issue has been clearly dealt with. For instance, the British Copyright Law provides that a work of joint authorship qualifies for protection if, "*at the material time*," any of its authors is a qualifying person (emphasis added).[57] At this juncture, the phrase material time requires explanation since it is essential to clearly understand the scope of application of law in the case of joint authorship. The material time in relation to a literary, artistic, musical, or dramatic work is the time when the work is made, and for a published work the time when the work is first published. For sound recordings and films, the material time is when the work was made, while for topographical arrangements it is when the edition was first published.[58]

By the same token, Article 120(1) of the German Copyright and Neighboring Rights Law clearly states that in the case of a work created by joint authors, it shall be sufficient to give protection to the work if one of the joint authors is a German national. However, the Ethiopian Copyright Proclamation has not dealt with the issue of protection of a work which is created by an Ethiopian national and a foreign national without any nexus

[57] Prime, *supra* note 10, at 45.
[58] Colston, *supra* note 34, at 193-119.

whatsoever with Ethiopia. This problem can be solved by incorporating a provision in our law which stipulates that a non-national of Ethiopia shall enjoy copyright protection if he/she co-authors a work with an Ethiopian national.[59]

2.3. Principal Residence of Authors as a Criterion of Qualification

Article 40(2) of the FDRE Constitution has provided that property includes any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen,[60] associations which enjoy juridical personality under the law or, in appropriate circumstances, by communities specifically empowered by law to own property in common. It is clear from the wording of the constitution that in the Ethiopian context private property (be it tangible or intangible) is only to be owned by Ethiopian citizens. This means that foreign nationals, though they are residents or domiciliary of Ethiopia, do not have the right to own property of any sort in Ethiopia.

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[59]See German Copyright Law, *supra* note 20. As a matter of fact, the Ethiopian Copyright Proclamation, *supra* note 5, has given recognition to joint authorship in Art. 21(2), which stipulates that where the work is a work of several authors, the co-authors shall be the original joint owners of the economic rights. Does this mean, however, that a foreign national who is a co-author with an Ethiopian national is protected by the Copyright Proclamation by virtue of this article? In the opinion of this author, the answer to this question does not seem to be affirmative, as the provision is not meant to deal with the issue of joint authorship by an Ethiopian national and a foreign national. Rather, had the Ethiopian law-maker desired to deal with this issue, it would have included a clear provision in the proclamation, i..e., under Art. 3, which deals with the scope of application of the law. In the opinion of this author, it is advisable to follow the British approach if we encounter such a problem in Ethiopia, as giving protection to the share of the Ethiopian citizen alone would have a devastating effect on the rights of the co- owner, i.e., the Ethiopian national.

[60] See Art. 40(1) of the FDRE Constitution, *supra* note 4.

However, the Ethiopian Copyright Proclamation has given protection to authors who are residents of Ethiopia irrespective of their nationality. So, can we say that the Copyright Proclamation is compatible with the spirit of the constitution? The Proclamation seems to be contradictory to the Constitution. However, it can safely be argued that the makers of the Constitution did not intend to limit property ownership to citizens alone, as the outcome would be ridiculous. Therefore, the scope of application of the Ethiopian Copyright Proclamation is not contradictory to the spirit of the FDRE Constitution as far as according protection to works created by residents of Ethiopia irrespective of their nationality (citizenship).

When we examine the law of other jurisdictions, we can see that protecting authors transcends citizenship as it extends to cover those with domicile or residence in a given country.[61] By the same token, the Ethiopian Copyright Proclamation gives protection to works whose authors have principal residence in Ethiopia, regardless of their nationality.[62] For that matter, even a stateless person can be protected by the Ethiopian Copyright Proclamation, provided that he or she has his or her principal residence in Ethiopia although this is not clearly articulated in the Proclamation. In contradistinction to the Ethiopian Copyright Law, the German Copyright Law clearly declares that stateless persons who are habitually resident in the territory to which German law applies shall enjoy, with respect to their works, the same copyright protection as German nationals. Stateless persons who are not habitually resident in the territory to which the German law applies shall enjoy with respect to their works the same copyright protection as the

[61] Bainbridge, *supra* note 10, at 44.
[62] Ethiopian Copyright Proclamation, Art. 3(1)(a), *supra* note 5.

nationals of the foreign state in which they habitually reside.[63] The German copyright law has gone further and given protection even to refugees who have that status under relevant German law or other international conventions.[64]

The Ethiopian Copyright Proclamation is also silent regarding the protections to be given to authors who have refugee status in Ethiopia as per the relevant domestic law[65] and international conventions to which the country is a party.[66] It is quite clear that Ethiopia has remained a sanctuary for refugees from the Sudan, Burundi, Kenya, Djibouti, Mali, Rwanda, Nigeria, Somalia and the like.[67] However, the issue that needs to be raised at this juncture is whether or not it would be detrimental to the national interest of the country if Ethiopia gives copyright protections to authors who are stateless persons and refugees, if such persons come up with copyrightable works in Ethiopia.

This writer believes that there is no conceivable jeopardy to the national interest of Ethiopia if the country gives protection to the works of authors who are refugees in Ethiopia, as long as they are present in Ethiopia in accordance with the relevant laws of the country and other multilateral or bilateral treaties to which the country is a party. To this end, it may be

[63] German Copyright Law, *supra* note 21.
[64] *Ibid.*
[65] *See* generally, Refugees Proclamation, 2004, Proc. No.409, *Federal Negarit Gazeta*, Year 10, No. 54.
[66] *See* the 1951 UN Convention relating to the Status of Refugees and the 1967 UN Protocol, to both of which Ethiopia acceded in December 1969. Ethiopia was also a signatory to the 1969 Organization of African Union Convention Governing the Specific Aspects of Refugee Problems in Africa.
[67] *See* Hailesellassie G/Mariam , The Ethiopian Asylum Policy Review, Addis Ababa University Student Law Review, Vol. 1, No. 2, December 2010, pp. 86-108.

necessary to revisit the scope of application of the Ethiopian Copyright Proclamation although it may be concluded that refugees who have principal residence in Ethiopia are protected by the law as it stands now, since this criterion is applicable to all persons with principal residence in Ethiopia.

As it can easily be discerned from the reading of Art.3(1(a) of the Copyright Proclamation of Ethiopia, not every resident author is protected. Rather, it is those authors having principal residence in Ethiopia who are protected by the Copyright Proclamation which means that those persons who have secondary residence in Ethiopia are not within the ambit of the Copyright Proclamation. In other words, the Ethiopian Copyright Proclamation has retained the classification made on residences as principal and secondary by the 1960 Civil Code of Ethiopia.[68] Therefore, this classification of residences into principal and secondary obliges us to pose these questions: How do we differentiate principal residence from secondary residence? Why are authors who have secondary residence in Ethiopia not protected by the Ethiopian Copyright Proclamation?

The copyright laws of more advanced jurisdictions such as the UK and the USA have given satisfactory answers to the above questions, establishing that residents of these countries are protected, without making distinctions between principal and secondary residence.[69] By the same token, the German copyright law has not made distinctions between principal and secondary residence although it has made clear that protection is given to habitual

[68]See Civil Code of Ethiopia, Arts.174-182, supra note 3.

[69] See Section 154 of UK Copyright, Design and Patent Act, *supra* note 45. *See also* Prime, *supra* note 10 at 44. Regarding the approach of the USA Copyright Act, see section 104 of the Act, *supra* note 46.

residents of Germany.[70] In Tanzania, works of authors who have habitual residence in the country are protected by the Tanzanian Copyright and Neighboring Rights Act of 1999.[71]

Article 185 of the Italian Copyright Law also provides that the law shall apply to the works of foreign authors domiciled in Italy which are first published in Italy.[72] But the Italian law uses domicile as a connecting factor to accord protection to the works of foreign authors, unlike the laws of the USA, the UK, Germany and Ethiopia, which use residence as a connecting factor for the same purpose. In addition, the Italian law uses more stringent criteria as it has combined the requirement of domicile with first publication of the work in Italy. In any case, the question of principal residence and secondary residence cannot arise as an issue in Italy since residence is not a basis of qualification for a work to be protected by the Italian Copyright Proclamation. The Berne Convention, on literary and artistic works, also makes no dichotomy between principal and secondary residence despite the fact that this convention uses the expression habitual residence.[73]

In Ethiopia, Article 174 of the Civil Code provides that the residence of a person is the place where he normally resides, and Article 177 stipulates that a person may have several residences and that one of these may have the character of principal residence while the others are secondary residences. Yet, the Civil Code does not provide any criterion which may help us to categorize residences of a person into principal and secondary, and this has

[70]German Copyright Law, *supra* note 21.
[71]Tanzanian Copyright Act, Art. 3, *supra* note 54.
[72]Italian Copyright Law, *supra* note 16.
[73]Berne Convention, Art. 3, *supra* note 2.

serious repercussions for proper implementation of the Copyright Proclamation with regard to copyright protection for residents of Ethiopia who are non-nationals.[74]

However, as the adjective 'principal' suggests, this residence may be understood to mean the place where the individual resides most of the time, has various social interactions, economic establishments and the like, as opposed to occasional presence in the area. Nonetheless, in the future the best solution to this problem will be either defining principal residence clearly or simply according protection to authors so long as they are residents of

[74]For instance, let us suppose that Mr. X is a Congolese national who is a well- known writer on African history. He teaches "African History during the Colonial Era" in Kenya. In Kenya, he has a wife and two children. He is also a permanent staff member of the Department of History and Heritage Management, Addis Ababa University, Ethiopia. In Ethiopia, he has another wife who is a Ugandan national with whom he has three children. Mr. X has been accomplishing his task of teaching by travelling from Kenya to Ethiopia and vice versa. Recently, he wrote a book on the *Contribution of Ethiopian Brothers to Anti-colonial Struggle in Africa.* However, to the dismay of Mr. X, Smart Publisher PLC, which is located in Ethiopia, published the manuscripts of Mr. X and distributed the work to the public without obtaining the consent of the author. The most important question, therefore, is whether or not Mr. X can be protected by the Ethiopian Copyright Proclamation. In other words, can Mr. X legitimately petition the Ethiopian Courts to give injunctive relief, ordering the infringer to refrain from the publication and distribution of the work? Can Mr. X be awarded both material and moral compensation? Additional issues in this connection are whether the police can conduct an investigation of violation of such work, whether the public prosecutor can prosecute individuals involved in the publication and distribution of Mr. X's work, and whether the criminal benches in Ethiopia can convict the infringer of the rights of Mr. X. In this hypothetical case, if we conclude that Mr. X has secondary residence in Ethiopia, it means that his work is not protected. Hence, Smart Publisher PLC is not required to pay material as well as moral compensation to Mr. X. Individuals involved in the publication and distribution of the work of Mr. X cannot also be held criminally liable. If, on the other hand, we conclude that Ethiopia is the principal residence of Mr. X, it automatically follows that his work is protected, which enables him to seek civil as well as criminal remedies in Ethiopia against violations of his rights. Therefore, a clear distinction between principal and secondary residence is instrumental to arrive at the right decision regarding copyright protection to be given to non- nationals of Ethiopia, while misconception regarding the difference between principal residence and secondary residence does entail undesirable consequences.

Ethiopia without making any distinction between principal and secondary residences.[75]

[75] As the law now stands, denial of protections to persons who have secondary residence in Ethiopia seems to be justified on the grounds that these persons do not have sufficient connections (links) to Ethiopia. This, in effect, means that if a person who has a secondary residence in Ethiopia has created an artistic or literary work, every individual in Ethiopia shall have every freedom to use, reproduce, distribute or otherwise exploit the work without getting the permission of the author, since such work is considered to be property without an owner. One issue that seems to be worrisome in Ethiopia is whether or not works of authors who are domiciled in Ethiopia are protected by the Ethiopian Copyright Proclamation, since the term domicile has legal significance under the Ethiopian Civil Code. According to *Black's Law Dictionary*, *domicile is the place at which a person has been physically present and that the person regards as home, a person's true home; a person's true fixed, principal and permanent home to which that person intends to return and remain even though currently residing elsewhere.* For Russell J. Weintraub, '*a person's domicile is the place with which that person* is closely associated *–his or her 'home' with all the connections of that word*.' The Ethiopian Civil Code also gives a similar definition to the term domicile in Art. 183, which states that '*the domicile of a person is the place where such person has established the principal seat of his business and of his interests, with the intention of living there permanently*.' Art. 184(1) of the same Code further provides that where a person has his normal residence in a place, he shall be deemed to have the intention of residing permanently in such place. Consequently, an intention to the contrary expressed by such person shall not be taken into consideration unless it is sufficiently precise, and it is to take effect on the happening of an event which will normally happen according to the ordinary course of things. On the basis of these definitions of the term domicile, it is possible to infer that domicile creates a stronger link between the individual and the country where he has established his domicile as compared to the link established between a resident person and the country of residence. Therefore, it may be argued that if works of authors who have principal residence in Ethiopia are protected by the Ethiopian Copyright Proclamation, works of authors who are domiciled in Ethiopia should also be protected by our law, and for stronger reasons, even if the law has omitted the issue of domicile. On the other hand, it may be argued that since the law-maker has not included domicile under the scope of application of the law under discussion, the law-maker intended to deny copyright protection to works of authors who are domiciled in Ethiopia. However, this argument does not, in the opinion of this author, seem to be cogent as it creates unwarranted discrimination between persons domiciled in Ethiopia and persons who have a principal residence in the country. In addition, this argument does not seem to reflect the purpose of the Ethiopian Copyright Proclamation. In the final analysis, this writer opines that the best way to give an unequivocal answer to the question of whether or not works of authors who are domiciled in Ethiopia are protected by the Copyright Proclamation

2.4. Publication of a Work in Ethiopia as a Basis of Qualification

Where a work belongs to authors who are nationals or residents of a given country, or domiciled there, the work is protected by copyright law because of one of these connecting factors, as long as the work has met the requirements of originality and fixation, as the case may be. In the absence of these connecting factors, a work of an author may be qualified for protection by virtue of publication, which is the case in many jurisdictions and relevant international copyright conventions. Under the UK Copyright Law, if an author's status is non-qualifying for protection by the law on other grounds, qualification may be by first publication. According to this law, a literary, dramatic, musical or artistic work, a sound recording or film or topographical arrangement qualify if it is first published in the UK or a country to which the Act is extended by order.[76]

However, according to the Italian Copyright and Neighboring Rights Law, publication alone does not suffice for the protection of a work of an author who is not a national of Italy. Instead, first publication of the work in Italy may be a basis of qualification for the work where such work belongs to an author who is domiciled in Italy.[77] Under § 57 (chapter eight) of the 1961 Copyright Law of Norway, works of an author that are first published in the country are brought within the ambit of this law and protected by it. Works that are simultaneously published in Norway and in another country are also

is by making clear reference to the issue in the article dealing with the scope of application of the Copyright Proclamation, which can be accomplished by amending the proclamation.

[76] See Colston, *supra* note 34 at 194.

[77] Italian Copyright Law, Art.185, *supra* note 16.

protected.[78] At the international level, for instance, Article 3(1)(b) of the Berne Convention provides that the convention applies to authors who are not nationals of any of the countries of the union if their work is first published in one of those countries or simultaneously outside the union and in a country of the union.[79]

In Ethiopia, even if an author is neither a national nor a resident of the country, his or her work enjoys protection under the Copyright Proclamation where the work is first published in Ethiopia. In addition, even if a work is first published abroad, it is protected by the Ethiopian Copyright Proclamation where it is also published in Ethiopia within 30 days of the date of publication abroad.[80]

The other relevant issue concerns when a work is considered to be published. Publication is defined as the act of declaring or announcing to the public, the offering or distribution of copies of a work. Publication may be

[78]The Copyright Act of Norway, 1961, last amended in 2006, available at wwwhttp://www.ub.uio.no/ujur/ulovdata/lov-19610512-002-eng.pdf, accessed on 20 January 2014.

[79]Berne Convention, *supra* note 2.

[80]Nonetheless, the Ethiopian Copyright Proclamation has not unambiguously dealt with the issue of simultaneous publication of a work by the same author in Ethiopia and abroad, unlike the stance taken by the Berne Convention and national copyright laws of other countries, which have clearly dealt with the issue. Yet, it seems safe to conclude that if a work is first published abroad and also published in Ethiopia within 30 days, reckoned from the exact date of publication, it is given protection in Ethiopia by the Ethiopian Copyright Proclamation, then a work which is simultaneously published abroad and in Ethiopia must be protected by the law of Ethiopia. Though this might be a cogent argument, the law should be crystal clear in this regard, to do away with future controversies arising between the one who claims protection and other persons who may believe that they have the liberty to exploit such work without obtaining the consent of the author. See generally the analysis given by Skone James, E. P., Mummery, J. F., Rayner, J. E. and Latman, A., *Copinger and Skone James on Copyright,* Sweet & Maxwell, 1980, p. 26. See also Bainbridge, *supra* note 10 at 69-70.

divided into general publication, which involves distribution of an author's work to the public, as opposed to selected group, whether or not restrictions are placed on the use of the work and limited publication which pertains to distribution of copies of a work to a limited group for a limited purpose.[81] According to Article 3(3) of the Berne Convention, the expression "published work" pertains to works published with the consent of their authors the means of manufacture of the copies may be, provided that the availability of such copies satisfies the reasonable requirements of the public with regard to the work.[82] Similarly, the WIPO Performances and Phonograms Treaty, in Article 2(e), defines publication of a fixed performance or phonogram as the offering of copies of the fixed performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.[83]

As an example of national copyright laws, Section 175(1)(g) of the UK Copyright Act defines publication as the issue of copies to the public in general, and in the case of literary, dramatic, musical or artistic works, publication pertains to making copies available to the public by means of an electronic retrieval system.[84] In Ethiopia, the Copyright Proclamation has defined published works in Article 2(22), which provides that:

> published work means a work or a sound recording, tangible copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending or for the transfer of the ownership or the possession of the copies, provided that, in the case of a work, the

[81] Garner, *supra* note 9, at 1264.
[82] Berne Convention, *supra* note 2.
[83] WIPO Performances and Phonograms Treaty, *supra* note 2.
[84] Bainbridge, *supra* note 10, at 69-70. *See also*, UK Copyright, Designs and Patent Act, *supra* note 45, section 175.

making available to the public took place with the consent of the author or other owner of copyright, and in the case of sound recording, with the consent of the producer of the sound recording.

When we compare the elements of publication incorporated into the Ethiopian Copyright Proclamation, we see that the definition accorded to publication by our law is similar to the afore-mentioned definitions although the Ethiopian law does not seem to deal with works available to the public online. Finally, we should bear in mind that there are some acts which may not be considered as publication although the works are available to the public. Under the Berne Convention, for instance, the performance of a dramatic, dramatic–musical, cinematographic or musical work, the public recitation of literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture do not constitute publication.[85] This means that in countries that are party to the Berne Convention, one cannot claim protection by merely doing these acts. This conclusion cannot, however, be buttressed by the Ethiopian Copyright Proclamation since it does not contain exceptions to publication. Nevertheless, the exceptions to publication will be applicable in Ethiopia if the country becomes a member to this convention in the future.[86]

2.5. Qualification of Audio-visual Works to be Protected in Ethiopia

[85]Berne Convention, Art. 3(3), *supra* note 2.

[86]Circumstances seem to suggest that Ethiopia may be allowed to join WTO and hence to become a member to the Berne Convention in the near future, although one cannot assert this with certainty given the ever-changing global situation.

An audio-visual work is a work consisting of related images that are presented in a series, usually with the aid of a machine and accompanied by sound.[87] In Ethiopia, the term has been defined by the Copyright Proclamation as a series of related images which impart the impression of motion with or without the accompanying sounds, and can be made visible by any appropriate device and includes cinematographic or other film.[88]

Coming to the issue of protection, audio-visual works are protected by the Ethiopian Copyright Proclamation where the headquarters or principal residence of the producer is Ethiopia.[89] The stance taken by the Ethiopian Copyright Law is the same as the position held by the copyright laws of other jurisdictions. For instance, Article 3 of the Tanzanian Copyright and Neighboring Rights Law clearly stipulates that audio-visual works are protected if the producer has his headquarters or habitual residence in the United Republic of Tanzania.[90]

At this juncture, the issue worth-raising concerns the meaning of "producer," since it has repercussions for the protections accorded to audio-visual works. Neither the Berne Convention nor any other convention on the protection of copyright and neighboring rights have defined the term. However, the Ethiopian Copyright Proclamation has tried to provide a statutory definition. Accordingly, as provided in Article 2 (20), a producer "[is] a person that undertakes the initiative and the responsibility for the making of the audio-visual works."

[87]Garner, *supra* note 9 at 1636.
[88]Ethiopian Copyright Proclamation, *supra* note 5, Art. 2(1).
[89]*Id.*, Art. 3(1)(c).
[90]The Copyright Act of Tanazania, supra note 54.

Here we are again obliged to ask whether the term "person" pertains to both physical persons and legal persons. Does it make any difference whether the producer is a physical person or an artificial person as far as the protection of the work under discussion is concerned? Under the Ethiopian Copyright Proclamation, the word has been defined as either a physical person or an artificial person, in which case there is a strong argument that a producer of an audio-visual work could be either of these persons. From this, it may be inferred that where the producer of the audio-visual work is an Ethiopian national, this work is protected by virtue of Article 3(1)(a) of the Copyright Proclamation irrespective of the location of the headquarter and residence of producer. On the other hand, we may validly conclude that where the producer of the audio-visual work is a foreign national, the work is to be protected by the Ethiopian Copyright Proclamation where the Headquarter is located in Ethiopia or the producer has principal residence in Ethiopia.

Finally, it should be borne in mind that the location of headquarter (the head office) or the principal residence of the producer is what determines copyright protection under Ethiopian law. In other words, it does not make any difference whether the audio-visual work is created in another country so long as the producer has his/her/its headquarters or principal residence is in Ethiopia. But as discussed previously, the thorny issue is the difficulty of demarcating the difference between principal and secondary residences. In addition, domicile of the producer remains an equally baffling issue with respect to audio-visual works. On the basis of the analysis made previously, this author argues that if a "person" domiciled in Ethiopia is a producer of an audio-visual work, that work should be accorded protection by the Copyright

Law of Ethiopia, as this point of attachment is arguably stronger than the point of attachment created by residence within Ethiopia.

2.6. Architectural Works When Protected

The Significance of architecture in a society should not be overemphasized as it has been playing meaningful roles in money life aspects of a society. In this regard, Winick wrote that: [91]

> The importance of architecture as an art form is not doubtable. Architects throughout history have viewed their craft as both expressing and driving culture. Architecture and society have a profoundly interdependent relationship. Architecture expresses the values of its cultural context and at the same time helps create the culture that it inhabits. Architecture plays more than an aesthetic role in society. For example, architecture performs invaluable utilitarian functions. Intelligent and creative architectural design makes everyday tasks infinitely easier. In addition to its direct economic importance, architecture also promotes scientific advancement. The needs of architecture provided the impetuses for varied technical advancements such as the flush toilet, the elevator, reinforced concrete, plate glass, and the air conditioner, to name just a few.

The social importance of architecture led most European nations to extend some copyright protection to architectural works. The scope of the protection offered by these nations ranges from quite limited to very broad. For example, Article 1 of the Norwegian Copyright Law,[92] Article 2(4) of the

[91] Winick, R., Copyright Protection for Architecture after the Architectural Works Copyright Protection Act of 1990, *Duke Law Journal*, Vol. 41, No. 6, at 1600-1601.

[92] Copyright Law of Norway, *supra* note 78.

German Copyright Law,[93] Article 10 of the Copyright Law of the Netherlands[94] and Article 2(5) of the Italian Copyright Law[95] expressly provide for the protection of architectural works. In Ethiopia, such works are protected because the term copyrightable work covers architectural works as stipulated in Article 2(30)(f) of the Copyright Proclamation.[96] Internationally, the Berne Convention is the most important instrument for the protection of architectural works because the definition of literary and artistic works subsumes these works, too.[97]

Various jurisdiction of the world have provided tests of qualification for the protection of architectural works. For example, Article 57 of the Norwegian Copyright Law[98] states that such works are protected by this law where they are incorporated in a building erected in the country. Similarly, Article 3(1)(d) of the Tanzanian Copyright Act declares that works of architecture and other artistic works are protected where such works are erected in a building or other structures located in Tanzania. The Ethiopian Copyright Law demonstrates a close resemblance to the Tanzanian Law. Article 3(1) (d) of the Copyright Law of Ethiopia states that works of architecture and other artistic works incorporated in a building or other structures erected in Ethiopia are protected. Nonetheless, this author argues that architectural works belonging to an Ethiopian national or to an author whose principal residence is located in Ethiopia are to be protected

[93] German Copyright Law, *supra* note 21.
[94] Copyright Act of the Netherlands, *supra* note 18.
[95] Italian Copyright Law, *supra* note 16.
[96] Ethiopian Copyright Law, *supra* note 5.
[97] *See* Berne Convention, Art. 2(1), *supra* note 2.
[98] Copyright Law of Norway, *supra* note 78.

automatically by virtue of Article 3(1) (a) of the Copyright Proclamation, despite the fact that such works are not erected in Ethiopia. Therefore, this author also contends that the requirement of the erection of the architectural work in Ethiopia applies to protection for non-national authors of architectural works and other authors of architectural works who do not have principal residence in Ethiopia. This is without prejudice to the stance of other individuals who maintain that architectural works should be protected by the Ethiopian Copyright Proclamation only when such works are erected in Ethiopia.

Other pertinent issues in relation to protection of architectural works are as to how artistic works can be combined with architectural works and as to what is meant by "other structures" - other than a building. As to the first issue, engravings, paintings, woodcuts and the like may be incorporated in a building, along with the architectural works. But "other structures" are not defined under the Ethiopian law; as far as the reading of this author goes, nor have the laws of other jurisdictions defined this phrase,. Despite this absence of definition, we can imagine that the phrase pertains to dams, towers, statues, tunnels, swimming pools, railroads, aerodromes, runways, bridges and the like constructed in Ethiopia.

Finally, before we close the discussion on the protection of architectural works, one more important issue is in order. Can an author of architectural works claim protection in Ethiopia by invoking first publication or simultaneous publication or publication within 30 days in Ethiopia? In this connection, the Berne Convention provides that construction of a work of

architecture does not constitute publication,[99] which means that the author of an architectural work cannot claim protection by invoking the rule of first publication in the country concerned. In Ethiopia, this situation does not seem to be entirely clear since the definition accorded to published works by the Copyright Proclamation does not make exclusions.[100] However, a close scrutiny of the definition given to the term published work reveals that publication is confined to works such as sound recordings, audio-visual works, books, booklets, newspapers, book reviews and the like. Art. 3(1.d) of the Proclamation seems to indicate that authors of architectural works are protected by the Copyright Proclamation regardless of publication as far as works of architecture are erected in any part of the Ethiopian territory. The same applies to other artistic works incorporated in buildings or other structures located in Ethiopia.. The same applies to other artistic works incorporated into buildings or other structures located in Ethiopia.

3. Scope of Application of the Law on Neighboring Rights: Performances, Sound Recordings and Broadcasts

3.1. General Remarks

When we compare and contrast the provisions of the 1960 Civil Code with the 2004 Copyright Proclamation of Ethiopia, we can see significant departures made by the latter law. One of such departures of the latter law is the incorporation of what are called neighboring rights such as performances, sound recordings and broadcasts of broadcasting organizations which were

[99] *See* Berne Convention, Art. 3(3), *supra* note 2.

[100] See the definition given to published works given by the Ethiopian Copyright Proclamation, Art. 2(22), *supra* note 5.

not clearly incorporated in the Civil Code of Ethiopia.[101]The new proclamation has also attached significant weight to neighboring rights. Accordingly, Part Five of the Copyrights Proclamation, which contains articles 26-32, is devoted to the protection of performers, producers of sound recordings and broadcasts of broadcasting organizations.

With regard to the scope of application the new proclamation for protection of such rights, sub-articles 3, 4, 5 and 6 of Article 3 are relevant. The first three sub-articles provide the qualification criteria for performances, sound recordings and broadcasts of broadcasting organizations. The last sub-article makes it clear that the provisions of the proclamation shall also apply to performers, producers of sound recordings and broadcasts of broadcasting organizations that are eligible for protection under the proclamation and any international conventions or other agreements to which Ethiopia is a party.

Now, let us proceed to the analysis of the conditions that must be satisfied so that these neighboring rights are protected by the Copyright Proclamation.

3.2. Qualification for Performances to be Protected in Ethiopia

Internationally, performers are protected by the 1961 Rome Convention, which is officially called the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.[102] According to this convention, performers are actors [or actresses], singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works.[103]

[101] *See* Arts. 1647-1674 of the Civil Code of Ethiopia, *supra* note 5.
[102] The 1961 Rome Convention, *supra* note 2.
[103] *Id.*, Art. 3(1)(a).

This definition of performers has been repeated verbatim in the Ethiopian Copyright Proclamation.[104]

Such works are qualified for protection when they meet the requirements set forth by the copyright law of a country concerned. In this regard, under German Copyright Law it is provided that German nationals enjoy protection with respect to all of their performances, irrespective of the place where they take place.[105] In addition, foreign nationals shall enjoy protection with respect to all of their performances that take place in territory to which the German Law applies.[106] Moreover, if performances by foreign nationals are lawfully fixed on video or audio recordings, and if such recordings have been published, foreign nationals shall enjoy protection, with respect to such video or audio recordings unless they have been published outside the territory to which the German Law applies more than 30 days before their publication within that territory.[107]

In Tanzania, the Copyright Law of the country is applicable to a performance where the performer is a Tanzanian national or the performance took place in the territory of Tanzania. The law is also applicable to performances fixed in a phonogram or audio-visual form if the original performance qualifies for protection or the performance itself (which is not fixed in a phonogram or audio-visual form) is embodied in a broadcast qualifying for protection.[108]

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[104] See Copyright Proclamation of Ethiopia, Art. 2(19), *supra* note 5.
[105] German Copyright Law, Article 125(1), *supra* note 21.
[106] Id, see Art.125(2).
[107] Id, see Art.125(3).
[108] Copyright Act of Tanzania, Art. 3(3), *supra* note 51.

In Ethiopia, the Copyright Proclamation gives due recognition to performances as long as they meet the requirements of the law for protection, which means that not every performer is protected by our law. Rather the law has put in place the conditions to be satisfied by a performer so that he or she is able to claim protection for his or her performance. According to Article 3(3)(a) of the Copyright Proclamation,[109] performers are protected where the performances take place in the territory of Ethiopia or when the performances are incorporated in sound recordings that are protected under the proclamation or included in a broadcast qualifying for protection though the performances have not been fixed in a sound recording.[110] From this, it is possible to gather that the requirements for qualification of performances to be protected by the Copyright Law of Ethiopia are very much akin to the qualification requirements set forth under the Tanzanian Copyright Act of 1999.[111]

3.3. Eligibility of Sound Recordings for Protection in Ethiopia

As we have said previously, production of sound recordings otherwise known as phonograms is an important neighboring right that has been recognized by international conventions and the domestic laws of various countries. Traditionally, protections were given to these categories of beneficiaries because their creative, financial and organizational resources are required to make recorded sound available to the public in the form of commercial sound recordings or phonograms and because of their legitimate interest in having the legal resources necessary to take action against

[109]See the discussions in section 2.2 of this paper with regard to nationality as grounds for protection for the works of an author who is an Ethiopian national.
[110] The Ethiopian Copyright Proclamation, Art. 3(3)(b)(i)-(iii), *supra* note 5.
[111]See Copyright Act of Tanzania, *supra* note 54.

unauthorized uses.[112] For these reasons, international conventions and national laws have given appropriate protection to sound recordings.

At the international level, the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms [sound recordings] and Broadcasting Organizations was the first pertinent international instrument for safeguarding the rights of producers of sound recordings.[113] The other pertinent international instrument was the 1971 Geneva Convention for the Protection of Producers of Phonograms [sound recordings] Against Unauthorized Duplication of Their Phonograms.[114] In addition to these, another international convention known as the WIPO (World Intellectual Property Office) Performances and Phonograms [Sound Recording] Treaty (WPPT) was adopted in Geneva on December 20, 1996 and entered into force on May 20, 2002.[115] When we have a close look at the preamble of this convention, we realize that the contracting parties were motivated to adopt this convention with a view to developing and maintaining the protection of the rights of performers and producers of sound recordings in an effective and uniform manner; introducing new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural, and technological developments; and balancing the interests of performers and producers of sound recordings in the larger public interest, particularly with regard to education, research and access to information.[116]

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[112] WIPO Academy, *supra* note 26, at 95.
[113] The 1961 Rome Convention, *supra* note 2.
[114]Geneva Convention for the Protection of Producers of Phonograms [sound recordings] Against Unauthorized Duplication of Their Phonograms, Geneva, 1971.
[115]WIPO Performance and Phonograms Treaty, *supra* note 2.
[116]*Id,* See the preamble of the treaty.

As per Article 2(d) of the WPPT, "producer of a phonogram [sound recording]" pertains to the person or legal entity who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds or representation of sounds.[117] Domestic laws have adopted definitions of the term very similar to the one provided by this convention. A typical example is Article 4 of the Tanzanian Copyright Act of 1999 which states that "a producer of sound recording means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds."[118] By the same token, the Ethiopian Copyright Proclamation declares that a producer of a sound recording is a person who undertakes the initiative and the responsibility for the making of sound recording works,[119] while sound recording pertains to an exclusively oral fixation of sounds of a performance or other sounds or a representation thereof, regardless of the method by which sounds are fixed or the medium in which sounds are embodied.[120]

Domestic laws and international conventions have also set forth criteria for eligibility for protection of producers of sound recordings. For example, Article 126(1) of the German Copyright Law[121] states that the protection afforded by the law shall be enjoyed by German nationals or German enterprises which have their headquarters in the territory to which the German Copyright Law applies with respect to all of their audio recordings, irrespective of whether and where they have been published. Sub-article 2

[117] *Ibid*.
[118] Copyright Act of Tanzania, *supra* note 54.
[119] Ethiopian Copyright Proclamation, Art. 2(21), *supra* note 5.
[120] *Id*., Art.2(28).
[121] German Copyright Law, *supra* note 21.

makes it clear that foreign nationals or foreign enterprises which do not have their headquarters in the territory shall enjoy protection for their audio recordings published in that territory unless the recording was published outside the territory to which the law applies more than 30 days before it was published in that territory. By virtue of sub-article 3 of the German Copyright Law, foreign nationals or foreign enterprises which do not have their headquarters in the territory to which this Law applies shall further enjoy protection as provided by international treaties to which Germany is a party. The same stance was taken by the Copyright Act of Tanzania,[122] because Article 3(4) of the Act provides that protection of phonograms [sound recordings] by the law is available where: (a) the producer is a national of the United Republic of Tanzania; or (b) the first fixation of the sound recording was made in the United Republic of Tanzania; and (c) the phonogram was first published in the United Republic of Tanzania.

In Ethiopia, sound recordings the producers of which are Ethiopian nationals are protected by the Ethiopian Copyright Proclamation, as clearly stated in Article 3(4)(a) of the Proclamation. In addition to the test of the nationality of producer, fixation and publication are relevant considerations. As per Article 3(4)(b) of the Copyright Proclamation, sound recordings that are first fixed (recorded) in Ethiopia are protected by the Ethiopian Copyright Proclamation regardless of the nationality of the producer. Also, Article 3(4)(c) of the Proclamation stipulates that "sound recordings first published in Ethiopia are protected by the law irrespective of the place where they are produced and the residence or nationality of the producer."

[122] Copyright Act of Tanzania, Art. 3, *supra* note 54.

Nevertheless, we are confronted with a critical issue when we read Articles 3(4)(b) and 3(4)(c) of the proclamation together. Should the requirements of fixation and publication be satisfied cumulatively or alternatively so that a sound recording may be protected by the Ethiopian Copyright Proclamation? A close reading of the English version of the article under consideration clearly indicates that the requirements should be satisfied cumulatively as the requirements of fixation and publication are connected by a coordinating conjunction- '***and.***' However, when we examine the Amharic version of this sub-article, it is not clear whether these requirements should be met cumulatively or alternatively, as the Amharic equivalent of the coordinating conjunction 'and' (እና) is missing in the Amharic version. On the basis of this, it is possible to contend that sound recordings are protected in Ethiopia where they are either first fixed or first published in the country. When there is a contradiction between the Amharic and English versions of Federal law,[123] the former prevails since Amharic is the language in which the Federal Parliament of Ethiopia deliberates upon the law,[124] which means that it is the Amharic version of the law that best reflects the intention of the legislature.[125]

The other thorny issue is whether or not sound recordings produced by individuals who have principal residence in Ethiopia are protected by the Ethiopian Copyright Proclamation. In other words, can a resident of Ethiopia that has produced a sound recording claim protection of this work by

[123] *See* Federal Negarit Gazeta Establishment Proclamation, 1995, Proc. No. 3, *Federal Negarit Gazeta*, Year 1, No. 3.
[124] *Id*., Art. 2 (4).
[125] *See* House of Peoples' Representatives of the Federal Democratic Republic of Ethiopia, Rules of Procedures and Members' Code of Conduct Regulation, 2006, Art. 25, Regulation No. 3/2006.

invoking residence as a point of attachment? This question is the result of the fact that Article 3(4) of the proclamation (which deals with the scope of application of law with regard to sound recordings) has only incorporated nationality of the producer, first fixation and first publication of the sound recording in Ethiopia as points of attachment with the Ethiopian Copyright Proclamation. In response to this issue, it may be argued that since Article 3(4) of the proclamation is silent in this regard, sound recordings produced by individuals who have principal residence in Ethiopia are not protected by the proclamation. But the contrary may also be also argued. In the opinion of the author, the latter argument is convincing because if sound recordings which are first fixed or first published in Ethiopia are protected by the Copyright Proclamation, it would be unsound to deny protection to sound recordings produced by individuals that have principal residence in Ethiopia. This is so because if the producer of the sound recording is an Ethiopian resident, he or she is more closely connected with Ethiopia than the requirements of first fixation or first publication of a sound recording entail.

Before we finalize the discussions in relation to protection of sound recordings, one last point should be raised. A close scrutiny of Article 3(4) of the proclamation invites questions about whether both physical persons and legal persons are envisaged by the proclamation as producers of sound recordings. That physical persons are producers of sound recordings and hence deserve protection can be gathered by reading Article 3(4)(a) of the Proclamation which states that sound recordings produced by Ethiopian nationals are protected by the Copyright Law. The question is whether or not sound recordings produced by legal persons (established as per the Ethiopian

Commercial Code or registered here in Ethiopia in accordance with the relevant laws) are protected by Article 3(4)(a) of the proclamation. A close reading of the definition of the term producer of sound recording seems to provide an affirmative answer to this query since the definition does not make any distinction between physical and legal persons.[126]

3.4. Qualification of Broadcasts of Broadcasting Organizations

Broadcasts are essential intellectual properties which are meant to serve a number of purposes for the international community in general and for the people of a given nation in particular. Such intellectual property plays an irreplaceable role in insuring the right to freedom of expression and access to information, which are fundamental constitutional rights in modern democratic countries. Generally speaking, broadcasts play remarkable roles in promoting the economic, social and political well-being of a given society. Therefore, national copyright laws have given recognition and protection to broadcasts of various natures.

At the international level, the most important conventions regulating the protection of broadcasts and hence the rights of broadcasting organizations are the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations,[127]the 1974 Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite,[128]and the 1994 TRIPS

[126] See Ethiopian Copyright Proclamation, Art. 2(21), *supra* note 5. It simply states that a producer of a sound recording is a person who takes the initiative and the responsibility for the making of sound recording works.

[127] The 1961 Rome Convention, *supra* note 2.

[128] The 1974 Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, *supra* note 2.

Agreement.[129]National laws of various countries have also incorporated pertinent provisions dealing with rights of broadcasting organizations in their broadcasts. Part Two, Chapter Two of the Italian Copyright Law,[130] for instance, is devoted to the protection of rights of broadcasting organizations in radio and television, while Part Two, Section Five of the Copyright Law of Germany deals with the rights of broadcasting organizations in their broadcasts.[131]The Tanzanian Copyright Act has also incorporated provisions which are meant to safeguard the rights of broadcasting organizations over their broadcasts.[132]

Before we discuss the qualification of broadcasts to be protected by the Ethiopian Copyright Proclamation, it is necessary to say a few words about broadcasting. As per Article 3(f) of the Rome Convention, broadcasting means "transmission by wireless means for public reception of sounds or of images and sounds."[133] According to Article 4 of the Tanzanian Copyright Law, broadcasting pertains to "communication of a work, a performance or a sound recording to the public by wireless transmission, including transmission by satellite."[134]In Ethiopia, broadcasting is defined by the Copyright Law as "transmission by wireless means for public reception of sounds or images or of sounds and images", which shows that the definition

[129] *See* TRIPS Agreement, *supra* note 2.
[130] Italian Copyright Law, *supra* note 16.
[131] See German Copyright Law, Art. 87, *supra* note 21.
[132] The Copyright Act of Tanzania, *supra* note 54.
[133] The 1961 Rome Convention, *supra* note 2.
[134] Copyright Act of Tanzania, *supra* note 54.

accorded the term by the Ethiopian Copyright Proclamation a verbatim copy of the definition is provided by the Rome Convention.[135]

It should be borne in mind that broadcasts are unthinkable without broadcasting organizations, which means that when we talk about the protection of broadcasts, we are in effect talking about the protection extended to broadcasting organizations. The Ethiopian Copyright Proclamation has tried to define what a broadcasting organization is. As provided in Article 2(4) of the Ethiopian Copyright Proclamation, a broadcasting organization pertains to a radio, television, and cable television station or satellite.[136]

With respect to criteria of qualification for protection, national laws have provided qualification requirements (points of attachments), taking into consideration their national interests and international obligations stipulated by international conventions to which they are parties. In this regard, under the German Copyright Law[137] broadcasting organizations which have their headquarters in the territory to which the German Copyright Law applies shall enjoy the protection afforded by Article 87 of the same law with respect to all of their broadcasts, irrespective of where they are broadcast. In addition, the German Copyright Law has stipulated that broadcasting organizations which do not have their headquarters in the territory to which the German copyright law applies shall enjoy protection for all of their broadcasts which are broadcast from that territory.[138]Moreover, this law has made clear that broadcasting organizations which do not have their headquarters in the

[135] See the Ethiopian Copyright Proclamation, Art. 2(3), *supra* note 5.
[136] Id,Art. 2(4).
[137]German Copyright Law, Art. 127(1), supra note 21.
[138]Id, Article 127(2

territory to which the law applies shall further enjoy protection as provided by international treaties to which the country is a party.[139] By the same token, according to Article 3(4) of the Tanzanian Copyright Law, protection of broadcasts of a broadcasting organization is available where the headquarters of the broadcasting organization is situated in Tanzania or the broadcast was transmitted from a transmitter situated in Tanzania.[140]

In Ethiopia, broadcasts are protected where the requirements stipulated in Article 3(5) of the Copyright Proclamation are satisfied.[141] Accordingly, broadcasts are protected where they are broadcasts of broadcasting organizations the headquarters of which are situated in Ethiopia. Here, we have to bear in mind that the ownership of the broadcasting organization or the place of the incorporation of such organization does not matter with regard to protection for such works. Rather, what matters is the location of the headquarters of the broadcasting organization. In addition, broadcasts are also protected in Ethiopia where they are transmitted from transmitters situated in Ethiopia.

Here, a close examination of Article 3(5)(a) and (b) of the Proclamation induces the author of this piece to ask whether or not the requirements provided in Article 3, sub-articles 5(a) and (b) of the Proclamation—i.e., location of the headquarters and the existence of the transmitter in Ethiopia—should be met cumulatively or alternatively. As with the case of sound recordings, the English version of this sub-article indicates that in order to extend protection to broadcasts, the broadcasting organization

[139] Id, Article 127(3)
[140] Copyright Act of Tanzania, *supra* note 54.
[141] The Ethiopian Copyright Proclamation, supra note 5.

must have its headquarters in Ethiopia and the broadcast must be transmitted from a transmitter located in Ethiopia. However, the Amharic version of this sub-article seems to indicate that the elements provided in Article 3(5)(a) and (b) should be met alternatively for a broadcast to be protected in Ethiopia, as the conjunction '**and'** is missing in the Amharic version of the Proclamation.[142]

Therefore, on the basis of the Amharic version of the Proclamation, this author argues that broadcasts should be protected in Ethiopia where the broadcasting organization has its headquarters in Ethiopia or where the broadcasts are transmitted from a transmitter located in Ethiopia, since demanding that both requirements be met would be extremely cumbersome to broadcasting organizations, making it difficult for them to obtain protection for their broadcasts. However, in order to avoid the confusion created by the Proclamation, with regard to the protection of broadcasts of broadcasting organizations, we need to amend the proclamation.

Concluding Remarks

[142]See the Federal Negarit Gazzeta Establishment Proclamation, *supra* note 120. In contradistinction to the Ethiopian Copyright Law, the Tanzanian Copyright Act has made it clear that a broadcast is protected in Tanzania where the headquarters of the broadcasting organization is situated in Tanzania or the broadcast is made from a transmitter situated in Tanzania. In order to better appreciate the problem posed by the confusion involved in this sub-article, let us consider the following illustrative hypothetical case. Let us assume that X is a broadcasting organization (share company) incorporated in accordance with the laws of South Africa. Its headquarters is situated in Addis Ababa. It broadcasts various television programs from a transmitter located in Cape Town. In this hypothetical case, if we stick to the argument that the location of the headquarters and the transmitter should be located in Ethiopia, the broadcasts of X Broadcasting Organization are not protected in Ethiopia. Whereas, if we maintain that for broadcasts to be protected in Ethiopia, either the headquarters of the broadcasting organization or the transmitter should be situated in Ethiopia, the broadcasts of X Broadcasting Organization are protected in Ethiopia.

As compared to the 1960 Civil Code, with regard to protection of copyright, the 2004 Copyright and Neighboring Rights Proclamation has introduced a number of significant changes that are instrumental for the proper protection of copyright and neighboring rights in Ethiopia. One of such improvements is that the Copyright Proclamation has tried to define its scope of application with regard to copyrights and neighboring rights. Consequently, Article 3 of the proclamation, which contains seven sub-articles, is entirely devoted to defining the various grounds of qualification for the protection of copyrights and neighboring rights by the proclamation.

However, there are problems and deficiencies contained in the proclamation with regard to certain points of attachment (criteria of eligibility) of works which will negatively impact appropriate implementation of the law in the future. To begin with**,** although Article 3(1)(a) of the Copyright Law has declared that works of authors who are nationals of Ethiopia are protected by the proclamation, the law has not regulated the situation where a work is jointly created by an Ethiopian national and a foreign national who (the latter) does not have any nexus whatsoever (point of attachment) with Ethiopia. Therefore, it is imperative to amend the proclamation to ensure protection for such works. The work should be protected by the Copyright Proclamation with a view to safeguarding the interest of the Ethiopian national and encouraging foreign nationals to work with Ethiopian nationals elsewhere in the world.

In addition, the same sub-article of the proclamation has provided that non-nationals are protected by the Copyright Law of Ethiopia where they are residents of Ethiopia. But the Ethiopian law has said nothing about protection

for a work created jointly by a person who has principal residence in Ethiopia and another non-national and non-resident of Ethiopia. Hence, this author recommends that a clear legal provision be put in place by amending the proclamation so as to ensure that the Ethiopian Copyright Proclamation shall be applicable to works which are jointly created by an Ethiopian resident and a non-resident person, just as though they were created by an Ethiopian resident alone.

The Ethiopian Copyright Proclamation has stipulated that works of authors who have principal residence in Ethiopia are protected by the proclamation which unequivocally indicates that works of authors who have secondary residence in Ethiopia are not protected, given that the Ethiopian Civil Code of 1960 divided residences into principal and secondary categories. The problem, however, is that there are no adequate guidelines to help us characterize a person's residence as principal or secondary, which leads to extremely subjective determinations. If we are convinced that it is only those works of authors who have principal residence in Ethiopia that must be protected by our law, then this author is believes that we must clearly define what principal residence is for the purpose of implementation of the Copyright Proclamation. If, on the other hand, we believe that distinguishing between principal residence and secondary residence is a difficult task, we have to do away with the distinction and simply provide that those authors who are residents of Ethiopia are protected by the proclamation, as is the case in other jurisdictions.

The Copyright Proclamation of Ethiopia has not said anything about the protection to be accorded to stateless authors who happen to be present in Ethiopia unlike the copyright laws of other jurisdictions, which declare that

stateless persons who are habitually resident in the territory to which the laws apply enjoy the same copyright protection as nationals of the country concerned. Therefore, it is the firm belief of this author that it is important to reconsider our law as far as the rights of stateless persons who have created copyrightable works in Ethiopia are concerned.

We know that there have been influxes of thousands of refugees into Ethiopia, particularly from the Sudan, Somalia, Eritrea and other African countries affected by civil war and unrest. For this reason and others, there may be individuals who create copyrightable works while they are in Ethiopia. The issue, therefore, is whether these individuals are to be protected under the Ethiopian Copyright Proclamation during their stay and after their repatriation to their home countries or their departure to a third country. The Ethiopian Copyright Proclamation is not clear in this regard while the German Copyright Law, for instance, has made it clear that its provisions shall apply to foreigners who are refugees within the meaning of treaties or other statutory provisions. Therefore, despite the fact that it may be contended that since refugees are considered to be residents of Ethiopia, such authors may be protected by virtue of the criterion of principal residence, the author recommends that clear provisions protecting their works be incorporated into our Copyright Proclamation by amending the law.

When we closely examine the English version of sub-article (4.b&c) of Art.3 our Copyright Proclamation, we can realize that the requirements of fixation and publication for the protection of sound recordings are put in a confusing manner. According to the English version, the requirements of first fixation and first publication must be satisfied

cumulatively. This is because these requirements are joined by the coordinating conjunction '***and,'*** which indicates that these requirements must be satisfied cumulatively for a sound recording to be protected in Ethiopia. In the Amharic version of this provision, however, the conjunction 'and' is missing. Nor does the Amharic version employ the conjunction '**or,**' which is used to introduce another possibility. In any case, this confusion can best be remedied by amending the Copyright Law of Ethiopia and by stating clearly that the requirements of first fixation and first publication should be met either alternatively or cumulatively for the purpose of protection of sound recordings in the country.

In addition, this provision dealing with grounds of qualification for protection of sound recordings in Ethiopia says nothing about whether or not sound recordings produced by individuals who have principal residences in Ethiopia are protected by the copyright law. What is more, though first fixation and first publication of a sound recording are declared to be grounds of qualification for protection by the Copyright Proclamation, the provision does not address the issue of simultaneous fixation or simultaneous publication of a sound recording in Ethiopia and abroad. In view of this problem as well as the others mentioned above, it is the firm belief of this author that the Ethiopian Copyright Law should be amended to clearly regulate these issues.

Finally, in the case of protection of broadcasts of broadcasting organizations in Ethiopia, a close scrutiny of Art.3(5.a&b) of the Copyright Proclamation reveals that the requirements of location of the headquarter of the broadcasting organization in Ethiopia and transmission of broadcasts from transmitters located in Ethiopia are put confusingly. This is so because these

requirements are joined by a coordinating conjunction '*and'* in the English version, indicating that the requirements must be satisfied cumulatively for such works to be protected by the Ethiopian Copyright Proclamation. But the conjunction '*and'* is missing in the Amharic version of this provision which seems to indicate that either the presence of the headquarters of the broadcasting organization in Ethiopia or the transmission of broadcasts from transmitters located in Ethiopia suffices for broadcasts to be protected by the Ethiopian Copyright Proclamation. Nevertheless, it is important to note that the Amharic version of the provision has not incorporated the conjunction 'or,' which should have been used to show that the afore-mentioned requirements (grounds of qualification) for the protection of broadcasts could be met alternatively. Therefore, the author recommends that the solution for this confusion be sought by amending the Copyright Proclamation. In the opinion of the author, the amended law should provide without equivocation that broadcasts of broadcasting organizations are to be protected by the Ethiopian Copyright Proclamation where the headquarters of the organization is located in Ethiopia or where the broadcast is transmitted from a transmitter located in the country.

CASE COMMENT

Scope of Taxable Employment Income: a case comment on FDRE Ministry of Justice V. Tekle Garidew *et al*[♥]

Ataklti Weldeabzgi Tsegay[♣]

Introduction

Employment income is the income that an employee receives from an office or employment.[1] The definition is wide and includes not only regular salary but also other cash payments, such as bonuses and sick-pay, most lump sum payments to employees and value of most benefits received as a result of the employment.[2] To be taxable as employment income, the income must derive 'from the employment'.[3]

The basic definition of employment income includes any compensation related, directly or indirectly, to the employment relationship.[4] Depending on the drafting style used and for further certainty, it may be appropriate to enumerate specific amounts including the following:[5]

♥ Federal Supreme Court of Ethiopia, Cassation Division, File No. 65330, Decided on 7 July 2011.

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[1] Gilberts, Tax and national insurance contributions (NICs) on income from Employment, p 1 [here in after Gilberts]

[2] Gilberts, *supra note 1*. Employment income includes normal salary, wages, bonuses, various allowances, and fringe benefits paid for employment. *See* National Tax Agency, Withholding Tax Guide, p 9. Under the Ethiopian income tax proclamation, income [employment income as one category of income] is defined as: "Income" shall mean every sort of economic benefit including nonrecurring gains in cash or in kind, … See Income Tax Proclamation No. 286/2002, Negarit Gazeta, Year 8, No. 34, Article 2(10). [hereinafter Income Tax Proclamation No. 286].

[3] Gilberts, *Id*

[4] Lee Burns and Richard Krever, Individual Income Tax in Tax Law Design and Drafting vol. 2; Victor Thuronyi, ed (1998), p 16 [here in after Burns and Krever].

[5] *Id*

- salary, wages, or other remuneration provided to the employee, including leave pay, overtime payments, bonuses, commissions, and work condition supplements, such as payments for unpleasant or dangerous working conditions;
- fringe benefits;[1]
- any allowance provided by the employer for the benefit of an employee or in respect of any member of the employee's family, including a cost of living, subsistence, rent, utilities, education, entertainment, or travel allowance;
- any discharge or reimbursement by an employer of expenditure incurred by an employee other than expenditure incurred in the performance of duties of employment;
- consideration provided by an employer in respect of the employee's agreement to any conditions of employment or to any changes in the conditions of employment;
- any payment provided by an employer in respect of redundancy, any payment for loss of employment or termination of employment, and similar payments;
- any compensation received for a total or partial loss of employment income;
- retirement pensions and pension supplements;
- any consideration paid to secure a negative covenant from a past, present, or future employee; and
- gifts provided by an employer to a past, present, or prospective employee in the course of or by virtue of employment.

Almost all countries collect the income tax payable on employment income PAYE (Pay-As-You-Earn) on a current basis by withholding at source by the employer.[2] Under the withholding tax system[3], (1) a payer of certain types of income, such as salary, interest, dividends and tax accountants' fees, (2) calculates the amount of income tax payable pursuant to

[1] *Id*, at 21. A "fringe benefit" is any monetary or nonmonetary benefit derived from employment that does not constitute cash salary or wages. Common examples of fringe benefits are employer provided housing, the use of an employer-provided car for personal purposes, and the provision of discounted goods to employees.

[2] Lee Burns and Richard Krever, Individual Income Tax in Tax Law Design and Drafting vol. 2; Victor Thuronyi, ed (1998), p 61 [here in after Burns and Krever]. PAYE is a system for collecting tax on employment income throughout the tax year, by requiring employers to deduct tax under PAYE every time an employee is paid. See Gilberts, at 2

[3] National Tax Agency, Withholding Tax Guide, p 3

prescribed methods at the time the income is paid, and (3) withholds the amount of income tax from the income payment and pays it to the government.

When we come to Ethiopia, what constitutes employment income is stipulated as: "Employment income shall include any payments or gains in cash or in kind received from employment by an individual, including income from former employment or otherwise or from prospective employment."[4] This shows that any income gained based on employment relationship is considered as employment income. Thus, as per article 10(1) of the Income Tax Proclamation, every person deriving income from employment is liable to pay tax on that income at the rate specified in Schedule A, as set out under Art 11. There are also incomes derived from employment relationship but which are exempted under various income tax laws. Art 13 of the Income Tax Proclamation provides exemptions for some income categories derived from employment.[5] The Income Tax Regulation, too, stipulates incomes that are

[4] Income Tax Proclamation No. 286, Article 12(1), *supra note 2*

[5] The following categories of income shall be exempt from payment of income tax hereunder:
(a) income from employment received by casual employees who are not regularly employed provided that they do not work for more than one (1) month for the same employer in any twelve (12) months period;
(b) pension contribution, provident fund and all forms of retirement benefits contributed by employers in
an amount that does not exceed 15% (fifteen percent) of the monthly salary of the employee;
(c) subject to reciprocity, income from employment, received for services rendered in the exercise of their duties by:
(i) diplomatic and consular representatives, and
(ii) other persons employed in any Embassy, Legation, Consulate or Mission of a foreign state performing state affairs, who are national of that state and bearers of diplomatic passports or who are in accordance with international usage or custom normally and usually exempted from the payment of income tax.
(d) income specifically exempted from income tax by:
(i) any law in Ethiopia, unless specifically amended or deleted by this Proclamation;

exempted from tax.[6] In addition, the Ethiopian Revenue and Customs Authority Directive made exemptions on income derived from employment.[7] Here we have exhaustive stipulation of employment incomes exempted from tax. Hence any income not mentioned under these various laws is taxable employment income.

Despite such legal frameworks as to taxable and exempted employment income, there are dispute relating to such issues. One such instance relates to resettlement fund or payment for loss of employment**.** A dispute appeared between the Federal Democratic Republic of Ethiopia Ministry of Justice (the applicant), on the one hand, and Tekele Garidew *et al* (respondents), on the other. The case was first entertained by the Administrative Tribunal of the

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(ii) international treaty; or
(iii) an agreement made or approved by the Minister.
(e) the Council of Ministers may by regulations exempt any income recognized as such by this Proclamation for economic, administrative or social reasons.
(f) payments made to a person as compensation or a gratitude in relation to:
(i) personal injuries suffered by that person;
(ii) the death of another person.

[6] The following categories of payments in cash or benefits in kind shall be excluded from computation of income
taxable under Schedule "A":
(a) amounts paid by employers to cover the actual cost of medical treatment of employees;
(b) allowances in lieu of means of transportation granted to employees under contract of employment;
(c) hardship allowance;
(d) amounts paid to employees in reimbursement of traveling expenses incurred on duty;
(e) amounts of travelling expense paid to employees recruited from elsewhere than the place of employment on joining and completion of employment or in case of foreigners traveling expenses from or to their country, provided that such payments are made pursuant to specific provisions of the contract;
(f) allowances paid to members and secretaries of boards of public enterprises and public bodies as well as to members and secretaries of study groups set up by the Federal or Regional Government;
(g) income of persons employed for domestic duties. Council of Ministers Income Tax Regulation No. 78/2002 Negarit Gazeta, Year 8, No. 37, art 3

[7] Ethiopian Revenue and Customs Authority income tax exemption Directive No. 21/2009, art 4

Federal Civil Service Agency[8] and later on it reached to the Federal Supreme Court on appeal.[9] Both the Tribunal and the Appellate Court decided that resettlement fund or payment for loss of employment is not taxable income. As a result, the case was finally taken to the Cassation Division of the Federal Supreme Court of Ethiopia which affirmed the decisions of the Tribunal and the Appellate Court. As we will be shown below, the decision of this Cassation Division is contrary to the income tax laws and its own analysis appearing in its judgment.

The Cassation Division based its judgment on Arts 2 (10), 10 (1) and 13 of the Income Tax Proclamation. While Art 2 (10) deals with definition of income, Art 10 (1) provides about taxable employment income. Art 13, on the other hand, is concerned with employment incomes that are exempted from tax. Resettlement fund or payment for loss of employment is not among those exempted.[10] But the Cassation Division maintained that resettlement fund or payment for loss of employment is un-taxable and this holding appears to contradict t the Division's analysis in the same case. Is the Cassation Division's ruling that resettlement fund or payment for loss of employment is un-taxable valid? What makes this Division to arrive at such a conclusion contrary to its analysis?

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[8] Federal civil service agency administrative tribunal, File No. 00944/2002 cited in Cassation Decisions of the Federal Supreme Court, File No. 65330, Vol.11, pp.369-370.

[9] Federal Supreme Court, File No 55990 cited in Cassation Decisions of the Federal Supreme Court, File No. 65330, Vol.11, pp.369-370.

[10] Even Art 88(4) of the Federal Civil Servants' Proclamation No. 515/2007 stipulates the type of severance pay exempted from taxation. That is … where the service of a civil servant is terminated due to death an amount equivalent to his three month's salary shall be paid to his …which is exempted from taxation. See Federal Civil Servants' Proclamation No.515/2007, *Negarit Gazeta*, Year 13, No.15. This seems to be consistent with what is provided under Art 13(f) (ii) of the Income Tax Proclamation. But the issue under discussion is not among those stipulated either in the income tax laws or the Federal civil servants' proclamation.

This case comment set out to examine and analyze the issues in this case and to critique the position of the Cassation Division. Finally, it suggests solution that would help determine similar issues in the future. The case comment is organized as follows. Section 1 is devoted to the summary and presentation of the facts of the case and the holding of the Administrative Tribunal of the Federal Civil Service Agency and the appellate bench of the Federal Supreme Court. Section 2 deals with the judgment of the Cassation Division of the Federal Supreme Court. The final Section goes to critique the decision of the Cassation Division.

1. Facts of the Case and Holdings of the Administrative Tribunal and the Appellate Court

Tekele Gardew *et al* were employees of the Ministry of Justice of the Federal Democratic Republic of Ethiopia. The Ministry of Justice retrenched employees it thought would not qualify service and meet age requirements. Those retrenched employees were paid to resettlement fund **(**payment for loss of employment). The Ministry deducted income tax from the payment it made to its retrenched employees as a withholding agent of Income Tax authority. [11]

Aggrieved by the act of the Ministry, these retrenched employees instituted suit before the Administrative Tribunal of the Federal Civil Service Agency against the Ministry.[12] The Administrative Tribunal decided that *resettlement fund* or payment for loss of employment is not subject to income tax.[13] Being dissatisfied with this decision, the Ministry appealed against and

[11] An employer shall withhold tax from every "payment to an employee, unless the payment is expressly made tax-exempt by this Proclamation. Income tax proclamation, art 51(1)

[12] The Administrative Tribunal has the power to hear and decide on appeal grievances brought by civil servants relating to an illegal attachment or deduction of salary or other payments. See Art 75(3) of the Federal Civil Servants' Proclamation No. 515/2007.

[13] *Supra note 13*

lodged its appeal before the Appellate Bench of the Federal Supreme Court. However, this appellate Court has confirmed the decision of the administrative tribunal.[14]

Ministry of Justice thus proceeded to the Cassation Division of the Federal Supreme Court and filed its application alleging fundamental error of law committed by the Administrative Tribunal and the Appellate Bench of the Supreme Court.

2. The Judgment of the Cassation Division of the Federal Supreme Court

The Screening Bench of the Cassation Division of the Federal Supreme Court went through the application of the Ministry and then maintained that the matter deserves reviewing by the Cassation Division. Thus respondents were ordered to present their responses on the petition of the Ministry.[15]

The Division framed an issue which reads: is resettlement fund or payment for loss of employment taxable or not? Then it went on to give some analysis and finally decided in favor of the respondents affirming the decisions of the Tribunal and the Appellate Court. It held that resettlement fund or payment for loss of employment is not taxable income. The Cassation Division reasoned that employment income is taxable by virtue of Arts 2 (10)

[14] *Supra note 14*

[15] But nothing is recorded regarding the previous history of the case, memorandum of appeal the applicant asserted and the respondent replied. In addition, the decision of the Cassation Division of the Federal Supreme Court revealed no record regarding arguments advanced by both parties during oral litigation that reflect their positions regarding the law.

and 2 (11).[16] It maintained that there is no error of law committed by the Administrative Tribunal and the Appellate Court.

3. Critique

Now let's see whether the Cassation Division has properly investigated the case and appreciated the legal regime governing employment incomes that are taxable and those that are not taxable (exempted).

As highlighted above, an employee may be entitled to various kinds of payments. Various types of payments are considered as employment income if they are earned on the basis of employment relationship. As a matter of rule, all employment incomes are taxable unless exempted by law. Under the Income Tax Proclamation, income is defined as referring to "every sort of economic benefit including nonrecurring gains in cash or in kind, from whatever source derived and in whatever form paid credited or received."[17] The Proclamation further stipulates that employment income shall include "any payments or gains in cash or in kind received from employment by an individual, including income from former employment or otherwise or from prospective employment."[18] This clearly indicates that if a person gains something from employment it is subject to tax. Nevertheless the same Proclamation and other subsequent income tax laws (Income Tax Regulation and Income Tax Exemption Directive) provide exemptions for some employment incomes.[19]

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[16] Wrongly it is written as art 1(11) but the concept provided there pertains to Art 2(11)) of the income tax proclamation.

[17] See Art 2 (10) of Income Tax Proclamation No.286/2002, *Federal Negarit Gazeta*, 8th Year, No. 34.

[18] Art 12(1).

[19] For detail information see Art 13 of the Proclamation and those other provisions under footnotes 10- 12 above. According to Art 13 of the Proclamation the following categories of income shall be exempt from payment of income tax hereunder:

When we come to the case under consideration, it is clear that respondents have got resettlement fund or payment for loss of employment. Here the question is whether this income is subject to tax or not. The Ministry argued that it is subject to tax while respondents claimed that it is not. The Cassation Division analyzed the law and the case and finally ruled as follows:

> …. በቀረበው አቤቱታ መነሻነት ጉዳዩ ለሰበር ይቀርባል የተባለው ይህንኑ ነጥብ ለማጣራት …. ስለገቢ ግብር የሚደነግገውን የገቢ ግብር አዋጅ ቁጥር 286/94 መመልከቱ ተገቢ ነው፡፡ በአዋጁ አንቀጽ 10 (1) ስር በግልፅ እንደተመለከተው ማንኛውም ሰው በመቀጠር ምክንያት በሚያገኘው ማናቸውም ገቢ ላይ የገቢ ግብር ይከፍላል በማለት ተቀምጧል፡፡ ከግብር ክፍያ ነጻ የሆኑትን አስመልክቶ በአዋጁ አንቀጽ 13 ላይ በዝርዝር ሲገልጽ አሁን የሰበር አቤቱታ የቀረበበትን ጉዳይ አይነት በግልፅ ከስራ ግብር ነፃ ስለመሆኑ አይጠቅስም፡፡ ይህ አንቀጽ ከግብር ክፍያ ነፃ የሆኑትን ከዘረዘራቸው ውስጥ ማናቸውንም አይነት የጡረታ ጥቅም፤ ወይም በተቀባዩ ሰው ላይ በደረሰ የአካል ጉዳት ካሳ ወይም በሌላ ሰው ላይ በደረሰ የሞት አደጋ የሚሰጥ የካሳ ክፍያ የሚሉት ይገኙበታል፡፡ የካሳ ክፍያ ሲባል በሕጉ ላይ በግልፅ እንደተመለከተው በደረሰ የአካል ጉዳት ወይም በደረሰ የሞት አደጋ የሚሰጥ የካሳ ክፍያ የሚመለከት እንጂ ማናቸውንም የካሳ ክፍያ ሁሉ ከግብር

(a) income from employment received by casual employees who are not regularly employed provided that they do not work for more than one (1) month for the same employer in any twelve (12) months period;

(b) pension contribution, provident fund and all forms of retirement benefits contributed by employers in an amount that does not exceed 15% (fifteen percent) of the monthly salary of the employee;

(c) subject to reciprocity, income from employment, received for services rendered in the exercise of their duties by:

- (i) diplomatic and consular representatives, and
- (ii) other persons employed in any Embassy, Legation, Consulate or Mission of a foreign state performing state affairs, who are national of that state and bearers of diplomatic passports or who are in accordance with international usage or custom normally and usually exempted from the payment of income tax.

(d) income specifically exempted from income tax by:

- (i) any law in Ethiopia, unless specifically amended or deleted by this Proclamation;
- (ii) international treaty; or
- (iii) an agreement made or approved by the Minister.

(e) The Council of Ministers may by regulations exempt any income recognized as such by this Proclamation for economic, administrative or social reasons.

(f) payments made to a person as compensation or a gratitude in relation to:

- (i) personal injuries suffered by that person;
- (ii) the death of another person.

> ነጻ መሆኑን የሚጠቅስ አይደለም፡፡ …. በመሆኑም ለተጠሪዎች ይከፈል የተባለው የመቋቋሚያ ክፍያ ግብር የሚከፈልበት ገቢ ነው ለማለት የሚያስችል የሕግ መሰረት አላገኘንም፡፡ በዚህም መሰረት በጉዳዩ ላይ በተሰጠው ውሳኔ መሰረታዊ የሆነ የሕግ ስህተት ተፈፅሟል ለማለት ስላልተቻለ የተሰጠው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 348(1) መሰረት ፀንቷል፡፡

When translated into English this reads as:

> In order to determine whether the disputed income is taxable or not, emphasis should be given to the Income Tax Proclamation. The Proclamation starts with stipulating about taxable employment income under Art 10(1). It then provides exempted incomes under Art 13. The income now in dispute is not clearly indicated under this provision. The provision exempted pension and compensation as provided by law for injury and death of another person. It does not exempt all types of compensation. There is no legal ground to maintain that resettlement fund or payment for loss of employment payable to respondents is taxable. There is no error of law in the judgment.[20]

Here it is clear that the analysis and final conclusion of the Cassation Division are inconsistent. In its analysis, the Division maintained that the income in dispute is not within the list of exempted incomes. It appears that it held the income is subject to tax. This analysis is correct and reflects what is provided in the Proclamation. But the Division's conclusion deviates from this analysis and from what the Proclamation stipulates. According to the Proclamation all employment incomes are taxable except those that are exempted specifically. It is clear that the Cassation Division arrived at a wrong conclusion. This shows how the Cassation Division failed to take due care while writing its judgment. In effect it appears that it enacted a new law that grants exemption from tax.

[20] Author's own Translation.

It is also regrettable to see that the Appellate Bench and the Cassation Division of the Federal Supreme Court took unnecessary time to revise the decision of the Administrative tribunal but later on to confirm that same decision. Such a practice does not add any value and should be discouraged. Litigating parties should not be exposed for wastage of their time, money and energy without any good justifications.

NOTE

Unratified Treaties, Unilateral Declarations and *Modus Vivendi*: Circumstances to be considered to have Effect on State Parties

Zewdu Mengesha*

Introduction

International law arises from the consent of states and state practice. The Vienna Convention on the Law of Treaties (VCLT, 1969) is an authoritative international document regarding treaties between and among states. The VCLT provides rules and guidelines concerning the conclusion, entry into force, reservations, interpretation, amendments, modification, invalidity, termination and suspension of the operation of treaties.[1] In order to have binding effect, a treaty must fulfill the requirements provided under the VCLT. Some have argued that agreements that do not have a 'normative' character, laying down specific legal obligations rather than simply asserting political positions, wishes or intentions, are not treaties.[2] However, there is a fascinating tendency in international law to cite, as authoritative and even "binding," acts that have not been legally completed, despite the fact that the formalities of completion are explicit requisites for their legality.[3]

In the decisions of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), it is possible to observe that

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[1] Vienna Convention on the Law of Treaties, 1969 [here in after VCLT].
[2] Reuter, Paul, *Introduction to the Law of Treaties*, revised 2nd edition, publication of the Graduate Institute of International Studies, Geneva, 1989, p. 26.
[3] Riesman, W. Michael, Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions, *Vanderbilt Journal of Transnational Law*, Vol. 35, No. 3, May 2002, p. 729.

unratified agreements, unilateral statements (acts) of states, *modus vivendi* and other unperfected treaties are creating legally binding obligations. The *Eastern Greenland* and *Nuclear Tests* cases provide poignant examples.[1] So long as such decisions have their own impact on countries, and it is common to see that such treaties are used, it is important to study these court decisions. Nevertheless, concerns emanate from uncertainty over the conditions that must be fulfilled for unperfected agreements to have binding legal effect in the eyes of international courts; in other words, the question of when, how, and why certain unperfected treaties should be treated as binding is an important issue requiring clarification. In addition, it will provide a description for legal advisors in the Ministry of Foreign Affairs trying to predict whether or not such undertakings may create binding legal obligations.

In fact, international courts do give justifications as to why they base their decisions on unperfected treaties. Therefore an attempt will be made to analyze these justifications. The author will look at the affirmative arguments and the counter-arguments concerning why unperfected treaties should be treated as binding or not.

1. Normative contents of unperfected treaties

Most scholars on the subject agree that treaties have become the primary source of international law. This is because treaties are a more direct and formal method of international law creation. Thus the concept of the treaty

[1] Pauwelyn, Joost, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, 2003, p. 144.

and the manner in which it operates have become of paramount importance to the evolution of international law.[2]

A treaty is an agreement between state parties. The VCLT of 1969 defines "treaty" under Art. 2(1) as:

> […] an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

This definition indicates the importance of treaties in creating international rules for regulating interests on the subject.[3] Scholars in international law have classified treaties into various categories.[4]

According to the usage of the US State Department, an "unperfected" treaty is one which has been signed but which has "for one reason or another definitely failed to go into force."[5] Unperfected treaties are a form of agreement which has not undergone the formal steps and met the procedural requirements necessary for a treaty to create legal obligations based on the accepted principles of customary international law regarding treaties and the VCLT of 1969.

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[2] Show, Malcolm N., *International Law*, 6th edition, Cambridge University Press, Cambridge, 2008, pp. 902-903 [hereinafter Show, *International Law*].

[3] Sangroula, Yubaraj, International Treaties: Features and Importance, Kathmandu School of Law, p. 1, available at: www.ksl.edu.np (last visited 25 February 2014).

[4] A treaty may be classified as bilateral or multilateral, based on the number of parties involved in the treaty; multilateral treaties deposited with the Secretary General of the United Nations, which are called "open" multilateral treaties, or U.N. multilateral treaties, and other multilateral treaties that are not deposited with the Secretary General. A treaty may also be classified as a constitutional treaty or a framework treaty; it can also be classified as an unratified treaty, *modus vivendi* and the like.

[5] Jessup, Philip C., List of Unperfected Treaties, *The American Journal of International Law*, Vol. 27, No. 1 (January 1933), pp. 138-139.

Unperfected treaties may include unratified treaties,[6] unilateral statements by government officials (unilateral undertakings),[7] *modus vivendi*,[8] and other types of unperfected agreements. Although it is clear that this type of agreement lacks the formality required in the VCLT, it is also becoming increasingly evident that unperfected treaties have some force of law, as state parties now cite such unperfected agreements in their pleadings, and international courts even use them in adjudicating cases. This also alerts countries that they should take due care as they undertake treaty negotiations with other states.

Now let us take a look at the different types of unperfected treaties and the conditions that should be considered with each of these types of agreements.

[6] Unratified treaties are treaties that are signed but remain unratified by the domestic legal system.

[7] Unilateral behavior of states on the international plane, and thus behaviors that may legally bind states, may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other states may reasonably rely. See generally, International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, Preamble, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf (last visited 27 February 2014).

[8] "It is an instrument of toleration looking towards a settlement. [...] Normally, it is used for provisional and interim arrangements which ultimately are to be replaced by a formal agreement of a more permanent and detailed character. [...] Usually a *modus vivendi* is agreed in a most informal way and does not require ratification." Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law*, Elsevier, Amsterdam, 1997, Vol. 3, cited by Duhaime's International law Dictionary, available at: http://www.duhaime.org/LegalDictionary/M/ModiVivendi.aspx (last accessed 13 November 2014).

1.1 Conditions to be considered in order to give effect to unratified treaties

Unratified treaties are treaties that are signed by state representatives (mostly by the executive branch official of that state) but remain unratified by the domestic legal system for various reasons.[9] Since the principle of separation of powers took hold, domestic legal systems have commonly been separated into the legislative, executive and judicial branches, each of these organs having their own powers and respective obligations not to encroach upon the power of the other branches of state government. Because of this concept, the international legal system also allows state organs to take part in treaty formation based on their respective powers as provided for in their own domestic legal systems.[10]

Under international law, a nation does not become a party to a treaty until it expresses its "consent to be bound." Traditionally, this consent may be expressed in a variety of ways, including through a nation's signature of the

[9] There are different reasons why states after signing a certain treaty fail to ratify it. For example, in the U.S. the president might submit a treaty to the Senate and have it defeated there, although this happens only rarely; a president might withhold submission of the treaty to the Senate because of perceived opposition in that body, perhaps with the hope that the Senate's position — and perhaps its composition — would change; or a president may submit a treaty to the Senate and have it languish there, once its supporters in the Senate realize that they do not have sufficient votes for advice and consent. A president might also sign a treaty without being committed to ratification, perhaps in an effort to stay involved in subsequent negotiations related to the treaty or in the institutions established by the treaty, or for symbolic political benefits. Another reason why a treaty might be signed by the United States but remain unratified is a change in policy that occurs as a result of a new presidential administration. For these and other reasons the state concerned may fail to ratify a treaty. See generally, Bradley, Curtis A., Unratified Treaties, Domestic Politics, and the U.S. Constitution, *Harvard International Law Journal*, Vol. 48, pp. 308-310.

[10] The issue of ratification by the domestic legal system after the signing of the treaty by the representative of the state may be cited here.

treaty.[11] Under modern practice, however, a signature is not typically regarded as a manifestation of consent to be bound, especially for multilateral treaties. Instead, consent is manifested through a subsequent act of ratification — the deposit of an instrument of ratification or accession with a treaty depositary in the case of multilateral treaties, and the exchange of instruments of ratification in the case of bilateral treaties.[12] It has also long been settled that the act of signing a treaty does not obligate a nation to ratify the treaty. The separation of signature and ratification for modern treaties reflects the domestic law of many countries, which requires that the executive obtain legislative approval before concluding treaties. As a matter of general rule, States are bound by international law not to defeat the object and purpose of treaties that they have signed but not ratified,[13] therefore the unilateral signature of the president or his agent can bind that respective State to certain international legal obligations.

Ratification of treaties in republican systems such as that found in the United States is a critical bulwark of the separation of powers and checks and balances.[14] This means that the domestic legal system empowers the different organs of the state to perform their own separate roles in order to ensure that certain treaties have binding effect.

Historically, the constitutive rules of international law viewed unratified treaties as unperfected acts that generated no rights or obligations. The only function of the signatures of the negotiators was to authenticate the text that had been agreed upon. The VCLT purported to "progressively develop" this

[11] VCLT, *supra* note 1, Art. 11.
[12] See generally, Bradley, *supra* note 12, p. 313.
[13] VCLT, *supra* note 1, Art. 18.
[14] Riesman, *supra* note 3, p. 743.

dimension of treaty practice by going beyond customary international law and imposing an obligation on a signatory not to act in such a way as to frustrate the object of the treaty, at least until such time as the signatory had decided not to ratify the treaty.[15] For this reason, the US "un-signing" of the Rome Statute was undertaken in order not to be bound by any obligations—even the obligation not to undermine the object and purpose of the treaty—even though the US Congress had never ratified the treaty. Therefore, being a signatory of a certain treaty cannot be without meaning. If a party that has signed an agreement is expected to maintain a sincere commitment to at least the treaty's "object and purpose."[16] However the VCLT affirmed the need for ratification for a treaty to enter into force when the instrument itself indicates that ratification is necessary.[17]

We must also note the issue of provisional application before the treaty actually enters into force.[18] In fact this provisional application may be considered to be in conflict with the domestic legal systems and the principle of separation of powers, given that it imposes obligation upon states before the agreement at issue has gained the acceptance of the legislature.[19]It is clear

[15] Ibid., p. 742.

[16] VCLT, *supra* note 1, Article 18, which deals with the obligation not to defeat the object and purpose of a treaty prior to its entry into force. "A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

[17] Ibid., Art. 14(1)(a).

[18] Ibid., Art. 25.

[19] It must be clear that while we talk about provisional application we must take care that we are not jeopardizing the power divisions (separation of powers) among different organs of the government.

that sometimes unperfected treaties will cause problems regarding what value and effect must be provided for a treaty that fails to fulfill the bureaucratic procedural requirements under any given domestic legal system. In fact, the question can be considered from two different perspectives; the first with regard to the obligation of the state to the other contracting party or parties of that specific unratified treaty, and the second with respect to the domestic application of the unratified treaty.

As the VCLT states, the consent of the state is required by way of ratification in cases where the treaty requires consent in order for a state to be bound, and requires that this consent be expressed by means of ratification.[20] The issue comes up in cases where the negotiating states come to an agreement that ratification should be required and later one of the negotiating states fails to ratify the treaty. What legal effect do such unratified treaties have under international law, and also under the domestic legal system? What conditions should the unratified treaty have to meet in order to have legal effect? These are important issues that need to be discussed.

In cases where the unratified treaty has the status of international customary law, this will not create much problem, as long as that international customary law serves as a source of law for the ICJ[21] and the parties to the dispute are able to show the existence of such custom. But the importance of eventual ratification is highlighted by two international decisions. In the *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder*, the PCIJ considered whether Poland should be bound by the

[20] VCLT, *supra* note 1, Article 14(1)(a).

[21] United Nations, Statute of the International Court of Justice, 18 April 1946, Art. 38(1)(b). See also the dissenting opinion of Judge Weeramantery in the case between New Zealand and France (the *Nuclear Tests* case), Judgment of 20 December 1974, Para. 63, available at: http://www.icj-cij.org/docket/files/97/7567.pdf (last visited 29 September 2014).

provisions of the Barcelona Convention on the Regime of Navigable Waterways of International Concern, a treaty which Poland had signed but not ratified. The court concluded that the Barcelona Convention could not be relied on against Poland, stating that "it cannot be admitted that the ratification of the Barcelona Convention is superfluous…"[22] A similar result was reached by the ICJ in the *North Sea Continental Shelf* cases, where the court refused to hold the Federal Republic of Germany bound by the provisions of the Geneva Convention on the Continental Shelf, which the state had signed but not ratified.[23]

Starting from the period when the PCIJ began to use unratified treaties as a means of adjudicating cases, unratified treaties which are unperfected by definition, have come to be considered somewhat binding. There are instances that show such unratified treaties treated as authoritative instruments and ascribed full legal value.

Now let us consider examples from the jurisprudence of the ICJ in which the Court relied explicitly on an unratified treaty, an unperfected legal act. In the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* in which a final judgment was rendered on 16 March 2001,[24] Qatar argued that its *de jure* control of the entire peninsula had been recognized since 1913, pursuant to a "Convention relating to the Persian Gulf and Surrounding Territories," concluded between the United Kingdom

[22] Permanent Court of International Justice, Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J., Ser. A, No. 23. cited by Martin, A., The International Legal Obligations of Signatories to an Unratified Treaty, *Maine Law Review*, Vol. 32, 1980, pp. 276-277.
[23] Ibid., p. 277.
[24] International Court of Justice, *Qatar v. Bahrain, Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment of 16 March 2001.

and the Ottoman Empire. Although both parties agreed that the 1913 Anglo-Ottoman Convention was never ratified, they differed as to its value as evidence of Qatar's sovereignty over the peninsula.[25] The Court observed that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature. In the circumstances of this case, the Court came to the conclusion that the Anglo-Ottoman Convention did represent evidence of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the *Al-Thani* ruler in Qatar up to 1913.[26] Finally, the Court held that the first submission made by Bahrain could not be upheld, and that Qatar had sovereignty over Zubarah.[27]

At this juncture, it is vital to ask a question: What were the conditions that made the ICJ use this unratified treaty as a means of adjudicating the case? In the first instance, the court noted that the text of Article 11 of the Anglo-Ottoman Convention was "*clear*," that "it is agreed between the two Governments that the said peninsula will, as in the past, be governed by the Sheikh Jasim-bin-Sani and his successors."[28] Thus, Great Britain and the Ottoman Empire did not recognize Bahrain's sovereignty over the peninsula, including Zubarah.[29] From a close reading of paragraph 90 of the case concerning the Maritime Delimitation and Territorial Questions between Qatar and Bahrain, we note that the clarity of the treaty content regarding the point of dispute may serve as a basis for making an unratified treaty binding upon the parties to that treaty. As long as the treaty content is clear and

[25] Ibid., Para. 88.
[26] Ibid., Para. 89.
[27] Ibid., Para. 97.
[28] Ibid., Para. 90.
[29] Ibid., Para. 90.

unambiguous about the issue that has arisen between the parties that signed but unratified treaty may constitute an accurate expression of the understanding of the parties at the time of signature, although the instrument is not yet ratified. And this may serve as a reason to treat this unratified treaty as having a legal value.

The second situation in which an unratified treaty may be treated as having legal significance is in situations where the unratified treaty is supplemented by another treaty which is ratified.[30] Here, the issue addressed in the two treaties may be different; what matters is whether the ratified treaty between the parties refers to the unratified treaty. If it does, this gives the unratified treaty binding legal effect despite the fact that the formal requirements of completion have not been met.[31]

The third reason that an unratified treaty may be given binding legal effect is related to maintaining an existing situation. The international court, as well as the international legal system, generally prefers to maintain things as they are, rather than creating something new. Therefore, if the unratified treaty helps to uphold the *status quo*, the international court may base its decision on the unratified treaty, when no other perfected treaty settles the

[30] In the Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, the Court also notes that Article 11 of the 1913 Convention is referred to by Article III of the Anglo-Ottoman treaty of 9 March 1914, duly ratified that same year. Article III defined the boundary of the Ottoman territories by reference to "the direct, straight line in a southerly direction … is separating the Ottoman territory of the *sanjak* of Nejd from the territory of Al-Qatar, in accordance with Article 11 of the Anglo-Ottoman Convention of 29 July 1913 relating to the Persian Gulf and the surrounding territories." See generally Para. 91.

[31] The reference in the 1914 treaty, which was ratified, is to the line in Article 11 in the 1913 treaty. The function of the 1914 treaty, however, was different from its predecessor, and, in context, the only point in the 1913 treaty that would have been relevant to the 1914 treaty concerned the boundary of the Kingdom of Najd, now Saudi Arabia, not the question of who was to have political control on the Qatari peninsula. *Supra* note 3, p. 734.

issue at hand. Thus courts set things right, as if the treaty had been binding all along.[32] It is easier for courts to do this than to create something new, but the matter is a bit more difficult when the court grounds its decision on unratified treaties, because they may assume positions that significantly affect the state's interest. Hence the courts must consider the practical consequences of their decisions, and beyond this they should know that they do not have any right to legislate.

The fourth circumstance in which unratified treaties may be interpreted as legally significant arises when the failure of ratification occurs for reasons extraneous to the states party to that specific treaty, and later one of them wants to withdraw on the ground of non-ratification of the treaty by its counterparts.[33] In this situation, it is possible to argue that, if the state party who fails to ratify a certain treaty is trying to avail itself of conditions that are extraneous to that treaty, the state should not be permitted to avoid the requirements of that unratified treaty. This is a matter of *pacta sunt servanda* (an individual's word must be kept). International courts may able to give some sort of legal value to a treaty that is not ratified for reasons external to the state concerned.

However this has its own problems, especially with regard to the concept of separation of powers in domestic legal systems. For example, the

[32] Taken from a class discussions on the course of treaty law for LLM candidates in the Public International Law program, Addis Ababa University School of Law. The professor was Mr. Fasil Amdetsion, who was also serving as Senior Policy and International Legal Adviser at the Ministry of Foreign Affairs of Ethiopia. He is currently working as an attorney in the New York law firm of Wachtell, Lipton, Rosen & Katz.

[33] The non-ratification of the convention is due to events that are external to the state concerned. For example, in the Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Qatar contends that the non-ratification of this Convention was largely attributable to the outbreak of the First World War. See generally, *supra* note 27, Para. 46.

imposition of international obligations based on the signature of a treaty poses a constitutional question for the United States. Article II of the U.S. Constitution specifies a process that requires the president to obtain the advice and consent of two-thirds of the Senate in order to make treaty commitments.[34] Therefore the international courts should be careful when adjudicating cases based on unratified treaties.

The other important issue that must be considered with regard to unratified treaties is their role and application in domestic courts. This is also an important concern. In a supplementary brief for the United States Department of Justice in the case *John Doe I et al. vs. Unocal Corporation et al*., *amicus curiae* notes that under the governing analysis established by the Supreme Court, it is plainly erroneous to construct the Alien Tort Statute (ATS) itself as conferring a private cause of action.[35] Moreover, it is clearly improper to infer a cause of action when the documents relied upon by the court to discern norms of international law were not themselves intended by that executive or Congress to create rights capable of domestic enforcement through legal actions by private parties.[36] If the U.S. refuses to ratify a treaty, regards a UN resolution as non-binding or declares a treaty not to be self-executing, there obviously is no basis for a court to infer a cause of action to enforce the norm

[34] United State Constitution, Art. II, § 2.

[35] In this regard, based on Rule 29(a) of the federal Rules of Appellate Procedure, the Department of Justice notes that "neither the ATS itself, nor international law norms, based on documents such as unratified and non-self-executing treaties, nor non-binding UN resolutions, provide any basis for inferring a cause of action." See generally, The United States Court of Appeals for the Ninth Circuit, John Doe I, et al. vs. Unocal Corporation, et al., on appeal from the United States District Court Supplemental Brief for the United States of America, as Amicus Curiae, pp. 13-14, available at; http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/legal/Unocal-doj-unocal-brief.pdf (last visited 29 September 2014).

[36] Ibid., p. 14.

embodied in those materials, because to enforce such agreements is anti-democratic and at odds with the principles of separation of powers.[37] As for treaties not ratified by the United States, it is clearly inappropriate for the courts to adopt and enforce principles contained in instruments that the president and/or the senate have declined to embrace as binding on the United States or enforceable as a matter of U.S. law through judicially created causes of action.[38]

In fact it is possible to see that U.S. courts pay some sort of obeisance to certain principles in unratified agreements.[39] The courts have affirmed that the U.S. signature on a treaty, though it remains unratified, carries sufficient acknowledgement of the underlying agreement that it may be used as an aid in interpreting domestic law.[40] In this regard it is also said that unless the state makes its intention clear *not* to be a party to a treaty, and it is voted down or rejected formally on the floor of the Senate, or in an equivalent manner, then even after the treaty has already been signed the state is obliged to refrain from arguments which would defeat its object and purpose. This is true as long as a convention has been signed or instruments exchanged constituting the treaty subject to ratification, acceptance or approval, until the state shall

[37] Ibid., p. 15.
[38] Ibid., pp. 15-16.
[39] A treaty is sometimes said to have force of law only if ratified. Courts, however, often use non-ratified treaties as aids in statutory construction. See generally, Horner, Christopher C., The Perils of "Soft" and Unratified Treaty Commitments: The Emerging Campaign to "Enforce" U.S. Acknowledgements Made In and Under the Rio Treaty and Kyoto Protocol Using Customary Law, WTO, Alien Tort Claims Act, and NEPA Competitive Enterprise Institute, July 2003, pp. 44-45, available at: http://cei.org/studies-issue-analysis/updated-perils-soft-and-unratified-treaty-commitments (last visited 29 September 2014).
[40] Ibid., p. 44.

have made its intentions clear not to become a party to the treaty.[41] That the United States has not ratified a number of treaties does not necessarily mean that the U.S. will not become a party to them.[42] This shows that there is a possibility of application of these unratified treaties in the domestic courts as long as the treaty does not run contrary to domestic law. However, the issue of separation of powers among the different organs of the domestic legal system is also at stake, because the courts are giving some sort of status to a treaty which lacks the ratification of the Senate. Though a treaty is not yet ratified, U.S. practice signals that courts may use such unperfected treaties as long as their application does not contradict the domestic laws of the country. This indicates that an unratified treaty may only serve to fill a gap in the domestic legal system.

1.2 Unilateral declaration: A source of legal obligation for the declaring state

According to the International Law Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, states may find themselves bound by their unilateral behavior on the international plane. Behavior that may legally bind a state may take the form of a formal declaration or mere informal conduct—including, in certain situations, silence—on which other states may reasonably rely.[43]

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[41] Ibid., pp. 46-47. See generally, Congressional Records, a speech from Senator Inhofe, 13 October 1999, pp. 65-66, available at: http://www.clw.org/pub/clw/coalition/inhofe101399.htm (last visited 29 September 2014).
[42] Bradley, *supra* note 12, p. 310.
[43] United Nations Report of the International Law Commission, Fifty-eighth session, General Assembly Official Records Supplement No. 10 (A/61/10), 1 May-9 June and 3 July-11 August 2006, p. 368, available at: http://legal.un.org/ilc/reports/english/a_61_10.pdf (last visited 29 September 2014).

Unilateral state declarations may consist of unilateral pronouncements that affect the rights and duties of other countries. It may be argued that in its strictest sense, unilateral declarations of intent cannot constitute international agreements because an agreement, by definition, requires at least two parties. For example, a unilateral commitment or declaration in the form of a promise to send money to a country to help earthquake victims, but without reciprocal commitments on the part of the other country, would be a promise of a gift and not an international agreement.[44] However, there are situations under which unilateral commitments or declarations of intent may become binding international agreements.[45] Such instances involve parallel undertakings by two or more states that are unilateral in form but in content constitute bilateral or multilateral agreements. Such reciprocal unilateral declarations occur regularly in international relations.[46] The ICJ and its predecessor PCIJ have both used such unilateral declarations as a means of adjudicating cases.[47] Unilateral commitments have been held legally binding for the party making the commitment, though it was not made in a multilateral context.

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[44] Congressional Research Service Library of Congress, Treaties And Other International Agreements: The Role of the United States Senate, Congressional Research Service Library of Congress, a study prepared for the Committee on Foreign Relations, United States Senate, 106th Congress, 2nd Session, January 2001, p. 59.

[45] This is because of the fact that the international courts were observed using such declarations as a source of law while adjudicating cases.

[46] This supports the premise that ‘‘reciprocal’’ unilateral declarations that accept the compulsory jurisdiction of the International Court of Justice under Article 26 of the Court’s Statute have been held by that Court to constitute an international agreement among the declaring states. See generally, Anglo-Iranian Oil cases (U.K. v. Iran), 1952 I.C.J. 93 (July 22). See also, United Nations Report of the International Law Commission, *supra* note 47, p. 59.

[47] In the case concerning a dispute between Denmark and Norway over sovereignty in Eastern Greenland (1933), the Permanent Court of International Justice used the declaration made by the Norwegian Foreign Minister, called the *Ihlen Declaration*. Similarly, in the *Nuclear Tests* case (Australia & New Zealand v. France), 1974, the International Court of Justice used statements made by the French authorities.

When, how and why unilateral declarations may be given binding legal effect by international courts is an important issue. First, let us consider the cases that the international courts have decided based on unilateral declarations and then we will consider the different points that should be emphasized when adjudicating such cases.

The Royal Danish Government brought a case in the PCIJ against the Royal Norwegian Government on the grounds that the latter government had published a proclamation on 10 July 1931 declaring that it had proceeded to occupy certain territories in Eastern Greenland. In the contention of the Danish Government, these territories were subject to the sovereignty of the Crown of Denmark. The PCIJ used historical evidence brought by the two countries regarding their respective claims over the legal status of Eastern Greenland. The Court also looked at the verbal undertakings called the *Ihlen declaration*,[48] which is the reply given by the Norwegian Minister for Foreign Affairs to the Danish Minister on 22 July 1919. This states that: - "the plans of the Royal Government in regard to the sovereignty of Denmark over the whole of Greenland would not encounter any difficulties on the part of Norway."[49] Denmark argued that this indicated recognition of existing Danish sovereignty over Greenland. The Court considered it beyond any dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a

[48] The *Ihlen Declaration*, made during a purely bilateral meeting between the Danish Minister of Foreign Affairs and the Norwegian ambassador to Copenhagen, on 22 July 1919.

[49] Permanent Court of International Justice, Denmark v. Norway**,** the Legal Status of Eastern Greenland, 5 April 1933, Para. 58, available at: www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm (last visited 29 September 2014).

foreign power, in regard to a question falling within his province, was binding upon the country to which the Minister belonged.[50] The Court concluded that Norway was under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland.[51]

At this point, we have to ask whether there was any agreement between the two countries. Are declarations of this kind binding upon the state? This declaration was a mere verbal undertaking, not a formal written agreement, and as such there was no ratification by the domestic parliament of that country. Therefore it can be argued that the *Ihlen declaration* fails to fulfill the requirements that would give it the status of binding declaration. Hence the validity of this agreement is in question.[52]

A second pertinent set of cases, known as the *Nuclear Tests Cases*, involves Australia and New Zealand, on the one hand, and France on the other.[53] In 1974 France made various public statements through which it announced its intention to cease the conduct of atmospheric nuclear tests following the completion of a series of these tests. The first of these statements was contained in a communiqué which was issued by the office of the president of the French Republic on 8 June 1974 and transmitted in particular to the applicant: "… in view of the stage reached in carrying out the

[50] Ibid., Para. 192.
[51] Ibid., Para..202.
[52] However there are also other arguments which are forwarded in this issue so long as this Declaration is made during a purely bilateral meeting whether this declaration constituted a unilateral act is controversial.
[53] International Court of Justice, Australia v. France, Nuclear Tests Case, 20 December 1974, at http://www.icj-cij.org/docket/files/58/6093.pdf last visited 9/29/2014. The proceedings instituted before the court concerned the legality of atmospheric nuclear test conducted by France in south pacific; the original and ultimate objective of New Zeeland/Australia is to obtain a guaranty for the termination of such like test in the region.

French nuclear defense programme France will be in a position to pass on the stage of underground explosions as soon as the series of tests planned for the summer is completed."[54] Further statements were contained in a note from the French Embassy in Wellington, a letter from the president of France to the prime minister of New Zealand, a press conference given by the French president, a speech made by the Minister for Foreign Affairs before the UN General Assembly and a television interview and press conference given by the Minister for Defense.[55]

In this case, the ICJ considered these statements to convey an announcement by France of its intention to cease conducting atmospheric nuclear tests following the conclusion of the 1974 series of tests.[56] What was the legal value of these unilateral declarations, especially if France were later to decide that its national security required it to resume nuclear tests? Could a unilateral declaration create an obligation, similar to the obligation created by a treaty?[57] The Court concluded that the French declarations constituted an undertaking possessing legal effect."[58] From these two cases decided by the ICJ and its predecessor, the Permanent Court of Justice, we can observe the possibility that unilateral state declarations may create legal obligations.

The ILC's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations set down the conditions that must be fulfilled in order to make a unilateral declaration binding on a state, producing legal obligations under international law. According to these

[54] Ibid., Para. 34.
[55] Ibid., Para. 33-40.
[56] Ibid., Para. 41.
[57] Riesman, *supra* note 3, p. 737.
[58] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 51.

Guiding Principles, a declaration made publicly and manifesting the will to be bound may have the effect of creating a legal obligation.[59] When the conditions are met, the binding character of such declarations is based on good faith. States concerned may then take them into consideration and rely on them, and such states are entitled to require that such obligations be respected.[60]

The wording of Guiding Principle 1, which seeks both to define unilateral acts in the strict sense and to indicate what they are based on, is directly inspired by the dicta in the Judgments handed down by ICJ on 20 December 1974 in the *Nuclear Tests* case.[61] It is also worth noting that the declarations made in the two cases discussed above were made publicly. But this does not mean that any declaration made by a state representative will have binding effect on a state.

It is also necessary to take into account the content of the statements at issue and all of the factual circumstances in which they were made, as well as the reactions they produced.[62] It is possible to infer from the above decisions of ICJ that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. The intention to be bound is to be ascertained by the interpretation of the act.[63]

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[59] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 1.
[60] Ibid.
[61] Commentary on the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook of the International Law Commission: 2006*, Vol. II, Part Two, p. 370.
[62] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 3.
[63] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 33-40.

With regard to their intention and to the circumstances in which they were made, declarations may be held to constitute an engagement of the state making the declaration. For example, in the *Nuclear Tests* case the Court said that the validity of the statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among states.[64] It is the actual substance of the statements, and the circumstances attending their making, from which the legal implications of the unilateral act must be deduced. The subject of these statements is clear and they were addressed to the international community as a whole, and therefore the Court holds that they constitute an undertaking possessing legal effect.[65] However it is not easy to reach such a conclusion, nor is it easy to predict whether a statement will be binding or not. Arguably, this lax standard allows the courts to decide whatever they want given the circumstances.

The other important factor that needs to be considered is who made the declaration. According to the Guiding Principles, a unilateral declaration binds the state internationally only if it is made by an authority vested with the power to do so.[66] It is a well-established rule of international law that the Head of State, the Head of Government and the Minister of Foreign Affairs are deemed to represent the state merely by virtue of their functions, even without having the document that authorizes this.[67] State practice shows that

[64] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 51.
[65] Ibid.
[66] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 4.
[67] VCLT, *supra* note 1, Art. 7(2).

unilateral declarations creating legal obligations for states are quite often made by the persons who occupy these positions without their capacity to commit the state being called into question.[68] Other persons representing the state in specified areas may be authorized to bind it, through their declarations in areas falling within their competence.[69]

Unilateral declarations may be formulated orally or in writing.[70] State practice shows the many different forms that unilateral declarations by states may take. As noted above, the various declarations by France about the cessation of atmospheric nuclear tests took the form of a communiqué from the Office of the President of the Republic, a diplomatic note, a letter from the President sent directly to those to whom the declaration was addressed, a statement made during a press conference and a speech to the General Assembly.[71] In the *Nuclear Tests* cases, the Court emphasized:

> [W]ith regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements.[72] Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which do not require that they should be couched in written form. Thus the question of form is not decisive.[73]

[68] It is possible to observe in the Nuclear Tests case, as well as the case between Denmark and Norway, that the declarations are made by individuals that have the power to represent the state.
[69] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 4.
[70] Ibid., Principle 5.
[71] Commentary on the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *supra* note 64, p. 375.
[72] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 45.
[73] Ibid., pp. 267-268 and 473, Para. 45 and 48.

Therefore the question of form is not important as long as the party who is claiming to avail itself based on a unilateral declaration is able to show the existence of such a declaration in any form. The other important question is whether the declaration is made in clear and specific terms.[74] A unilateral declaration entails obligations for the formulating state only if it is expressed in clear and specific terms. In the case of doubt as to the scope of obligations resulting from such a declaration, the obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.[75] In the *Nuclear Tests* decisions, it is possible to observe that the clarity and specificity of the declaration is important. The Court stressed that a unilateral declaration may have the effect of creating legal obligations only if it is stated in clear and specific terms.[76] In addition, the unilateral declaration must not contradict peremptory international norms, because a unilateral declaration which is in conflict with a peremptory norm of general international law is void.[77] The invalidity of such a unilateral act derives from the analogous rule contained in article 53 of the VCLT. If the unilateral declaration fulfills these

[74] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 7.
[75] Ibid.
[76] International Court of Justice, *Nuclear Tests* case, *supra* note 56, Para. 43, 46 and 51.
[77] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *supra* note 10, Principle 8.

conditions, it is possible to assume that states may find themselves bound by their unilateral behavior on the international plane.

Although the practice of international courts shows that a unilateral declaration may create legal obligations on the state making the declaration, there are objections from various parties. The ICJ's decisions, although binding only on the parties in these particular cases, may be considered problematic for legal analysts because they run contrary to the legal principles that have traditionally governed such unilateral pronouncements or statements of intent.[78] Moreover, the analysts argue, among other things, that governments are unlikely to accept the view that their policy pronouncements are binding. If such pronouncements are subject to interpretation as legal commitments by the ICJ, some observers point out that few states would submit to its jurisdiction.[79] Therefore it is possible to take the position that international courts should be careful while adjudicating cases based on unilateral declarations.

1.3 Modus vivendi as a means of creating legal obligation on state parties

A *modus vivendi* is a temporary arrangement entered into for the purpose of regulating a matter of conflicting interests, until a more definite and permanent arrangement can be obtained in treaty form.[80] The *Encyclopedia of Public International Law* also defines *modus vivendi* as:-

[78] The United States Court of Appeals for the Ninth Circuit, John Doe I et al. vs. Unocal Corporation et al., *supra* note 39, p. 60.
[79] Ibid.
[80] Duhaime's International law Dictionary; available at: http://www.duhaime.org/LegalDictionary/M/ModiVivendi.aspx (last accessed 13 November 2014).

> […] an arrangement of a temporary and provisional nature concluded between subjects of international law which gives rise to binding obligations to the parties. [...] It is an instrument of toleration looking towards a settlement. […] Normally, it is used for provisional and interim arrangements which ultimately are to be replaced by a formal agreement of a more permanent and detailed character. […] Usually a *modus vivendi* is agreed in a most informal way and does not require ratification.[81]

The usual way to complete such a temporary agreement is by way of an exchange of correspondence between diplomats.[82] There are a number of agreements that are entered into between states in the form of *modus vivendi;* however the binding legal effect of such agreements is questioned in international law. But it is also possible to observe from trends in the international courts that they are using such agreements as a means to create legal obligations. The most important example in this regard is the maritime boundary dispute between Libya and Tunisia, decided by the ICJ in 1982.[83] The questions before the court concerned which principles and rules of international law may be applied to the delimitation of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and the Republic of Tunisia.[84] In this case the ICJ used what it called a tacit *modus vivendi* between France and Italy—when those states ruled, respectively,

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[81] Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law*, Elsevier, Amsterdam, 1997, Vol. 3, pp. 442-443.

[82] Ibid.

[83] International Court of Justice, Tunis vs. Libyan Arab Jamahiriya Case Concerning the Continental Shelf, Judgment, 24 February 1982, available at: http://www.icj-cij.org/docket/files/71/6527.pdf (last visited 4 October 2014).

[84] Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, Digest of International Cases on the Law Of The Sea, United Nations, New York, 2006, p. 61, available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/digest_website_version.pdf (last visited 4 October 2014).

Tunisia and Libya—as a means to adjudicate the case at hand. The *modus vivendi*, which ran at a forty-five degree angle to the section of the coast where the land boundary began, had, as its initial function, to obviate incompatible fishing claims that had been generating disputes and incidents between the two colonial powers.[85] The Court held that a line close to the coast, which neither party had crossed when granting offshore oil and gas concessions nor which thus constituted a *modus vivendi*, was highly relevant.[86]

A *modus vivendi* is a quintessential unperfected international legal act. It is inherently non-binding. Indeed, its whole function is to suspend conflict over whatever is the subject of the *modus vivendi* in order to permit the parties to interact peacefully and productively pending the settlement of the matter.[87] But in this case we see that an agreement which is temporary in nature was used as a source of binding legal obligation.

However, this does not mean that every modus *vivendi* will create a binding legal obligation on the state parties to the agreement. So what are the factors we have to take into consideration? Among the central issues here is that forced us to apply a *modus vivendi* in the first place, as one important factor may be related to the absence of an agreed and clearly stated agreement.[88] The *modus vivendi* may evidence a binding legal obligation where there is no specific binding treaty that exists dealing with the issue at hand. In this case we may resort to the use of an existing *modus vivendi* to

[85] International Court of justice, Tunis vs. Libyan Arab Jamahiriya Case Concerning the Continental Shelf, Judgment, *supra* note 86, Para 56-57.
[86] See ICJ Reports, 1982, pp. 18, 71, 84 and 80–86, cited by Show, supra note 5, pp. 606-607.
[87] Riesman, *supra* note 3, p. 738.
[88] International Court of justice, Tunis vs. Libyan Arab Jamahiriya Case Concerning the Continental Shelf, Judgment, *supra* note 86, Para. 70-71.

tackle the case. Certainly, a scholar or historian studying the diplomatic relations between France and Italy in North Africa and then between the successor states of Libya and Tunisia would have included the *modus vivendi* as one of the factors contributing to stable and peaceful relations in the maritime area between the governments over more than half a century.[89]

The second factor is related to the question of whether it is possible to show that the *modus vivendi* has been employed or respected to a certain extent for a certain period of time.[90] Here we need to consider whether the *modus vivendi* is respected by the parties to the agreement. If we successfully able to observe the existence of such a respected agreement, this might warrant its acceptance through historical justification, and we can assume that this might be the basis of a binding norm.

Another important issue to consider is whether the *modus vivendi* has been formally contested by either side during the relevant period of time.[91] If the *modus vivendi* is not contested by either party from the time when the agreement was entered, this may indicate that the parties have been willing to be governed by that agreement; therefore we may ascribe it a legal value. This point is reinforced by the fact that the international legal system generally prefers to maintain the status quo. Courts may favor a *modus vivendi* for this reason and favor its use as evidence.

Although a *modus vivendi* is by definition a temporary and non-binding treaty, negotiators must assume that whatever they write *ad*

[89] Riesman, *supra* note 3, P.741

[90] International Court of justice, Tunis vs. Libyan Arab Jamahiriya Case Concerning the Continental Shelf, Judgment, *supra* note 86, Para. 70.

[91] Ibid., Para. 70-71.

referendum may at some point be used against their state, even without subsequent ratification. In fact, court decisions on this point may prove to be a disincentive for agreeing to *modus vivendi*.

The above case shows us that the ICJ is using *modus vivendi* as a means to adjudicate cases, but it is rarely questioned about the legality of using such an agreement as a binding norm. This is because a *modus vivendi* is an agreement that is not binding by definition. So interpreting this thing as a perfected agreement and binding a state by it goes against the intention of the state at the time of agreement. International lawyers generally agree that an international agreement is not legally binding unless the parties intend it to be. Put more formally, a treaty or international agreement is said to require an intention by the parties to create legal rights and obligations or to establish relations governed by international law.[92] If that intention does not exist, an agreement is considered to be without legal effect.[93] For this reason, it is possible to see why scholars of international law and treaty law contest the position taken by the international court of justice.

2. Conclusions and the way forward

By their nature, unperfected agreements fail to fulfill the requirements that would allow them to be considered perfected. The ICJ is the principal judicial organ of the United Nations and its judgments are usually considered highly persuasive with respect to international law.[94] The ICJ was established by the

[92] See O'Connell, D. P,, *International Law*, 2nd ed, 1970, p. 195; Mcnair, Arnold, *Law of Treaties*, 1961, p. 6; cited by Schachter, Oscar, Editorial comment on the twilight existence of non-binding international agreement, *American Journal of International Law*, Vol. 71, 1977, p. 296.
[93] Ibid., pp. 296-297.
[94] Rubin, S., The International Legal Effects of Unilateral Declarations, *The American Journal of International Law*, Vol. 71, No. 1, 1977, p. 1.

UN Charter and its function is governed in accordance with the provisions of the ICJ Statute.[95] The ICJ is not empowered by Article 38(1) of the statute to decide in accordance with international law any disputes submitted to it using sources of law other than the ones enumerated.[96]

With regard to unratified treaties, it is clear that the state is obliged to abstain from performing acts that will go against the object and purpose of any treaty signed by the state. Although signing is no longer viewed as a manifestation of consent to be bound to a treaty, many international law scholars and lawyers contend that signing does impose certain obligations on the signatory state.[97] This contention is based on a provision in the Vienna Convention, a treaty that regulates the formation, interpretation, and termination of treaties. Article 18 of the VCLT states that a nation that signs a treaty is "obliged to refrain from acts which would defeat the object and purpose [of the treaty] until it shall have made its intention clear not to become a party to the treaty." Most modern constitutions require intervention of the legislature before the Head of State signs the instrument of ratification. In fact, it is by ratification that the state expresses its intent to be legally bound by the treaty. Until the instrument of ratification is drawn up, signed, and exchanged with the other parties, or deposited with one of them or with an international organization, the state is not bound by the treaty.[98] However, when an international tribunal assigns an unperfected treaty legal value despite its non-ratification, there is a prospective constitutive consequence.

[95] See United Nations, Statute of the International Court of Justice, *supra* note 25, Article 1.
[96] O'Connell, *supra* note 95, p. 29.
[97] Bradley, *supra* note 12, p. 314.
[98] Sangroula, *supra* note 6, p. 4.

The flexibility that a negotiator enjoys in experimenting with different packages of concessions in order to strike a consensus with the other party is reduced, for henceforth the negotiator must assume that whatever he or she writes *ad referendum* may be used against his or her state, even without subsequent ratification.[99]

Most of the time, it is the executive branch of the government that negotiates and makes undertakings with the external relations and commitment of the state. Making these undertakings binding upon a state without passing through the steps required in that state's domestic legal system goes against the principles of checks and balances and separation of powers. Beyond this, it can be said that applying undertakings without the consent of the organs of the state concerned is a clear infringement on the state's sovereignty.

We have examined the ways in which the ICJ is using unilateral declaration of states as a source of binding law and a means to adjudicate cases. But this trend is highly contested by scholars. Legal analysts consider the ICJ's decision in this matter problematic, although binding only on the parties to particular cases,[100] because it runs contrary to the legal principles that have traditionally governed such unilateral pronouncements or statements of intent. Moreover, the analysts argue, among other things, that governments are unlikely to accept the view that their policy pronouncements are binding. If such pronouncements are subject to interpretation as legal commitments by the ICJ, some point out that few states would submit to its jurisdiction.[101] It is also arguable that the ICJ is exceeding its authority in searching for a rule of

[99] Riesman, *supra* note 3, p. 743.
[100] See United Nations, Statute of the International Court of Justice, *supra* note 25, Article 59.
[101] Rubin, *supra* note 97, pp. 28-30.

law, as the ICJ is not authorized to adjudicate cases based on unperfected treaties since none of these unperfected treaties fall under the provisions of article 38(1) of the Statute of the ICJ. The implications for the United States with its long history of reluctance to submit to the jurisdiction of the court do not need further elaboration here.[102] The existence of such trends in the international courts suggests that diplomats should be careful in their undertakings with other countries' diplomats.

Despite the above discussion, I am not asserting that unperfected agreements and other unperfected acts should serve no purpose. Rather, these distinct forms of agreement have their own advantages. In fact, it is possible to argue that even unperfected legal acts, such as unratified treaties, can influence the expectations and behavior of states. The rules of making and ratifying treaties are not absolute. In fact, states decide how to bring into being legally binding undertakings. As a result, there are often problems created by 'uncertainties' in the rules. Such uncertainties create confusion as to whether contracting parties merely wanted to undertake 'political commitment' or to take on 'legal obligations.'[103] With the emergence of an increasing number of states and the horizontal as well as vertical expansion of international law, the traditional theories fail to account for the interests and aspirations of the international community as a whole and the changes that have taken place. It is therefore necessary to articulate a dynamic and comprehensive theory that creates a basis for legal obligations that may make allowances for the international community's interests and inspirations. International jurists can make a significant contribution in this connection. The ICJ also has to be careful

[102] Ibid., p. 30.
[103] Sangroula, *supra* note 6, p. 4.

when it adjudicates cases based on unperfected treaties. For example, the mere expression of political commitment does not constitute an agreement with binding effect; therefore, such commitments should not be interpreted to create legal obligations.[104]

When unperfected treaties are used, it should be only in limited situations where no other alternatives are available for the court, and as a means to fill the gap for settlement of the case at hand. The courts are also expected to give details and convincing justifications as to why they are resorting to using any unperfected treaty. All the facts of the situation regarding the case at hand must be examined carefully. Such acts should only bind the state making them if they evidence of an intention to be bound.[105] Nevertheless, it is important to emphasize that legal advisors should be cautious with regard to the possible legal effects of such undertakings by their respective government officials.

[104] Ibid., p. 5.
[105] Pauwelyn, *supra* note 4, p. 143.

የተመረጡ ፍርዶች

(በአሰሪ እና ሠራተኛ ህግ ላይ ያተኮሩ)

የሰ/መ/ቁ. 46075

ታህሳስ 25 ቀን 2003 ዓ.ም

ዳኞች፡- ሐጎስ ወልዱ

ተሾገር ገ/ሥላሴ

ብርሃኑ አመነው

አልማው ወሌ

አሊ መሐመድ

አመልካች፡- አቶ ንጉሴ ሀዱሽ አልቀረቡም

ተጠሪዎች፡- የመቀሌ ዩኒቨርሲቲ የተማሪዎች ዲን አልቀረቡም

መዝገቡ ለዛሬ የተቀጠረው ለምርመራ ሲሆን መዝገቡን መርምረን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

ይህ የሰበር ጉዳይ የግራቀኙን ክስራ ቅጥር የመነጨን ክርክር የሚገዛ የትኛው ህግ ነው የሚለውን ለይቶ ዳኝነት ለመስጠት ሲባል የቀረበ ነው፡፡

የአሁን አመልካች በተጠሪ ጽ/ቤት በሻሂ ማሽን ሠራተኝነት በደመወዝ ተቀጥሮ ሲሰራ የቆየ ለመሆኑ እና በመጨረሻም ተጠሪ በሰጠው ምክንያት ከሥራ የተሰናበተ ለመሆኑ ተጠሪ የካደው ጉዳይ አይደለም፡፡

በዚህ መነሻ በተጠሪ በኩል የተፈፀመው የሥራ ስንብት የአሰሪና ሠራተኛ ህግ ከደነገገው ውጭ ስለሆነ ልዩ ልዩ ክፍያ ይገባኛል በማለት የአሁን አመልካች ለቀረበው ክስ የአሁን ተጠሪ በስር ፍ/ቤት በጥሪው መሰረት የበኩሉን መልስ ለማቅረብ አልቻልም በሚል ምክንያት ክሱ የቀረበለት የወረዳ ፍ/ቤት የአሁን አመልካችን የክስ አቤቱታ እና እንደ አቤቱታው ለማስረዳት ያቀረበውን የሰውና የሰነድ ማስረጃ ተመልክቶ በግራቀኙ መካከል የስራ ቅጥር ግንኙነት እንዳለ እና ከዚህ የቅጥር ግንኙነት የተነሳው ክርክር የሚዳኘው በአዋጅ ቁጥር 377/96 መሠረት መሆኑን ገልፆ ሠራተኛው ለቀጣሪው ከሰጠው የአገልግሎት ዘመን አንፃር ሊሰጠው የሚገባው የአንድ ወር የማስጠንቀቂያ ጊዜ ብቻ ሆኖ አልተገኘም የማስጠንቀቂያ አሰጣጥ ሥርዓቱ የተሟላ ሆኖ አልተገኘም ስለሆነም ከአዋጅ

አንቀፅ 35/1/ለ/ አንፃር ሲታይ ስንብቱ ህግ ከደነገገው ውጭ ሆኖ ተገኝቷል በማለት ልዩ ልዩ ክፍያ እንዲከፈለው ወስኗል፡፡

በዚህ ውሳኔ ላይ የአሁኑ ተጠሪ በቀረበው የይግባኝ አቤቱታ መነሻ ይግባኝ ሰሚው ፍ/ቤት ግራቀኙን አከራክሯል፡፡

ዋነኛ የይግባኝ አቤቱታውም የመቀሌ ዩኒቨርሲቲ የሚተዳደረው በአዋጅ ቁጥር 515/99 እና በደንብ ቁጥር 61/99 መሠረት በመሆኑ ዩኒቨርስቲው ተከራካሪ የሆነበትን ይህን መሰል ጉዳይ በሚተዳደርበት አዋጅ መሠረት እንጂ በአሰሪና ሠራተኛ ህግ የሚገዛ አይደለም የሚለው ይገኝበታል፡፡

ይግባኝ ሰሚው ፍ/ቤትም የአሁን ተጠሪ እንደሚለው ጉዳዩ በአሰሪና ሠራተኛ ህግ የሚዳኝ አለመሆኑን የስር ፍ/ቤት ተገናዝቦ በፍ/ብ/ስ/ስ/ህ/ቁ 9 እና 231/1/ለ/ መሠረት መዝገቡን መዝጋት ነበረበት በሚል ምክንያት ተችቶ የስር ፍ/ቤትን ውሳኔ ሽሮታል፡፡ በዚህ ውሳኔ ቅር ተሰኝቶ በክልሉ ጠ/ፍ/ቤት ሰበር ሰሚው ችሎት የቀረበው አቤቱታ ተቀባይነት አለማግኘቱ ገልፆ ለዚህ የሰበር ጉዳይ ምክንያት የሆነውን የሰበር አቤቱታ የአሁን አመልካች አቅርቧል፡፡

የሰበር ቅሬታው ይዘትም የስር ወረዳ ፍ/ቤት ጉዳይ የወሰነው የአሁን ተጠሪ በሌሉበት ስለሆነ ይህ ተጠሪ በዚያው ጉዳይ ተከራካሪ ለመሆን በፍ/ብ/ስ/ስ/ህ/ቁ 78 መሠረት በከርከሩ እንዲገባ ካልተደረገ በቀር በቀጥታ የይግባኝ አቤቱታ የማቅረብ መብት የለውም ይህም ከርከር ይግባኝ ሰሚው ፍ/ቤት አላየውም እኔን የቀጠረኝ የመቀሌ ዩኒቨርስቲ የተማሪዎች ዲን ጽ/ቤት ሲሆን የተቀጠርኩበት ለሻሂ ክበብ በሻሂ ማሸን ሰራተኝነት ነው የምሰራበት ክበብ በራሱ ገቢና በጀት የሚተዳደር በተማሪዎች ዲን ጽ/ቤት ቁጥጥር የሚንቀሳቀስ በመሆኑ በቀጥታ በአዋጅ ቁጥር 515/99 ሆነ በደንብ ቁጥር 6199 የሚገዛ የሚሸፈን አይደለም የሚለውን በግራ ቀኝ መካከል ለተነሳው የህግ ጥያቄ መነሻና አንኳር የሆነውን ክርክር አቅርቧል፡፡

በዚህ የሰበር አቤቱታ ላይ ያሁን ተጠሪ ቀርቦ የበኩሉን ክርክር ማቅረብ ይችል ዘንድ መጥሪያ ተልኮለት መጥሪያው የደረሰው ለመሆኑ በራሱ ማህተም ካረጋገጠ በኃላ እንደጠሪው ለመደመጥ መብቱ ሊጠቀም አልቻለም፡፡ በመሆኑም የአሁን አመልካች በተጠሪ በኩል በተጠቀሱት አዋጆች ለግራቀኛችን የቅጥር ሁኔታ ተፈፃሚነት የላቸውም በማለት በቀረበው ክርክር በተጠሪ በኩል ሊቀርብ የሚችል ማስተባበያ ካለ ባከራካሪ ነጥብነቱ

ለይቶ ተገቢውን ዳኝነት መስጠት አልቻለም የተለየ ማስተባበያ እስካልቀረበ ድረስም አመልካች እንዳለው እንዲያገለግል የተቀጠረበት የሻሂ ክበብ በራሱ ገቢና በጀት የሚተዳደር ከሆነ ከዚህ መሰል ቁጥር የመነጨን ክርክር ተጠሪ የጠቀሳቸው ህጎች የማይገዙ ይልቁንም ክፍተቱ ባሰሪና ሰራተኛ ህግ የሚሸፈን ሁኖ አግኝተነዋል፡፡ ስለሆነም በመቀሌ ዩኒቨርስቲ ቅጥር ግቢ ስለተገኘ ወይም ለዩኒቨርስቲው የህ/ሰብ ክፍል አገልግሎት ስለሰጠ ብቻ በደፈናው በሲቪል ሰራተኛ አስተዳደር ህግ ይገዛል ለማለት የሚያበቃ አለመሆኑ እየታወቀ ይግባኝ ሰሚው ከፍተኛ ፍ/ቤት የግራ ቀኙን ጉዳይ ባሰሪና ሰራተኛ ህግ የሚገዛ አይደለም በዚህም ሳቢያ የወረዳው ፍ/ቤት ጉዳዩን ተመልክቶ ዳኝነት ለመስጠት ስልጣን የለውም በማለት የሰጠው የውሳኔ መሰረታዊ የህግ ስህተት የተፈፀመበት ሆኖ አግኝተነዋል፡፡

ው ሣ ኔ

1. የክልሉከፍተኛ ፍ/ቤት በመ/ቁ 7229 በ19/6/2001 ዓ.ም የሰጠው ፍርድ እና የትግራይ ክልል ጠቅላላ ፍ/ቤት ሰበር ሰሚ ችሎት በሰ/መ/ቁ 29531 በ30/07/2001 ዓ.ም የሰጠው ትዕዛዝ በፍ/ብ/ሥ/ሕ/ቁ 348/1/ መሠረት ተሽሯል፡፡
2. ከሥራ ቅጥር የመነጨውን የአሠሪና ሠራተኛ ጉዳይ ሥልጣን ባለው የወረዳ ፍ/ቤት ታይቶ ዳኝነት የተሰጠበት ስለሆነ ይግባኝ ሰሚው ፍ/ቤት በይግባኝ ሰሚነቱ ስልጣን የመ/ቁጥር 7229 አንቀሳቅሶ በሌላው ጉዳይ ላይ ተገቢውን ዳኝነት ይሰጥበት ዘንድ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 341 መሠረት መልሰናል፡፡ ግልባጩ ይድረሰው፡፡

አመልካች ለዚህ ክርክር ያወጣውን ወጭ በእራሱ ይሸፍን ብለናል፡፡ መዝገቡን ዘግተናል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

የሰበር መ/ቁ 49931

ሚያዝያ 21 ቀን 2002 ዓ.ም

ዳኞች፡- ሂሩት መለሰ

ተሾገር ገ/ሥላሴ

ታፈሰ ይርጋ

አልማው ወሌ

ዓሊ መሐመድ

አመልካች፡- የጎሽና እርግብ መለስተኛና አነስተኛ የሕዝብ ማመላለሻ ባለንብረቶች ማህበር፤

ጠበቃ ምክሩ ወልደአረጋይ ቀረቡ

ተጠሪ፡- አቶ ተሰማ ኃይሉ - ቀረቡ

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ጉዳዩ የአሰሪና ሰራተኛ ጉዳይ አዋጅ ቁጥር 377/96 ን መሠረት ያደረገ ሲሆን ክርክሩ የተጀመረው ያሁኑ ተጠሪ ባሁኑ አመልካች ጋር ህዳር 12 ቀን 2002 ዓ.ም በመሰረቱት የስራ ውል በድርጅቱ የፋይናንስ አገልግሎት ኃላፊ ሆነው ሲሰሩ መቆየታቸውን ገልፀው የስራ ውሉ ጥቅምት 19 ቀን 2001 ዓ.ም ከህግ ውጪ መቋረጡን ጠቅሰው ውዝፍ ደመወዝ ተከፍሏቸው ወደ ስራ እንዲመለሱ፣ የሞባይል ስልክ አበል ከተቋረጠበት ጊዜ ጀምሮ እንዲከፈል ይወስንላቸው ዘንድ ዳኝነት መጠየቃቸውን የሚያሳይ ነው፡፡ ያሁኑ አመልካች ለክሱ በሰጠው መልስም የመጀመሪያ ደረጃ መቃወሚያ እና የፍሬ ነገር ክርክር አቅርቧል፡፡ አመልካች በመጀመሪያ ደረጃ መቃወሚያነት ያነሳው ክርክር ተጠሪ የስራ መሪ ስለሆነ የስራ ክርክር ችሎት ጉዳዩን ለማየት ስልጣን የለውም የሚል ሲሆን በፍሬ ነገር ረገድ ደግሞ በስራ አፈፃፀም ላይ ባሳዩት ጥፋትና የብቃት ማነስ ችግር የተሰናበቱ በመሆኑ እርምጃው ሕጋዊ ነው ሲል ተከራክሯል፡፡ ጉዳዩን በመጀመሪያ ደረጃ የተመለከተው ፍርድ ቤትም የግራ ቀኙን ክርክር ለማየት ስልጣን እንዳለው በመግለፅ ዋናውን ክርክርም ተመልክቶ የስራ ውሉ የተቋረጠው ከሕግ ውጪ ነው ወደሚለው ድምዳሜ በመድረስ አመልካች የስድስት ወራት ውዝፍ ደመወዝ ተከፍሏቸው ወደ ስራ እንዲመለሱ ሲል ወስኗል፡፡ በዚህ ውሳኔ አመልካች ባለመስማማት ይግባኙን ለፌዴራሉ ከፍተኛ ፍርድ ቤት አቅርቦ ግራ ቀኙ ከተከራከሩ በኃላ የስራ ፍርድ ቤት ውሳኔ ሙሉ በሙሉ ፀንቷል፡፡ የአሁኑ የሰበር አቤቱታ የቀረበውም ይህንኑ ውሳኔ በመቃወም ለማስቀየር ነው፡፡

የአመልካች ጠበቃ ጥቅምት 17 ቀን 2002 ዓ.ም በፃፉት ሦስት ገፅ የሰበር አቤቱታ በበታች ፍርድ ቤቶች ውሳኔ ላይ መሰረታዊ የሆነ የህግ ስህተት ተፈፅሟል የሚሉበትን ምክንያት ዘርዝረው አቅርበዋል። ይዘቱ ባጭሩ ተጠሪ በስራቸው ላይ የብቃት ማነስ ያሳዩ መሆኑ ተረጋግጦ እያለ ስንብቱ ከህግ ውጪ ነው ተብሎ መወሰኑ ያላግባቡ ስለሆነ ሊታረም ይገባል በማለት መከራከራቸውን የሚያሳይ ነው። አቤቱታቸው ተመርምሮም ተጠሪ በብቃት ማነስ ምክንያት ለስራው ብቁ አይደሉም በማለት አመልካች ያቀረበው ክርክር መታለፉ ባግባቡ መሆን ያለመሆኑን ለመመርመር ሲባል ጉዳዩ ለሰበር ችሎቱ እንዲቀርብ ተደርጓል። ተጠሪም በተደረገላቸው መጋቢት 16 ቀን 2002 ዓ.ም በተፃፈ ሁለት ገፅ ማመልከቻ የሰበር አቤቱታቸውን በማጠናከር የመልስ መልሳቸውን ሰጥተዋል። የጉዳዩ አመጣጥ አጠር አጠር ባለመልኩ ከላይ የተገለፀው ሲሆን ይህ ችሎትም የግራ ቀኙን ክርክር ለሰበር አቤቱታው መነሻ ከሆነው ውሳኔ እና አግባብነት ካላቸው ድንጋጌዎች ጋር በማገናዘብ ጉዳዩ ለሰበር ችሎቱ ሊቀርብ ከተያዘው ጭብጥ አንፃር በሚከተለው መልኩ መርምሮታል።

ከክርክሩ ሂደት መገንዘብ የተቻለው አመልካች የስራ ስንብቱን እርምጃ ህጋዊ ነው የሚልባቸውን ምክንያቶች ገልፆ ማስረጃ ጠቅሶ የተከራከረ መሆኑና የበታች ፍርድ ቤቶች የቀረቡት ማስረጃዎች የአመልካች ምክንያት በአሳማኝ ማስረጃ ያልተደገፈ መሆኑን በመግለፅ ውሳኔ የሰጡ መሆኑን ነው። እንደሚታወቀው ይህ ሰበር ችሎት ስልጣኑ ፍሬ ነገርን የማጣራት ስልጣን ያላቸው ፍርድ ቤቶች በህግ አተረጓጎም ረገድ መሰረታዊ የሆነ የህግ ስህተት ሲፈፀሙ ማቃናት ነው። ይህም በሕገ-መንግስቱ አንቀጽ 80(3/ሀ) እና በአዋጅ ቁጥር 25/88 አንቀጽ 10 ድንጋጌዎች ስር የተመለከተ ጉዳይ ነው። በተያዘው ጉዳይም የበታች ፍርድ ቤቶች አመልካች ለተጠሪ ተደጋጋሚ ማስጠንቀቂያ ሲሰጥ ነበር የተባለው የስራውን አሰራር የሚገልፅ ነው በሚል ምክንያት ተቀባይነት የሌለው ነው በማለት የደመደሙት ሲሆን የሂሳብ ሪፖርቱም አመልካች የተሳሳተ ነው ብሎ ቢከራከርም ተጠሪ ሪፖርቱ በሰነድ ችግር ያልተሟላ ስለመሆኑ በመግለፅ ለአመልካች የገለጸ መሆኑን አረጋግጠው ሂሳቡ የተሳሳተ ነበር ለማለት ያልቻሉ መሆኑን ያመኑበት ጉዳይ ነው። ይህ የበታች ፍርድ ቤቶች ድምዳሜ የማስረጃ ምዘናን መሰረት ያደረገ በመሆኑ በዚህ ችሎት ሊታረም የሚችልበት የህግ አግባብ የለም። በመሆኑም አመልካች በዚህ ረገድ ያቀረበው ክርክር የመሰረታዊ ህግ ስህተት መመዘኛን የሚያሟላ ባለመሆኑ ተቀባይነት የሌለው ሆኖ

ተገኝቷል፡፡ በሌላ በኩል ጉዳዩ በሰበር ችሎቱ እንዲታይ ሲደረግ በጭብጥነት ያልተያዘውን ተጠሪ በስራ ግንኙነቱ ከፍተኛ ችግር ሊፈጥሩ ስለሚችሉ ካሳ ተከፍሏቸው እንዲሰናበቱ ይወሰን ዘንድ ዳኝነት በአማራጭ አመልካች በመልስ መልሱ ላይ ጠይቋል፡፡ ይሁን እንጂ አመልካች ተጠሪ ካሳ ተከፍሏቸው እንዲሰናበቱ ይወሰን ዘንድ ምክንያት ይሆናል ያለው ነጥብ ተጠሪ ለአለቃ የማይታዘዙ ናቸው የሚለው ሆኖ በስር ፍርድ ቤቶች የክርክር ነጥብ ያልሆነ እና በተገቢው ማስረጃም ያልተረጋገጠ ነው፡፡ አንድ ሰራተኛ ወደ ስራ ከሚመለስ በአማራጭ ካሳ ተከፍሏቸው እንዲሰናበቱ ይወሰን ዘንድ ምክንያት የሚደረገው በስራ ግንኙነቱ ከፍተኛ ችግር የሚከሰት መሆኑን ፍር ቤቱ ሲያምን ስለመሆኑ አዋጅ ቁጥር 377/96 አንቀፅ 43(3) ድንጋጌ ያሳያል፡፡ ከድንጋጌው ይዘት በግልፅ መረዳት እንደሚቻለው ፍርድ ቤቱ የስራ ግንኙነቱ ከፍተኛ ችግር ውስጥ ይገባል ብሎ ለማመን የሚያስችል በቂ ምክንያት ሊኖር ይገባል፡፡ ያለበቂ ማስረጃና ምክንያት አሰሪ የስራ ግንኙነቱ ችግር ውስጥ ሊወድቅ ይቻላል ብሎ ስለተከራከረ ብቻ ድንጋጌውን ተግባራዊ ማድረግ የስራ ዋስትናን ጥያቄ ውስጥ የሚያስገባ ይሆናል፡፡ በመሆኑም አመልካች በዚህ ረገድ ያቀረበው የዳኝነት ጥያቄ ተቀባይነት የሌለው በመሆኑ አልፈነዋል፡፡ በአጠቃላይ በበታች ፍርድ ቤቶች ውሳኔ ላይ መሰረታዊ የሆነ የህግ ስህተት ተፈፅሟል ለማለት ስላልተቻለ ተከታዩን ወስኗል፡፡

ው ሣ ኔ

1. በፌደራሉ መጀመሪያ ደረጃ ፍርድ ቤት በመ/ቁጥር 14112 ግንቦት 14 ቀን 2001 ዓ.ም ተሰጥቶ በፌዴራሉ ከፍተኛ ፍርድ ቤት በመ/ቁጥር 80323 ጥቅምት 10 ቀን 2001 ዓ.ም የፀናው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 348(1) መሰረት ፀንቷል፡፡
2. በዚህ ችሎት ለተደረገው ክርክር የወጣውን ወጪና ኪሳራ የየራሳቸውን ይቻሉ ብለናል፡፡

ት ዕ ዛ ዝ

በዚህ ችሎት ህዳር 30 ቀን 2002 ዓ.ም ተሰጥቶ የነበረው እግድ ተነስቷል፡፡ ይጻፍ፡፡ መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

የሰ/መ/ቁ. 59666

ግንቦት 4 ቀን 2003 ዓ.ም

ዳኞች፡- ሐጎስ ወልዱ

አልማው ወሌ

አሊ መሐመድ

ነጋ ዱፍሣ

አዳነ ንጉሴ

አመልካች፡- የኦሮሚያ መንገድ ባለሥልጣን ነ/ፈጅ ሠላማዊት ኃይሉ ቀረቡ፡፡

ተጠሪዎች፡- አቶ አቡ ጎበና ከጠበቃቸው ከአቶ ተካልኝ ነጋሣ ጋር ቀረቡ፡፡

መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

በአሁኑ የሰበር ተጠሪ አቅራቢነት ለሰር ወረዳ ፍ/ቤት ነሐሴ 27 ቀን 1999 ዓ.ም የቀረበው ክስ በተከሳሽ /በአሁኑ አመልካች/ መ/ቤት ከ1989 እስከ የካቲት 1999 ዓ.ም በተለያዩ የሥራ መደቦች በወር 2110 ደመወዝ እየተከፈለኝ ከቆየሁ ነኃላ ተከሳሹ ከስራ ሲያሰናብተኝ የአገልግሎት ካሳ እና የዓመት እረፍት በገንዘብ ተለውጦ ብር 13,187.50 ካሰበልኝ በኃላ ከዚሁ ገንዘብ ውስጥ ታክስ ብር 2,203.87 ከቀነሰ በኃላ በስልጣኑ ለት/ቤት የከፈልኩት ነው በማለት ብር 6,792.57 ቆርጦብኝ ብር 4,191.04 ብቻ ከፍሎኛል፡፡ የከፈለኝን ገንዘብም ቢሆን መከፈል ከሚገባው ጊዜ 2 ወር በማዘግየት የሚያዝ የሚያዚያ ወር 1999 ዓ.ም በመሆኑ በአሰራርና ሰራተኛ ጉዳይ አዋጅ ቁጥር 337/96 በአንቀፅ 36 በተደነገገው መሠረት በ7 ቀን ውስጥ አልከፈለም፡፡ የት/ቤት ክፍያም ቢሆን በህብረት ስምምነታችን አንቀፅ 25 ከ12ኛ ክፍል በላይ ለሆነ ትምህርት የት/ቤት ክፍያ ተከሳሽ መ/ቤት 50% እንደሚከፍል ተገልጽዋል፡፡ በመሆኑም ተከሳሽ መ/ቤት ያለአግባብ የቆረጠብኝ ገንዘብና ክፍያ ባዘገየበት የ3 ወር ደመወዜን እንዲከፍለኝ ይወሰንበት የሚል ነው፡፡

ተከሳሹም በነገረፈጁ አማካኝነት በሰጠው መልስ ከሳሽ ለ11 ዓመት አገልግያለሁ የሚለው ተቀባይነት የለውም፡፡ ምክንያቱም ከሳሽ ከመስከረም 1 ቀን 1989 እስከ ሰኔ 30 ቀን 1992 ድረስ የመንግስት ሰራተኛ ነበረ፡፡ የመንግስት ሰራተኛ ከሆነ ደግሞ በአሰሪና

ሰራተኛ ጉዳይ አዋጅ 377/96 ጥቅማጥቅም ማግኘት አይችልም፡፡ ከሳሽ በተከሳሽ መ/ቤት የተቀጠረው ከሐምሌ 1 ቀን 1992 ጀምሮ ስለሆነ የአገልግሎት ካሳ ማግኘት ያለበት ከዚሁ ጊዜ ጀምሮ ነው፡፡ ከሳሽ በጊዜው የት/ቤት ክፍያ እየጠየቀ ተከሳሽ መ/ቤት ሲከፍል የቆየ በመሆኑ በመካከላችን ውል የለም ሲል ያቀረበው ክርክር ተቀባይነት የለውም ከዚሁ በተጨማሪ በአዋጅ ቁጥር 494/98 አንቀፅ 2/ለ/ ስር የተጠቀሰው ግዴታ አልተወጣም በማለት የከሳሽ ክስ ውድቅ እንዲደረግ ጠይቋል፡፡

የስር ወረዳ ፍ/ቤትም ዕዳን አንድ ሠራተኛ ከሚያገኘው የአገልግሎት ካሳ ማቻቻል አይቻልም፡፡ ተከሳሽ አለኝ የሚለው መብት ካለ ህጉ በሚፈቅደው መሰረት መጠየቅ እንጂ ከደመወዙ ጋር ተያይዞ የሚገኝ ነገር ላይ ማቻቻያ ሊደረግ አይገባም፡፡ ይህ ሆኖ ሳለ ተከሳሽ ከሳሽ ደመወዝ መቁረጡ በፍታብሔር ህግ ቁጥር 1833/11/ የተደነገገውን የሚፃረር ነው በማለት ተከሳሽ ከከሳሽ የቆረጠውን ገንዘብ ብር 6,792.57 ክፍያ ለዘገየበት የ3 ወር ደመወዝና ኪሳራ ብር 500 እንዲሁም የጠበቃ አበል 10% እንዲከፈል ወስኗል፡፡

ጉዳዩን በይግባኝ የተመለከተው የሥር ከፍተኛ ፍ/ቤት በበኩሉ ይግባኝ ባይ /የሥራ ተከሳሽ/ የ11 ዓመት የአገልግሎት ካሳ ለመልስ ሰጪው ከከፈለ በኃላ የ11 ዓመት አገልግሎት በተከሳሽ መ/ቤት የለውም ሲል የተከራከረው ያለአግባብ ነው፤ ይግባኝ ባይ መልስ ሰጪውን ያስተማረ ቢሆንም ምን ያህል እንደሚያገለግል የተማረው መቼ እንደሆነና ግዴታውን ተወጥቷል የሚባለው መቼ ነው የሚሉትን ነጥቦች ያላስረዳ በመሆኑ በስር ፍ/ቤት ውሳኔ ላይ የሚነቀፍ ነገር የለም በሚል ውሳኔውን በፍ/ብ/ሥ/ሥ/ሕ/ቁ/348/1/ መሠረት አጽንቷል፡፡

የአሁኑ የሰበር አመልካች ለሥር የኦሮሚያ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በስር ፍ/ቤቶች ውሳኔ ላይ መሠረታዊ የህግ ስህተት ተፈጽሟል ሲል በማመልከቱ የሥር ሰበር ሰሚው ችሎትም የግራቀኙን ወገኖች ካከራከረ በኃላ ከአገልግሎት ካሳ ክፍያ ውስጥ ለትምህርት የተከፈለውን በሚመለከት ተመላሽ የሚያደርግ ስለመሆኑ ውል መኖር አለበት፡፡ ውል በሌለበት አስተማርኩ በሚል ብቻ ከአገልግሎት ካሳ ቆርጦ ማስቀረት ተቀባይነት የለውም፡፡ ክፍያ ለዘገየበት አመልካች ያመነውን ያልከፈለ ስለሆነ በክፉ ሀሳብ ተጠሪን

ለመጉዳት አዘግይቷል ለማለት አይቻልም በማለት አመልካች ለተጠሪ የ3 ወር ደመወዝ መክፈል የለበትም ሲል የሥር ፍ/ቤት ውሴኔን በማሻሻል ወስኗል።

በሥር ፍ/ቤቶች ውሳኔ ቅር የተሰኘው የበር አመልካችም ለዚህ ችሎት ባቀረበው ቅሬታ ተጠሪው ከመስከረም 01 ቀን 1989 ዓ.ም ጀምሮ እስከ ሰኔ ወር 1992 ዓ.ም ድረስ በአመልካች መ/ቤት ያገለገለው በአሰሪና ሠራተኛ ህግ መሠረት ሳይሆን በመንግስት ሠራተኞች አስተዳደር ህግ በመሆኑ የሦስት ዓመት ከአሥር ወር የአገለግሎት ክፍያ በአዋጅ ቁጥር 377/96 መሠረት ሊከፈለው አይገባም። ተጠሪው ሥራውን በገዛ ፈቃዱ የለቀቀው የ2ኛ ዲግሪውን ትምህር መንግስት እየከፈለ ትምህርቱን እንዲጠናቀቅ የሚፈለግበትን አገልግሎት ሳይፈፅም በመሆኑ በተሸሻለው የአሠሪና ሠራተኛ አዋጅ ቁጥር 494/98 አንቀጽ 2/2/ መሠረትና አንቀጽ 39/ሸ/ የውል ግዴታ ስላለበት የሚከፈለው የአገልግሎት ክፍያ የለም፣ ገንዘቡም ለመንግስት ተቆርጦ ገቢ መደረጉ ተገቢ ነው። ምንም ዓይነት ስምምነት ከአመልካች ጋር የለኝም በሚል ያቀረበው ክርክርም ቢሆን የህብረት ስምምነት አንቀጽ 26 በግልጽ የተቀመጠ በመሆኑ ባለመፈረሙብኝ ግዴታውን የሚያስቀርለት አይሆንም የኦሮሚያ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የከፍተኛውን ፍ/ቤት ውሳኔ እስከአሻሻለው ድረስ የጠበቃ አባል 10% እና ኪሳራ ብር 500 አሻሽሎ መወሰን አልያም መሰረዝ ይገባው ነበር በማለት ከመስከረም 1 ቀን 1989 እስከ ሰኔ 30 ቀን 1992 ዓ.ም ያለውን የ3 ዓመት ከ10 ወር ያገልግሎት ካሳ አመልካች ለተጠሪው ይከፈላል የተባለው እንዲሰረዝ አመልካች ከተጠሪው ያገልግሎት ካሳ ውስጥ ለትምህርት የከፈለውን ቆርጦ ማስቀመጡ ያላግባብ ነው የተባለው ተሸሮ ገንዘቡን ለአመልካች ገቢ እንዲሆን እንዲወሰን፣ አመልካች ለተጠሪው እንዲከፈል የተወሰነበትን የጠበቃ አበል እና ኪሳራ እንዲሰረዝ ጠይቋል።

አመልካች ላቀረበው የሰበር ቅሬታ ተጠሪው በሰጠው መልስ ከመስከረም ወር 1989 ዓ.ም ጀምሮ ያለውን ያገልግሎት ካሳ አስቦ ይከፈለኝ እራሱ ያሁኑ አመልካች ስለሆነ ተጠሪ ክስ ከመሰረትኩበት በኃላ ያገልግሎት ካሳው የተከፈለው በስህተት ነው ብልም ከመስከረም 01 ቀን 1989 ዓ.ም ጀምሮ ሰራተኛ ስለመሆኔ በስር ፍ/ቤት በቀረበው የፅሁፍ ማስረጃ ተረጋግጧል። የህብረት ስምምነት አንቀጽ 26/2/ ከትምህርትና ስልጠና በተያያዘ የውል ግዴታ መግባት እንደሚያስፈልግ ይናገራል። ተጠሪም የውል ግዴታ ገብቸ

የፈረምኩት ሰነድ የለም፡፡ አመልካችም በማስረጃነት ያቀረበው ሰነድ የለም፡፡ አዋጅ ቁጥር 494/98 አንቀጽ 39/1/ሸ/ ከስልጠና ጋር በተያያዘ የአሰሪው የውል ግዴታ ሳይኖርበት ስራውን በገዛ ፍቃዱ ሰራተኛው ሲለቅ ያገልግሎት ካሳ እንደሚከፈለው ይደነግጋ፡፡ በመሆኑም የሰበር ተጠሪው ካሰሪው መ/ቤት ጋር የገባሁት የትምህርት ውል ስለሌለ የአገልግሎት ካሳ ከማግኘት የሚከለክለኝ ነገር የለም፡፡ ስለሆነም በስር ፍ/ቤቶች ውሳኔ ላይ የተፈፀመ መሰረታዊ የሆነ የህግ ስህተት የለም በማለት ተከራክረዋል፡፡

የግራቀኙ ክርክር ከዚህ በላይ እንደተገለጸው የቀረበ ሲሆን እኛም በስር የኦሮሚያ ጠቅላይ ፍ/ቤት ውሳኔ ላይ ለተጠሪ ሊከፈለው ይገባል በሚል በተወሰነው ገንዘብ ላይ መሰረታዊ የሆነ የህግ ስህተት ተፈፅሟል ወይስ አልተፈፀመም የሚለውን ጭብጥ ይዘን እንደሚከተለው መርምረናል፡፡

አመልካች በስር ፍ/ቤት ውሳኔ ላይ መሠረታዊ የህግ ስህተት ተፈፅሟል የሚለው በአገልግሎት ካሳ በጠበቃ አመል እና በኪሳራ ገንዘብ አከፋፈል ነው፡፡

የአገልግሎት ካሳን በሚመለከት ግራ ቀኙን የሚያከራክሯቸው ጠቅላላ የአገልግሎት ዘመን አቆጣጠር እና ያገልግሎት ካሳ ለተጠሪው ይገባል በማለት አመልካች ከወሰነው ገንዘብ ውስጥ አመልካች ለተጠሪው የት/ቤት ክፍያ ፈፅሜያለሁ በማለት የቀነሰው ገንዘብ ነው፡፡

ተጠሪው ከመስከረም 1989 እስከ የካቲት 1999 ዓ.ም ለ11 ዓመት በአመልካች መ/ቤት ማገልገሉን በመጥቀስ ሲከራከር አመልካች ግን ተጠሪው ከ1989 መስከረም ወር ጀምሮ እስከ 1992 ሰኔ ወር ድረስ ተጠሪው በአዋጅ ቁጥር 377/96 የማይተዳደርና የመንግስት ሠራተኞች አስተዳደር ሰራተኛ ነበር በማለት ተከራክሯል፡፡ ከዚህ የተነሳ የ3 ዓመት ከ10 ወር የአገልግሎት ካሳ አይገባውም ብሏል፡፡ ይሁን እንጅ ከስር ጀምሮ ከተደረገው ክርክር መገንዘብ እንደሚቻለው አመልካች መ/ቤት ቀደም ሲል በመንግስት ሠራተኞች አስተዳደር አዋጅ የሚተዳደር የነበረና ከዚያም በአዋጅ ቁ. 377/96 ማለትም ስለ አሰሪና ሠራተኛ ጉዳይ በወጣው አዋጅ እንዲተዳደር መደረጉን ነው፡፡ ተጠሪም ቢሆን ቀደም ሲል በአመልካች መ/ቤት የመንግስት ሠራተኛ የነበረ ሲሆን አመልካች መ/ቤት በአዋጅ ቁጥር 377/96 እንዲተዳደር ሲደረግ ተጠሪውም በተመሳሳይ ሁኔታ በተጠቀሰው አዋጅ ቁጥር 377/96 እንዲተዳደር ሲደረግ ተጠሪውም

በተመሳሳይ ሁኔታ በተጠቀሰው አዋጅ የሠራተኛን ትርጉም በማሟላት በአመልካች መ/ቤት ማገልገሉን በማመን የ11 ዓመት የአገልግሎት ካሳ በማስላት አቃላይ የሚከፈለው የአገልግሎት ካሣ መጠን ከታወቀ በኃላ ለትምህርት ቤት የከፈለውን በመቀነስ ለራሱ አስቀርቷል። ይሁን እንጂ አሠሪው ማለትም ያሁን አመልካች የተጠሪው የአገልግሎት ዘመን 11 ዓመት መሆኑን ተቀብሎ ምን ያህል የካሣ መጠን እንደሚከፈለው ካረጋገጠ በኃላ በፍ/ቤት በተጠሪ ከሳሽነት ክስ ሲቀርብ የተጠሪውን ቀደም ሲል የመንግስት ሠራተኛ ነበር በአዋጅ ቁጥር 377/96 መሠረት የአገልግሎት ካሣ ማግኘት ያለበት ከሐምሌ 1992 ጀምሮ ነው በማለት ያቀረበው ክርክር ህጋዊ ውጤት ያለው ሆኖ አላገኘንም። ስለሆነም አመልካች ተጠሪን የአገልግሎት ዘመን በሁለት በመክፈል ካሣ ሊከፈለው የሚገባው በአሰሪና ሠራተኛ ጉዳይ አዋጅ ቁጥር 377/96 መተዳደር ከጀመረበት ጊዜ ነው በማለት ያቀረበውን ክርክር የሥር ፍ/ቤት ያልተቀበለው በአግባቡ ነው። በመሆኑም ተጠሪው 11 ዓመት አገልግሎት አለው ተብሎ በዚሁ መጠን የ11 ዓመት የአገልግሎት ካሳ ሊከፈለው አይገባም በማለት አመልካች ያቀረበውን ክርክር የሥር ፍ/ቤት ውድቅ በማድረጉ የተፈፀመ መሠረታዊ የህግ ስህተት የለም። ከዚህ ከካሣ አከፋፈል ጋር ተያይዞ የሚነሳው አመልካች ለተጠሪው የሚገባውን የካሳ መጠን በስሌት ካረጋገጠ በኃላ የተጠሪው 2ኛ ዲግሪ ሲማር አመልካች ለት/ቤት የከፈለውን ገንዘብ የቀነሰው ትምህርቱን ካጠናቀቀ በኃላ በአመልካች መ/ቤት ማገልገል ሲገባው ግዴታውን አልተወጣም። ስለሆነም አመልካች ለት/ቤት ያወጣውን ወጪ ከተጠሪው ለመቀበል በአዋጅ ቁጥር 494/98 አንቀጽ 2/2/ሸ/ መሠረት መብት አለው ምክንያቱም በአመልካችና ተጠሪ መካከል የውል ግዴታ አለ የሚል ነው። የውል ግዴታውም ሊመሠረት የቻለው ተጠሪው የትምህርት ቤት ክፍያ እንዲከፍልለት በየጊዜው እየጠየቀ አመልካችም ይከፍልለት ነበር በማለት ነው። ሆኖም ከአመልካች አለ የሚለውን የውል ግዴታ ተጠሪው የፈረምኩት ሠነድ የለም በማለት ይከራከራል።

እዚህ ላይ ምላሽ ማግኘት ያለበት ነጥብ በአመልካችና በተጠሪው መካከል የትምህርት ቤት ክፍያን በሚመለከት ውል አለ ወይስ የልም? የሚለውን ነጥብ ሳይሆን አመልክች ለተጠሪው ከሚገባው የአገልግሎት ካሣ የትምህርት ቤት ክፍያ ቆርጦ ማስቀረት ይችላል ወይስ አይችልም? የሚለውን ነጥብ ነው።

ከዚህ በላይ ከፍ ተብሎ እንደተገለፀው አመልካችና ተጠሪ የሚተዳደሩት በአሠሪና ሠራተኛ ጉዳይ አዋጅ ቁጥር 377/96 ሲሆን የግራ ቀኙን ተከራካሪዎች በአዋጁ የተቀመጡትን መብትና ግዴታ ማክበር ይጠበቅባቸዋል፡፡ በአዋጁ ከተጠቀሱት መብቶች አንዱ የሥራ ውል ሲቋረጥ ሠራተኛው ደመወዙንና ከደመወዙ ጋር የተያያዙትን ክፍያዎችን በህጉ በተወሰነ የጊዜ ገደብ ውስጥ መክፈል ይኖርበታል፡፡ ሆኖም ክፍያው አከራካሪ ሆኖ ከተገኘ የህጉን አካሄድ መከተል የግድ ይላል፡፡ በዚህ በተያዘው ጉዳይ የመንግስት ግብር ተቀንሶ ተጠሪው የአገልግሎት ካሣ ማግኘት ያለበት ብር 10,983.63 መሆኑን ሲገልጽ ይኸንኑ የገንዘብ መጠን አመልካችም ትክክል መሆኑን ያምናል፡፡ ይሁን እንጅ የት/ቤት ክፍያ ብር 6,792.57 መቀነሱ አግባብ ነው ይላል፡፡ በአሰሪና ሠራተኛ ጉዳይ አንቀጽ ንዑስ አንቀጽ /1/ ደመወዝ የሚቀነሰው በህግ በህብረት ስምምነት ወይም በስራ ደንብ በተወሰነው ወይም በፍ/ቤት ትዕዛዝ መሠረት ካልሆነ ወይም ሠራተኛው በጽሁፍ ካልተስማማ አሰሪው ከሠራተኛው መቀነሥ እንደማይችል ወይም በዕዳ ሊይዝ ወይም ሊያቻችል እንደማይችል ተደንግጓል፡፡ የአገልግሎት ካሳም ቢሆን ለዕዳ የሚያዝ ወይም የሚቀነስ ከሆነም በተጠቀሰው የህግ አንቀጽ መሠረት መቀነስ ወይም ሊያዝ ከሚችል ውጪ አሠሪ በራሱ ውሳኔ ሊቀንስ ሊይዝ ወይም ለዕዳ እንዲቻቻል ማድረግ አይችልም፡፡ በመሆኑም የሥር ፍ/ቤት የሰበር አመልካች ቆርጦ ያስቀረው የአገልግሎት ካሣ ገንዘብ ለተጠሪ እንዲመልስ በሰጠው ውሳኔ ላይ የተፈፀመ መሠረታዊ የህግ ስህተት አላገኘንም፡፡ ሌላው አመልካች እንደመሠረታዊ የህግ ስህተት የጠቀሰው የጠበቃ አበል 10% አመልካች ለተጠሪ እንዲከፈል መወሰኑ ነው፡፡ በዚህ ነጥብ ላይ አመልካች ተጠሪው ክርክር ያካሄደው በግሉ ስለመሆኑ አልተከራከረም፡፡ ነገር ግን 10% ለጠበቃው አበል መወሰኑ አለአግባብ መሆኑን ገልጾ ተከራክሯል፡፡ ጠበቃው ሙያዊ አገልግሎት መስጠቱ እስካልተካደ ድረስ ደግሞ በሚኒስትሮች ምክር ቤት ደንብ ቁጥር 57/1992 አንቀጽ 42 በተደነገገው መሠረት ተገቢና ሚዛናዊ የሆነ የአገልግሎት ክፍያ ማግኘት ይኖርበታል፡፡ ተገቢና ሚዛናዊ ክፍያ ነው የሚባለው ደግሞ በተጠቀሰው የህግ ቁጥር ከንዑስ ቁጥር 1-8 የተዘረዘሩትን መመዘኛዎች መሠረት በማድረግ የተወሰነ ሆኖ ሲገኝ ነው፡፡ አመልካች ግን የሥር ፍ/ቤት 10% የጠበቃ አበል ሲወስን በደንብ ቁጥር 57/92 አንቀጽ 42 ሥር የተዘረዘሩ መመዘኛዎች የተጣሱ ስለመሆናቸው ያቀረበው የህግ ክርክር የለም፡፡ ይህ

ችሎትም የቀረበውን የጠበቃ አበል ቅሬታ ከተጠቀሰው ደንብ ቁጥር 57/92 አንቀጽ 42 እና ከፍ/ብ/ሥ/ሥ/ሕ/ቁ/ 462ና 463 ድንጋጌ ጋር እንዳገናዘበው በደንቡ የተዘረዘሩት መመዘኛዎች የተጣሱ ስለመሆናቸው አመልካች የሚሆን ነገር አላገኘንም፡፡ በመሆኑም በጠበቃ አበል አወሣሠን ላይ በሥር ፍ/ቤት ውሳኔ የተፈፀመ መሠረታዊ የህግ ሥህተት የለም፡፡

አመልካች ያቀረበው ሌላው ክርክር የሥር ሰበር ሰሚ ችሎት የሥረ ፍ/ቤቶችን ውሣኔ በማሻሻል እስከወሰን ድረስ የብር 500 /አምስት መቶ/ ኪሣራ መቀነስ ወይም መሰረዝ ነበረበት የሚል ሲሆን ይህ ችሎት ተጠሪ በክርክር ወቅት ከብር 500 (አምስት መቶ) ያላነሠ ኪሣራ እንደሚደርስበት ያምናል፡፡ የኪሣራው መጠን ከዚህ ከተጠቀሰው የገንዘብ መጠን ያንሣል ቢባል እንኳን የአመልካች ኢኮኖሚያዊ ጥቅሙን በጎላ መልኩ የሚጎዳ አይደለም፡፡ በሌላ በኩል የሥር ሰበር ሰሚ ችሎት የሥር ፍ/ቤቶችን ውሣኔ አሻሽሎ በመወሰኑ ብቻ ኪሣራ መቀነስ አለበት ወይም ሙሉ በሙሉ መሠረዝ አለበት ለማለት ህጋዊ መሠረት ያለው አይደለም፡፡ በመሆኑም የሥር ሰበር ሰሚው ችሎት የሥር ፍ/ቤቶች ውሣኔን አሻሽሎ ሲወስን ኪሳራውን ግን በማጽናቱ የተጣሰ ህግ የለም፡፡ ስለሆነም በኪሣራ አወሳሰን አሻሽሎ ሲወስን ኪሳራውን ግን በማጽናቱ የተጣሰ ህግ የለም፡፡ ስለሆነም በኪሣራ አወሣሠን ረገድም የሥር ፍ/ቤት የፈፀመው መሠረታዊ የህግ ስህተት አላገኘንም፡፡

ው ሣ ኔ

1. የኦሮሚያ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁ 90368 በቀን 14/10/2002 ዓ.ም በዋለው ችሎት የሰጠው ውሳኔ ፀንቷል፣ በውሳኔው የተፈፀመ መሠረታዊ የሆነ የህግ ስህተት የለም ተብሏል፡፡
2. የዚህን ፍ/ቤት ወጪና ኪሣራ ግራ ቀኙ ይቻቻሉ፡፡
3. ከዚህ በፊት በዚህ ጉዳይ ተሰጥቶ የነበረው የዕግድ ትዕዛዝ ተነስቷል፡፡ ይፃፍ፡፡
4. መዝገቡ የተዘጋ ስለሆነ ወደ መዝገብ ቤት ተመላሽ ይሁን፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

Call for Contributions

The Law School of Bahir Dar University publishes a bi-annual peer-reviewed journal of law, the *Bahir Dar University Journal of Law* (BDU Journal of Law). The main aim of the *Journal* is to create a forum for the scholarly analysis of Ethiopian law and to promote research in the area of the legal system of the country in general. The Journal also encourages analyses of contemporary legal issues.

The assessment of various manuscripts submitted for Volume 4 (issues No.2) and Volume 5 (issue No.1) is now underway. The *Journal* is now calling for contributions for its next issues. The Editorial Committee of the *Journal* welcomes scholarly *articles, notes, reflections, case comments* and *book reviews* from legal scholars, legal practitioners, judges and prosecutors and any legal professional who would like to contribute his/her own share to the betterment of the legal system of Ethiopia and of the world at large.

Any manuscript which meets the preliminary assessment criteria shall be referred to anonymous internal and external assessors for detailed and critical review. Authors may send us their manuscripts any time at their convenience.

Submissions should include:

- Full name (s) and contacts of author (s);
- Declaration of originality;
- A statement that the author consents to the publication of the work by the *Bahir Dar University Journal of Law*.

All submissions and enquiries should be addressed to:

The Editor- in-Chief,

Bahir Dar University Journal of Law;

E-mail: alebe2007@gmail.com;

or

jol@bdu.edu.et

Guide for Authors

Aim and scope of the *Journal:*

The *Bahir Dar University Journal of Law* is established in 2010 G.C. under the stewardship of the School of Law Bahir Dar University. It aims to promote legal scholarship and critical inquiry. The *Journal* places the needs of the readers first and foremost in its composition and aspires to become a well-cultivated resource for the community of legal professionals. While, in principle, it is open for any kind of contributions on the subject matter of law or interdisciplinary issues related to law, it gives high priority to contributions pertaining to Ethiopian laws to encourage discourse on Ethiopian laws where literature is scanty.

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The *Bahir Dar University Journal of Law* invites submission of manuscripts in electronic format (Soft copy). Manuscript should be sent in Microsoft Word format as attachment to

alebe2007@gmail.com or
jol@bdu.edu.et

Contributions should be unpublished original work of the author. The form of contributions can be feature article, case comment, book review, or reflection paper.

Review procedure

The *Bahir Dar University Journal of Law* is a peer-reviewed journal. All submissions are reviewed by the editor-in-chief, one member of the editorial committee. The publication of feature articles is further subject to review by an anonymous external referee and final discussion and approval by the editorial committee. Please note that our evaluation process takes account of several criteria. While excellence is a necessary condition for publication, it is not always the only condition. The need for balance of topics, the *Journal's* particular area of interest which may change overtime, and the fact that an article discussing a similar topic has already been commissioned, etc., may also influence the final decision. Therefore, a rejection does not necessarily reflect upon the quality of the piece.

Time frame

You can submit your manuscript at any time. We do not have deadlines for submission of manuscripts. Each day we accept submissions and those qualified submissions will be commissioned for publication on a rolling basis. As soon as we receive your submission we will send you an acknowledgement email. We aim to give notification of acceptance, rejection, or need for revision within four weeks of acceptance, although exceptions to this timeframe may occur. In the event of final acceptance you will be notified when it will be published and in which issue of the *Journal* the paper will feature.

Language

All submissions need to be written in articulate and proficient language either in English or Amharic. Authors who lack good command of the language are encouraged to send their article to language editing prior to submission.

Size of contributions

The size of contributions shall be as follows:

- feature articles: Min 15 pages, max 40 pages
- case comments: Min 3 pages, max 15 pages
- Book Review: Max 3 pages
- Reflections: Min 3 pages, max 15 pages

Manuscript presentation

Bahir Dar University Journal of Law generally follows the style and citation rules outlined below.

Author's affiliation:

The author's affiliation should be indicated in a footnote marked by an asterisk and not by an Arabic number. Authors should refer to themselves in the third person throughout the text.

Headings:

Manuscripts shall have an abstract of approximately 200 words and introduction and the body should be arranged in a logically organized headings and sub-headings. Headings in the various sections of the manuscript shall be aligned to the left margin of the page and shall be as follows:

Abstract
Introduction
1. First Heading
1.1. Second Heading
1.1.1. Third Heading
1.1.1.1. Fourth heading
i. Fifth heading
a. Sixth heading
Conclusion

Italicization:
All non-English words must be *italicized*

Emphasis:
To indicate emphasis use *italics*.

References:
All contributions should duly acknowledge any reference or quotations from the work of other authors or the previous work of the author. Reference shall be made in the original language of the source document referred to.

Quotations:
Quotations of more than three lines should be indented left and right without any quotation marks. Quotation marks in the block should appear as they normally do. Quotations of less than three lines should be in quotation marks and not indented from the text. Regarding alterations in a quotation, use:-

Square bracket "[ ]" to note any change in the quoted material,
Ellipsis "…" to indicate omitted material,
"[sic]" to indicate mistake in the original quote.

Footnotes:

Footnotes should be consecutively numbered and be set out at the foot of each page and cross-referenced using *supra*, *infra*, *id* and *ibid*, as appropriate. Footnote numbers are placed outside of punctuation marks.

References in footnotes:

References in footnotes should generally contain sufficient information about the source material. In general, references should have the content and style outlined below in the illustrations for the various types of sources.

Books:

Brownlie,I., *Principles of Public International Law*, 6th edition, Oxford University Press, Oxford, New York, 2003(first published in 1966), p. 5, [hereinafter Brownlie, *Principles of Public International Law*]

Contributions in edited books:

Fleck, Dieter, the Law of Non-International Armed Conflicts, *in* Fleck, Dieter (ed.),*The Handbook of International Humanitarian Law*, Second Edition, Oxford University Press, Oxford, New York, 2008, p. 613, [hereinafter Fleck, *The Handbook of International Humanitarian Law*]

Articles in Journals:

Jinks, D., September 11 and the Laws of War, *Yale Journal of International Law*, Vol.28, No. 1, 2003, p. 24.

Legislations:

Federal Courts Proclamation, 1996, Art. 8(1) & (2), Proc.no.25/1996, *Fed. Neg. Gaz.*, year 2, no. 13.

Codes:

Revised Family Code, 2000, Art. 7 (1), Proc.no. 213/2000, *Fed. Neg. Gaz*. (Extraordinary issue), year 6, no. 1.

Treaties:

Vienna Convention on the Law of Treaties, 1969, Article 31.

Resolutions:

Security Council Resolution 1368 (2001), at WWW http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement > (consulted 10 August 2008).

Cases:

International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic*, Appeals Chamber, Judgement, 15 July 1999, para. 120, at WWW <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf > (consulted 7 August 2008), [hereinafter, ITY, Tadic case, Appeals Chamber, Judgement].
የኢትዮጵያ መድን ድርጅት vs. ጊታሁን ሀይሉ፤ጠቅላይ ፍርድቢትሰበር ሰሚ ችሎት፤ መ.ቁ. 14057፤ 1998 ዓ.ም.

Format requirements:

All contributions should be submitted in Microsoft Word document format, written in 12 fonts, double space, Times New Roman (Footnotes in 10 fonts, single space, Times New Roman).

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