የባህር ዳር ዩኒቨርሲቲ የህግ መጽሔት

Bahir Dar University Journal of Law

ISSN 2306-224X

ቅጽ ፭ ቁጥር ፩		ታህሣስ ፳፻፯
Vol. 5 No. 1		December 2014

In This Issue

በዚህ ዕትም

በባህር ዳር ዩኒቨርሲቲ ህግ ት/ቤት በዓመት ሁለት ጊዜ የሚታተም የሕግ መጽሔት

A Biannual Law Journal published by the Bahir Dar University School of Law

በ፪ሺ፪ ዓ.ም.ተመሠረተ

Established in 2010

የባህር ዳር ዩኒቨርሲቲ የህግ መጽሔት

Bahir Dar University Journal of Law

ቅጽ ፭ ቁጥር ፩ | ታህሣስ ፳፻፯
Vol. 5 No. 1 | December 2014

Advisory Board Members

Mizane Abate (PhD, Asst. Professor, Director of Law School, BDU)....Chairman
Laurel Oates (Professor, Seattle University, USA)…….Member
Pietro Toggia (Professor, Kutztown University, USA)……..…….…Member
Tilahun Teshome (Professor, AAU)…….....Member
Won Kidane (Assoc. Professor, Seattle University, USA).....Member
Yeneneh Simegn (President of ANRS Supreme Court)……..….Member

Editor-in-Chief

Alebachew Birhanu
(Assistant Professor)

Editorial Committee Members

Belayneh Admasu (Assistant Professor)
Haile Guesh (Lecturer)
Melkamu Aboma (Lecturer)
Mihret Alemayehu (Lecturer)

Language Editor

Emily Boersma(PhD, Asst. Professor, BDU)

List of External Reviewers of Articles and Case Comment in this Issue

Aschalew Ashagre (LLB, LLM, Lecturer, AAU)
Asnakech Getnet (LLB, LLM, Lecturer, BDU)
Belachew Mekuria (LLB, MSc, LLM, PhD, Asst. Professor, AAU)
Belay Worku (LLB, LLM, Lecturer, BDU)
Belayneh Ketsela (LLB, LLM, Asst. Professor, BDU)
Elias Hizkeal (LLB, LLM, Lecturer, BDU)
Gizachew Silesh (LLB, LLM, Lecturer, BDU)
Heran Ayele (LLB, LLM, UN Women for Peace)
Jacksons Kern (JD, School of law, Seattle University)
Nega Ewunetie (LLB, LLM, Lecturer, BDU)
Seid Demeke (LLB, LLM, Lecturer, Jigjiga University)
Seyoum Yohannes (LLB, LLM, PhD, Asst. Professor, AAU)
Temesgen Sisay (LLB, LLM, Lecturer, BDU)

Secretary

Samrawit G/alfa (W/rt)

Address:

The Editor-in-Chief,

Bahir Dar University Journal of Law,

School of Law,
Bahir Dar University
P.O. Box 5001
Tel. +251588209850

jol@bdu.edu.et
Bahir Dar, Ethiopia

Law School Academic Full Time Staff

1.	Alebachew Birhanu	LLB, LLM, MPhil (Assistant Professor)
2.	Alemu Dagnaw	LLB, LLM (Lecturer)
3.	Ataklti W/Abizgi	LLB, LLM (Lecturer)
4.	Asnakech Getnet	LLB, LLM (Lecturer)
5.	Ayene Mengesha	LLB (Assistant Lecturer)
6.	Belay Worku	LLB, LLM (Lecturer)
7.	Belayneh Admasu	LLB, LLM (Assistant Professor)
8.	Belayneh Ketsela	LLB, LLM (Assistant Professor)
9.	Dessalegn Tigabu	LLB, LLM (Lecturer)
10.	Elias Hizkeal	LLB, LLM (Lecturer)
11.	Gizachew Sileshi	LLB, LLM (Lecturer)
12.	Kidisan Desta	LLB, LLM Candidate (Assistant Lecturer)
13.	H/Mariam Yohannes	LLB, LLM (Lecturer)
14.	Haile Guesh	LLB, LLM (Lecturer)
15.	Melkamu Aboma	LLB, MA, LLM (Lecturer)
16.	Mihret Alemayehu	LLB, LLM, MPhil (Lecturer)
17.	Mizanie Abate	LLB, LLM, PhD (Assistant Professor)
18.	Mohammode Doude	LLB, LLM Candidate (Assistant Lecturer)
19.	Molla Ababu	LLB, LLM (Assistant Professor)
20.	Nega Ewunetie	LLB, LLM (Lecturer)
21.	Temesgen Sisay	LLB, LLM (Lecturer)
22.	Tesema Simachew	LLB, LLM, PhD Candidate (Lecturer)
23.	Tilahun Yazie	LLB, LLM (Lecturer)
24.	Worku Yaze	LLB, LLM, PhD Candidate (Asst. Professor)
25.	Zewdu Mengesha	LLB, LLM (Lecturer)

MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 5, 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 Emily Boersma who did the painstaking editorial work of this issue.

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 country.

Disclaimer

The views expressed in this journal do not necessarily reflect the views of the Editorial Committee or the position of the Law School.

የባህር ዳር ዩኒቨርሲቲ የህግ መጽሔት
Bahir Dar University Journal of Law

ቅጽ ፭ ቁጥር ፩ | ታህሣስ ፳፻፮
Vol. 5 No. 1 | December 2014

Content

The African Women Protocol as Supplemental to the African Charter and Other Human Rights Instruments: A Brief Analysis

Mizanie Abate Tadesse (PhD)[♣]

Abstract

The African women's Rights Protocol was adopted in July 2003 and came into force in November 2005 as a response to widespread human rights violations sustained by women in Africa.The purpose of this article was to succinctly canvass the issue of whether the Protocol is able to remedy the inadequacies of the African Charter and other human rights instruments in terms of guaranteeing rights of African women. The article found out that the Protocol is a landmark treaty in a number of respects either by conferring new rights or broadening the scope of rights of women in existing treaties. Specific areas to which the Protocol has added value to the existing human rights instruments include: violence against women, harmful practices, women's reproductive rights and HIV/AIDS. In some cases, however, the Protocol is found out to contain protections below the existing treaties as can be exemplified by its failure to expressly recognize the right of women to vote or to participate at the international level and the right of women to equal share of common property at the time of dissolution of marriage. In terms of establishing a treaty monitoring body to improve states' compliance with their treaty obligations, the Protocol has not come up with a distinct body as opposed to CEDAW and the African Charter on the Rights and Welfare of the Child. The article contended that cultural and religious practices as well as lack of universal ratification could hamper the smooth implementation of the Protocol. To overcome these setbacks, the article, inter alia, recommended that the Protocol should be ratified by the remaining

[♣] LL.B (Addis Ababa University), LL.M (Univerity of Pretoria), PhD (University of Alabama); Assistant Professor of Law, Director of School of Law, Bahir Dar University; lawmizane@yahoo.com.

states with minimum possible or no reservation(s) and cultural and religious resistance should be lessened through continuous awareness creation and dialogue.

Key Words: Women's Rights. Protocol, African Charter, CEDAW

1. Introduction

Many women in Africa suffer from widespread human rights violations in the private and public spheres. These violations perpetuate their inequality and put them at risk for poverty and disease, including HIV/AIDS. Brutal violations, such as domestic violence, marital rape, unequal property and inheritance rights, trafficking, labour rights abuses, sexual violence in armed conflict, and discrimination in education and health care systems continue despite the adoption and ratification of the African Charter on Human and Peoples' Rights (the Charter)[1] and other human rights instruments[2] by the majority of African states.[3]

LL.B (Addis Ababa University), LL.M (Univerity of Pretoria), PhD (University of Alabama); Assistant Professor of Law, Director of School of Law, Bahir Dar University; lawmizane@yahoo.com.

[1] African Charter on Human and Peoples' Rights, 1981.

[2] Other international instruments that protect and promote the rights of women include, but not limited to: Convention on the Elimination of All Forms of Discrimination against Women, 1979; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; Convention on the Rights of the Child, 1989; and Beijing Declaration and Platform for Action, 1995. Moreover, the World Conference on Human Rights held in Vienna, Austria in 1993 made advances to human rights theory and practice with respect to women's human rights. The Declaration and Programme of Action of the World Conference on Human Rights at Vienna emphasized: 'The human rights of women and of the girl child are an inalienable, integral and indivisible part of the

As a response to the failure of the Charter and other human rights instruments to guard the rights of women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol) was adopted in July 2003 and came into force in November 2005.[4] This article briefly examines whether the Protocol is successful in rectifying the drawbacks of the Charter and other human rights instruments in safeguarding the rights of women. It further outlines the challenges the Protocol faces in addressing these issues. By way of background, it highlights the shortcomings of the Charter and the need for the adoption of the Protocol.

2. Shortcomings of the Charter in Promoting and Protecting Women's Rights

Indeed, the Charter is the most important human rights instrument in promoting and protecting human rights in Africa. The African Commission on Human and Peoples' Rights (the Commission), an organ in charge of monitoring the Charter, has made remarkable progress in interpreting and applying the provisions of the Charter. The Charter and the Commission do not, however, escape criticism.

---

universal human rights.' It also emphasized that elimination of violence against women is a human-rights obligation upon states.

[3] Protocol to the African Charter on Human and Peoples, Rights on the Rights of Women in Africa, 2003, Preamble [hereinafter the Protocol).

[4] Article 66 of the Charter that provides for the establishment of Protocols and Agreements to supplement its provisions gave impetus for the consideration and subsequent formulation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

One of the main criticisms forwarded against the Charter is that it gives little express attention to the position of women.[5] Only three provisions are pertinent in terms of addressing the rights of women. These articles include: article 2 providing a general non-discrimination clause, article 3 stating equality before the law and article 18 (3) requiring states to eliminate 'every discrimination against women and ensure the protection of the rights of women as stipulated in international declarations and conventions.'

The latter article makes reference to relevant international declarations and conventions to ensure the protection of the rights of women. Such reference is made regardless of the fact that the state concerned is a state party to a particular convention. By doing so, the Charter seems to grant a wider protection to the rights of women as required under international standards. However, this procedure is unsatisfactory and its appropriateness is doubtful[6] for the following reasons. First, making reference to international declarations, such as the Universal Declarations of Human Rights, is the weakest means of guaranteeing protection of women's rights. It is a well-founded principle of international law that declarations do not have a binding

[5] Ouguergouz, F., *The African Charter on Human Peoples' Rights: A comprehensive Agenda For Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff Publishers, 2003, pp. 192-193, [hereinafter Ouguergouz, *The African Charter on Human Peoples' Rights*].
[6] *Id*., p. 192.

force on states.[7] This creates loopholes for African states to evade their responsibilities in respect of ensuring the rights of women.

Second, when article 18 (3) of the Charter makes reference to binding international instruments, it is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that will come to mind. This is because CEDAW is a relatively comprehensive and specialised international treaty addressing the rights of women. Making reference to CEDAW, nevertheless, is not the best way of promoting and protecting the rights of women in Africa. This reference is a mere repetition of the already existing treaty obligations of African states in view of the fact that almost all African states[8] have ratified CEDAW and are bound by it. The reference to CEDAW also makes the protection of the rights of African women incomplete. As we shall see later, there are rights of women which are not addressed in CEDAW.

Apart from the failure of the Charter in granting comprehensive protection to the rights of women, there have also been concerns in reference to traditional

[7] Although the Universal Declaration of Human Rights is evolved as customary international law and thus binding on all states, it by no implies that all provisions therein, including women's rights, are parts of custom.

[8] By the time the Charter came into force in 1986, CEDAW was ratified by a number of African states. Currently, all African states, except Somalia and Sudan, have ratified it. For details, see <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx> (consulted 20 December 2014).

values in the Charter would take preference over women's concerns.[9] One such concern is well articulated as:

> *Articles 17(2) and (3) of the African Charter state that every individual 'may freely take part in the cultural life of his community' and that '[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.' Article 27(1) of the African Charter further provides that 'every individual shall have duties towards his family and society.' Moreover, the only specific reference to women's rights in the charter is contained in a clause concerning 'the family and [upholding] tradition, thereby reproducing the essential tension that plagues the realization of the rights of women' in Africa.*[10]

'In Africa, some of the most serious violations of women's rights take place in the private sphere of the family and are reinforced by traditional norms and cultural values.'[11] Thus, given the fact that African women are bound towards their family and the family is the custodian of traditional values, there may be a tendency to give effect to traditional values in event they conflict with the limited rights of women recognised in the Charter.

---

[9] Murray, R., Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa, in Ssenyonjo, Manisuli (ed.), *International Law: Modern Feminist Approaches*, Martinus Nijhoff Publishers, 2005, p. 258 [hereinafter Murray, Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa].

[10] Centre for Reproductive Rights, The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights,

At <http://www.reproductiverights.org/pdf/pub_bp_africa.pdf> (consulted 23 June 2007).

[11] *Ibid.*

Additional weaknesses of the Charter indentified by writers include its 'failure to explicitly define discrimination against women' and 'lack of guarantees of the right to consent to, and equality in, marriage.'[12]

The criticism forwarded against the Commission relates to its failure to give effect to the rights of women recognised in the Charter.[13] It has been argued that although the Commission has a broad power 'under article 45 and 46 of the Charter to promote and protect the rights contained in the Charter and a potentially large variety of mechanisms at its disposal, yet few have been used to advance the rights of women.'[14] This argument is evidenced, for example, by the fact that, for long period of time, the Commission had adopted only few resolutions interpreting the Charter from the perspective of women although it has adopted a number of resolutions on other issues.[15]

[12] Klugman, J., Women's health and human rights: Public spending on health and the military one decade after the African Women's Protocol, *African Human Rights Law Journal*, (14), 2014, p. 720. See also Centre for Human Rights, Faculty of Law, University of Pretoria, *The impact of the Protocol on the Rights of Women in Africa on violence against women in six selected Southern African countries: An advocacy tool, 2009,* at <http://www.genderlinks.org.za/attachment.php?aa_id=13283> (consulted 20 March 2015).

[13] Murray, Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa, supra note 9, p. 259. See also Banda, Fareda, Protocol to the African Charter on the Rights of Women in Africa, *in* Malcolm and Rachel Murray (eds.), The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006, 2nd Edition, Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, 2008, p. 444, [hereinafter Banda, *Protocol to the African Charter on the Rights of Women in Africa*].

[14] *Ibid.*

[15] Resolutions cited to show the weakness of the Commission that specifically relate to women are those on special raporteurs and draft protocol.

Recently, however, the Commission has passed several resolutions relating to the rights of women.[16] In May 2014, for example, the Commission adopted two resolutions; namely, Resolution on the Situation of Women and Children in Armed Conflict[17] and a Resolution on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo. The Commission in the latter resolution condemned 'the several acts of sexual violence and other forms of gender-based violence committed by the various armed groups against Congolese women and girls' and, among other things, required DRC to take effective measures to end sexual violence against Congolese women. Almost two months after adoption of this resolution, the Commission endorsed a Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt.[18]

[16] Resolution on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo, adopted at its 55th *Ordinary Session held from 28 April to 12 May 2014 in Luanda, Angola, at* <*http://www.achpr.org/sessions/55th/resolutions/284/*> (consulted 20 December 2014). This resolution is not the first resolution on DRC pertaining to the rights of women. Prior to this Resolution, the Commission passed Resolution ACHPR/Res.103 (XXXX) 06 of 29 November 2006 on the situation of the rights of women in the DRC.

[17] Resolution on the Situation of Women and Children in Armed Conflict, adopted at its *55th Ordinary Session held in Luanda, Republic of Angola, from 28 April to 12 May 2014, at* <*http://www.achpr.org/sessions/55th/resolutions/283/*> *(consulted 20 December 2014).*

[18] Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt, adopted at its *16th Extraordinary Session held from 20 to 29 July 2014 in Kigali, Rwanda, at* <http://www.achpr.org/sessions/16th-eo/resolutions/288/> (consulted 20 December 2014).

Apart from resolutions, the Commission has adopted three important general comments on the rights of women. The general comments[19] are meant to give authoritative interpretations to articles 14(d) and (e) of the Protocol. These provisions provide for the rights of women in the context of HIV/AIDS. While the Protocol has been praised for explicitly mentioning the need to protect the rights of women from the HIV/AIDS pandemic, scholars criticized articles 14(d) (e) as extremely superficial.[20] These general comments responded to criticisms by specifying the measures to be taken by states parties to ensure the full implementation of women's rights to sexual and reproductive health in general and pertaining to HIV/AIDS in particular. The general comments also provide a set of international standards and best practices towards an effective implementation of the provisions of Article 14 (1) (d) and (e) of the Protocol.

3. Why the Women's Protocol?: A Brief Background of Its Rationale

The foregoing analysis on the shortcomings of the Charter sheds some light as to why the Protocol is needed. The idea of having a protocol was raised in a seminar organised by the Commission with WILDAF (Women in Law and

[19] General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at its 52nd Ordinary Session held from 9 to 22 October 2012 in Yamoussoukro, Côte d'Ivoire, at http://www.achpr.org/instruments/general-comments-rights-women/(consulted 20 December 2014).

[20] Viljoen, F., An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *Washington and Lee Journal of Civil Rights and Social Justice* 16, 2009, P. 29, [hereinafter Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*].

Development in Africa) in 1995 in Lome, Togo.[21] The NGOs participating in the seminar recognized the inadequacy of the Charter and other human rights conventions in terms of guaranteeing the rights of women and started to drive the process for greater recognition.[22] Human rights and genders activists were also of the opinion that:

> *the existence of a specific treaty on women's rights has the benefit of highlighting the issues that impact upon women disproportionately, and forcing on existing mechanisms and States a more gendered interpretation of rights so that human rights really do begin to be seen as women's rights.*[23]

More specifically, there were three reasons behind adopting a protocol although they are not mutually exclusive.[24] The first reason was to have an African binding document which provides detailed rights of women. Second, a protocol was seen as a means of consolidating existing international standards for African states and to allow African governments to fulfil the international commitments to which they have subscribed. Lastly, the Protocol was seen as a strong enforcement mechanism for the existing obligations of states with respect to the rights of women in Africa. Whether the Protocol is successful in addressing these issues will be addressed in the following section.

---

[21] Murray, *Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, supra note 9, p. 261.
[22] *Ibid*.
[23] Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, p. 445.
[24] *Id*., pp. 263-264.

4. Does the Protocol Successfully Address the Drawbacks of the Charter and Other Human Rights Instruments?

As pointed out earlier, the adoption of the Protocol aims at rectifying and supplementing the shortcomings of the existing human rights instruments dealing with the rights of women. This section is devoted to analysing whether the Protocol is successful in this regard. An evaluation of the success of the Protocol is made from three angles; namely, its success in respect of broadening the scope of the existing instruments; improving observance; and using extra-legal means of implementation.

4.1 The Success of the Protocol in Broadening the Scope of the Existing Instruments

The Protocol has been praised by many writers and NGOs for addressing the concerns of African Women.[25] It has become a milestone in a number of respects either by conferring new rights to African women which have never existed in any human rights treaty or broadening the scope of rights of women in existing global and regional treaties. From the outset, it should be borne in mind that even prior to the Protocol, different treaty bodies had drawn up general comments and concluding observations regarding protection and promotion of the rights of women, for instance, authorising abortion in specified circumstances.[26] These general comments and concluding

[25] See Stefiszyn, K., The African Union: Challenges and Opportunities for Women, *African Human Rights Law Journal* (5), 2005, p. 376. Center 1, Protocol on the Rights of Women in Africa at *http://www.equalitynow.org/english/campaigns/african-protocol/african-protocol_en.html* (consulted 23 June 2007).

[26] The General Comments and Concluding Observations of the CEDAW Committee, the CRC Committee and Human Rights Committee are relevant in this regard.

observations are not, however, binding on state parties. They have only a mere persuasive value and hence, they do not create a strong obligation unlike the Protocol.

The Protocol adds rights not found in CEDAW, such as specific articles proscribing violence against women. In this regard, article 3 (4) of the Protocol requires state parties to take all appropriate measures to 'ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.'[27] The protocol is also unique among global human rights treaties in expressly articulating girls' and women's right to be protected from sexual harassment as a key component of their right to equality in education.[28] It affirms women's right to be free from sexual harassment as a basic social and economic right and as a key component of their right to work.[29] Apart from the inclusion of new rights, the Protocol incorporates provisions that expand rights contained in CEDAW. This is exemplified by the broader meaning it draws to violence against women so as to include economic harm and a threat to take physical, sexual, psychological, and economic harmful acts.[30] Given women's economic vulnerability and dependence on men, the recognition of economic harm 'which can include denial of income, refusal of permission to participate in the paid sector, or demanding that earnings be handed to the

[27] Article 3 (4) of the Protocol has to be read together with article 1 (j) that defines violence against women and 4 (2) (a) that includes violence against women as a violation of the right to life, integrity and security of the person.
[28] The Protocol, supra note 3, art. 12(1) (c).
[29] *Id*., art.13 (c).
[30] See art. 1(j) of the Protocol.

husband, and, indeed, sexual harassment at work' is indispensable.[31] Despite the recognition of violence against women in its broadest possible definition, however, the impact of the Protocol has not yet been adequately felt on the ground. The findings of research on adherence to the Protocol by six Southern African Development Community (SADC) countries focusing on the provisions of the Protocol dealing with violence against women revealed that 'the levels of violence against women in Sub-Saharan Africa remain unacceptably high and continue to fuel the spread of HIV.'[32]

Moreover, the Protocol is a groundbreaking, legally binding human rights instrument that expressly bans harmful practices, such as female genital mutilation and outlines measures to accompany legislation towards its eradication.[33] The obligation of states to proscribe harmful practices in the Protocol is extremely crucial for African women. This is because harmful practices are practiced in many African countries and their practice is a source of violation of the rights of African women. As discussed below, harmful practices, such as female genital mutilation, early marriage, widow inheritance, marriage by abduction, sexual cleansing and dry sex also increase women's vulnerability to HIV/AIDS.

Recognizing the specific human rights violations that widows experience due to harmful practices, the Protocol innovatively dedicates article 20 for the

[31] Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, p. 455.
[32] Centre for Human Rights, supra note 12, p. 91.
[33] *Id*., art. 5. Read art. 5 in conjunction with 1(g) of the Protocol that defines harmful practices and art. 2(2) of the Protocol that requires state parties to modify the social and cultural patterns of men and women as one means of elimination harmful practices.

right of widows. In particular, article 20(a) is meant to protect widows from being subject to harmful practices such as sexual 'cleansing' rituals (common in Zambia, Kenya and Malawi) that require the widow to have sexual intercourse with one of the deceased husband's relatives. In certain communities of these countries, there is a wrong belief that 'if the widow refused to exorcise her dead husband's spirit [through cleansing ritual], she would be blamed every time a villager died.'[34]

Article 20(c) of the Protocol that recognizes widow's right to marry the person of her choice and thereby outlawing the harmful practice of widow inheritance is also meant to address the plight of African women. The practice of widow inheritance commonly requires a woman to marry her husband's brother or another family member after he dies.[35] In the past, the practice was justified by taking care of the widow and the children of the deceased.[36] In the era of HIV/AIDS, however, 'this practice exposes women both to greater violence and to a greater chance of being infected with HIV/AIDS.'[37]

Recognising that much of the controversy about the human rights of African women is the issue of 'African cultural values,' the Protocol acknowledged

[34] Fuller, L., *African Women's Unique Vulnerabilities to HIV/AIDS: Communication Perspectives and Promises*, Palgrave Macmillan, New York, 2008, p. 74.

[35] Human Rights Watch, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, 2003, at <http://www.-hrw.org/reports/ 2003/uganda0803/index.htm> (consulted 20 January 2009).
[36] *Ibid.*
[37] *Ibid.*

the importance of African culture,[38] nevertheless required the participation of African women at all levels in the determination and formulation of cultural policies.[39] The equal participation of women in the formulation of cultural policies is taken as one manifestation of the non-discrimination clause of the Protocol. The participation of women in the formulation cultural policies gives them the opportunity to influence policy making so that cultural policies will be formulated in conformity with their rights. It could be contended that the right of citizens to participate in the formulation of cultural policies is a particular manifestation of the rights to participate in conduct of public affairs recognized in article 25 of the International Covenant on Civil and Political Rights (ICCPR),[40] article 21 of the Universal Declaration of Human Rights; and article 13 of the Charter.

The protocol is also the first legally binding human rights instrument to expressly recognise women's reproductive rights as human rights, and to expressly guarantee a woman's right to control her fertility.[41] Further, it

[38] Banda, F., *Women, Law and Human Rights: An African Perspective*, Hart Publishing, Portland & Oxford, 2005, P. 67 [hereinafter Banda, *Women, Law and Human Rights: An African Perspective]*. In this context, the term 'culture' should not be interpreted to include harmful practices.

[39] The Protocol, supra note 3, art.17 (1).

[40] The Human Rights Committee, an organ empowered to monitor the implementation of the International Covenant on Civil and Political Rights, has elaborated the content of the right to take part in processes that constitute the conduct of public affairs. According to the Committee, the conduct of public affairs is extensive enough to cover 'the formulation and implementation of policy at international, national, regional and local levels.' See Human Rights Committee, *General Comment No. 25, Right to Participate in Public Affairs (1996)* para 2 and para 5.

[41] The Protocol, supra note 3, art.14. See also *Fana Hagos Berhane, Women, sexual rights and poverty*: Framing the Linkage under the African Human Rights System, *in* Ngwena, Charles and Durojaye, Ebenezer (eds.), *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region through Human Rights*, Pretoria

provides more detailed provisions than global human rights instruments of women's right to reproductive health and family planning services. The protocol affirms women's right to reproductive choice and autonomy, and clarifies African states' duties in relation to women's sexual and reproductive health. The Protocol is the first international human rights instrument that explicitly authorises a woman's right to abortion 'in case of sexual assault, rape, or incest; and when the continued pregnancy endangers the mental and physical well-being of the mother or the life of the mother or the foetus.[42]

The recognition of abortion right in the Protocol is of paramount importance to African women. Africa is a continent in which 4 million unsafe abortions take place each year and 40 percent of unsafe abortions in the world occur.[43] Another staggering statistic tells us that '[w]hile the ratio of unsafe-abortion-

University Law Press (PULP), 2014, P. 334; and Stefiszyn, Karen et al, Realising the Right to Health in the Universal Declaration of Human Rights after 60 Years: Addressing the Reproductive Health Rights of Women Living with HIV in Southern Africa, A project by the Centre for Human Rights, University of Pretoria, for the Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights - Protecting Dignity: An Agenda for Human Rights, June 2009, P. 23, at

<atfile:///C:/Users/Vostro154032bit/Downloads/13282_gender_realising_right_to_health_hiv_southern_africa.pdf> (consulted 16 April 2015).

[42] The Protocol, supra note 3, art.14 (2) (c).

[43] See the Millennium Development Goals Report 2006, UN, New York, 2006, pp. 6–7. See also Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, pp. 458-59; Centre for Reproductive Rights (CRR), The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights': Briefing Paper, February 2006, p. 1, at <http://www.reproductiverights.org/sites/default/files/documents/pub_bp_africa.pdf>(consulted 16 April 2015); and CEDAW Committee, *General Comment 24 on Health*, UN Doc. a/54/38/Rev.1, paras. 12(d), 14 and 31(c) (e).

related deaths in low-resource countries is estimated to be 330 per 100,000 abortions, that of Sub- Saharan Africa is 680 per 100,000 abortions.'[44] Even if restrictive abortion laws are not the sole reason for the occurrence of unsafe abortion, 'such laws constitute a potent obstacle to accessing safe abortion services' and 'serve as major incentives or active catalysts for resort to unsafe, illegal abortion.'[45] Thus, the recognition of abortion in the Protocol could have an immense contribution in terms of paving the way for safe abortion and thereby reducing the suffering of African women.

The Protocol is the only obligatory human rights instrument that specifically addresses women's rights in relation to HIV/AIDS, and to recognise protection from HIV/AIDS as a key component of women's sexual and reproductive rights.[46] In addition to guaranteeing women's right to protection from sexually transmissible infections, including HIV/AIDS, the protocol guarantees women's right to adequate, affordable, and accessible health services.[47] The Protocol, by recognizing the right of women to be protected against HIV/AIDS, impose a duty on state parties to take measures to address all the factors that exacerbate women's vulnerability to HIV/AIDS in Africa.

[44] Singh, S., The Incidence of Unsafe Abortion, *in* Warriner, K. and Shah, H., (eds.), Preventing Unsafe Abortion and its Consequences, Guttmacher Institute, New York, 2006, p. 45. For similar data, see also Klugman, supra note 12, pp.711-717.

[45] Ngwena, C., Protocol to the African Charter on the Rights of Women: Implications for Access to Abortion at the Regional Level, *International Journal of Gynecology and Obstetrics*, (110), 2010, p. 164.

[46] Article 14 of the Protocol.

[47] *Id*., art.14 (1) (d) & 14 (2) (a).

Apart from physiological factors,[48] women's vulnerability to HIV in Sub-Saharan Africa stems from a mix of social and human rights factors.[49] The social and human rights factors that increase women's vulnerability to HIV infection include: harmful traditional practices, sexual violence, such as rape, and other socio-economic factors which limit women's capacity to protect themselves.[50] Rape and other forms of sexual assault diminish the power of women to control when, with whom, and how they perform sex, which in turn considerably increase their HIV infection.[51] Lack of economic independence of women also fuels their susceptibility to HIV/AIDS. It is an unquestionable fact that women are generally economically dependent than men particularly in Sub-Saharan Africa. Consequently, economically dependent women will be more submissive to their spouses' sexual request even in risky situations;

[48] Most African women become infected with HIV through unprotected sexual intercourse. Studies made it clear that male-to-female sexual transmission of HIV is much greater than female-to-male transmission. The major factors that account for this greater variation in transmission 'are the large mucosal surface area exposed to the virus in women, and the greater viral concentration in semen compared with vaginal secretions'. See Amnesty International, Women, HIV/AIDS and human rights, 2004, at <http://www.amnesty.org/en/library/asset/ ACT77/084/2004/en/dom-ACT770842004en.pdf> (consulted 2 February 2009).

[49] *Ibid*.

[50] *Ibid*. See also Tlou, S., Gender and HIV/AIDS, *in* Max Essex *et al* (eds.) *AIDS in Africa*, Kluwer Academic Publishers, New York, Boston, Dordrecht, London, & Moscow, 2002, p.655.

[51] World Health Organization, *Violence against Women and HIV/AIDS: Setting the Research Agenda*, World Health Organization, Geneva, 2000, p. 6.

for fear that they will be abandoned by their spouses.[52] Moreover, poverty may compel women to exchange sex for food or other needs.[53]

In guaranteeing women's right to adequate, affordable, and accessible health services, the Protocol, *inter alia*, enjoins states to ensure that millions of women living with HIV/AIDS in Africa have access to antiretroviral medication. Apart from realizing the right to health of women living with HIV/AIDS, ensuring treatment of those infected with and affected by HIV/AIDS significantly contributes towards the public health goals of controlling HIV/AIDS and mitigating its effects. It has also become clear that HIV treatment lessens the socio-economic impact of HIV/AIDS and increases the length and quality of life of PLWHA.[54] Proper implementation of an antiretroviral therapy (ART) program has proven to be successful in terms of significantly reducing the viral load and thereby reducing the risk of HIV transmission. The role of ART on HIV prevention was initially recognized in the context of preventing the vertical transmission of HIV from the mother to the child.[55] Recent evidence, nevertheless, shows the impact of ART beyond vertical transmission. According to a study by the United States National Institutes of Health, 'if an HIV-positive person adheres to an effective

[52] Andreeff, J., *The Power Imbalance between Men and Women and its Effects on the Rampant Spread of HIV/AIDS among Women*, *Human Rights Brief*, (l.9), 2001, p. 24. See also, Human Rights Watch, supra note 35.
[53] Facing the Future Together, *Report of the United Nation Secretary General's Taskforce on Women, Girls and HIV/AIDS in Southern Africa*, 2004, p.9.
[54] WHO, *National AIDS Programs: A Guide to Monitoring and Evaluating HIV/AIDS Care and Support*, 2007, p.7, at <http://data.unaids.org/publications/irc-pub06/jc1013-caresupport_en.pdf> (consulted 1 January 2011).
[55] UNAIDS, *Outlook Report*, 2010, p. 48, at <http://data.unaids.org/pub/Outlook/2010/20100713_outlook_report_web_en.pdf> (consulted 20 July 2011).

antiretroviral therapy regimen, the risk of transmitting the virus to their uninfected sexual partner can be reduced by 96%.'[56] Furthermore, ART has proven to increase the uptake of HIV testing and encourage disclosure of HIV status. It also significantly contributes to reducing stigma and discrimination compounding HIV infection.[57]

While African states have significant gain in terms of reducing new HIV/AIDS infections and HIV/AIDS related morbidity and mortality, HIV/AIDS continues to be a major public health problem in Africa even currently. Of the 35 million people living with HIV at the end of 2013 around the world, 24.7 million were living in sub-Saharan Africa.[58] In terms of new infections, 'adolescent girls and young women account for one in four new HIV infections in sub-Saharan Africa.'[59] The figures clearly show that African states must design and implement more targeted strategies to curb HIV/AIDS infection among adolescent girls and young women.

Although the Protocol should be praised for recognizing the rights of women in the context of HIV/AIDS, scholars have criticized its HIV/AIDS provisions as unnecessarily brief and ambiguous particularly in the light of the need to

[56] UNAIDS, *Groundbreaking Trial Results Confirm HIV Treatment Prevents Transmission of HIV*, May 2011, at

<http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2011/may/20110512pstrialresults/#d.en.59530> (consulted 15 June 2011).

[57] *Ibid*.
[58] UNAIDS, Gap Report, 2014, p.18.
[59] Id., p.5.

give the necessary guidelines for states to discharge their duties.[60] It is true that the provisions on HIV/AIDS are scanty given the gravity of the problem on African women. However, the Protocol itself implicitly recognizes this limitation and consequently by referring to "internationally recognized standards and best practices."[61] These internationally recognized standards and best practices can be used to elucidate the rights and corresponding states' obligation. Moreover, the Commission has responded to this criticism by issuing General Comments on Article 14 (1) (d) and (e) of the Protocol. These General Comments 'unpack the obligations arising out of the provisions, and set out the specific methods in which a state could meet its responsibility' under the Protocol.[62]

Apart from those rights mentioned above, the Protocol addresses a range of rights of women in different contexts, such as marriage, including polygamy and the choice of matrimonial regime.[63] Economic and social welfare rights and group rights,[64] such as the rights to a healthy and sustainable environment,[65] the right to peace,[66] and the right to development[67] are also

[60] Stefiszyn, Karen*, Adolescent Girls, HIV and State Obligations under the African Women's Protocol, in* Ngwena, Charles and Durojaye, Ebenezer (eds.), *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region through Human Rights*, Pretoria University Law Press (PULP), 2014, p.161.
[61] The Protocol, supra note 3, art. 14(1) (e).
[62] Geldenhuys, M., et al, The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e) of the Protocol, *African Human Rights Law Journal*, (14), 2014, pp. 485-486

[63]The Protocol, supra note 3, art. 6.
[64] *Id*., art. 3.
[65] *Id*., art. 8.
[66]*Id*., art.10.
[67] *Id*., art.19.

addressed. The Protocol is particularly innovative as is the inclusion of the right to inheritance,[68]and special protection for the elderly and disabled women.[69]

With regard to polygamy, the Protocol, under article 6(c), implicitly recognizes polygamous marriages. Polygamy is a practice that allowes a man to marry more than one wife. It remains a practice in many countries, particularly in Africa.[70] Polygamy has been justified by 'sexual abstinence during pregnancy in societies where sexual intercourse' was a 'taboo during periods of pregnancy, menses, lactation, mourning, and ritual ceremony periods';[71] and giving 'security to childless women'. [72] It serves as an instrument of sexual abstinence during the said times as the husband would have sex with one of his other wives. It also gives sterile women some sort of security because the husband can marry additional wife instead of divorcing the sterile one.[73] Polygamous marriages are, nevertheless, less acceptable these days. This is because when compared to monogamous marriages, they are more risky in terms of HIV/AIDS transmission. Women are generally more subservient in this kind of marriage than in monogamous marriage.[74] Since the husband may have several wives, he can divorce one of them in

[68] *Id*., art.21.
[69] *Id*., arts. 23 &24.
[70] United Nations Children's Fund, *Early Marriage: a Harmful Traditional Practice: a Statistical Exploration,* 2005, p.18.
[71] Mwale, G. *et al, Women and AIDS in Rural Africa: Rural Women's Views of AIDS in Zambia,* Avebury, 1992, pp.39-40.
[72]Ibid.
[73] Id., p.39.
[74] See Human Rights Watch, supra note 35, p.32.

case of refusal to blindly obey him. The inferior position of the women in this relationship will decrease her bargaining power over when and how to have sex.[75] Thus, seeing this from the right to equality and HIV/AIDS prevention points of view, polygamous marriages should not be tolerated. The Protocol is, however, cautious in recognizing polygamous marriages. While, on the one hand, it implicitly recognizes polygamous marriage and thereby embraces culture, it requires states to ensure the rights of women living in this kind of relationship, on the other hand. Thus, it rectifies the shortcomings of CEDAW and the Charter by striking a balance between culture and equality. However, it remains to be seen how states will be able to ensure equality between men and women living in polygamous marriages while at the same time allow the existence of such kind of marriage.

Undeniably, the Protocol has incorporated new rights for African women which had never been addressed either by international or African human rights instruments. In some cases, however, the Protocol falls clearly below international standards and contains provisions that do not reflect realities on the ground.[76] For example, it fails to expressly refer to the right of women to vote or to participate at the international level despite its inclusion in the General Comment No. 23 of the CEDAW Committee.[77] With respect to the

[75] G Mwale, supra note 71, pp.39-40. See also Andreeff, supra note 52, p.24.

[76] Murray, Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa, supra note 9, p. 268.

[77] Art. 9 (1) of the protocol limits the political participation of women at national level, thereby excludes their participation at international level. On the other hand, the CEDAW Committee, in its General Comment No. 23, has given broad scope of participation, including in national and international levels.

right of women to participate at international level, the CEDAW Committee contended that:

> *Under article 8 [of the CEDAW], Governments are obliged to ensure the presence of women at all levels and in all areas of international affairs. This requires that they be included in economic and military matters, in both multilateral and bilateral diplomacy, and in official delegations to international and regional conferences.*[78]

Article 7(d) of the Protocol is another example where the Protocol does not guarantee a robust protection of the right of women. This provision requires states to 'ensure that, in case of separation, divorce or annulment of marriage, women and men shall have the right to an *equitable* sharing of the joint property deriving from the marriage.' Given the ambiguity of the term "equitable" share, women may be disfavored during partition of common property in the event of dissolution of marriage. As Banda contended:

> *The concept of what is fair or equitable is, like beauty, in the eyes of the beholder. Women rarely receive equal shares in property on death or divorce, meaning that it was incumbent on an instrument seeking to protect their rights to state explicitly that they were entitled to equal shares with men. Women's historical lack of access to resources, including land, has played a major role in their relative lack of bargaining power vis-`a-vis men, and has been identified as a reason for the fact that they are disproportionately impacted by poverty. If anything, it has made them subject to the whims of husbands, fathers and brothers. With this in mind, it is a pity that, when addressing*

[78] The CEDAW Committee, *General Comment No. 23*, para 35.

> *women's rights to access land, the Protocol was not more explicit in saying that women had equal access to land.*[79]

The Commission, by availing itself of its power of "formulat[ing] and lay[ing] down principles and rules aimed at solving legal problems relating to human and peoples' rights" provided under article 45(1)(b) of the Charter, can rectify this ambiguity through contextual interpretation and interpretation in the light of the object and purpose of the treaty.[80] In doing so, the Commission can rely on the Preamble, the definition of discrimination in Article 1(f) and the introductory phrase of Article 7 of the Protocol.

At this point, it is important to note, that in areas where the Protocol does not guarantee more robust protection, the Protocol implicitly allows treaties with stronger protection of the rights of women to override the Protocol. In this regard, Article 31 of the Protocol provides that:

> *None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.*

Article 6 of the Protocol contains important provisions that are designed to protect the right of women during marriage and the conclusion thereof. However, in one its sub article, it sets a requirement that may backfire against

[79] Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, p. 463.
[80] For the rules of interpretation of treaties, see article 31of the Vienna Convention on Law of Treaties of 1969.

women themselves. In particular, Article 6 (d) of the Protocol stipulates that 'every marriage shall be recorded in writing and registered in accordance with national laws, *in order to be legally recognized*.'(Emphasis mine) The obvious purpose of this provision is to enable women to easily prove the existence of their marriage and thereby claim the consequence of marriage notably partition of common property. Put differently, it aims at safeguarding women from denial of their marital relationship and the results thereof. Despite the good intentions of the drafters, however, the written form and registration requirement of marriage may negatively affect millions of rural women. In rural areas of Africa, marriage is quite often concluded according to local custom without bothering about the written formality and much less about its registration. Moreover, the marriage registration services are often not available in rural areas. Thus, the registration requirement for the legal validity of marriage may disadvantage women themselves for the simple reason that women who concluded their marriage in accordance with customary and religious rules cannot prove their marriage for lack of certificate of marriage. As discussed below, it is for this reason that South African made a reservation on Article 6 (d) of the Protocol. The author of this article is also of the opinion that one of the reasons for Ethiopia's failure to ratify the Protocol so far is due to the requirement of Article 6(d) of the Protocol. According to the Revised Family Code of Ethiopia, marriage registration is not a requirement for the validity of marriage whether the marriage is concluded according to customary or religious rules or even

before the officer civil status.[81] This stipulation of the Family Code is in part a reflection of the reality that marriage registration facilities are not available in many parts of Ethiopia.

4.2 The Protocol's Success in Improving Observance

As an instrument supplementing the Charter, the Protocol is monitored by the same body as the Charter; namely, the Commission. As can be discerned from Article 26 (1) of the Protocol, state parties are under obligation to submit to the Commission their periodic reports in accordance with article 62 of the Charter. The African Court on Human and Peoples' Rights is also entrusted with the task of interpretation of the Protocol.[82]

From this, it is possible to argue that the Protocol does not add value to the Charter as regards putting in place institutions in charge of overseeing states' observance of the obligations they assume in the Protocol. The main downside of the Protocol in this respect is its failure to establish a separate treaty monitoring body for the Protocol similar to CEDAW that established the CEDAW Committee and the Charter on the Rights and Welfare of the Child that established the African Committee on the Rights and Welfare of the Child. Banda severely criticized the Protocol for its failure to set up a distinct monitoring body raising the following three reasons.[83] First, the CEDAW Committee 'has played an important role in raising the profile of

[81] Revised Family Code, 2000, Art. 28, Proc. No. 213/2000, *Fed. Neg. Gaz*. (Extraordinary issue), year 6, no. 1.

[82] See article 27 of the Protocol.

[83] Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, pp. 469-470.

women's rights throughout the organization' and its jurisprudence has augmented the works of the United Nations (UN) treaty monitoring bodies and other agencies of the UN. A separate treaty monitoring body for the Protocol could have played similar role at the African Union (AU) level. Second, despite the fact that the Commission has shown improvements in its treatment of issues of women, it is less likely that it can effectively and efficiently deal with all human rights issues at continental level including the rights of women. Third and related to the second, the continued human rights violations of women in different parts of the continent coupled with wide spread gender-based discrimination means that a separate body should be dedicated to overcome these challenges.

A close examination of the relevant provisions of the Protocol, however, reveals that the Protocol has gone a step ahead in designing effective mechanisms of compliance at the domestic level. In this respect, article 25 (1) of the Protocol requires state parties to provide appropriate remedy to any woman whose rights or freedoms have been infringed. Based on this general obligation, states should put in place specific remedies to victims of human rights violations. Remedies for violation of human rights may take different forms including 'cessation of an ongoing violation' and reparation to victims of human rights violations.[84] The Human Rights Committee explained that reparation may include 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-

[84] *See* Human Rights Committee, *General Comment No.31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2004, paras. 15 and 16.

repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.'[85] Courts, national human rights institutions and administrative bodies are the main government institutions providing remedies.

4.3 The Success of the Protocol in Including Extra-Legal Means of Implementation

The Protocol is commendable, not only for its recognition of the limitations of legislative prescriptions alone and its provisions, but also for taking a holistic approach to women's rights.[86] Such broad-based approach to protection of rights is also reflected in the implementation mechanism of the Charter. The drafters of the Protocol are cognizant of the fact that promoting and protecting the rights of women involves a sea change in societal and individual thinking. To effect such profound social change, government action should take multiple forms and legislative measures should be part of a long-term process of promoting social justice for all, particularly women.[87]

The Protocol requires state parties to take a range of non-legislative means of implementation of the provisions of the Protocol. These include, but are not limited to, policy, administrative, social and, economic measures;[88] education

[85] *Ibid*.
[86] Stefiszyn, supra note 25, pp. 376-77.
[87] Center for Reproductive Rights: Female genital mutilation: A matter of human rights, at <*http://www.reproductiverights.org/pdf/fgmhandbook.pdf*> (consulted 24 June 2007).
[88] The Protocol, supra note 3, arts. 2 (1) (c) & 4 (2) (b).

and outreach programmes;[89] supporting victims of harmful practices;[90] and provision of legal aid.[91]

5. Challenges to Effective Implementation

Even though the Protocol managed to rectify most of the drawbacks of the existing instruments on rights of women, such as the Charter and CEDAW, its effective implementation may be challenged by a number of factors. The following two sub-sections discuss these challenges.

5.1 Cultural and Religious Challenges

Generally speaking, international human rights treaties, including CEDAW, face a legitimacy crisis and attempts to enforce them face difficulty as states raise culture as a defence for non-compliance for their treaty obligation.[92] Effective realisation of the rights of women envisaged in CEDAW has been greatly hindered by the sweeping reservations entered by states.[93] What is striking is not just the number or scope of the reservations that states entered,

[89] *Id*., art.2 (2) & 5 (a).
[90] *Id*., art. 5(c).
[91] *Id*., art. 8 (a).
[92] Mullally, S., *Gender, Culture and Human Rights: Reclaiming Universalism*, Hart Publishing, Portland, Oregon & Oxford, 2006, p. 74, [hereinafter Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism]*.
[93] *Ibid*. As explained by Mullally, 'More than half of the states parties to the Convention have entered reservations and declarations, limiting the scope of the Convention and also limiting the mandate of the CEDAW Committee. Many states have entered sweeping reservations to article 2, the core obligation of the Convention, making it difficult to ascertain what obligations, if any, are being undertaken by those states'.

but the justifications given by states for making the reservations.[94] States have appealed to religious beliefs and practices to justify such reservations.[95]

With respect to cultural and religious challenges, the Protocol, like CEDAW, may face a stiff cultural resistance. This argument is reinforced by the situation of Africa where different societies give priority to culture and religion than law as their guiding principle. Consequently, African women may still be victims of discriminations and harmful practices despite the hope that the Protocol will resolve such problems.

Of course, the Protocol has incorporated mechanisms, such as awareness-raising, to tackle harmful practices. Until now, however, the traditional practices, such as female genital mutilation have proven to be difficult to eliminate, despite efforts of awareness-raising, legislative reform and human rights activism.[96] Why is this so? First, communities that practice female genital mutilation and other such practices today believe that their tradition is indeed logical, rational, and necessary. Second, the rural socio-cultural setting where these practices are particularly widespread is steeped in traditional and socio-cultural norms that guide individual behaviour.[97] Third, the formal law including the family and the criminal law which should be applicable are mostly simply imposed without sufficiently raising the awareness of law

[94] Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism*, supra note 92, p. 89.
[95] *Ibid*.
[96] Packer, C., Understanding the Socio-Cultural and Traditional Context of Female Genital Mutilation and the Impact of Human Rights Discourse, *in* Nnaemeka, O. and Ezeilo, J. (ed.), *Engendering human rights: Cultural and socio-economic realities in Africa* Palgrave MacMillan, New York, 2005, p. 227.
[97] *Id*., p. 228.

enforcement local officials and the people on the ground. Such kinds of impositions are far from success in communities in which cultures are deeply embedded.

5.2 Ratifications

According to Article 29(1) of the Protocol, the Protocol would come into force upon ratification by 15 states. For a treaty to impose a binding obligation on individual states, a state in question should ratify or accede to it after the treaty is enforced. A state will be bound by treaty obligation only where it willingly becomes a party to a treaty either through ratification or accession. On 26 October 2005, the Protocol received its 15th ratification, meaning the Protocol entered into force on 25 November 2005. For the Protocol to bring the desired change to the lives of all African women, it needs to be ratified by all African states. Although the ratification status of states is encouraging with the 36 ratifications, there are still 18 countries that have not yet ratified.[98] Of these 18 countries that have failed to ratify so far, 3 of them have even failed to sign the Protocol. Ethiopia has signed but not ratified the Protocol. This lack of universal ratification of the Protocol may hinder the application of the Protocol all over Africa. Compared to the ratification of CEDAW by African states, the ratification of the Protocol by the same token is not satisfactory. As mentioned above, CEDAW has been ratified by all African States except Somalia, South Sudan and Sudan.

[98] For list of countries that have ratified the Protocol, at < *http://www.achpr.org/instruments/women-protocol/ratification/*> (consulted 19 December 2014).

Therefore, for the Protocol to have a wider scope of application, relevant NGOs and human rights activists must lobby African governments to ratify the Protocol. Moreover, states that are not yet parties to the Protocol should also consider ratification by themselves to turn their commitment of realization of rights of women into reality.

Although states may be willing to ratify the Protocol, they may do it with reservations. Obviously, reservations impact on the scope of application of the Protocol. The Protocol is silent as to whether states can enter reservations. The silence of the law may be interpreted in two ways. First, since it does not expressly allow reservation, reservation is prohibited. However, this argument is weak because, if the silence is interpreted as prohibition of the reservation, it prevents the Protocol from having wider acceptance which defeats the very purpose of the Protocol.[99] The second possible interpretation is that the silence of the Protocol is with the implicit assumption that the issue of reservation shall be governed by international law. This is a much more plausible interpretation; certainly more tenable than the former one.[100] As long as the reservation is compatible with the object and purpose of the Protocol,[101] it must be allowed so that states will not be shying off ratifying the Protocol.

[99] Dugard, J., *International Law: A South African Perspective*, third edition, Lansdowne, Juta, p. 411.
[100] Article 19 of the Vienna Convention on the Law of Treaties of 1969 provides the conditions of entering reservations.
[101] *Ibid*.

Although reservations entered upon ratification have been the major setback for CEDAW, the problem is less visible in the Protocol.[102] According to the available information, only three countries; namely, The Gambia, Namibia and the Republic of South African made reservations to the Protocol.[103] According to Viljoen, while there were many countries that raised concerns during the drafting stages of the Protocol, only these countries made reservations.[104] Both South Africa and Namibia made reservations on Article 6 (d) of the Protocol which requires every marriage to be reduced in written form and registered consistent with domestic law to produce legal consequence. In their reservations, Namibia postponed the requirement of registration until the issuance of legislation to that effect and South African excluded the application of the validity requirement of registration of marriage for customary marriages.[105] While the sweeping reservation made by the Gambia on Articles 5, 6, 7 and 14 was viewed by scholars as incompatible with the very purpose and objectives of the Protocol, it withdrew its reservation in March 2006 as a result of a sensitization campaign by civil society organizations.[106]

---

[102] Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, supra note 20, p. 42.

[103] Information available at http://www.chr.up.ac.za/index.php/documents-by-theme/women.html (consulted 20 December 2014).

[104] Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, supra note 20, p. 42.

[105] Information available at http://www.chr.up.ac.za/index.php/documents-by-theme/women.html (consulted 20 December 2014).

[106] Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, supra note 20, p. 43.

6. **Conclusion**

The core aim of the Protocol is undoubtedly to remedy the limitations of the Charter and other human rights instruments with respect to protecting women from discrimination and harmful practices. In doing so, the Protocol has made a remarkable progress by introducing new rights which do not exist in other treaties although few rights incorporated in other treaties are left out or inadequately guaranteed in the Protocol. Scepticism about the single-hand effective implementation of the Protocol by the Commission has also made progress in terms of designing domestic ways of implementation, such as by requiring states to provide appropriate remedy for any woman whose rights have been violated. Last but not least, it has coupled legislative and non-legislative means of implementation which is expected to improve the effective application of the Protocol.

Despite these innovative aspects of the Protocol, there are some factors that may hinder the Protocol from keeping its Promise. As is the case of CEDAW, the practical application of the Protocol at a grass-root level may be challenged by cultural and religious practices. As the current trend shows, lack of universal ratification and reservation may also hinder the scope of application of the Protocol. In order to effectively implement the Protocol, therefore, governments must ratify the Protocol with minimum possible reservation(s) and ensure the implementation thereof. Much is also expected from NGOs in terms of awareness-raising on the ground and lobbying governments to ratify the Protocol.

The Commercial-Civil Dichotomy of Business Organizations and Its Legal Significance under Ethiopian Law

Gizachew Silesh[♦]

Abstract

The classification of business organizations into commercial business organizations and civil business organization (also known as non-commercial business organizations) is traditionally maintained in most civil law countries. The Ethiopian legal system, which maintains distinct civil codes and commercial codes, also upholds the classification of business organizations into commercial and civil business organizations. With respect to this classification, a host of issues remain blurred. What is the basis of the classification? Is the basis of the classification clear cut? What are the legal consequences of this classification? What legal frameworks do these categories of business organizations share and where do they differ? Do we necessarily need to sustain this dichotomy anymore? Has any subsequent legislation affected the earlier legal framework of the distinction in the Commercial Code of Ethiopia? These issues and other related matters deserve critical consideration in the Ethiopian context. Through analysis of these issues, this article concludes that the civil-commercial dichotomy of business organizations is somewhat old fashioned, at least in some respects, and under Ethiopian law it has put civil business organizations at a disadvantage.

Key Terms: Commercial Business Organizations, Civil Business Organizations, Commercial Activities.

[♦] LLB (Addis Ababa University), LLM (Addis Ababa University), Lecturer, Bahir Dar University, School of Law.

Introduction

Traditionally, a division of private law in to civil law and commercial law is maintained in the continental legal system.[1] However, whether there exists a compelling logic to divide the general private law in to civil law and commercial law has continued unsettled. The points of convergence and divergence between commercial and civil law remain contested. Scholars ponder on questions about what distinct category of subjects and/or transactions the two branches of private law distinctly regulate.[2] Do they significantly differ in content and then have differing consequences in regulation? The general response is that the two branches of private law have special subjects and transactions to regulate; commercial law specifically governs commercial transactions (as opposed to civil transactions) and/or merchants and business organizations (as opposed to other persons).[3] Nevertheless, there are no satisfactory scientific criteria to precisely demarcate these domains of commercial law in contrast to those that are the subject of civil law.[4] Indeed, cross-references between the two branches of private law whereby one recognizes the applicability of the other branch of private law as a gap filling law are common but this cross reference tends to

[1] See generally, Tallon, Denis, Civil Law and Commercial Law, in David, R *et al* (eds.), International Encyclopedia of Comparative Law, Volume VIII, Chapter 2(Martin Nijhoff Publishers,; the Hague, Boston, London; 1983).

[2] Ibid.

[3] Ibid.

[4] Enrique Lalaguna Domínguez, The Interaction of Civil Law and Commercial Law, 42 La. L. Rev. (1982)

Available at: http://digitalcommons.law.lsu.edu/lalrev/vol42/iss5/10 P.1634.

reduce their distinctness.[5] Along with this controversy, there comes the problem of delineating categories of subject matters regulated by the two. The classification of natural and legal persons as a primary subject of either of the two has posed a challenge.

In an attempt to demarcate the subjects of the two branches of private law, there arose the classification of business organizations into commercial business organizations and civil business organizations. It continues to be a point of contention as to whether the categorization of business organizations into commercial and civil would/should put them into the exclusive domain of commercial law and civil law respectively. The Ethiopian legal system, that has maintained distinct civil code and commercial code, has also adopted the classification of business organizations into commercial and civil business organizations.[6] This dichotomy has left a host of issues awaiting exposition but little or no research has done that so far. The distinction might be particularly perplexing in Ethiopia since both of these business organizations are regulated by the Commercial Code, unlike the case of many countries with similar distinction but that are regulated separately in the commercial codes and civil codes. This article aims to uncover the basis of such classification, the legal consequence of the distinction, as well as the importance or otherwise of maintaining the distinction with the pre-existing scope particularly in the Ethiopian context.

---

[5] Ibid.

[6] Commercial Code of the Empire of Ethiopia, 1960, Art.10, Proclamation No.166 / 1960, Neg. Gaz., Year 19, No.3 (Herein after Commercial Code).

Methodologically, the author heavily relied on review of literatures and laws in the continental legal system to explain the position of Ethiopian law on issues raised. This article is organized in to four main sections. The first section of this article, briefly explores the notion of business organizations in Ethiopia generally while the second section reviews major classifications of business organizations based on different parameters. Particular emphasis is given to the exposition of the distinction between civil business organizations and commercial business organizations for which section three is dedicated. Since classification partly depends on the nature of the economic activities in which they engage, this section has also provided a fair account of the distinctive feature of commercial activities and the non-commercial activities, with a separate portion on commercial activities in Ethiopian law. In addition, justifications for the distinction between commercial and civil business organizations based on their form of organization are offered. Section four is devoted to analysis of the legal significance of having the distinct category of business organizations. It constitutes a significant portion of this article. Finally, under section five, concluding remarks are provided, in which the writer forwards his appraisal of the relevance of the distinction. As the scope of this piece does not allow, this author does not claim to have undertaken exhaustive investigation of implications of the distinctions.

1. A Brief Overview of Business Organizations under Ethiopian Law

Commercial law plays a pivotal role in facilitating the business environment. Nations strive from to provide the utmost suitable legal environment for operation of business. Commercial activity may be carried out individually or

in groups where businessmen join hands to exploit the advantages from mobilizing capital, skill and other resources.

Commercial law has lent its hand in assisting the creation and operation of a number of alternative ways of doing business. A person may conduct business as a sole proprietor (trader). Alternatively, business people having the common goal of operating business by combining their capital and/or labor may avail business organizations may be employed as a way of doing business. The laws of many nations, including the Ethiopian Commercial Code, provide various alternatives of these business associations. These alternatives business associations are just like the menu from which the persons who intend to join hands for their business success would select according to their preferences. Each form of business association has its own advantages and disadvantages. Which form is best adapted to a particular venture depends on many factors such as the nature of the business, the number of associates, their relative ability and willingness to participate in management, the extent of their capital investments, etc.

The Ethiopian Commercial Code recognizes six forms of business organizations[7] namely, ordinary partnership, general partnership, limited partnership, joint venture, share company, and private limited company. The law defines business organizations in general by describing their common attributes, and then characterizes each of them separately. According to Art. 210(1) of the Commercial Code, a business organization is "any association

[7] Commercial Code, *supra* note 6, Art.212.

arising out of a partnership agreement." This definition simply tells us that there must be a voluntary association[8]/grouping between two or more persons. Needless to say, not all voluntary groupings are business organizations. A fair rectification of the limitation in this definition could be derived from its reference to 'partnership agreement' as a base for establishment of business organizations-that all business organizations are preceded by partnership agreement. A partnership agreement is defined as "a contract whereby two or more persons who intend to join together and to cooperate undertake to bring together contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out thereof, if any."[9]

Some important, and perhaps distinctive, attributes of business organizations are enshrined in this definition. First, it tells us that business organizations come in to existence by virtue of a contract implying that all requirements for validity of contract must be met. Also, as business organizations are groupings, we need at least two persons. This requirement of minimum of two persons is true for all business originations except a share company, in which at least five persons are required.[10] It also indirectly informs us that Ethiopian

[8] The use of the term 'association' in definition of business organizations as "any association arising out of a partnership agreement" might be misleading when seen in conjunction with the Civil Code provision on association. The term association is not used in the sense it is used in Art.404 of the Civil Code. Rather it is better to understand it as grouping of persons. See Civil Code of the Empire of Ethiopia, 1960, Art.404, Proclamation No.165 / 1960, Neg. Gaz., Year 19, No.2 (Herein after Civil Code).

[9] Commercial Code, *supra* note 6, Art.211.

[10] Ibid., Art. 307(1).

law does not recognize a business organization with a single member, unlike the case of some countries where a one person company is recognized.[11]

Moreover, the phrase "… intend to join together and to cooperate…" implies that the parties must have a community of interest and intend to collaborate. A business organization arises from deliberate act. It does not arise from possession of status such as being heirs to one person and joint owners of property. Commitment and intent to collaborate must be accompanied by contribution (in kind or in cash)[12] toward the capital of a business organization. An important element in this definition is the purpose of cooperation agreement- to carry out economic activity and thereby seek to earn profit. Yet engagement in business activity may entail loss. The parties

[11] See Commercial Company Act (of Portuguese), (Republished by Decree-Law No. 76-A/2006, of 29 March and amended by Decree-Law No. 8/2007, of 17 January and Decree-Law No. 357-A/2007, of 31 October), (herein after Commercial Company Act of Portuguese), Art. 270- A. For instance the Portuguese commercial code recognized Single-member Private Limited Companies. It prescribes in Article 270- A Establishment-that:

1) Single-member private limited companies shall be established by a single partner, an individual or legal person, who is the owner of the entire share capital.

2) Single-member private limited companies may lead to a concentration in the ownership by a single partner of the quotas in a private limited company, regardless of the reason for the concentration.

3) The conversion referred to in the previous paragraph shall be brought about by means of a declaration by the single partner, in which their will to convert the company into a single-member private limited company is expressed. The said declaration may form part of the document entitling the transfer of shares.

[12] Commercial Code, *supra* note 6, Arts. 229-232.

realize that and agree to share both in profits and losses.[13] These being the elements of the definition, it gives the impression that if there is a partnership agreement that fulfills all of the definitional elements elaborated here, there will be a business organization. This would relegate a business organization into a mere contractual relationship among persons. However, business organizations (except joint venture) are vested with institutional character that goes beyond contractual relationship. They do have their own legal personality.[14] They will acquire legal personality upon registration in the register of commerce.[15] Although business organizations share common characteristics as enshrined in the definition of partnerships agreement, each of them have unique attributes, some of them share several features not shared by others; they can be typified and classified in different ways.

[13] Ibid., Art. 215. The partnership agreement may never award all profits to some of the partners alone. All should have a share in profits. Similarly no partner may be exempted from losses that may accrue. All partners should take parts in the losses as well. Otherwise the partnership agreement is not valid. However, there is one exception. As per Art 254 a partner in ordinary partnership who contributed skill may be exempted from sharing in losses.

[14] Some of the requirements of the definitional elements do not apply to joint venture. A joint venture as a business organization is somehow unique than other business organizations. Thus even though there has to be a partnership agreement for formation of joint venture, it does not need to be in writing unlike other business organizations. Nor should it be registered. And hence it does not have legal personality. See Ibid., (Arts. 272(2) & (3).

[15] Ibid., Art. Art. 222; Commercial Registration and Business Licensing Proclamation, 2010, Art. 9, Proclamation No. 686/2010, Fed. Neg. Gaz., Year 16, No.42. This proclamation amended the publication requirement in the Commercial Code. It provides that "[b]usiness organizations shall acquire legal personality by registering in the commercial register without being publicized in a newspaper as provided for under Article 87, 219, 220, 223 and 224 of the Commercial Code for their establishment or amendments to their memorandum of association."

2. General Overview of the Classification of Business Organizations

Business organizations may be classified in various ways. Common classifications include personal versus capital business organizations; closed (private) versus open (public) business organizations; and commercial versus non-commercial/civil/ business organizations.[16]

The personal versus capital classification of business organizations corresponds to the distinction of Ethiopian business organizations into partnerships and companies respectively. Of the six business organizations, the category of partnerships embraces four of them namely, 'ordinary partnership', 'general partnership', 'limited partnership', and 'joint venture'. The remaining two i.e. 'private limited company' and 'share company' could be characterized as capital business organizations.

Personal business organizations (partnerships)are basically characterized by the central character of the partners and the greater simplicity of its internal organization and regulation. This personal element is clearly portrayed in the legally stipulated main features that liability of the partners for the partnership debts is unlimited though subsidiary,[17] minimum statutory capital is not required,[18] service is recognized as valid contributions,[19]

[16] See Antunes, José Engrácia, An Economic Analysis of Portuguese Corporation Law-System and Current Developments, at http://www.estig.ipbeja.pt/~ac_direito/antunes.pdf; >(consulted 5 November , 2014).

[17] For instance, See Commercial code, *supra* note 6, Arts.255&294.

[18] While the provisions dealing with companies stipulate minimum capital, no similar requirement exists in relation to partnerships. See Ibid., Arts.306(1)&512(1).

interests(share) in the partnership are not freely assignable,[20] the inclusion of the name of at least two partner in the partnership trade name is a requirement,[21] each partner plays prominent role in the management of the partnership[22] and equal voting right[23] (if no other wise agreement is provided). All these show the focus of partnerships is on the persons becoming partners and subsidiary nature of capital in partnerships.

Concerning capital business organizations, of which share company is the prototype under Ethiopian law, the element of capital comes to the forefront: shareholders are not liable to debts due by the company so long as they have made their promised contribution,[24] the company has a minimum mandatory equity capital,[25] shares are, as a rule, freely transferable,[26] and the corporate organization is complex and largely mandatory,[27] decision- making power depends on the amount of voting rights as measured by the capital

---

[19] Ibid., Arts. 254.

[20] Ibid., Arts. 250&302.

[21] Ibid., Ibid., Art.281(1).

[22] Ibid., Arts. 236&287.

[23] Ibid., Arts. 234&288(3).

[24] Ibid., Arts. 304&510(1).

[25] Ibid., Arts. 306(1)&512(1).

[26] Ibid., Arts. 333&523.

[27] Ibid., Arts. 347,368,388, 525. These provisions demand that there must be shareholder meeting, board of director, and auditors in case of share companies, and in case of private limited company there must be a designated manager and depending on the number of shareholder there may be shareholders meeting and auditors.

contribution of shareholders.[28]

Business organizations may also be categorized as Private (or closed) versus Open (or public). This distinction is also common in contemporary company law systems all over the world.[29] Definitions for this distinction might vary across legal systems. But the essential characteristic is that open corporations are open to public investment while private ones are not. For instance, according to Portuguese law, public (open) corporations *(sociedades abertas)* are defined in general as stock corporations whose equity capital is open to public investment.[30] The criteria of the legal definition might be several and alternative, including corporations incorporated through an initial public offering for subscription, corporations that issued shares or other securities granting the right to subscribe or to acquire shares that have been the object of a public offer of subscription, corporations that issued shares or other securities that are or have been listed on a regulated market operating in Portugal, corporations whose shares have been sold by public offer for sale or exchange in a quantity greater than 10% of their nominal capital, or corporations resulting from a the split up of, or a merger to, a public corporation.[31] In contrast, private or closed companies are defined negatively, as being all those companies whose parts of capital are not freely transferable

[28] Ibid., Arts 407&534(2).

[29] Antunes, supra note 17, p.11.

[30] Ibid.

[31] Ibid.

and which, therefore, cannot be admitted to listing on a stock exchange.[32]

A parallel distinction can be made in Ethiopian law though the absence of stock market in Ethiopia may render this comparison less full-fledged. It appears that only a share company qualifies as public company in Ethiopia. A share company may be formed by public offering for subscription in which case it becomes public company at the initial stage.[33] Or it can be formed among founders without offering for public subscription in which it remains private (closed) but can become public at later stage as Share Company is authorized to issue transferable security including debentures and increase capital by offering for public subscription.[34] But private limited company and all other business organizations in Ethiopia cannot issue transferable security or mobilize fund by public subscription,[35] and as such can only be private. Another distinction of business organizations is into commercial and non-commercial ones, which is discussed in detail next.

3. Classification of Business Organizations into Commercial versus Civil/Non-Commercial/ Business Organizations

3.1. The General Trend

The distinction between commercial and civil/non-commercial business organizations has long caused confusion, lending itself to diverse

[32] Ibid.

[33] Commercial code, *supra* note 6, Art. 317.

[34] Ibid., Arts.429-434

[35] Ibid., Art.513

understandings in different legal systems. At times, the classification of business organizations into commercial and civil is alien to some legal systems. This distinction is not familiar, or, if familiar, not very important in common-law jurisdictions.[36] Perhaps a common law lawyer may be surprised to learn that a certain company is civil and the other is commercial while both are engaged in profit making activities, and as such the civil one is not subject to bankruptcy proceeding while the other is. On the other hand, classification of business organizations into civil and commercial is made in French Commercial Code. Similarly, division between two basic sets of companies is held in many continental legal system adherents like Germany, Spain, Portugal, etc.[37] Also the Latin-American civil law countries distinguish between commercial partnerships and civil partnerships whereby the two classes of business organizations are subject to different legal requirements and consequences.[38]

The bases of distinction between civil and commercial business organizations and its justification could be explained perhaps more on historical ground than scientific inquiry. An inquiry into the origin of the distinction between

[36] Andenæs, Mads Tønnesson & Frank Wooldridge, European Comparative Company Law, p.101

[37] Ibid.

[38]See generally Cueto-Rua, Julio, Administrative, Civil and Commercial Contracts in Latin-American Law, 26 Fordham L. Rev. 15 (1957). Available at: http://ir.lawnet.fordham.edu/flr/vol26/iss1/2. Cueto-Rua noted that commercial partnerships are endowed with juridical personality while there is a serious question, at least in several Latin-American countries, as to whether civil partnerships (*sociedad* civil) have or have not a juridical personality.

civil law and commercial law will ultimately lead us to appreciation of the foundation of civil and commercial business organizations dichotomy. Historically, with the growth of commerce there appeared a body of customs and practices applicable to merchants as a class that constituted what is commonly known as *lex mercatoria* or law of the merchants.[39] The *lex mercatoria* then underwent a profound change due to state intervention that ultimately led into the codification of rules governing merchants (traders), on the one hand, and separate rules governing civil matters, on the other hand, that finally resulted in the codification of separate civil and commercial codes among the Romano-Germanic legal families. Notable in this regard is the Napoleonic codification (Civil Code of 1804 and Commercial Code of 1807) that opened the era of distinct codification of private law.[40] Accordingly, the economic engagement of some persons is governed by the commercial law while others are governed by the civil law.[41] On the other hand, in common law countries the *lex mercatoria* was absorbed, by and large, into the general private law-common law-without leading to separate commercial law codification though recent enactments of separate commercial legislation such as the 'Uniform Commercial Code' in United States raised doubts as to the total demise of the distinction.[42]

[39] Tallon, supra note 1, p.7-9

[40] Ibid, p.8.

[41] It assumes that the commercial law and civil differs in substantive content of the rule, the rules of evidence required to prove a case depending on whether a matter is governed by commercial law or civil law. See Cueto-Rua, *supra* note 38, p.24.

[42] Ibid, p.47-56.

However, in those countries where separate civil and commercial codes are adopted, a clear demarcation of the respective domain remained blurred. In determining to whom or to what the commercial law applies, as distinguished from to whom or to what the civil law applies, two different approaches have been employed: the objective and the subjective approaches.[43] Some countries, Germany[44] for example, adopted the subjective approach while others such as Spain[45] opted for the objective approach. The two criteria are never exclusive.[46] It is only a matter of which approach dominates in commercial law of a given country. Some other countries, like France, have mixed the two approaches without one being clearly more important than the other.[47]

In the objective approach, commercial law mainly regulates certain legal transactions which are categorized as commercial transactions.[48] In this approach, the basis of commercial law is the definition of these transactions irrespective of whoever carries out these transactions. The commercial transaction may be determined by providing an objective list of acts, though usually not exclusive, or setting forth some general statement that

[43] Ibid., 9.

[44] Ibid.10.

[45] Ibid.

[46] Ibid.

[47] Ibid.,29.

[48] Ibid., p.11.3

characterizes them objectively.[49] The substantive content of commercial law based on the objective criterion is primarily made up of rules governing these transactions.

The subjective approach holds that commercial law is the law for those practicing commerce.[50] In other words, it is the law for a determined social professional category known as merchants[51] (both individuals and legal entities). Thus commercial law regulates principally the legal status of merchants and as a subsidiary matter the operation they undertake. The commercial law being the law of merchants, the scope of commercial law in a

[49] Ibid., P.27. By way of definition, acts of commerce/ commercial transaction/, are those which are commercial in themselves, i.e., independent of the profession of whoever undertook them. An alternative definition is that 'acts of commerce'are either those which promote or facilitate the circulation of wealth or those which are performed for profit or speculation. In general, those doctrines have hinged upon the ideas of mediation between producer and consumer, profit and speculation.. Atypical "objective act of commerce" is the purchase of goods for resale, commercial transaction in itself, regardless of the profession or calling of the buyer.Ibid., P.25. But this definition failed to be comprehensive enough, it is admitted that some transaction should be subjectively defined even in these systems adopting the objective approach. Even the French Ordinance of 1763, where the objective criterion appeared for the first time, declared that business transactions(actes de commerce, actos de comercio), were those conducted by merchants. 25. Acts that are deemed to be commercial solely because they were undertaken or performed by merchants are subjective acts of commerce. Usually a merchant is described as one who: (1) performs acts of commerce, (2) in his own name, (3) as a profession. Ibid., P.38

[50] Talon, *supra* note 1,p.10.

[51] Ibid. Despite the absence of homogeneity in determining to whom or to what economic activities commercial law would apply, the Romano-Germanic legal families recognized duality of private law (dichotomy into civil and commercial) and agree that commercial law applies to merchants (broadly understood to embrace both individuals and organizations having legal personality that engage in certain activities).

given country depends on how merchants are defined. The usual criteria[52] for defining merchants are the "economic activities" in which the person engages, the form of organization (for business organizations), and the means employed.[53]

Individual merchants/traders are defined as those who carry on "commercial activities"[54] as a principal activity and for profit.[55] In relation to legal entities, 'economic activities' and the form of organization are alternative used as defining factors for identifying business organizations that qualify for status of merchant (to be subject of commercial law). For instance, the Portuguese commercial law prescribes that:

---

[52] Ibid. For example, in Germany, the definition of merchants depends upon the economic activities the person engages in, the means employed, the form of business organization, etc. Ibid, p.14. Based on economic activities, merchants/traders/ are defined as those who carry on commercial activities as a principal activity and for profit, accompanied by list of "commercial activities"- a list of 9 mercantile trades/commercial activities is provided.. See German Commercial Code (of1897), Translated and Briefly Annotated by A. F. Schuster, of the inner temple, barristek-at-law 1911, digitized in 2007, Art.1(1), (herein after German Commercial Code).

[53] The definition of merchants based on the means employed often comes into picture not to define merchants; rather, it helps certain category of persons undertaking commercial activities and thereby would qualify as a merchant to be exempted from certain rigidities of commercial law. They are often referred to as artisans or hand crafts men. See German Commercial Code), Ibid., p.14,35. To qualify for this exemption, it is usually required that the person needs to be one who works at manual job and employs his own and his family's labor.

[54] Determining what constitutes the class "commercial activities" is found to be difficult. A fair detail is given below (see section).

[55] German Commercial Code, *supra* note 52.

> *This law (Commercial Companies Act) shall apply to commercial companies. Commercial companies are those whose purpose is to exercise commercial activities and which take the legal form of partnerships, private limited companies, public companies, limited partnerships or limited partnerships with share capital. Companies having as their purpose the exercise of commercial activities must take one of the forms referred to above. Companies having the sole purpose of practising non-commercial activities may take one of the forms referred to in paragraph 2 (second sentence), in which case they shall be subject to this law.*[56]

Similarly, the French Commercial Code declares that "[t]he commercial nature of a company shall be determined by its form or by its objects. General partnerships, limited partnerships, limited liability companies and joint-stock companies are trading companies by virtue of their form, irrespective of their objects."[57] Other legal systems as well adopt similar criteria.[58] Thus a business organization is considered commercial if its purposes are the performance of commercial activities while a business organization is considered civil/non-commercial if its profits are to be made in the performance of civil acts/non commercial activities. Moreover, perhaps due to some difficulties encountered as to the civil or commercial nature of the activities,[59] additional criterion based on form of organization is adopted to

[56] Commercial Company Act of Portuguese, *supra* note 11, Art.1.

[57] French Commercial Code, , Updated 03/20/2006, (herein after French Commercial Code), at http://ox.libguides.com/content.php?pid=108878&sid=819232> (consulted 6November , 2014), Art. L210-1.

[58] The latin-American civil law countries do have similar classification criterion. See Cueto-Rua, *supra* not 38, P.42.

[59] Ibid.

define status of legal entities as merchant. A business organization performing activities other than commercial activities and did not adopt any one of the types specified for commercial business organizations shall be considered civil/non-commercial concern (non-merchant).

It is this attempt to determine to whom the commercial law applies that led to the distinction of business organizations into commercial and civil. Civil business organizations are subject to the rules of civil code and commercial business organization subject to commercial code. This holds true at least for most dualist countries;[60] however, the scenario in Ethiopia is different as both are regulated by the commercial code.

3.2 The Classification under Ethiopian Law

As noted above, legal systems distinguish between commercial and civil business organizations usually based on either of two grounds: the purposes of the business organization or its form. In this regard, the Ethiopian Commercial Code pursues same trend. The relevant provisions stipulate that:

> *Art.- 10 Business organizations*[61]
>
> *(1) Business organizations shall be deemed to be of a commercial nature where their objects under the memorandum of association or in fact are to carry on any of the (commercial) activities specified in Art. 5 of this (Commercial) Code.*

[60] See *infra* footnotes 94-96.

[61] Commercial Code, *supra* note 6, Art.10.

> *(2) Share companies and private limited companies shall always be deemed to be of a commercial nature whatever their objects.*
>
> *Art. 231-Commercial business organisations.*[62]
>
> *(1) Any business organisation other than an ordinary partnership may be a commercial business organisation within the meaning of Art. 10 (1) of this Code.*
>
> *(2) Where a commercial business organisation is created in the form of an ordinary partnership or where the form of the organization is not specified, the commercial business organisation shall be deemed to be a general partnership.*

These provisions speak of commercial business organizations and the criteria thereof implying that there are also civil business organizations.[63] As described above, a business organization, either civil or commercial, presupposes cooperation among two or more persons for sharing profits and losses. Based on the twofold criteria i.e., form of organization and object, the Ethiopian Commercial Code categorizes the six types of business organizations into commercial and civil. With respect to the form of business organizations, the two types of companies (share company and private limited company) are always commercial irrespective of their object of economic engagement. On the contrary, an ordinary partnership can only be civil.

[62] Ibid., Art.213.

[63] The terms civil and non-commercial are used alternatively in different literatures. E.g. see Antunes, *supra* note, 16, p. 9. He used the term "civil" to refer to Art 1845 of the French Civil Code that uses the term "non-commercial" to refer to similar entities. For our consumption the term civil might be preferable to the term non-commercial as the latter might be misleading giving the impression that these business organizations are non-profit making/civil society/organizations.

Whenever a business organization purports to be an ordinary partnership it must also ensure that its economic activity falls out of the class of commercial activities listed in Article 5 Commercial Code. Other business organizations i.e., the three partnerships (joint ventures, general partnership, and limited partnership) could fit into either commercial or civil business organizations depending on the object of their economic activity. They shall be commercial where their object falls within the list of commercial activities in Article 5 otherwise they shall be civil.

Notable from this discussion is that while most civil law countries including Germany, France and Portugal extend the default category of commercial business organizations into partnerships as well, Ethiopian law has limited that to companies only. Therefore, it follows that the notion of civil business organizations in Ethiopia has to be reduced to partnerships as there is no possibility for companies to be civil. All partnerships other than ordinary partnership could be either commercial or non commercial depending on their object. The default categorization in the above mentioned countries reveals a general tendency to prefer commercial forms and to reserve few alternatives for civil form of organizations. This propensity is reflected to some extent in Ethiopian law. This can be inferred from the 'catch the rest' clause that categorizes business entities engaged in commercial acts with unspecified form into commercial business organizations.[64]

[64] See Commercial Code, *supra* note 6, Art 213 (2).

3.3. Distinguishing commercial activities from non-commercial activities

All that said, why are certain business organizational forms commercial by default while some others may be civil or commercial depending on whether their object is commercial activity or not? In other words, what is the typical feature of "commercial activities" that renders business organizations engaged in these economic activities commercial and while engagement in other economic activities makes business organizations civil?

As discussed above, the very purpose of distinguishing commercial activities from non-commercial activities goes to the question of demarcating the subject matter of commercial law and civil law in the dualist system. As noted above, the general approach in doing that is is relying on either objective test or subjective test or by combining both tests. Since the classification of merchants based on commercial activities is the feature of the subjective approach, characterization of commercial activities is to be sought in countries relying on subjective approach. However, the subjective resolution of the subject matters of commercial law, emphasis is placed on defining merchants rather than defining commercial activities. Of course, merchants are defined in relation to commercial activities but in most cases that is done by mere enumeration of the commercial activities. For instance, the French Commercial Code,[65] which is said to be based on the mixed approach,

[65]See French Commercial Code, *supra* note 57, Article L110-1& Article L110-2 that stipulates:

Article L110-1.The law provides that commercial instruments are:

provides what appears to be a complete list of commercial activities, though practically courts are said to have enlarged the scope by way of interpretation[66]. German Commercial Code, which is based on subjective test,

---

All purchases of chattels in order to resell this, either in kind or after having worked and developed this;

All purchases of real property in order to resell this, unless the purchaser has acted in order to construct one or more buildings and to sell these en bloc or site-by-site;

All intermediate operations for the purchase, subscription or sale of buildings, business or shares of property companies;

All chattels rental undertakings;

All manufacturing, commission and land or water transport undertakings;

All supply, agency, business office, auction house and public entertainment undertakings;

All exchange, banking or brokerage operations;

All public banking operations;

All obligations between dealers, merchants and bankers;

Bills of exchange between all persons.

Article L110-2: The law also deems commercial instruments to be:

All construction undertakings and all purchases, sales and resales of ships for inland and foreign-going navigation;

All sea shipments;

All purchases and sales of ship's tackle, apparatus and foodstuffs;

All chartering or chartering and bottomry loans;

All insurances and other contracts relating to maritime trade;

All agreements and conventions on crew wages and rents;

All engagements of seamen for the service of commercial ships.

[66]Tallon, *supra* note 1, p.32.

supplies an illustrative list[67] of commercial business activities used as a defining element of merchants. In defining the of 'commerciality' of economic activities, the German Commercial code holds that all business activities except those that do not require "commercial business operation" are commercial activities. "Commercial business operation" in turn is described as indicative of scale of operation as measured by turn over, employees, acting via agent, bank finance, etc.[68] This parameter does not disclose the essence of commercial activities that distinguish them from non-commercial ones, as it simply relies on scale of operation rather than inherent essence the activities. Hence, in the subjective system as well, little effort is devoted to explicate the very essence of commercial activities beyond listing of activities. Simple enumeration of activities without defining the nature of activities would be a challenge for courts in countries that adopt illustrative list of activities.

Nevertheless, the traditional specification of commercial activities in commercial laws commonly exempts certain economic activities including "liberal professions"[69] and primary production (agriculture, fishing, etc)[70]

---

[67] German Commercial Code, *supra* note 52. Art. 1(2) provides that an undertaking carried on for purposes of trade in a manner and on a scale which requires a mercantile business organisation, even when it does not fall under any of the heads mentioned in the last section(a list of 9 mercantile trades/commercial activities), is for the purposes of this Code a mercantile trade, provided the undertaker's trade name is entered in the Mercantile Register.

[68] Zekoll, Joachim, Introduction to German Law, Kluwer Law International, , 2005, p.31.

[69] See European Economic and Social Committee, (A study on) The State of Liberal Professions Concerning Their Functions and Relevance to European Civil Society, 5/2013, P.13-14, (herein after European Economic and Social Committee), at (www.eesc.europa.eu)> (consulted 5 November, 2014), p.13.

from the scope commercial activities thereby letting them to fall into the class of civil activities. The commercial laws of Germany[71], France[72] and Ethiopian[73] are notable examples. Yet we need to enquire as to what characteristics justify their exemption. There is no universal definition for the term "liberal profession" but an example here is what the German law has to say on the concept. German law defines a liberal professional service as "a high value service provided in general on the basis of special professional qualification or creative talent, personally, in a professionally independent manner, in the interests of the client and the general public," [74] and provides a long list[75] of these professions.

---

[70] Civil-Law Corporations (German: GbR / BGB-Gesellschaft), at

http://www.frankfurt-main.ihk.de/english/business/legal_forms/gbr/, >(consulted 6 November, 2014).

[71] Zekoll, supra note 68. Members of the learned professions such as doctors, lawyer, accountants, and architects are excluded from the class of merchants on the claim that they are not business people and "only business people can be merchants". Yet the meaning of business people is not clear.

[72] Talon, *supra* note 1, p.33

[73] See Commercial Code, *supra* note 6, Art.5. It is exhaustive list and does not include such activities; See also section 3.4 below.

[74] European Economic and Social Committee, *supra* note 69.

[75] It enumerates the independent professional activities of medical doctors, dentists, veterinarians, medical practitioners, physiotherapists, midwives, massage therapists, psychologists, members of lawyers' chambers, patent attorneys, accountants, tax advisors, economics and business consultants, accountants (chartered accountants), tax agents, engineers, architects, commercial chemists, pilots, full-time court appointed experts, journalists, photo reporters, interpreters, translators, and similar professions as well as scientists, artists, writers, teachers and educators are explicitly mentioned. See Ibid.

European Union Member States recognize several characteristics of liberal professions that include the public interest aspect of the service; the professionally and economically independent performance of tasks; the independent and personal execution of services; the existence of a special relationship of trust between client and contractor; and *the restraint of the profit-maximization motive* (emphasis added). [76]

The liberal professions are 'intellectual' activities that are often subject to strict public supervision to meet public interest. In the exercise of liberal professions there is restraint of the profit-maximization motive since public service aspect is deemed to be their component. In relation to agriculture, the traditional exclusion criterion seems to assume that agriculture is an economic sector for mere subsistence rather than accumulation of profit and wealth.[77] Thus it appears that other economic activities traditionally conceived as civil economic activities are backed by these and similar justifications.

On the other hand, commercial activities such as those listed in Art. 5 of the Ethiopian Commercial Code are economic activities that are operated in competitive and totally profit driven motive. Yet the demarcation between civil and commercial activities remains slippery in that in most commercial codes activities that are considered non-commercial may be considered commercial activities where the scale[78] of operation is significant or the form

[76] .Ibid., p.14.

[77] Talon, *supra* note, p.96-see the topic "enterprise and company".

[78] See footnote 67.

of organization of business organization justifies categorization of the operators as merchants.[79]

The formality test tends to to tell us that some business organizations are more commercial (more profit oriented) than others. An activity which could as well have been civil act becomes commercial when undertaken by a more organized business organization. The more formalized the business organization is, the stronger signal it sends as to its impetus for commerce (profit).[80] In conclusion, both civil and commercial business organizations seek to earn profit but the commercial ones are more profit oriented than the civil ones. The degree of commercialization (level motivation for profit) can be inferred either from the economic activities they engage in or the degree of formalization/organization/. In Ethiopian case, partnerships could be civil or commercial depending on whether their economic activity is civil or commercial respectively. Companies are always commercial because they manifest a high degree of organization as indication of commercialization.

3.4. Commercial Activities in Ethiopian Law

Article 5 of the Ethiopian Commercial Code has come up with a list of 21 commercial activities.[81] Article 5 simply defines 'traders' as persons who

[79] See the paragraphs indicated by footnotes 56, 57&61.

[80] Talon, supra note 1, p. 96.

[81]Commercial Code, supra note 6, Art. 5., - Persons to be regarded as traders.

Persons who professionally and for gain carry on any of the following activities shall be deemed to be traders:

(1) Purchase of movables or immovables with a view to reselling them either as they are or after alteration or adaptation;

(2) Purchase of movables with a view to letting them for hire;

(3) Warehousing activities as defined in Art. 2806 of the civil Code:

(4) Exploitation of mines, including prospecting for and working of mineral oils;

(5) Exploitation of quarries not by handcrafts men;

(6) Exploitation of salt pans;

(7) Conversion and adaptation of chattels such as foodstuffs, raw materials or semi-finished products not by handicraftsmen;

(8) Building, repairing, maintaining, cleaning, painting or dyeing movables not by handicraftsmen;

(9) Embanking, leveling, trenching or draining carried out for a third party not by handicraftsmen;

(10) Carriage of goods or persons not by handicraftsmen;

(11) Printing and engraving and works connected with photography or cinematography not by handicraftsmen;

(12) Capturing, distributing and supplying water;

(13) Producing, distributing and supplying electricity, gas, compressed air including heating and cooling;

(14) Operating places of entertainment or radio or television stations;

(15) Operating hotels, restaurants, bars, cafes, inns, hairdressing establishments not operated by handicraftsmen and public baths;

'(16) Publishing in whatever form, and in particular by means of printing, engraving, photography or recording;

(17) Operating news and information services;

(18) Operating travel and publicity agencies;

(19) Operating business as an agent, broker, stock broker or commercial agent;

(20)Operating a banking and money changing business;

professionally and for gain carry on any of the 21 activities in the list. In other words, it defines traders in terms of commercial activities as persons who regularly perform commercial activities to earn their livelihood. This is not an attempt to characterize acts of commerce; rather, it is an effort to define traders. This closely approaches the subjective determination of the domain of commercial law,[82]and this provision is of little relevance in characterizing the essence of commercial activities due to the mere listing of commercial activities.

Classification of individuals into trader/non-trader, and business organizations into commercial/civil depends on the commercial activities depicted in this article. Hence, whether the list in Article 5 is exhaustive or illustrative is what matters most in this regard. If the list in Ethiopian Commercial Code were illustrative, critical investigation and characterization of the essence of the commercial activities would have been indispensable so as determine whether an economic activity not found in the inventory is commercial or civil one. Fortunately, from the perspective of legal simplicity, the inventory of activities in the said provision is a closed one. On this issue, Alfred Jauffret, the drafter of the Commercial Code noted:

> *The list in Article 5 is very long, and one might even think it too long. One could, in effect, summarize commercial activities in a shorter formula, as has been done in the Italian Civil Code. But the danger of*

(21) Operating an insurance business.

[82] For similar explanation, see Cueto-Rua, supra not 38, P.27.

> *these general formulae is that they raise difficulties of interpretation. At the risk of having a rather long list, I thought it better to prevent difficulties of interpretation and to guide the judge in detail. Of course, each activity enumerated has been carefully weighed to include all the activities which I thought should be subject to commercial law. Because the list is as complete as possible, I have decided that the enumeration should be limitative.*[83]

Jauffret enumerated a long list of commercial activities that he believed to be comprehensive of all possible typical acts of commerce and unequivocally tells us that it was meant to be exhaustive.

Nonetheless, some scholars hold that Article 5 is amended by subsequent laws and claim that the list is enlarged. They remarked:

> *The list in Article 5 was meant to be exhaustive. However, it has been broadened by subsequent legislation. Cases in point are the Commercial Registration and Business Licensing Proclamation No. 67/97, as amended, (now replaced by Proclamation 686/2010)*[84]*, the Re-enactment of the Investment Proclamation No. 280/2002, as amended, (repealed by Proclamation No.769/2012 which in turn is*

[83] Jauffret, Alfred, General Report: Book I (1 March 1958) (Excerpt), in Peter Winship (trans.), Background Documents to the Ethiopian Commercial Code of 1960, Artistic Printers, Addis Ababa: 1974). He also added that "I have also decided to exclude from commercial law the farmer and the handicraftsman two very delicate points. Articles 6 and 7 deal with agriculture; article 8 assimilates to farmers fishermen and persons who breed fish. Article 9 deals with handicraftsmen, already excluded by sub – articles (5), (7), (8), (9), (10) and (11) of Article 5, which declare that certain activities are not commercial if carried on by handicraftsmen. I have kept the maximum number of employees and apprentices allowed at the number three, which is the number that the codification commission gave me in April 1957."

[84] Proclamation No. 686/2010, *supra* note 15.

amended by proclamation No.849/2014)[85] *and the Trade Practice Proclamation No. 329/2003 (repealed by Proclamation No.685/2010 which in turn is repealed by Proclamation No.813/2013*[86]*). The said laws redefined the scope of the enumeration of commercial activities under Article 5 of the Commercial Code. … all of the above terms ('trader', 'businessperson' and 'sole businessperson') refer to one and the same legal concept, viz., and the concept of trader."* [87]

[85] See Investment Proclamation, 2012, Proclamation No. 769/2012, Fed. Neg. Gaz., Year18, No.63; and Investment (amendment) Proclamation, 2014, Proclamation No. 849/2014, Fed. Neg. Gaz., Year 20, No.52.

[86] Trade Competition and Consumer Protection Proclamation, 2013, Proclamation No.813/2013, Fed.Neg.Gaz., Year, No.28.

[87]Alemayehu Fentaw and Kefene Gurmu, Law of Traders and Business Organizations: A Course Material, (sponsored by Justice and Legal Systems Research Institute, Unpublished, Addis Ababa, Ethiopia, January 2008), p.16. They continue to explain the issue as follows:"For instance, such activities as higher education, health, and construction are included. In addition to studying the list of activities that are being opened for traders, it is also important to examine the definition of trader in these laws. In this regard, note that Article 2(2) of Proc. No.67/97 replaces the word 'trader', which is a legal term of art used by the Commercial Code, by 'businessperson'. The definition of the newly introduced term 'businessperson' as found in Art.2(2) of Proclamation No.67/97 is broader than the definition of the hitherto existing terminology "trader". Art.2(2) defines a businessperson as "any person who professionally and for gain carries on any of those activities specified in Article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by Regulations issued by the Government." Amazingly, Article 2(10) of the Trade Practice Proclamation No.329/2003 uses the term 'trader' with the same definition given for the term 'businessperson' by Proc. No.67/97. Still, the terminological question does not seem to have been settled once and for all. For instance, the Commercial Registration and Business Licensing Proclamation (Amendment) No. 376/2003 introduces a new term 'sole businessperson'. Anyway, you should keep in mind that all of the above terms refer to one and the same legal concept, viz., and the concept of trader."

In support of their assertion, these authors relied on the broader definitions given to the terms "business person"[88], "commercial activity"[89] and "trader"[90] in the subsequent laws.

I argue, however, that the assertion that these laws have amended the meaning of the term "trader" is unfounded. Admittedly, the meaning ascribed to these terms in the subsequent laws is broader than the definition of the hitherto existing terminology "trader" in the Commercial Code. Yet it must be noted that the cited laws provide only purposive definitions limited to their own scope of application; they are not meant to amend the definition of trader in the Commercial Code. For instance, the scope of Proclamation No. 686/2010 is limited to licensing and registration.[91] Trade Competition and Consumer

[88] Proclamation No. 686/2010, *supra* note 15, Art.2 (2). "Business Person" means any person who professionally and for gain carries on any of the activities specified under Article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by law. The definition here is note different from the repealed legislation. Cf. Commercial Registration and Business Licensing Proclamation, 1997, Proc.No.67/1997,Fed. Neg. Gaz., Art.2 (2).

[89] Proclamation No. 686/2010, *supra* note 15, Art.2(3): "commercial activity" means any activity carried on by a business person as defined under sub - Article (2) of this Article; see also Proclamation No.813/2013, Art 2 (6): "Commercial Activity ' means any activity Carried on by a business person as defined under Sub-Article (5) of this Article.

[90]Trade Practice Proclamation No. 329/2003' Art 2 (10): "Trader" means any person who professionally and for gain carries on any of those activities specified under Article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by laws issued by the government. Proclamation No.813/2013 replaced the term 'trader' by the term 'business person' but provided identical definition. See Proclamation No.813/2013, Art.2 (5).

[91] Proclamation No. 686/2010, Art. 2. Definitions. It goes on like this: "[u]nless the context otherwise requires. in this Proclamation: …"business person" means… "commercial activity" …means. Also Article 4. Scope of Application holds that "[t]he provisions of this

Protection Proclamation No.813/2013' also defines "business person" for the sake of regulated issues covered in that proclamation alone as can be inferred from the introductory clause " [i]n this Proclamation unless the context otherwise requires …"[b]usiness personr" means… "[c]ommercial activity" means and the scope determining provision holds that "[t]his Proclamation shall apply to any commercial activity…".[92]

Therefore, the wider definitions of the said terms were not meant to amend the meaning of "traders" in Art. 5 of the Commercial Code in all respects. Rather, it indicates that not only traders as defined in the Code but also others engaged regularly and for gain in economic activities outside of Art.5 owe the duty to obtain license and get registered. The other proclamations as well define their subjects broadly than traders not to amend art.5 but only as it fits their purpose only. For instance, not all "business persons" (as defined in art. 2(2) of proclamation 686/2010) nor do all "traders" as defined in the Trade practice proclamation 329/ 2003 are subject to bankruptcy proceeding by virtue of Art. 968 of the Commercial Code but only the narrow class of "traders" as defined in Art. 5 of the Commercial Code.

Therefore, for the sake of classification of business organizations into commercial or civil and demarcation of traders from non-traders, we have to

---

Proclamation relating to business license shall apply to any person engaged in any commercial activity …"

[92]Proclamation No.813/2013, Arts. 2(5), 2(6) &4. The definitions in Trade Practice Proclamation No . 329/2003 were similar.' See Art 2 (10) and Art.4 of Proclamation No . 329/2003.

stick to the limitative inventory in Art.5. Given the long list of commercial activities in Art.5, the question what possible economic activities are likely to remain outside the inventory is in order. In other words, though the inventory of activities in Article 5 is long, would Jauffret's more than half a century old position be justifiable in light of the present state of commercial life in Ethiopia? New market demands evolve continuously and sociological development and social realities may call for expansion of the domain of commercial law beyond its traditional frontiers. The necessity to enlarge Art. 5 is apparent in the new draft of Commercial Code. Article 5 of the Draft defines "Trader" as "[a]ny person who as his regular profession and for gain, carry on any production and service activities," [93] and a list of 17 commercial activities including "operating health, education and kindergarten activities, and any consultancy service", which are not in list of commercial activities in Article 5 of the existing Commercial Code, are provided. The draft also tells us illustrative nature of the list as inferred from the phrase "in particular" that preceded the list.

But until enactment of this draft, "trader" would remain to mean what it was in the 1960s pursuant to Art.5 while those individuals who fail to meet the parameters there will stay non-traders. Similarly, business organizations that are engaged in civil acts (not in the list of Article 5), however enterprising they may be, will continue with the status of civil business organizations unless, of course, they prefer some forms of organizations that are solely

[93] The Draft Revised Commercial Code Prepared by the Ministry of Justice, as cite in Alemayehu Fentaw and Kefene Gurmu, *supra* note 87, p.18.

reserved for commercial ones (company forms in Ethiopia). On the contrary, those that engage in the activities within the list of Article 5 will remain commercial business organizations. All this said, what is the legal significance of this classification?

4. The Legal Significance of the Dichotomy under Ethiopian Law

The classification is not without purpose; it presupposes the necessity and existence of distinct rules governing commerce as opposed to civil engagements. Persons engaged in civil acts are subject to civil law (usually codified/civil code) while persons who opt for acts of commerce as their profession for livelihood are supposed to be subject to commercial law; though commercial law is not often full-fledged and its deficiency is supplemented by civil law. Based on this logic, non-traders and civil business organizations are governed by the civil law while those individuals who qualify as traders and commercial business organizations are subject to the commercial law allegedly leading to different consequences of legal regulation.

Currently, due to increasing commercialization of civil law, the legal significance of demarcating business organizations into civil and commercial does not carry the weight that it used to have in the earlier times. Yet the distinction may be more pertinent in some countries whereby the civil business organization (partnership) is found and regulated in their respective

civil codes rather than the commercial code. This is true in France,[94] Germany[95] and Portugal[96]. Hence, for all purposes, the civil partnership is subject to rules in civil code while the commercial ones found in commercial code are regulated by same though cross reference between the codes exists. Even in these countries the importance of the distinction is diminishing from time to time through new legislation and judicial interpretations.[97]

In the Ethiopian context, the implication of the distinction is likely to be even

[94]See French Civil Code, Art.1832-1873, Georges Rouhette(trans.), English translation , Updated 04/04/2006, (herein after French Civil Code),at http://ox.libguides.com/content.php?pid=108878&sid=819232, >(consulted on November 7, 2014).

[95] German Civil Code/BGB/, Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the statute of 27 July 2011 (Federal Law Gazette I page 1600), ss. 21 – 79, (Translation provided by the Langenscheidt Translation Service.), (herein after German Civil Code), at www.juris.de >(consulted August 2014), Section 705-740.

[96] Portoguese Civil Code, Art.980 as cited in Antunes, supra note 16, p.9.

[97] Patrick C. Leyens , German Company Law: Recent Developments and Future Challenges, in German Law Journal, Vol. 06, No. 10, 2005, p.1. The author stated that "[t]he most basic form for any type of co-operation is the Gesellschaft bürgerlichen Rechts (GbR) (civil partnership) that is subject to the more than one hundred year old provisions of the Bürgerliches Gesetzbuch (BGB) of 1896 (German Civil Code). The BGB applies to non-commercial partnerships but also lays the fundament for the law on commercial partnerships according to the Handelsgesetzbuch (HGB) of 1897 (Commercial Code). The breaking change in the legal understanding of the civil partnership came recently in 2002 when the Bundesgerichtshof (BGH) (Federal Civil Court of Justice) held that a GbR has its own legal personality. The consequence is a largely parallel liability regime for civil and commercial partnerships. According to the BGH, new partners are liable for debts that stood before they joined the partnership. From the viewpoint of a creditor the advantage of this change in doctrine is a considerable facilitation of litigation. Today a law suit can be brought against the partnership itself. Formerly the procedural requirement to state the name of each single partner had proved to be a severe obstacle for litigation particularly in regard to law suits against foreign partnerships."

more minimal. Unlike above cited countries, both commercial and civil business organizations are regulated by the Commercial Code from birth to death.[98] At the same time, we cannot dare to say that civil and commercial business organizations are subject to same treatment in the Commercial Code because if that were the case there would not have been such distinction. If so, what unique treatments are they subject to?

Although the substantive divergence points of commercial law from civil[99] remain controversial and are labeled as unscientific, a glance at the commonly cited unique rules of commercial law, to which the commercial ones are subjected to while the civil one are not, is essential for the issue under this topic. The most important distinctly regulated subject matters are requirements on disclosure, keeping books and accounts, rules of evidence,

[98] The formation, organization, management and dissolution of civil and commercial business organizations are regulated by the code in similar fashion except the scanty exclusive reference to commercial ones. See generally Commercial Code, *supra* note 6, Book II.

[99] Some of the the distinction between civil and commercial law are: in civil matters written form may be mandatory whereas the same transaction may be exempted from formal requirement in commercial matters; production of evidence is flexible in commercial matters; no formal demand required where this might be the case in civil matters; the court may not give grace period in commercial matters while this is possible in civil matters; interest rate is due without default notice in commerce while not in civil cases; period of limitation is shorter in commercial matters; also the books and records of traders and commercial companies have special evidentiary value as among themselves even availing once record in his own favor. Non-commercial business organizations are governed by civil code such as in France and they differ in all these respects from commercial ones. Also in the old days many countries used to maintain special courts and summary procedure for commercial ones and traders only. See generally Tallon, *supra* note 1.

liability of partners, rules on "insolvency/bankruptcy proceeding,"[100] jurisdiction of tribunals, and so on. These major departures are briefly discussed herein below.

In the first place, the disclosure rules - inscription in a special register and publication- is the oldest criterion for the distinction between civil and commercial business organizations. Registration (in the register of commerce) and publication as well as keeping books and accounts are used to be the characteristics of traders and commercial business organizations and entail their own legal consequences including a constitutive effect; whereas, at least as a matter of principle, non-traders and civil business organizations should not be required to undergo this.[101] But legal systems differ significantly on this issue. In France, for example, all firms (business organization) other than undisclosed partnership (a sort of joint venture under Ethiopian law) shall have juridical personality from their registration[102] while in Germany the civil

[100] The term "collective insolvency proceeding" is used in French law as generic expression to describe any insolvency proceedings where the debtor is in a payment failure situation. Safeguard proceedings are also categorized under collective insolvency proceedings even though the debtor is not in a payment failure situation. See Tetley, Andrew *et al*, Insolvency Law in France, 2009, p.196.

[101] Becken, Hubert and Bondt, Walter de, Introduction to Belgian Law, Geens, Koen and Carl Clottens, Corporations and Partnerships (in Belgium), Kluwer International, 2006, p. 276. Registration gives information about all facts essential for law which can be important for a merchant's business partner. This includes, for example, the corporate name, the proprietor's name or that of the personally liable partner of a business partnership. The register of Commerce enjoys public belief, i.e. it protects bona fide legal dealings to a certain scope through trust in the correctness of the entries and publications.

[102] French Civil Code, *supra* note 94, Art.1842, and French Commercial Code, *supra* note 57, Art. L-123.

business organization (a partnership), the typical one being *Gesellschaft bürgerlichen Rechts (GbR),* is regulated by the Civil Code and is not required to register[103] in so far as they remain *under conditions that keep them civil*.[104]The trend in Belgium[105] is similar to that of Germany.

[103] See German Civil Code, *supra* note 95, Sections 54, 705… and German Commercial Code, *supra* note 52, Art. 2 and 106. In German civil code that deals with Partnership (civil) there is no requirement of registration but in the commercial code partnership (commercial) are required to register. German Civil Code Section 54: Associations without legal personality. Associations without legal personality are governed by the provisions on partnership (in the Civil Code). When a transaction is entered into with a third party in the name of such an association, the person acting is personally liable; if more than one person acts, they are liable as joint and several debtors. But according to recent case-law the GbR (Civil-Law organization) is considered to be a legal entity and is able to sue and be sued. It is often used for single joint ventures (e.g. construction projects) and comes to an end when the joint project has been completed. On the other hand, German Commercial Code, Section 106 stipulates that :The partnership must apply for registration in the Mercantile Register of the Court in whose district its place of business is situated.

[104] See German Commercial Code, *supra* note 52, Art. 2. An undertaking carried on for purposes of trade in a manner and on a scale which requires a mercantile business organization, even when it does not fall under any of the heads mentioned in the last section (list of commercial acts), is for the purposes of this Code a mercantile trade, provided the undertaker's trade name is entered in the Mercantile Register. Such entry is obligatory upon the undertaker, and must be made in the manner prescribed for the registration of mercantile trade-names. The decisive criteria for the assessment whether a business operation set up in a commercial way are, above all, annual turnover, amount of the capital used, nature and quantity of business processes, use and granting of loans, size and properties of the business premises, number of people employed, nature of accountancy. As a rule, a duty to entry can be assumed in the retail trade with an annual turnover of € 250,000. In the wholesale trade and in production, an annual turnover of € 400,000 to € 500,000 is assumed. If an enterprise does not have itself entered in the Register of Commerce although it is liable to entry as a result of its scope of business, the Local Court can enforce registration - if applicable by imposing penalty payments. If an enterprise does not require a business operation set up in a commercial way with a view to its nature and scope, there is no obligation, but there is the entitlement to apply for entry in the Register of Commerce. If such an enterprise has itself entered in the Register of Commerce voluntarily, the capacity of a merchant is acquired upon

In Ethiopia, these requirements of registration and keeping books of account are due for both civil and commercial business organizations and traders. Both civil and commercial business organizations are subject to compulsory requirement of registration.[106] The Commercial Code and subsequent legislation as well demand all business organizations and traders to keep books and accounts.[107] So in these respects civil business organization could not posses any special legal significance in Ethiopia.

The second point of distinction is with respect to rules of evidence. With respect to claims arising out of contracts subject to commercial law, more flexible rules of evidence are applicable.[108] Also in commercial matters one's

---

entry. A civil-law partnership (GbR) becomes a general partnership (OHG). See http://www.linkedin.com/groups/What-are-differences-between-commercial-4295377.S.96276581 >(consulted 10 November, 2014).

[105] Becken and Bondt, *supra* note 101, p.185.

[106] See Commercial Code, *supra* note 6, Art.100.The requirement of registration is enshrined in Art. 100. Art. 100(1) laid down the principle for both civil and commercial business organizations and proceeds in its sub-article 2 to emphasize the need for registration of traders and commercial business organizations. Again business licensing and registration proclamation 686/2010 demands any business person to register. "Business Person" includes all traders and business organization. see art.2(2).

[107] Commercial Code, *supra* note 6, Art. 63. Although Art.71 - Scope of application of this Chapter(keeping accounts)- that holds "the provisions of this Chapter shall apply to all commercial business organisations and to all persons carrying on trade seems to modify Art. 63 and confine its application to commercial business organization, the Income Tax Proclamation no.286/2002, Art. 48 confirms the position of Art. 63 0f the Commercial Code by demanding all profit earning businesses having annual turnover of more than 100,000 to keep books and accounts.

[108] Becken and Bondt , *supra* note 101, p. 276. Most often the rules of evidence in civil matters are more rigid than in commercial matters. In commercial matters evidences are freely admissible. In civil matters transactions involving beyond certain fixed sum of may demand written contract as formality and disputes in that regard may not be proved other than

own records and books may be used as evidence in his/her own favor where as this is not the case in civil matters. The Ethiopian Commercial Code adopts this flexibility on evidence in commerce for traders and all business organizations and makes no distinction between business organizations.[109]

Third, the relationship of partners in relation to third parties is one important area where the legal significance of civil versus commercial business organizations dichotomy manifests itself. Traditionally, whether co-debtors are presumed jointly and severally liable or individually liable used to be one of the distinguishing marks of commercial law and civil laws. It was in commercial custom that joint and several liability is presumed.[110] The tradition still exists in countries such as France[111] that partners of civil

---

by written evidence. But such specification may be relieved of in commercial matters. Transactions of whatever amount could be concluded without any formality, and proof in relation to that may not require written evidence rather any form of proof. The justification for not requiring written formally and evidence in commercial matters lies in that in its essence commercial law focuses on facilitated transaction and should not be hampered by excessive formality.

[109] Read Commercial Code, *supra* note 6, Arts. 63, 71, together with Art. 3. Art.63 requires all traders and business organizations to keep books and accounts. Art. 71 holds that "[w]here a dispute arises between traders as to their commercial activities, the court may, notwithstanding the provisions of Art. 2016 of the Civil Code, admit as evidence in favour of a party books and accounts which have been kept by such party according to the provisions of the preceding Articles (on keeping accounts). Art.3 extends the applicability of provision meant for physical persons/traders/ to business organizations. Art.63 requires all traders and business organizations to keep books and accounts. Hence, Art. 71 read together with Art. 3 permits admissibility of of own records as evidence in ones own favor.

[110] Tallon, *supra* note 1, p.78.

[111] French Civil Code, *supra* note 94, Art. 1857. It states that "[w]ith regard to third parties, partners are liable indefinitely for debts of the partnership in proportion to their share in the

business organizations are not presumed to be jointly and severally liable in the absence of otherwise agreement while partners of commercial business organizations are mandatorily jointly and severally liable so as to reinforce creditors' confidence in commercial affairs.[112]Thus liability of partners in civil business organizations is more moderate than in commercial ones.

In this regard, Ethiopian Commercial Code displays similar feature. The major features of legal regime of civil business organizations are found in the Commercial Code under the provisions dealing with ordinary partnership which is the typical civil business organization.[113] The relevant provision prescribes that:

Art. 255. - Creditors of the partnership.

---

capital of the partnership on the date when falling due or on the day of cessation of payments. A partner who has contributed only his industry is liable like the one whose contribution in the capital is the smallest." Versus French Commercial Code on General partnerships, Article Article L221-1, that holds "[t]he partners in a partnership shall all be deemed to be merchants and shall have unlimited joint liability for the debts of the partnership. A partnership's creditors may not pursue payment of the debts of the partnership against a partner until after having fruitlessly given the partnership formal notice to pay by extra-judicial means."

[112] French Commercial Code, *supra* note 57, Article L221-1

The partners in a partnership shall all be deemed to be merchants and shall have unlimited joint liability for the debts of the partnership.

[113] Commercial Code, *supra* note 6, Art. 227. - Definition.

A 'partnership is an ordinary partnership within the meaning of this Title where it does not have characteristics which make it a business organization covered by another Title of this Code. Art. 213. - Commercial business organisations. (1) Any business organisation other than an ordinary partnership may be a commercial business organization within the meaning of Art. 10 (1) of this Code (that classifies business organizations based on their object).

> *(1) The creditors of the partnership may claim against partnership assets.*
>
> *(2) They may also claim against the personal property of the partners who shall, unless otherwise agreed, be jointly and severally liable to them for the obligations of the partnership. A partner who issued on his personal property may require, as though he were a guarantor, that the creditor first distrain the property of the partnership.*
>
> *(3) Any provision relieving the partners or some of them of joint and several liability may not be set up against third parties unless it is shown that such parties were aware such provision. Notwithstanding any provision to the contrary, the partners who acted in the name of the partnership shall always be jointly and severally liable.*

Accordingly, Art. 255 of the Code permits an otherwise agreement to limit liability that does not have a counterpart in other partnerships that are principally meant for commercial business organizations.[114] Given the general trend toward that presumption of joint and several liability of co-debtors in civil transactions as well,[115] distinctions based on this criteria tends to to be unwarranted particularly in Ethiopian context.

---

[114] Cf. Ibid., Art. 280. - Nature of general partnership.

(l)A general partnership consists of partners who are personally, jointly, severally and fully liable as between themselves and to the partnership for the partnership firm's undertakings. Any provision to the contrary in the partnership agreement shall be of no effect with regard to third parties.

[115] Tallon, *supra* note 1, p.78; Civil Code, *supra* note 8 , Art.1896

Fourth, particularly in early times, there used to exist special commercial courts that handle only disputes related to commerce between or against traders/commercial business organizations whereas non-traders and civil business organizations were under the jurisdiction of ordinary courts. There was a tendency to consider ordinary private law judge as unsuitable. Special courts with judges equipped with knowledge of the context of commerce used to entertain cases in commercial matters. The tradition is still intact in some countries such as Belgium.[116]The commercial tribunal in Belgium entertains suits between and against commercial firms as well as bankruptcy and reorganization proceedings. In the Ethiopian legal system, the commercial code did not stipulate for this distinct judicial arrangement. Of course this may be more of procedural and it is possible that special courts for commercial disputes or special bench within a court could be established at any time. Indeed, recent pieces of legislation such as the trade practice proclamation have come up with special tribunal. Be that as it may, the silence of the commercial code on special courts and subjecting commercial matters including bankruptcy proceeding to ordinary courts shows its deference from this alleged traditionally distinctive feature of commercial law.

Fifth, the most significant point of divergence between civil and commercial business organizations goes to the existence of special insolvency proceedings for commercial ones while civil ones are subject to the ordinary rules of civil

[116] Bocken and Bondt, *supra* note 101, p. 281.

procedure.[117] Under insolvency proceedings, traders and commercial business organizations that are unable to honor their debts will be declared bankrupt and subjected to compulsory liquidation procedure provided that they cannot be saved/reorganized.[118] To mention few among a host of benefits of insolvency proceeding, for creditors it ensures expedient proceedings as opposed to the ordinary proceeding in civil matters; they will be treated collectively rather than individually, and not on first come first served basis.[119] To the debtor, it offers a chance for survival by applying for reorganization, if the entity can be saved.[120]

The legal significance of the distinction of business organizations in Ethiopia tends to assume special importance in this respect. Book V of the Commercial Code entitled "Bankruptcy[121] and Schemes of Arrangement" [122] (herein after

[117] Ibid., p.277and 281.

[118] Ibid.

[119] Levratto, Nadine, Bankruptcy: from Moral Order to Economic Efficiency, 2007, p.20. The bankruptcy system and the protection it offers were therefore valued by debtors who, owing to the compulsory "class", did not run the risk of finding themselves confronted by isolated creditors seeking to commence proceedings first, for fear of being overtaken by the others.

[120] Ibid.

[121] Bankruptcy as used in the Ethiopian Commercial Code represents liquation oriented proceeding. See generally Commercial Code, *supra* note 6, Arts.974-1118

[122] Schemes of arrangement under Ethiopian law corresponds to "Safeguard proceedings" under French law which is described as a variation on judicial reorganization of which the principal distinguishing feature is that it can be invoked, at the debtor's request, without the debtor being in a payment failure situation. The objective for the debtor, who seeks to take

bankruptcy proceeding is used to refer to both terms) excludes civil business organizations from its sphere of application. Art. 968 of the the Commercial Code on scope of application prescribes that:

> *(1) The provisions of this Book (Book V. Bankruptcy and Schemes of Arrangement) shall apply to any trader within the meaning of Art. 5 of this Code and to any commercial business organization within the meaning of Art. 10 of this Code with the exception of joint ventures.*
>
> *(2) Without prejudice to such provisions as are applicable to physical persons only or to the provisions of Title IV applicable to business organisations only, the provisions of Titles I, II, III and V of this Book shall apply to traders and commercial business organisations.*
>
> *Art. 1155. - Business organisations which may be adjudged bankrupt.*
> *(1) Al1 commercial business organisations, other than a joint venture, may be adjudged bankrupt or be granted a scheme of arrangement.*

Apparently, these provisions of the Code - that are the cornerstone determinants of the scope of Book V- have limited the scope of application of the rules on "bankruptcy and schemes of arrangement" to traders and commercial business organizations thereby exempting civil business organizations. [123] Hence, in Ethiopia, claims concerning insolvent civil business organizations are subject to the ordinary proceeding in the Civil

---

advantage of safeguard proceedings, is to obtain a moratorium on claims during the observation period. See Commercial Code, *supra* note6, Arts.1119…together with Tetley, *supra* note 100, p.197.

[123] In some of the provisions under Book V, the Code uses the term business organizations without the qualifying term 'commercial'. This should not lead to confusion and does not imply the Code lacks consistency since the provisions that determine scope are explicit.

Procedure Code while bankruptcy proceeding applies to traders and commercial business organizations.

Nevertheless, the wisdom of maintaining this distinction to date may be questionable. In its origin, insolvency proceeding and the overall spirit of this law was focused to penalize[124]with civil and criminal sections. The traditional exclusion of non-traders and civil business organization from the application of bankruptcy law tends to be founded on the sympathy to these supposedly unsophisticated groups. Nowadays, insolvency law has shown tremendous transformation from liquidation targeted and creditor focused orientation to saving businesses by giving a chance to survive.[125] In the Ethiopian Commercial Code as well, the "schemes of arrangement"[126] offers moratorium on credit claims and give the debtor the chance reorganize and survive. Moreover, the provision on "composition" proposal-particularly "composition by way of surrender of assets"-[127] bestows the debtor the

[124] For instance, the insolvency provisions of Commercial Code of 1807 of France were said to have focused on punishing the debtor that included incarceration, the sealing and confiscation of the debtor's assets and various civil and professional sanctions. See Tetley, supra note 100, p.224.

[125] For instance, French insolvency law is said to have undergone through three evolution periods: the Commercial Code of 1807 -focused on punishing the debtor; the law of 1967 which sought to provide protection to creditors by assisting the company with its reorganization; and the 3rd period, more recently, the tendency being to use the bankruptcy procedures as a way to protect debtors from their creditors and assist them in reorganizing in order to return to financial health. See MJULI, Legal Consequences of Bankruptcy,

[126] Commercial Code, *supra* note 6, Art.1119….

[127] Ibid., Art.1099 (3).

prospect to start business afresh, closing the file for all previous claims.

Business logic can hardly justify the denial of these benefits to civil business organizations. Other legal systems such as France that used to exclusively apply bankruptcy law to traders and commercial business organizations have extended its application to all those in business-including individuals' undertaking in the liberal profession and all private legal entities.[128]

Sixth, the other consequence of the distinction between civil and commercial business organizations pertains to the applicability of provisions[129] on "businesses". Book I, Title V of the Ethiopian Commercial Code. In defining "business ", Article 124 reads stipulate that " a business is an incorporeal movable consisting of all movable property brought together and organized

[128] It is stated that with the passage of time, more and more entities have been made subject to the law in this area. The scope of application has continuously been widened. Whereas, before 1967 only commercial entities could be made subject to a collective insolvency proceeding, today all types of independent professionals and all types of legal entities are affected. … The most recent development concerns regulated liberal professions or professions whose status is otherwise protected." Bayle, Marcel, Description of French Collective Insolvency Proceedings, in Tetley, *supra* note 100, p.224. see also Levratto, Nadine, Bankruptcy: from Moral Order to Economic Efficiency, 2007, p.25 Levratto, supra note 119. Here it is stated that the evolution of bankruptcy law observed in France testifies to the unification of commercial and civil law which admitted bankruptcy of corporations under non-trading private law (non-commercial partnerships, associations, trade unions, cooperatives), authorised receivership for artisans in 1985 and for farmers in 1988 and allowed the liquidation of companies to be extended to their managers who were still did not have legal trader status. The same phenomenon of unification occurred in other countries in Europe, albeit at very different periods: in England, the Insolvency Act (1986) applied to all debtors, in Germany, the procedure ensuring equal rights to payment on execution among unsecured creditors (1877) was also applied to all insolvent debtors (which explains why this particular system was maintained in the three recovered departments of Alsace-Lorraine), as well as in the Netherlands (see Sgard, 2005).

[129] These provisions cover Arts. 124-209 of Commercial Code, supra note 6.

for the purpose of carrying out *any of the commercial ac1livities specified in Art. 5 of this Code*." Article 125(1) continues to tell us that "every trader operates a business". By virtue of Article 3 that extends[130] applicability of provisions on traders to business organization, commercial business organizations also operate 'business" within the meaning of Articles 124.

On the other side, civil business organizations are not deemed to be operating business since 'business' is defined under Article 124 in relation to commercial activities under Article 5. It from these it follows that the *provisions of the Code on 'business'*[131] do not apply to civil business organizations. To be more specific, that the provisions of the Code on 'constituency of business', protection of 'goodwill', 'trade name' and 'distinguishing mark', the 'right to the lease of premises' in which 'trade' is carried, 'sale of business', 'mortgage of business, 'hire of business', and 'contribution of business' to business organization apply only to commercial business organizations and not to civil business organizations.

On matters similar to those stated above, the Civil Code and other relevant laws apply as far as civil business organizations are concerned. This exclusion of civil business organizations deprives several potential benefits provided in

[130] Article 3 of the Commercial Code –captioned as "persons and business organizations"- states that "the provisions of this Code applicable to persons other than those provisions applicable to physical persons only shall apply to business organizations. Nothing shall affect the special provisions of Book II and Book V Title IV of this Code app1icahle to business organisations only. See Commercial Code, *supra* note 6, Art.3.

[131] Ibid., Arts.127-209.

the Commercial Code by departing from the Civil Code. For instance, the law defining "constituency of business" and recognition of different items as a single whole maximizes the value of business assets since business assets as a whole fetch a better value than assets dismembered.[132] It also enables transaction of all the elements as a single "incorporeal property"[133] in transactions such sale, hire, mortgage and contribution of business. Moreover, simplifies business transactions for those operating business by filling gaps as to what items are considered to be transacted as part of a single whole/business/ but one dealing with civil business organizations has to rely on the rules of the Civil Code on accessories and intrinsic elements if they could be any help.[134] Again, Article 145 of the Commercial Code has guaranteed those operating business unconstrained right to sub-lease premises in which 'trade' while sub-leasing in the Civil Code[135] possible only if lessor agreed.

Other differences in legal consequence may also be discerned from provisions of the Commercial Code here and there. For instance, as per Art. 280 (2) of the Commercial Code, partners in commercial business organizations do have

[132] Levratto, *supra* note 119, p.25.

[133] Commercial Code, *supra* note 6, Art.124

[134]Cf. Arts. 1131-1139 of Civil Code with Arts. 127-129, 155(2) of the Commercial Code. *supra* note 6.

[135] Cf. Civil Code, *supra* note 8, Art. 2959.

the status of trader.[136] The converse is that where a partnership is a civil one the partners are not deemed to be traders. This will have its own implication. Noteworthy in this regard is that to assume the status of a trader one needs special legal capacity. Ethiopian commercial law denies an emancipated minor to acquire the status of trader absent written authorization from family council (now replaced by judicial authorization)[137] while mere emancipation suffices for engagement in civil activities.[138] Hence an emancipated minor needs special capacity (additional requirement of written authorization from family council (now court authorization) to be a partner in commercial partnerships but not in civil ones. Neither could a tutor invest capital of a minor in commercial partnerships but only in civil ones or company form of commercial business organizations since these do not vest the minor the status of a trader.

---

[136] Commercial Code, *supra* note 6, Art. 280 (2). It stipulates that "where the partnership (general partnership) is a commercial partnership, each partner shall have the status of a trader."

[137]The institution of "Family Council" that was one of the organs of protection of the minor in the civil code is no more applicable in the federal jurisdictions and perhaps states that have enacted new family laws. The power of the Council to supervise the guardian and tutor is vested to the court. Cf. Arts.241-260 of the Civil Code of Ethiopia and the Revised Family Law, proclamation no. 213/200, Fed. Neg. Gaz., Year 6, No.1, Arts.224-235, 239, 272 etc.

[138] Commercial Code, Art. 13. - Emancipated Minors.

(1) Notwithstanding the provisions of Art. 333 of the Civil Code, emancipated minors may not carryon a trade unless authorised in writing by the family council.

(2) In default of authorisation under sub-art. (1), emancipated minors shall not be deemed to be of age. Cf: French Commercial Code, Art. Article L121-2 that states "[m]inors, even when declared of full age and capacity, may not be traders."

In the same vein, since being a partner in civil partnership does not entail status of trader, these provisions on objections to trading spouse by the other spouse are arguably applicable in case a spouse is to become a partner in commercial partnership only.[139]

As a last remark, compared to commercial ones, civil business organizations are taken to be less sophisticated: contractual relation between partners is more manifest than institutional character or lacks it; subject to lesser regulation by law and more of contractually dealt by the partners; and that they are designed for small scale and perhaps temporal business opportunities.

In this regard, Cueto-Rua stated that:

> *The Latin-American civil law distinguishes between commercial partnerships and civil partnerships and subjects them to different legal requirements and consequences. For instance, today there is no doubt that commercial partnerships are endowed with juridical personality, while there is a serious question, at least in several Latin-American countries, as to whether civil partnerships (sociedad civil) have or have not a juridical personality.*[140]

Also in Germany, the GbR (civil partnership) is considered to be devoid of legal personality[141] with the consequent implication that it cannot sue or be sued. Also, partners transact in their own name and their actions are not

[139] Commercial Code, *supra* note 6, Arts.16-21.

[140] Cueto-Rua, *supra* note 38, p.39-40.

[141] See footnote 66. But according to recent case-law the GbR (civil partnership) is considered to be a legal entity and is able to sue and be sued.

attributable to the partnership. Hence acts of one partner can bind and affect the other only if there is explicit authorization is given to one partner to act on behalf of the other in accordance with law of agency. Moreover, in practice as well, the GbR is often used for single joint ventures (e.g. construction projects) and comes to an end when the joint project has been completed.[142] Still more, where the scale of operation is significant and began to be sophisticated, the GbR shall become commercial and subject to commercial code.[143] A useful analogy is that while individuals engaged in commercial activities at small scale / handicraftsmen levels are exempted from being strictly subject to rules applicable to traders, business organizations engaged in civil activities but of small scale are exempted from certain rules applicable to commercial business organizations. These small scale civil business organizations are assimilated to petty traders/handcrafts. They will remain petty business organizations till the scale of operations manifests the scope of commercial motive.

In similar vein, Engrácia Antunes described the legal situation of civil business organizations in Portugal as follows:

> *The civil company is ruled in the Civil Code of 1966 as a contract between two or more persons (individuals or legal persons) which contribute with goods (cash or in kind) or services to jointly enter into a profit-making civil economic activity (art. 980º CC). Examples of*

[142] Katy Elmaliah, introduction to German Corporate Law, available at http://www.elmaliah.com/?categoryId=84560, accessed on November 5, 2014.

[143] See footnote 67&104.

> *these civil companies are partnerships of liberal professions such as those involving attorneys, auditors, physicians, artists, engineers, and so on. All partners are also personally and jointly responsible for the company debts, although subsidiarily in front of the company itself: this mean that, while each partner can be directly sued by company's creditors, he may request the previous exhaustion of the company assets.* [144]

Even where civil partnerships manifest institutional character equivalent to commercial partnerships, such as in France[145] and Ethiopia, there appears to be significant demonstration of the contractual character in civil ones than commercial ones. For instance, the Ethiopian Commercial Code allows partners of ordinary partnership to use partnership's property with due caution,[146] diminishing the separate entity character of the partnership to some extent while no comparable provision is found in the case of general partnership.

---

[144] Antunes, *supra* note 16, p.9.

[145]Compare partnership in the French Civil Code, *supra* note 94, (Art.1832...) and partnership in French Commercial Code, *supra* note 57, Art. L 221-1.

[146] Commercial Code, *supra* note 6, Art. 245. - Use of partnership property.

(1) Property, debts and rights brought into or acquired by the partnership shall belong to the partners in common under the terms of the partnership agreement.

(2) Every partner may use partnership property in accordance with usual partnership practice.

(3) No partner may use partnership property against the interests of the partnership or so as to prevent his co-partners from using such property in accordance with their rights.

5. Concluding Remarks

In conclusion, the distinction between civil law and commercial law is too delicate. Due to increasing commercialization of civil law, even the traditionally alleged differences are diminishing. Within the scope of their shrinking differences, they purport to regulate different subjects and/or transactions. The commercial law is meant to govern traders and business organizations in their dealings and/or commercial transactions while the civil law regulates dealings of non-traders and civil business organizations in their dealings and/or civil transactions.

The basis of distinction between civil and commercial business organization is the form of business organization and the business purpose it undertakes. Certain forms are considered commercial without regard to the business purpose while in other cases the object of the entity is determinant .i.e., where the economic activity the entity undertakes belongs to the category of commercial activities, it is commercial and otherwise it will be civil. In this regard, Ethiopian law holds that ordinary partnership is always civil and companies are by default commercial. The remaining ones .i.e., joint venture, general partnership and limited partnership could be either civil or commercial depending on their object. In connection with this classification, it is important to note that the closed list of commercial activities in Article 5 of the Commercial Code has simplified the classification of business organizations.

Due to the declining differences in substance between the two branches of

private law i.e. civil law and commercial law, these days the legal significance of demarcating business organizations into civil and commercial does not seem to carry the credence that it used to have in the earlier times. The legal significance of the distinction is likely to be more minimal in Ethiopia since both the civil and commercial business organization are governed by the Commercial Code unlike countries that maintained separate regulation, at least by and large, of civil business organizations by their civil code and commercial business organizations by commercial code.

In the Ethiopian legal context, the principal legal significance of the distinction between civil and commercial business organizations pertains to liability of partners, and applicability of bankruptcy proceeding and scheme of arrangement, and applicability of rules on "business". At least in the case of ordinary partnership, which is the typical civil business organization under Ethiopian law, the partners can individualize liability but in other partnerships joint and several liability is not only presumed but mandatory. Distinction based on this criterion is unwarranted in Ethiopian context not only because the general trend witness that presumption of joint and several liability has permeated into civil transactions the Ethiopian Code has also endorsed presumption of joint and several liability co-debtors.

Again, under Ethiopian law, applicability of "bankruptcy" and "schemes of arrangement" constitutes the most important legal significance of the distinction; the commercial business organizations are subject to bankruptcy proceeding and scheme of arrangement while the civil ones are not. In relation to the provisions on "business", civil business organizations are

excluded by the very definition of "business" from the application of the Articles 124-209 of the Commercial Code.

Countries such as France, Germany and Portugal rendered most business entities commercial business organizations by virtue of their form, and they permit single or few options for civil business organizations. It tells us that, like petty traders, there could petty business organizations known for their simplicity as a result their exemption from application the rules of commerce. The experience of these countries also tells us that but there be only few petty civil business organizations. Unlike the situation in these countries, under Ethiopian law four of the six business organizations could be civil. This is against the general tendency that subjects organized business entities to the rules of commerce in all respects. The case in Ethiopia is likely to deny creditors the relatively secured bankruptcy proceeding and fair apportionment of claims due to the non-applicability of this special proceeding to civil ones. It also entails that the civil business organizations in financial constraint would lose the opportunity for survival via schemes of arrangement.

Moreover, the provisions of the Commercial Code dealing with "business" endorse the typical advantages of being a merchant (trader and commercial). The exclusion of civil business organizations and individuals operating business in economic sector other than in Art.5 of the Code from the potential benefits in these provisions tends to be unsound. Against this background, this author holds that the distinction between civil and commercial business organization needs revision on account of concerns mentioned in these

concluding remark. Revision could still recognize the very logic of the distinction that was meant to allow more flexibility to civil business organizations by exempting certain rules in commercial law applicable commercial ones. Yet this could be done without denying potential benefits hinted in this research and others. Finally, it must be clear that the author does not pretend to have exhaustively studied the implications of the distinctions. This article simply evaluates some of the apparent distinctions in legal treatment and holds that on account of these appraised points, the classification appears to be outmoded. This article does not call for total abolition of the distinction for such a bold conclusion should be preceded by wider and deeper investigation from different perspectives.

A Comparative Analysis of the Ethiopian Legal Framework for Challenging Arbitral Awards through Appeal

Seid Demeke Mekonnen[♣]

Abstract

The grounds on which an award may be challenged under modern international arbitration laws are narrowly drawn and, in particular, do not allow a review of the merits. Nevertheless, in countries having traditions of court intervention in arbitration, the laws may – in addition to the usual action to set aside – allow parties to appeal the award before the courts. Comparably, the Ethiopian arbitration law facilitates both the avenues of appeal and setting aside. However, the legal framework for challenging arbitral awards through appeal is criticised for allowing excessive intervention of courts over arbitration, mainly, over the making of the award. This aspect of judicial intervention represents the most contestable interference in arbitral procedure. Where parties are able to challenge, appeal or overturn the outcome of arbitration, the finality and currency of an award will be compromised. Hence, this work is to provide possible approach to rectify the legal problems associated in the challenge of arbitral awards. Accordingly, after addressing the general overview of commercial arbitration, this article, with a view to draw best international experiences, provides an intensive comparative analysis of the Ethiopian legal framework for challenging arbitral awards-with UNCITRAL Model Arbitration Law and England Arbitration Act.

Keywords: Appeal, Arbitral awards, Challenge, Civil Procedure Code, English Arbitration Act, Merit review, Model Law, Setting aside

---

♣ LL.B (Mekelle University), LL.M in Business and Corporate Law (Bahir Dar University), Lecturer at JigJiga University. The author can be reached at: seid1429@gmail.com.

Introduction

Although the avenue of appeal from arbitral awards seems appropriate for the dissatisfied party in the arbitral decision, it does not meet with the demand of the current commercial arbitration of Ethiopia and the universal trend. In order to create a brand which appeals to parties, it is necessary to ensure that it reflects the contemporary needs of the international commercial community as well.[1] At present, the most pressing need appears to be that of reducing the cost of arbitral proceedings which, it is argued, will become even more acute in the present economic conditions if arbitration is to distinguish itself from litigation. Put it in other words, the more courts intervene in an approach that discredits the autonomy of the award holder, the more international parties keep away from choosing Ethiopian arbitration law and as a seat of arbitral tribunal.

The comparative analysis under this work is with the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law on international commercial arbitration (ICA) (here after the Model Law) and the English arbitration legal regime. The justification in selecting the Model Law is mainly because it is the widely accepted standard for the modern commercial arbitration rules, where several countries including the so-called arbitration superpower countries and the developing world are harmonising their domestic laws towards these arbitration friendly rules. Hence, since Ethiopia cannot leave itself out of the global trend, it is

[1]H.M. Holtzmann, *Report V: The Conduct of Arbitral Proceedings, in* P. Sanders, *UNCITRAL's Project for a Model Law on International Commercial Arbitration*, Kluwer, 1984, p.134.

indispensable to harmonise and modernise our laws in light of this trend. Principally, having harmonised and modernised or arbitration friendly legal framework will have a positive impact for the economic growth of a country. Thus, understanding the current trade and investment development and the demand of commercial communities participating in this area, it is unquestionable that Ethiopia adjusts its old and hostile arbitration rules, especially rules for the challenge of arbitral awards, in light of the Model Law.

Whereas the justification in choosing the English arbitration law for the comparison is, mainly for different purpose from that of the Model Law. That is, more to learn from the negative impacts that England is facing due to its failure to adopt arbitration friendly rules, mainly those related with the challenge of arbitral awards.

The scope of the comparative analysis is limited to the issue of challenging arbitral awards through appeal. Hence, the writer's suggestion regarding the need for adopting harmonised and modernized arbitration law is concerning the law governing challenge of arbitral awards through appeal.

To the best of the researcher's knowledge, academic works in this area of Ethiopian law is scant. Of course, some writers in a sub-section of their respective journal articles have attempted to show that the Ethiopian law for the challenge of arbitral award is knotty.[2] This article differs in that it is an

[2] *e.g.* Aschalew Ashagre, Involvement of Courts in Arbitration Proceedings under Ethiopian Law, *Journal of Business and Development*, vol.2, 2007; Tewodros Meheret, በሽምግልና መዳኘት

intensive comparative analysis to identify legal problems and to draw best experiences from international principles and practices just to rectify the legal problems. More importantly, the position of those mentioned writers is directed to the need for improving appeal rules; however, this work argues for the total lift of appeal procedure.

1. An Overview of Commercial Arbitration

1.1. Commercial Arbitration and the Progress towards Harmonisation

International commercial arbitration (ICA) has enjoyed growing popularity with business and other users over the past 50 years.[3] There are a number of reasons that parties elect to have their international disputes resolved through arbitration. These include the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain a quicker, more efficient decisions, the relative enforceability of arbitration agreements and arbitral awards (as contrasted with forum selection clauses and national court judgments), the commercial expertise of arbitrators, the parties' freedom to select and design the arbitral procedures, confidentiality

---

ሂደት የፍርድ ቤቶች ሚና, *መንበር*, ቅጽ 1, 2008, ገጽ. 66-92; Hailegabriel G. Feyissa, The Role of Ethiopian Courts in Commercial Arbitration, *Mizan Law Review*, Vol.4, 2010, 298-333, [hereinafter Hailegabriel, *The Role of Ethiopian Courts in Commercial Arbitration]*; Michael Teshome, Law and Practice of Arbitration in Ethiopia: A Brief Overview, www. Abyssinialaw Blog, 01 March 2013, [hereinafter Michael, *Law and Practice of Arbitration in Ethiopia: A Brief Overview*].

[3]Queen Mary University of London School of International Arbitration, *International Arbitration Study: Corporate Attitudes and Practices,* sponsored by Price Waterhouse Coopers, 2008, Available at <www.pwc.co.uk/eng/publications/International_arbitration.html>.

and other benefits.[4] Understanding those merits, different commentators and advocates have been attempting to advance the principles and practices of ICA through harmonising domestic arbitration laws.

Pressures for harmonization began to mount within ICA in the late 1970's and 1980's, given the perceived inadequacies of existing national arbitration laws and the differences and variations in legal systems.[5] In response to criticisms over the antiquated state of many national arbitration laws, and to serve the needs of the users of ICA, efforts towards reform of national arbitration laws commenced.[6] As a result, UNCITRAL began work on harmonizing national arbitration laws dealing with ICA using the New York Convention as the cornerstone.[7] Harmonization in the context of UNCITRAL can be defined as making regulatory requirements or government policies of different jurisdictions identical (or, at least, similar).[8]

UNCITRAL sought to eliminate barriers to ICA created by differing levels of state control and varying arbitration laws by drafting a model law and group of uniform rules on ICA. This harmonization approach is reflected in the

[4]Jan Paulsson, *International Commercial Arbitration, Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, 4th ed, *in* John Tackaberry, Cambridge University Press, 2003, p.3354.
[5]W. Laurence Craig, Some Trends and Developments in the Law and Practice of International Commercial Arbitration, *International Law Journal*, Vol. 30, No.25, 1995, p.22.
[6]*Ibid.*
[7] David W Leebron, Lying Down with the Procrustes: An Analysis of Harmonization Claims in Fair Trade and Harmonization: Pre Requisite for Free Trade? *Journal of International Business Law*, vol. 22, 1996, p.48.
[8]Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law*, 3rd ed., Oxford University Press,1998, p.129.

efforts of UNCITRAL in the drafting and diffusion of the Model Law on ICA.[9]

Harmonization of national law on ICA for creating a harmonized legal environment has become one of the most important challenges globalization posed today. A harmonized legal environment is a key to improving ICA, international commerce and hence economic growth.[10] The process of harmonization acknowledges the role of national laws and courts in the international arbitration process, albeit with greater recognition of party autonomy and more limited judicial intervention. Because of harmonization, the law relating to ICA is now conducted, in many respects, in a similar manner throughout the world.[11]

Outdated laws, inefficient regulation and malfunctioning institutions are common problems in many developing countries. By undertaking to modernise the legal framework for domestic business and following acceptable international standards, a country would signal its readiness to promote investment.[12] Interestingly, the past twenty years have shown that the Model Law has indeed been highly useful not only for developing countries,

[9]United Nations commission on International Trade Law on the work of its 18th Session -3-21 June 1985, Rep.17, U.N.Doc.A/40/17 (August 21, 1985).
[10]G Hermann, The UNCITAL Arbitration Laws: A Good Model of a Model Law, 3 *Uniform Law Review*, vol. 3, No.485, 1998, pp.466-499.
[11]*Ibid*.
[12]Kofi Annan, Help by Rewarding Good Governance, *International Herald Tribune*, March 20, 2009, at 8.

but also for many industrialized countries which have also reformed their law by adopting the Model Law.[13]

Within ICA, the main justifications for harmonization of national arbitral regimes and practices generally include: (a) providing a jurisdictional interface to enable parties from different systems to interact or communicate; (b) fairness in international transactions and international trade competition; (c) economies of scale, and (d) political economies of scale.[14]

Despite these justifications given for harmonization of national diversity within international trade and commerce, not all commentators adhere to belief in harmonization. Some commentators doubt whether elimination of legal diversity is necessary for free trade and international transactions generally.[15] Lord Goff, for example, states, "we should not try to insist upon uniformity or harmonization of laws which are different processes."[16] Despite the theoretical debate over the inherent merits of harmonizing international trade regime, on-going practical efforts try to either unify or harmonize international trade and commercial law generally.

---

[13]UNCITRAL, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Rep. 42, U.N. Doc. A/CN.9/264 (Mar. 25, 1985).

[14]Katherine Lynch, The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration, *Yale Journal of International Law*, vol., 47, No. 44, 2012, p.36.

[15]Since this article is not intended to analyze the merits and de-merits of the harmonization process, the researcher will not be addressing the doubts raised by various commentators about the legitimacy of the harmonization process.

[16]Lord Goff, *Windows on the World: International Commercial Arbitration For Today and Tomorrow*,
Oxford University Press, 2011, p. 52.

When preparing the Model Law, the main focus of UNCITRAL was to harmonize and modernize the law governing the settlement of international commercial disputes, rather than the conduct of domestic arbitrations. Nevertheless, it was obvious that a State could easily adapt the Model Law to domestic arbitrations and a significant number of States have done so.[17]

However, there are some states which follow their own path and have insisted not to harmonise their arbitration law with the current global trend. Notably, England can be cited as an example. Before the English Arbitration Act came into force, English arbitration law was scattered over the Arbitration Acts 1950, 1975 and 1979. This legislation applied to different aspects of arbitration and was complemented by, interpreted by and built on a large body of case law.[18]

Historically, three broad criticisms were levelled at English arbitration: it was slow and expensive: "litigation without wigs"; the law was inaccessible to laypersons and to foreign users; and the courts were too ready to intervene in the arbitral process. As a result, arbitration became increasingly unattractive as an option for dispute resolution and London lost out to other jurisdictions as a venue for international commercial arbitrations.[19]

---

[17]*e.g.* Bulgaria, Canada, Egypt, Germany, Hungary, India, Kenya, Lithuania, Mexico, New Zealand,
Nigeria, Oman, Sri Lanka, Zimbabwe.

[18] Karen Tweeddale and Andrew Tweeddale, *A Practical Approach to Arbitration Law*, Blackstone Press, 1999, p.35, [hereinafter Tweeddale, *A Practical Approach to Arbitration Law]*.

[19]William W. Park, The Interaction of Courts and Arbitrators in England: the 1996 Act as a Model for the United States, *International Arbitration Law Review*, vol. 54, No.144, 1998, p.125.

In the 1980s, the Department of Trade and Industry of England established the Departmental Advisory Committee on Arbitration Law (hereinafter DAC**).** One of the key decisions for the DAC was whether to recommend the enactment of the Model Law (1985). Whilst the DAC decided against adopting the Model Law (1985) wholesale, it did recommend that the new Arbitration Act should, as far as possible, adopt the structure and language of the Model Law (1985) and be clear and accessible. Despite these aspirations, the first draft bill in February 1994 did little more than consolidating the existing statutes of 1950, 1975 and 1979.[20]

In case of Ethiopia, it is obvious that there has not any attempt made to harmonize and modernize the arbitration law in light of the current global trend. The major sources of Ethiopian arbitration law are the Civil Procedure Code (CPC), the Civil Code (CC) and Federal Cassation Bench decisions.[21] The Ethiopian legal framework for modern arbitration has been laid down by the mid-20th century codifications. Before that, arbitration was known only within the context of traditional dispute resolution.[22] "The pertinent provisions of the CPC do not make a difference, except in cases of execution

[20]Margaret Rutherford and John Sims, Arbitration Act 1996 of Egland and Wales : A Practical Guide, Sweet and Maxwell, 1996, p. 4.; A comprehensive discussion of the Departmental Advisory Committee's (DAC) on the draft of 1996 arbitration act, UK, May 2, 1989.

[21]Civil Code of the Empire of Ethiopia, Negarit Gazzeta, 1960, Arts.3325-3346, [hereinafter *Civil Code of Ethiopia*]; Civil Procedure Code of the Empire of Ethiopia, Negarit Gazzeta, Arts.315-319 and 350-357, 1965 [hereinafter *Civil Procedure Code of Ethiopia*]. These codes reveal that courts in Ethiopia control arbitration by avenues of appeal, setting aside and refusal.

[22] Hailegabriel, *The Role of Ethiopian Courts in Commercial Arbitration*, *Supra note* 2, p. 301.

of foreign arbitral awards, between domestic and international arbitration."[23] Besides, there is no law geared to only commercial disputes as is the case in some traditional civil law countries.[24]

Like that of its English counterpart, the approach of Ethiopian arbitration law, especially that related with the challenge of arbitral awards, has been criticised for allowing courts maximum intervention over the arbitration process. This old approach of the law is in opposition to the current global trend, where several countries are shifting towards minimising courts control over the arbitration process.

1.2. Court Intervention in Arbitral Proceedings

As in all relationships, the appropriate balance must be found between the rights of the courts to supervise arbitrations and the rights of parties to ask for the court's assistance in times of need. As Lord Mustill, a former senior English judge, has stated:

> *[T]here is plainly a tension here. On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.*[25]

---

[23]Michael, *Law and Practice of Arbitration in Ethiopia: A Brief Overview*, *supra note* 2, p. 11.
[24]Hailegabriel, *The Role of Ethiopian Courts in Commercial Arbitration*, *supra note* 2, p. 303.
[25]Lord Mustill *in Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals*, Newcastle Hight Court, England, case No. 109, para. 116, 2006.

As is evident from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (hereinafter 'the New York Convention') and the Model Law, there are four stages when courts are most likely to become involved with the arbitration process: (1) prior to the establishment of a tribunal; (2) at the commencement of the arbitration; (3) during the arbitration process; and (4) during the enforcement stage.[26]

With regard to the Ethiopian arbitration law, it seems to approve elevated role of the courts rather than arbitration tribunals. Before the arbitral proceeding, during and after the making of the award, there is ignominious intervention of state courts.[27] The legal framework is being criticised for allowing courts to follow a hostile approach over the arbitral proceedings.

Overall, national courts have vested interest in arbitration because it is a private quasi-judicial dispute settlement method. National procedural law exercises authority over contractually constituted arbitration panels for fear that it may be abused, and become a way to escape the law.[28] However, the current global approach advocates this role of national courts to be arbitration friendly.

---

[26]Julian D.M. Lew *et al*., *Comparative International Commercial Arbitration*, Oxford University Press, 2003, p. 367.

[27]For instance, Civil Code of Ethiopia, Arts. 3330(3) (1) and 3330(1)-(2); Civil Procedure Code of Ethiopia, Arts. 317(3),317(3) , 351, 356 and 461.

[28]Redfern, A & Henter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 2005, p. 439 [hereinafter Redfern, *Law and Practice of International Commercial Arbitration*].

1.3. The Arbitral Award

Parties generally expect an arbitration to result in an award that will be final and binding. The widely accepted meaning of award is that it is the final decision by the arbitrators, dispositive of the issues in the case.[29] Tribunals may, however, issue partial awards or interim awards, which also may be final and binding on the parties.[30] In addition, arbitrators may issue certain directions and orders during the course of the proceedings, which may be reviewable by the tribunal, and which do not constitute awards.[31]

Once the parties have made their final submissions, be it at the final hearing, in post hearing briefs, or in response to the tribunal's subsequent written questions, the arbitration enters its ultimate chapter: the award phase. This comprises two or three separate stages, at least where the tribunal consists of three arbitrators. These stages are the tribunal's deliberations, the writing of the award itself, and post-award procedures within the arbitration, such as the correction or interpretation of the award.[32]

As explained above, it is generally understood that an award is a decision that finally disposes of the substantive disputed issues that it addresses. It should

[29]*Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, London High Court, England, case No. 234, Para. 123, 2003 (Interim order requiring posting of pre-hearing security properly confirmed by court).
[30]International Court of Arbitration (ICC), Final Report on Interim and Partial Awards, *ICC Bulletin*, Oct. 4, 1990, p. 7.
[31]*Ibid*.
[32] e.g., ICC Rules, Art. 29.

have the legal effect of *res judicata* as regards those issues.[33] Awards are distinct from orders issued by the tribunal, in that orders are decisions that do not finally resolve substantive issues disputed by the parties, whereas awards do – irrespective of whether the decision is entitled order or award.[34]

The effect of the award (after any correction or interpretation has been performed or the deadline for such measures has expired) is that the arbitration is at an end, and the tribunal's service is complete. In addition, the dispute between the parties that is submitted to the tribunal is finally resolved, assuming there is no action to set the award aside. The award therefore has *res judicata* effect between the disputing parties with respect to that dispute. This means that the same dispute between the same parties cannot be submitted to another court or tribunal for resolution.[35] Finally, and perhaps most importantly, the award may give the victorious party a title to enforce against its opponent, allowing it to secure effective relief.

The arbitrators' duty in rendering their award is to decide the dispute in accordance with the applicable rules of law and procedure, and in view of the evidence before them, but also, in the words of Article 35 of the ICC Rules to "make every effort to make sure that the Award is enforceable by law."[36] Arbitrators must therefore be conscious – or be made conscious by the parties,

[33]Bernard Hanotiau, The Res Judicata Effect of Arbitral Awards, *ICC Bulletin*: Complex Arbitrations – Special Supplement, May 7, 2003, at 47, [hereinafter Bernard, *The Res Judicata Effect of Arbitral Awards*].
[34]*Ibid*.
[35]*Ibid*.
[36]G.J. Horvath, The Duty of the Tribunal to Render an Enforceable Award, *Journal of International Arbitration*, vol. 18, No.143, 2001, p.158.

especially the claimant – of the grounds on which enforcement of an award can be resisted in the countries where it is likely to be enforced, and of the grounds for setting it aside at the place of arbitration.[37]

2. Challenging Arbitral Awards through Appeal

2.1. Legal Frameworks

As Redfern and Hunter note, the degree of court involvement that is allowed by different states may be observed as a spectrum.[38] At one end of the spectrum are: for instance, countries like France, which apply a minimum intervention over international arbitral awards, and Switzerland, which permits non- Swiss parties to waive controls all in all. In the centre of the spectrum are grouped a considerable number of states that have adopted the grounds of challenge listed in the Model Law. At the other end of the spectrum are countries like England, which operate a spectrum of controls, including a limited right of appeal on error of law that the parties may agree to put aside.[39] In the opinion of the writer, the Ethiopian arbitration law may be categorized in a different spectrum which can be regarded as a kind of extreme control of courts, where the grounds of appeal includes not only error of law (like England), but also extends to error of fact and procedural issues.

Most or all modern arbitration laws, including those inspired by the Model Law, contain provisions on setting aside international awards that are similar to those of the Model Law: a dissatisfied party may challenge the award, but

[37]Bernand, The Res Judicata Effect of Arbitral Awards, supra note 33.
[38] Redfern, Law and Practice of International Commercial Arbitration, supra note 28, p. 607.
[39]Ibid ; A. Tweeddale, Arbitration of Commercial Disputes: International and English Law and Practice, Oxford University Press, 2007, p.59, [hereinafter Tweeddale, Arbitration of Commercial Disputes: International and English Law and Practice]

only in an action to set aside, and only on limited grounds that preclude a review of the merits.[40] Under Article 34 of the Model Law, an arbitral award can only be set aside in limited circumstances. These include the incapacity of one of the parties to enter into the arbitration agreement (Article 34(2)(a)(i)), the lack of substantive jurisdiction on the part of the arbitrators (Article 34(2)(a)(iii)), and the infringement of the public policy of the state where the award is made (Article 34(2)(b)(ii)).[41] The scope of the set aside action covers the procedural defect, but not its substance.[42] There is no appeal under the Model Law on the facts or judicial review on the merits.[43] In a setting aside

[40]G. Herrmann, The Role of the Courts under the UNCITRAL Model Law Script, in J.D. Lew, Contemporary Problems in International Arbitration, Queen Mary College,1986, p.169.

[41] These grounds are taken from Article V of the New York Convention. There is a pleasing symmetry here. The New York Convention, in Article V, sets out the grounds on which recognition and enforcement of an international award may be refused. Article 34 of the Model Law sets out the same grounds (with slight differences of language) as the grounds on which such an award may be set aside. These grounds are as follows:
lack of capacity to conclude an arbitration agreement, or lack of a valid arbitration agreement; where the aggrieved party was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings or was otherwise unable to present its case; where the award deals with matters not contemplated by, or falling within, the arbitration clause or submission agreement, or goes beyond the scope of what was submitted; where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Model Law itself; where the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State where the arbitration takes place; where the award (or any decision in it) is in conflict with the public policy of the State where the arbitration takes place. An application under the Model Law for setting aside an award must be made within three months from the date on which the aggrieved party receives the award (subject to any extended time limit that may be appropriate where corrections, interpretations, or additional awards have been issued under Article 33).

[42]The Model Law regarding the Law's scope of application, article 1(2).

[43]A.S. Reid, The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart? *Journal of International Arbitration*, vol. 21, No.237, 2004, p. 227.

action, courts are restricted to the reasons offered by Article 34(2), mainly to procedural issues. The court may not review the merits of the award.[44]

In describing the nature of setting aside proceedings, a court from a Model Law country held that the 'applicable review in annulment proceedings is that of an external trial, (…) in such a way that the competent court examining the case solely decides on the formal guarantees of the proceedings and the arbitral award, but cannot review the merits of the matter.'[45] Moreover, courts of Model Law countries have regularly emphasized the exceptional character of the remedy as courts should in principle not interfere with the decision of the arbitral tribunal.[46]

There are exceptions to the general rule in arbitration that the only grounds for challenging an award are based upon jurisdiction, procedural irregularities, arbitrability, or public policy. These exceptions are found generally in common law legal systems. In England, for example, a party may appeal from an arbitral award on a point of law, unless the parties have agreed otherwise.[47] This right of appeal, however, is subject to substantial limitations. The appeal cannot be brought unless all the parties agree, or unless the court grants leave to appeal.[48] The court should grant leave if the

[44]R. B. Lillich and C.N. Brower, *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?* Transnational Publishers, 1994,78.
[45]*Sofía v. Tintorería Paris, Sofía*, Madrid Court of Appeal, Spain case No. 19, Para. 23, 20 January 2006.
[46]*e. g, Quintette Coal Limited v. Nippon Steel Corp. et al.,* Court of Appeal for British Columbia, Canada, 24 October1990, Case No. 16, Para. 54.
[47]English Arbitration Act of 1996 [hereinafter *English Arbitration Act*, § 69(1)].
[48]*Id*., § 69(2).

tribunal was obviously wrong on the point of law.[49] Moreover, case law has established that only a point of English law can be appealed.[50]

On an appeal under the English Arbitration Act, the court may either confirm, vary or remit the disputing case to the arbitral tribunal for reconsideration in whole or in part or set the award aside in whole or in part. The court will generally remit the matters in question to the arbitral tribunal for reconsideration unless it is satisfied that this would be inappropriate under the circumstances.[51]

Coming to the arbitration law of Ethiopia, unlike the approach of the Model Law, a party can appeal from the awards of arbitrators to ordinary courts-based on error of law or fact, or procedural irregularity grounds, article 351 of Civil Procedure Code (hereinafter CPC). Moreover, since the lists under the above provision are not exhaustive, parties can also put additional grounds of appeal in their arbitration agreement. However, as provided under Artticle

[49]*Id*., § 69(3). In England awards can be appealed on points of law only. An award may only be appealed after permission has been granted by the court or by the agreement of the parties. The grounds on which such permission to appeal will be granted derive from the pre-English Arbitration Act common law guidelines. Leave to appeal shall be given only if the court is satisfied that: the determination of the question will substantially affect the rights of one or more of the parties; the question is one which the arbitral tribunal was asked to determine; on the basis of the findings of fact in the award, the decision of the arbitral tribunal on the question is obviously wrong; n the basis of the findings of fact in the award, the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

[50]*Reliance Industries Ltd. v. Enron Oil & Gas India Ltd.,* London High Court, England, Case No. 143, Para. 312, 2002 (Appeal not granted because issues related to Indian law, not English law.).

[51]*English arbitration act, supra note* 47, § 69.

350(2) of CPC, parties can waive this right of appeal provided that they are with full knowledge of the circumstance.

The grounds of appeal which can be categorised as procedural matters are: inconsistency, uncertainty or ambiguity of the award, or the arbitrator omitted to decide maters referred to him. In such cases, by the cumulative reading of Articles 353 and 354 of CPC, the appellate court may confirm, vary or remit the disputing case to the arbitrator for reconsideration. Whereas, as per Article 353 of CPC, in case of the remaining grounds, i.e. irregularities of proceeding and misconduct of arbitrator, courts may confirm or vary the decision of arbitrators, but remit is not facilitated in the procedural rules. Besides, in case of error of law or fact, as provided under Article 354 of CPC, "arbitrators may be ordered to correct the mistakes mentioned under Articles 351(1) (a) and (b)" of CPC that include error of law or fact.

From the above explanations, one can easily understand that, on one hand, unlike the Model Law, the Ethiopian arbitration law has made the avenue of appeal to be employed for challenging arbitral awards. On the other hand, the law provides wider ranges of illustrative grounds for challenging arbitral awards than its English counterpart in that, in addition to error of law, procedural issues and error of facts are also made to be grounds of appeal in Ethiopia. Hence, as it will be further elucidated herein under, one can comprehend that the Ethiopian arbitration law is in favour of courts extreme control over the arbitration process-after the making of the awards.

2.2. Grounds of Appeal

2.2.1. Error of Law

It should be noted that since the avenue of appeal is totally lifted in the Model Law jurisdiction, there shall not be a comparison concerning grounds of appeal with this jurisdiction, unless to analyse the general approach.

As explained herein above, under English arbitration law, the way in which the merit of an award may be challenged is on a point of law provided that the parties did not contract out their right of appeal.[52] This is facilitated under section 69 of the 1996 Act. The reasoning for including a restricted right of appeal was provided by the 1996 DAC's Report:

> *It seems to us, that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of law clause to govern the rights and obligations arising out of the bargain made subject to that agreement. It can be said with force that in such circumstances, the*

[52]Unlike challenges under Sections 67 and 68 of the English Arbitration Act, the parties' right to appeal on points of law can be excluded by agreement between the parties, either in the arbitration agreement or at a later stage. Where the parties choose to arbitrate under the ICC Rules or the LCIA Rules, the parties' right to appeal under Section 69 of the English Arbitration Act is waived automatically. Where the parties opt for ad hoc arbitration or institutional rules which do not contain waiver language akin to the ICC Rules and LCIA, the parties can exclude the application of Section 69 by stating so expressly in the arbitration agreement. Pursuant to Section 69(1) of the English Arbitration Act, the parties' agreement to dispense with the requirement that the arbitral tribunal give reasons for its award will be considered an agreement to exclude the right of appeal. Sections 70 – 73 of the English Arbitration Act contain supplementary provisions and restrictions in relation to the challenge or appeal of awards. See ICC Rules, article 28(6) and LCIA Rules, article 26(9).

> *parties have agreed that the law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fails to do this, it is not reaching the result contemplated by the arbitration agreement.*[53]

It is submitted that the remit of section 69 would appear to represent an area where judicial intervention is justified given that it concerns an aspect upon which judges are pre-eminently qualified and are likely to offer more expertise than an arbitrator. As the DAC emphasise in their reasoning, "…the parties have agreed that the law will be properly applied by the arbitral tribunal and where this does not occur, it is for a court to resolve the issue and restore justice in the case."[54]

During its involvement in the drafting of the Model Law, the United Kingdom expressed reservations concerning the scope of the grounds upon which an award could be challenged.[55] The UK argued that the Model Law should set a minimum level of judicial control in the arbitral process, but this does not necessarily entail "…that the Model Law must set a maximum, eliminating even those means of judicial control which the parties themselves desire to retain."[56]

[53]The Departmental Advisory Committee on the Arbitration Bill 1996, Annual Rep. Department of Trade and industry, London, 1996, p.285.
[54] *Ibid.*
[55] Lord Mustill, A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law, *Arbitration International Journal*, vol. 6, No. 27, 1990, p.25.
[56]Fraser Davidson, The New Arbitration Act – A Model Law? *Journal of Business Law*, Vol, 101, No.125, 1997,122.

Although the approach of England may seem appropriate, it has not been met with universal acceptance. Holmes and O'Reilly question the value of section 69, noting that it "adds little to the cause of justice or the development of the law. As well as being contrary to the spirit of party autonomy (…) it is a source of cost and inefficiency."[57] Those writers have also asserted that hostile rules like section 69 of English arbitration act have been the main reasons for parties not to select London as a seat of arbitration tribunal.[58]

The right to appeal on a question of law under section 69 is indeed broad in scope and it may be viewed as a key disincentive for arbitration in England. Tuckey J in *Egmatra AG v Macro Trading Corporation* recognised that Article 69 is broad and warned that the courts should exercise it sparingly so as to "respect the decision of the tribunal of the parties' choice."[59] The underlying principle which should be applied in respect of this provision was articulated by the Court of Appeal in *BMBF (No 12) Ltd v Harland v Wolff Shipbuilding and Heavy Industry*: "it is not for the courts to substitute its own view for that of experienced arbitrators."[60] Although these comments of the judiciary represent a sensible approach as regards the application of section

[57] R Holmes and M O'Reilly, Appeals from Arbitral Awards: Should Section 69 be Repealed?' *Journal of Arbitration,* vol., 23, No.145, 2003, p.127.
[58] *Ibid.*
[59] *Egmatra AG v Macro Trading Corporation,* London High Court, England, Case No. 342, Para. 213, 1999.
[60] *BMBF Ltd and Harland v Wolff Shipbuilding and Heavy Industry,* London High Court, England, Case No. 221, Para. 231, 2001.

69, they also serve to indicate the potential that the provision has for undermining the decisions and awards of arbitrators.[61]

Some further critiques have also been offered by different scholars. An appeal under section 69 of the Arbitration Act 1996 may be challenged on a question of law as distinguished from a question of fact. Taner Dedezade posits that "[t]his distinction is notoriously difficult to draw and arises in almost all areas of law when it comes to a question of appeal."[62] Similarly, Shackleton has emphasised the controversy which surrounded the enactment of this particular provision at the time of the drafting of the 1996 Act and highlights that the appeal regime is fraught with tension. He asserted that:

> *Confusion surrounds the demarcation of a question of law for the purposes of appeal. Implementation continues to be problematic. The legislative objective of reducing appeals form arbitrators' awards has not been met; the largest single category of arbitration-related litigation continues to involve appeals on the legal merits of arbitral awards.*[63]

Like its English counterpart, under the Ethiopian arbitration law, one prominent example of a ground for challenge that departs substantially from the Model Law is the availability of an appeal on a point of law, discussed earlier. Article 351(a) of CPC allows a party to appeal an award before courts on the basis of error of law.

---

[61]Stewart Shackleton**,** Challenging Arbitration Awards: Part 3, *New Law Journal,* vol. 152, No. 22,2002, p 23, [hereinafter Stewart**,** *Challenging Arbitration Awards: Part 3*]

[62]Taner Dedezade, Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law, *International Arbitration Law Review*,vol.34 No.56, 2007, p.34.

[63]Stewart**,** *Challenging Arbitration Awards: Part 3***,** *supra note* 61.

Critically, the Model Law does not contain any general right to appeal an arbitral award for substantive error of law. This is to be contrasted with the respective legal frameworks of both the English (Arbitration Act 1996 and Case Decisions) and the Ethiopian (the Civil Procedure Code and Cassation Decisions). Put precisely, the two countries' legal regimes provide strong support for the notion of an appeal on a point of law.

Furthermore, in England, it is open to the parties to exclude the right of appeal in any category of dispute and at any time, that is to say before or after the commencement of the arbitration.[64] Comparably, under article 350(2) of CPC, the Ethiopian arbitration law has also facilitated to the parties just to contract out their right of appeal provided that they are with full knowledge of the circumstance.

While fully understanding the point of view that the parties should not be compelled to submit an appeal on question of law, it may be suggested that the logical consequence of party autonomy is that the parties should be allowed to have recourse, if that is what they have agreed.[65] Holding such a position, one may pose an interesting issue of what is the problem of the existence of appeal procedure and why is it criticised in the condition where the law allows parties to waive this avenue if they wish to avoid it.

[64] B. Harris & R. Plant, *The Arbitration Act 1996: A Commentary*, Blackwell Publishing, 2000, p.310.

[65]UNCITRAL, Preliminary discussion on the draft of the Model Law, UN Doc A/CN9/263/Addendum, paras. 37-38(1984)

The existence of appeal procedure for challenging arbitral award may be tolerated when the arbitration finality clause made in the parties' agreement is always respected by the enforcer, that is, the court. However, it should be noted that the situation of judicial intervention is largely depend on the approach courts will adopt in interpreting the arbitration finality clause. This concerns both England and Ethiopia. In England, given the strict limitations envisaged by the 1996 Act, one may expect that waiver of an appeal right will be hardly successful in English courts. Even if the Act under section 69 facilitates waiver agreement, English courts have not so far followed a clear-cut approach while enforcing arbitration finality clause. For example in *Gbangola v. Smith & Sheriff Ltd*[66], invoking fundamental error of law, the court has intervened to challenge the arbitral awards although arbitration finality clause was made by the parties. By contrast, in *India Steamship Co. Ltd v. Arab Potash Co Ltd*[67], the court rejected appeal justifying that the parties have agreed to waive their right of appeal.

By the same token, such dilemma of courts approach has been observed in Ethiopian courts. The conclusiveness of an arbitration clause was regarded as parties' autonomous right in the previous decision of FDRE Supreme Cassation Bench. In the case between *National Motors Corp. v. General Business Development*,[68] the cassation bench defended the finality of the arbitration clause. The court asserted that in the existence of a valid

[66] *Gbangola v. Smith & Sheriff Ltd,* London High Court, England, Case No. 12, Para. 22, 2004.
[67] *India Steamship Co. Ltd v. Arab Potash Co Ltd,* London High Court, England,Case No.32, Para. 32, 2007.
[68]*National Motor Corp. v. General Business Development,* Federal Supreme Court Cassation Bench, Addis Ababa, 1997, Case No. 21849, 1997 E.C.

arbitration finality clause, the appellant cannot challenge the awards before courts. Appreciating this position of the bench, Hailegabriel Gedich hypothesizes that: "... the precedent set in *National Motors Corporation v General Business Development* may take Ethiopian law to the level of modern arbitration legislations which permit arbitrators to act as *amiable compositeure* with the agreement of the parties."[69]

However, this previous approach of the court has changed recently and the optimistic posits of Hailegebriel is not realised. In the case between *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co.*,[70] the cassation bench was struck down arbitration finality clause. The cassation bench invoked article 80 (3) of the FDRE Constitution, Proclamation No.454/1997, article 356 of CPC and the purpose of arbitration to strike down the arbitration finality clause justifying that the mere existence of waiver agreement cannot preclude a dissatisfied party from appeal, where the decision of the arbitral tribunal contains basic error of law.

In sum, in the opinion of the writer, the regime of appeal on the legal merit of arbitral awards is under pressure in Ethiopia because the legal theory that sustained it under the Civil Procedure Code has all but disappeared. This is on the one hand, due to procedural confusion made by courts just to assume

[69]Hailegabriel, *The Role of Ethiopian Courts in Commercial Arbitration* supra note 2, pp. 328-329.

[70] *National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co*, Federal Supreme Court Cassation Bench, Addis Ababa, Civil Case No. 42239, Tikimt 29 2003 E.C., in የፌዴራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት ዉሳኔዎች፤ ቅጽ 2፤ የኢፌዲሪ ጠቅላይ ፍርድ ቤት፤ አዲስ አበባ፤ 2003 E.C. ፤ ገጽ 346-351።

power in unjustified manner; and on the other hand, due to hostile approaches of the courts that extends up to paralysing arbitration finality clause, which was formerly considered as a manifestation for the supremacy of parties' autonomy. Hence, in this condition, advocating for the existence of appeal procedure may endanger the merit and purpose of arbitration.

2.2.2. Error of Fact

As has been seen, there is no provision in the Model Law for challenging an award on the basis of mistake of fact or law. In England, except error of law, any other ground including error of fact is not provided under section 69 of the 1996 Act. Conversely, the Ethiopian arbitration law, under article 351(a) of CPC, has made error of fact to be a ground of appeal equally with error of law, procedural irregularity and misconduct of arbitrator.

In the case of England, the circumstances in which section 69 is invoked extend to where the proper law of the contract is a foreign law, where the parties have chosen a foreign law as the procedural law and where there arises a question of fact. In respect to the first circumstance, Tweeddale and Tweeddale note that a question of law under a foreign law is a question of fact under the law of England and Wales and cannot be the subject of an appeal under section 69 of the Arbitration Act 1996.[71]

Whether an event has occurred or not, or whether an allegation is proven or not, is a question of fact and is considered having regard to the evidence

[71]Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, *supra note* 39, p. 877.

presented in a case.[72] Tweeddale and Tweeddale use the example of a situation in which it is to be determined whether there has been a breach of contract and whether a loss has been incurred due to the breach of contract.[73]As is evident from the cases of *Fence Gate Ltd v NEL Construction Ltd*[74] and *Hallamshire Construction plc v South Holland DC*,[75] an arbitral tribunal's award cannot be challenged under section 69 of the Arbitration Act 1996 on the basis that it has made an error of fact.

Of course it has been criticised much, that the main reason for allowing an appeal from the arbitral awards on error of law is that it is in the general public interest, i.e., the law should be certain. There can be no such interest in the findings of fact of a certain tribunal in exacting case. In view of that, almost all states with developed laws of arbitration decline to allow appeals from arbitral tribunals on the basis of error of fact.[76]

Most states are broadly content to restrict the challenge of arbitral awards to excess of jurisdiction and lack of due process. These grounds for challenge are either adopted directly from the Model Law, or at any rate reflect the policy behind those grounds. Other states are prepared to offer a limited measure of judicial review on questions of law, if this is what the parties

[72]Ibid.
[73]Ibid.
[74]Fence Gate Ltd v NEL Construction Ltd, London High Court, England, Case No, 2431, para. 124, 2001.
[75]Hallamshire Construction plc v South Holland DC, London High Court, England, Case No. 134, Para. 214,2009.
[76]Redfern, Law and Practice of International Commercial Arbitration, supra note, 27, p. 612.

wish; but the possibility of the review of an award on the basis of error of fact is really odd.[77]

Moreover, remarks made by Steyn LJ in *Geogas SA v Tammo Gas Ltd*237 are testament to the above assertions:

> *It is irrelevant whether the court considers the findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be.*[78]

Concurrent with the above assertions, the writer of this article also believes that arbitrators are the masters of the facts than judges in a particular dispute submitted to arbitrators. Neither the English arbitration Act nor the Model Law (even for setting aside) made error of fact as an element for challenging arbitral awards. Hence, challenging/appealing on the basis of error of fact is not the practice around the globe in general, rather it is the experience of Ethiopia and oddly of some other jurisdictions.

2.2.3. Procedural Grounds

As provided under Article 34(2) of the Model Law, procedural issues are exclusively ready to be grounds for the avenue of setting aside. Comparably, in England, under section 67 and 68 of the 1996 Act, procedural irregularities are also made grounds for setting aside, rather than for merit review. Whereas

[77] B Dasser, International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis, ASA Bulletin, Jun. 22, 2007, p. 18.
[78]Geogas SA v Tammo Gas Ltd, London High Court, England, Case No. 2341, Para. 124, 1993.

in Ethiopia, we find a different approach, that is, as per Article 351 of CPC, procedural matters are listed to be used as grounds of appeal. These grounds are: (i) inconsistency, uncertainty or ambiguity of the award or when the award is wrong in matters of law or fact; (ii) the arbitrator omitted to decide matters referred to him; or (iii) lack of due process-irregularities of proceeding and misconduct of arbitrator.

Like error of law or fact, those grounds confer power to courts to review the merit of the case, where like ordinary judgments retrial is conducted, i.e. evidence is re-evaluated and the correctness of the arbitral tribunal's decision on the merits is examined. This situation has several problems. Principally, it leads to very excessive intervention of courts over each irregularity of the arbitral proceedings which ultimately endanger the merit of choosing arbitration than litigation as a dispute settlement mode. Among others, quicker, more efficient decision and confidentiality elements of arbitration will be affected.

Overall, the parties plan to avoid courts litigation will be smashed up. This can further be explained by the following Redfern and Hunters' assertion:

> *... there are serious disadvantages in having a system of arbitration that gives an unrestricted right of appeal from arbitral awards. First, the decisions of national judges may be substituted for the decisions of an arbitral tribunal specifically selected by or on behalf of the parties. Secondly, a party that agreed to arbitration as a private method of resolving disputes may find itself brought unwillingly before*

> *national courts that hold their hearings in public. Thirdly, the appeal process may be used simply to postpone the day on which payment is due, so that one of the main purposes of international commercial arbitration— the speedy resolution of disputes—is defeated.*[79]

Therefore, the above assertions lead us to criticise the Ethiopian arbitration law in providing procedural matters to be grounds of appeal (merit review), in the situation where the universal trend is towards making those grounds for the avenue of setting aside. Hence, the writer is in the opinion that the law should be revised to lift the appeal avenue at all and make those grounds of appeal (procedural matters) to be grounds of setting aside- as is the case in the Model Law jurisdiction and England.

Generally speaking, it should be renown again and again that a review through appeal has no place in a modern transnational environment where the parties' objective in agreeing to arbitration is usually to get away from the courts of whatever country and entrust the resolution of their disputes – and especially of the merits of their disputes – to international arbitrators. Some countries regard even low level of control as unnecessary and are content to leave matters within the hands of the arbitrators. For instance, Belgium, Sweden and Switzerland permit parties to waive in their arbitration agreement their right to seek to set an award aside provided that the parties are not nationals of or incorporated in the country in question.[80]

[79]Redfern, Law and Practice of International Commercial Arbitration, supra note 27, p. 607.
[80]Belgian Code Judiciaire, Article 1717(4), allows a waiver where none of the parties is either an individual of Belgian nationality or residing in Belgium, or a legal person having its head office or a branch there'; the Swedish Arbitration Act, section 51, allows a waiver where

Of course, it is not easy to strike a balance between the need for finality in the arbitral process and the wider public interest in some measures of judicial control, if only to ensure consistency of decisions and predictability of the operation of the law. However, universally, the balance has come down overwhelmingly in favour of finality, and against judicial review, except in very limited circumstances. A great number of cases underline that the Model Law does not permit review of the merits of an arbitral award.[81] This has been found to apply in principle to issues of law,[82] as well as to issues of fact.[83]

Moreover, different courts from the Model Law countries have regularly emphasized the exceptional character of the remedy as courts should in principle not interfere with the decision of the arbitral tribunal.[84] For instance, the reason given by a court in Singapore for this minimal court intervention which respects the finality of the arbitral process is that it "acknowledges the

---

none of the parties is domiciled or has its place of business in Sweden; and the Swiss PILA, article 192, allows a waiver of an action to set aside if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland. Belgium previously experimented with a law that removed entirely the parties' right to recourse against the award (rather than making it subject to the agreement of the parties) where none of the parties was a national of or incorporated in Belgium.

[81]e.g., Alibas Ltd. v Kalidon Share Company, Cairo Court of Appeal, Egypt, case No. 112, Para. May 12, 2009; Sendrofan Karia v LBC Shariml Ltd., Amman Court of Appeal, Jordan, No. 206, Para. 25, 10 June 2008; Karlsruhe Ltd. v LCF food Ltd, Frankfurt Supreme Court, Germany, case No. 321, Para. 10, 14 Sep. 2001, available at http://www.dis-arb.de/de/47/datenbanken/rspr/olg-karlsruhe-az-10-sch-04-01-datum-2001-09-14-id1268

[82]*Navigation Sonamar Inc. v. Algoma Steamships Limited and others,* Superior Court of Quebec, Canada,1987, Case No. 10, Para. 16, Apr. 1987.

[83]*Ibid*.

[84]*Quintette Coal Limited v. Nippon Steel Corp. et al.,* Court of Appeal for British Columbia, Canada, Case No. 16, Para. 2241, 24 October 1990.

primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen."[85]

In sum, the extreme approach of Ethiopian law for challenging arbitral awards is; therefore, does not go with the current global trend, where several countries are shifting towards minimising courts control over the arbitration process. Ethiopia cannot exclude itself from globalization.

Conclusion

> *Arbitration, unlike national court systems, is a commercially orientated product that flourishes on the basis of market forces. To avoid fading away, the popularity of this product depends on whether the demands of customers are satisfied. However, excessive interference exercised by state courts can result in the dissatisfaction of the customers.*[86]

The availability of an appeal from arbitral awards in Ethiopia is a trap for unwary parties who might expect a recent Ethiopian arbitration law and court practice to be consistent with recent arbitration laws elsewhere in the world (especially with the Model Law), and not therefore permit an appeal of the merits of an award. This is one reason parties may prefer to have the place of their international arbitration outside Ethiopia.

---

[85]*CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK,* Court of Appeal, Singapore, Case No. 1443, Para. 223, 13 July 2011.

[86]Hong-Lin Yu, Five Years On: A Review of the English Arbitration Act 1996, *Journal of International Arbitration*, vol. 19, No. 209, 2002, pp. 200-232.

The trend in legal systems around the world has been towards immunising the award from challenge based on the merit. Maintenance of recourse via appeal sets Ethiopia apart from this universal trend, which is being advocated by the Model Law jurisdictions. Of course, in Ethiopia, the adverse effect of extreme courts intervention via appeal has not observed as much as what is facing England. This may be due to less practice of commercial arbitration in Ethiopia, especially disputes involving a foreign party. However, it should be anticipated that discontent by the commercial communities will face the country while trade and investment develops more and more. Anyhow, the critics forwarded against the approach of England arbitration regime and the adverse effects facing the country due to its approach of wider courts intervention should be an alarming lesson for Ethiopia. The country should follow a new and modern approach for challenging arbitral awards, that is, the Model Law arbitration friendly approach.

Generally, the suggestion is that the avenue of appeal has nothing to do with parties' interest in modern commercial arbitration. Therefore, it should be totally lifted from the arbitration legal framework of Ethiopia. Hence, it is enough to have a modernised avenue of setting aside geared in light of the universal best principles and the demand of current commercial arbitration.

Tax Exemption through Letters: Issues of Legality and Equality

Ataklti Weldeabzgi Tsegay[♣]

Abstract

Employment income is one source of income tax in Ethiopia. Employees, in addition to their periodic salary, may be entitled to other payments or gains in cash or in kind during the employment relationship. The main concern of this article is to assess whether payments other than periodic salary of an employee, particularly house and transportation allowances, are taxable or not. The income tax proclamation, income tax regulation and income tax exemption directive provide employment incomes exempted from taxation. However, house and transportation allowances are not among those exempted. Practically, the writer traced that some federal government institutions, including Ethiopian Revenues and Custom Authority (ERCA) employees' incomes received in the form of house and transportation allowances and one regional government institution employees' income paid for house allowance are exempted from taxation via letters written by the Office of the Prime Minister and the regional government Supreme Court respectively. The exemptions for the federal government institutions employees are granted following the request of their employers. These exemptions being made by bodies not authorized by law to grant exemption and the means of exemption, i.e., the letters raise basic questions of legality. The exemptions also violate the principle of equality as similar incomes of

[♣] Lecturer, Bahir Dar University, School of Law, LL.B (Mekelle University), LL.M (Mekelle University). Particular acknowledgement for helpful comments on the earlier draft of this article is due to my colleague Haile Guesh and Yohannes W/gebriel. I am further grateful to the editor-in-chief of BDU Journal of Law and the anonymous reviewers for their contributions to the betterment of this piece. I would also like to express my gratitude to Aberra, Habtom Kesete for availing me with necessary materials to do research. The author can be reached at <atakltiw@yahoo.com>

other institutions employees are not exempted. The acts of those institutions that request exemption of tax liability and the office that grant exemption violate the income tax proclamation which imposes an obligation on them to cooperate in the enforcement of the proclamation. Particularly, ERCA, the principal body in the administration of tax, fails to respect and ensure compliance of tax laws.

Key terms*:* allowance, employment income, letter, principle of equality, principle of legality, tax authority**,** tax exemption, withholding agents.

Introduction

Income may be defined as the receipt in the form of money or money's worth which is derived from definite source with some sort of regularity or expected regularity.[1] For the purpose of the charging of income tax and computation of total income, all income shall be classified under the following heads of income: salaries, income from house property, profits and gains of business or profession, capital gains, and income from other sources.[2]

[1]Gurminder, K., Lesson 4, Income under the Head, Salaries – I, P 30, available at http://www.dawnhrs.co.in/pdf/Income Under Various Heads.pdf, Consulted 11 June, 2015, [here in after Gurminder]. In Ethiopia, the income tax defines income as: "Income" shall mean every sort of economic benefit including nonrecurring gains in cash or in kind, from whatever source derived and in whatever form paid credited or received. *See*, Income Tax Proclamation, 2002, Art 2(10), Pro.no.286/2002, *Fed. Neg. Gaz.*, year 8, no. 34, [here in after Income Tax Proclamation No. 286].

[2] Tax Payers Information Series 31, Taxation of Salaried Employees Pensioners and Senior Citizens, p 3, available at http://www.incometaxindia.gov.in/booklets%20%20pamphlets/tax-salaried-employees.pdf, Consulted 3 June, 2014, [here in after Tax Payers Information Series 31]. Note that classification of bases of income can be found differently in other documents. For instance, Lee, B. and Richard K., Provide that, income is commonly divided into employment, business, and investment income. There are often supplementary definitions of each category of income and, in the case of investment income, definitions of amounts included in

Once we know what incomes of a person are taxable, then we need to know how to compute total taxable income according to the provisions of income tax law.[3] The taxable income of a person for a tax period is commonly defined as the gross income of the person for the period less the total deductions allowed to the person for the period.[4] The gross income of a person for a tax period is the total of amounts derived by the person during the period that are subject to tax.[5] The gross income of a person, therefore, will not include amounts that are exempt from tax.[6] The total deductions of a person for a tax period are the total of expenses incurred by the person during the period in deriving amounts subject to tax plus any capital allowances and other amounts allowed as a deduction on a concessional basis (e.g., charitable

---

investment income (e.g. dividends, interest, rent, and royalties). Lee, B. and Richard K.., Individual Income Tax *in* Victor Thuronyi, (ed.), *Tax Law Design and Drafting*, International Monetary Fund, vol. 2, 1998, Pp 8-9 [here in after Lee and Richard, *Tax Law Design and Drafting*]. Under the Ethiopian jurisdiction, sources of income are listed in a non-exhaustive manner. That is, Income taxable under this proclamation shall include, but not limited to: a) income from employment; b) income from business activities; c) income derived by an entertainer, musician, or sports person from his personal activities; d) income from entrepreneurial activities carried on by a non-resident through a permanent establishment in Ethiopia; e) income from movable property attributable to a permanent establishment in Ethiopia; f) income from immovable property and appurtenances thereto, income from livestock and inventory in agriculture and forestry, and income from usufruct and other rights deriving from immovable property if such property is' situated in Ethiopia; g) income from the alienation of property referred to in (e); h) dividends distributed by a resident company; i) profit shares paid by a resident registered partnership; j) interest paid by the national, a regional or local Government or a resident of Ethiopia, or paid by a non-resident through a permanent establishment that he maintains in Ethiopia; k) license fees (including lease payments, and royalties paid by a resident or paid by a nonresident through a permanent establishment that he maintains in Ethiopia. Income Tax Proclamation No. 286, *Id*, art 6

[3] Gurminder, *Supra note*, p. 30

[4] Lee and Richard, *Supra note 2*, p 7. In Ethiopia, "Taxable Income" shall mean the amount of income subject to tax after deduction of all expenses and other deductible items allowed under this Proclamation and regulations issued there under. Income Tax Proclamation No. 286, *supra note 1*, art 2(11)

[5] Lee and Richard, *supra note 2*, P.7

[6] Ibid

donations).[7] Consequently, there are three key elements in the definition of the tax base: first, the inclusion of amounts in gross income; second, the identification of amounts that are exempt income; and third, the allowance of amounts as deductions.[8]Computation of income from employment as one source of income is subject to exempt and deductible amounts. However, the concern is which incomes are exempted and the manner of the exemption.

This article then explores employment income tax administration from the perspective of legality and equality principles. The focus is to address how employment income tax particularly income derived from *house and transportation allowances* are treated under some federal institutions and *house allowance* in the Amhara National Regional State Supreme Court.

The scheme of the paper is as follows: Section 1 looks into employment income tax in general and principles of legality and equality in particular. These principles are discussed in relation to taxation of allowances under some withholding agents/institutions. Section 2 examines the practice of some withholding agents. It also explores whether the Ethiopian revenue and customs authority is monitoring compliance and administer the tax laws fairly and impartially. Finally, some conclusions are drawn.

[7] Ibid
[8] Ibid

1. Employment Income Tax in General

Employment income consists of any income that an employee receives pursuant to employment relationship.[9] The definition of employment income is broad and comprises periodic salary as well as other cash payments, such as bonuses, sick pay, most lump sum payments to employees and the price of almost all gains collected following the employment relationship.[10] Regardless of the type of payment, to be taxable as employment income, the source of income must be in an employment relationship.[11]

Payment of employment income is commonly effected as soon as the employee earns the income; for this reason, some describe it as a "pay as you earn" income, abbreviated as PAYE (Pay-As-You-Earn). Under the prevailing arrangement, this timely payment is effected in most countries by withholding at the source, which is generally regarded as the cornerstone of

---

[9] Gilberts, Tax Accountants and Business Advisors, Tax and National Insurance Contributions (NICs) on income from Employment, p 1, available at http://www.gilberts.uk.com/cms/filelibrary/treatment_of_employment_income.pdf, consulted 3 June, 2014, [here in after Gilberts]. The definition of employment income may serve a number of purposes in a global or schedular income tax system, and the appropriate definition may differ depending on the use to which it is put. The definition may be used, for example, to identify a category of income for which special deduction rules apply. It may also be used to establish the base for withholding of tax at source by employers. *See*, Lee and Richard, Tax Law Design and Drafting, Lee and Richard, *Supra note 2*, p. 15

[10] Gilberts, *supra note 9*, p 1, In Japan **e**mployment income includes normal salary, wages, bonuses, various allowances, and fringe benefits paid for employment. *See* National Tax Agency, Withholding Tax Guide, p 9. Available at, http://www.nta.go.jp/foreign_language/withholdingtax2008.pdf, Consulted 5 July, 2014, [here in after National Tax Agency]. Under the Ethiopian income tax proclamation, Employment income includes 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. Income Tax Proclamation No. 286, *Supra note 4*, Art. 12(1).

[11] Gilberts, *supra note 9*, p 1

an effective income tax system.[12] The withholding tax approach is devised to secure uninterrupted and reliable collection of return for the government.[13] It is advantageous because:[14] (a) it brings about productive tax administration by enhancing the collection of tax return; (b) it motivates tax compliance and reduces tax evasion and avoidance habits; (c) it saves the taxpayer from financial hardship in obtaining the whole sum of tax when it becomes payable; and (d) it furnishes the government uninterruptable money to fund its activities. How revenue is collected, the impact of revenue-generation endeavor on equity, on the political fate of the government, and on the level of economic welfare may in some course of action be justly (or more) relevant as *how much* revenue is generated.[15]

Equity concerns are the most important subject matters during policy consultations on the devise of a personal income tax (PIT).[16] It is usual to state these concerns in relation to the subsequent two commonly-used notions

[12] Lee and Richard, *Supra note 2*, p 61. 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, *supra note 9*, p 2

[13] Domo, R., Study on Strengthening the Withholding Tax System on Individual Taxpayers, *NTRC Tax Research Journal*, Vol. XXIII, 2011, p 1[here in after Domo]

[14] Ibid

[15] Richard, B., Smart Tax Administration, 2010, p 1
Available at: http://www.siteresources.worldbank.org/INTPREMNET/Resources/EP36.pdf, consulted 22 December, 2014, [here in after Richard]

[16] Howell, H., Personal Income Tax Reform: Concepts, Issues, and Comparative Country Developments, IMF working paper, (2005), p 4, (available at: https://www.imf.org/external/pubs/ft/wp/2005/wp0587.pdf, consulted 7 April, 2014), [Here in after Howell]. Employment income taxes are sometimes mistakenly referred to as 'personal income taxes' in Ethiopia. There are no personal income taxes in Ethiopia, in the strictest sense of the expression. *See*, Taddese, L., Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About, *Mizan law review*, Vol. 4 No.1, 2010, P 38 [here in after Tadesse, Income Tax Assignment]

of equity: (1) horizontal equity (HE)—one that treats similarly situated individuals alike; and (2) vertical equity (VE) — tax treatment of differently situated persons differently.[17] With a view to realize horizontal equity, the tax system should avoid unreasonable differentiation among people in equal position.[18] Failure to comply with equity concepts would result in injustice and lose of trust in the tax adjudication process as well as increased non-compliance.[19]

Yet, in many cases, some random discriminatory treatment will be unavoidable.[20] For instance, even if clearly selective tax legislation can be avoided, but during implementation some randomness or differentiation or mistakes in administration are inevitable, and often important.[21] Further, arbitrary distinctions may be necessary for convenience purpose (for example, not all fringe benefits that conceptually are income can feasibly be taxed), and

[17] *Ibid.* In modern thought, horizontal equity and vertical equity represent the notion of Aristotelian formal justice used in tax law and tax policy. *See* Yoseph *infra note 26*, p 1197. Horizontal equity is closely linked to the idea of "vertical equity," which holds that people with different levels of welfare should be treated differently by the tax system. Vertical equity requires that individuals with a higher level of welfare pay proportionally more tax than those with a lower level of welfare. It has been said that "the requirements of horizontal and vertical equity are but different sides of the same coin – it is impossible to have one without the other. *See* Marc L., Horizontal equity and the personal income tax system, Library of Parliament Canada, 2005, p 1.

[18] Richard, S., Income Averaging After Twenty Years: A Failed Experiment in Horizontal Equity, 1984 Duke L.J. 509, p 546. *Cited* in Charles, *infra note 19*, p 630.

[19] Charles, A., Social Science Explanations for Disparate Outcomes in Tax Court Abuse of Discretion Cases: a Tax Justice Perspective, *Capital University Law Review* [33:623], 2005, p 630 [here in after Charles].

[20] Louis, k., Horizontal Equity: Measures in Research of a Principle, *National Tax Journal*, Vol. 42, no. 2, 1989, p 143, [here in after Louis]

[21] Ibid

individuals with equal incomes may have acted differently, therefore they may be differentially affected by a given reform.[22]

Another concept of equity which does not require detail discussion for the purpose of this work is vertical equity. The fundamental maxim of "vertical equity" implies that tax payers with greater ability to pay should pay more tax.[23] This principle requires that taxpayers with different incomes pay different amounts of tax and it addresses how best to distribute the burden of tax across different economic layer of society.[24]

As mentioned above, under the fairness requirement, tax levy and collection should be made in compliance with the principles of horizontal and vertical equity. Equal taxpayers should pay equal tax amounts and unequal taxpayers should pay different tax amounts. But the question is: Are there principles or rules used to limit taxation power of governments in order to ensure equity?

The government is empowered only to act within the constitutional limits.[25] Restrictions imposed on the government's power have two aspects: formal and substantial.[26] The first deals with simple authorization whether the

---

[22] Ibid

[23] Lars, O., The Problem of Equity in Taxation, p 75, available at http://www.myweb.dal.ca/osberg/classification/book%20chapters/Whats%20Fair/Fair.pdf, consulted 21 October, 2014, [here in after Lars]

[24] Ibid

[25] The Federalist NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) *cited in* Yoseph, foot note 1, *infra note 26*,

[26] Yoseph, E., Constitutional Review and Tax Law: An Analytical Framework, *American University Law review*, Vol. 56:5, 2007, p. 1190, [here in after Yoseph]

government is empowered to do.[27] The second deals with the issue of "how" - what is the correct and pertinent fashion of discharging government's obligation set by the constitution?[28]

In general, the fundamental legal principle insists taxation to be made in respect of rule of law.[29] The basic elements of this framework are (1) a tax can be levied provided there is a law, (2) a tax should not be applied in preferential or discriminatory manner, and (3) tax collected should be used only for common interests.[30]

1.1. The Principle of Legality

The first principle in tax is that tax could only be imposed by the express words of the legislature.[31] History tells us that in the Western world arbitrary taxation by the state was a cause for political campaigns.[32] In view of this history, in most countries there is an underlying constitutional principle that tax can only be levied based on predetermined laws.[33] This principle means that any tax is to be levied only by an act of the legislature.[34] In other countries, the principle is not explicitly revealed in the constitution, rather

[27] Ibid
[28] Ibid
[29] Frans, V., Legal Framework for Taxation, *in* Victor Thuronyi (ed.), *Tax law design and drafting*, International Monetary Fund, Vol. 2, 1996, P 1, [here in after Frans, *Tax law design and drafting*]
[30] bid
[31] Id, p 2
[32] Ibid
[33] Ibid. *See* also Yoseph, *supra note 26*, Pp 1191-1192, for instance, in the US, Article I, Section 8 of the Constitution describes the general power of Congress in terms of tax laws as follows: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . .".
[34] Ibid

derived from another constitutional rule, as in Switzerland, where the principle of the legality of taxation is derived from the principle of equality of taxation.[35]

The Federal Democratic Republic of Ethiopia (FDRE) Constitution does not explicitly require that taxation must have a firm basis in law, but the concept can be derived from a provision of the Constitution that grants the Federal Parliament the power to impose taxes and duties on sources reserved to the Federal Government.[36] During deliberation on the draft of the FDRE Constitution, one member of the constitutional assembly forwarded his opinion concerning this issue. He proposed the addition of a sub-article to Article 102 of the draft Constitution (now Article 100 of the FDRE Constitution). His proposed sub-article reads:

"በፌደራልም ሆነ በክልል ምክር ቤት ህግ ሳይወጣ ግብር ወይም ታክስ አይኖርም።".[37] When translated: "There shall not be taxation unless a law is issued by the federal legislature or regional council". [Translation mine].

Currently, the federal government has issued a public financial administration law, which appears to recognize the principle of tax legality that any tax must have a firm basis in law.[38] Further, the income tax proclamation provides that

[35] Ibid
[36] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 51(10), Pro.no. 1/1995, *Fed. Neg. Gaz*. year 1, no. 1. [here in after FDRE Constitution], See also Taddese, L., The Ethiopian Tax System: Excesses and Gaps, *Michigan State International Law Review*, Vol. 20:2, 2012, p 337, [here in after Taddese, The Ethiopian Tax System]
[37] Ethiopian constitutional assembly minute, Vol. 6, Addis Ababa, Oct 26-Dec 2, 1987 E.C., p 000017.
[38] Taddese, The Ethiopian Tax System, *supra note 36*

"[e]very person having income as defined herein shall pay income tax in accordance with this Proclamation".[39] This is to mean that only income whose source is mentioned in the proclamation is taxable. Under the income tax proclamation, income is defined as "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."[40] Unfortunately this definition seems to be incompatible with the scheduler approach adopted by Ethiopia.[41] This is because an income, which is not assigned under either of the four schedules, will not be subject to tax due to lack of rule of computation particularly tax rate. These laws demonstrate that the principle of tax legality in its minimum requirement is recognized in Ethiopia.

The prevalent principle of legality of taxation has in some countries extended to prohibit the tax administration not to engage in compromise regarding tax liability with the taxpayer.[42] This is due to the tax administration not being allowed to negotiate on the amount of tax due other than implementing the tax laws. Some countries impose the prohibition against compromise based on the belief of tax law as being public order.[43] This means that tax law is accorded

[39] Income Tax Proclamation No. 286, *supra note 1,* Article 10
[40] Id, art 2(10)
[41] Id, art 8. The schedular approach of income taxation, still in use in some countries including Ethiopia, segments income by sources. Each schedule of the income tax has its own rules of computation of gross income, taxable income, tax rates, and methods of assessment. In contrast global income tax systems aggregate the income of a person from 'all' sources and apply the tax rate on the whole. *See* Taddese, Income Tax Assignment, *supra note* 16, Pp 37-38
[42] Frans, *supra note 29, p.4*
[43] Ibid

similar treatment like that of criminal law, on which agreement between the police authorities and the criminal is prohibited.[44]

1.1.1. Taxation of Allowances

This section discusses how allowances are treated. Are all allowances taxable or exempted? How are allowances under the federal tax law regime and one regional government income tax law treated? To begin with the concept of allowance, "[a]llowance is defined as a fixed quantity of money or other substance given regularly in addition to salary for meeting specific requirements of the employees."[45] Different types of allowances are given to employees by their employers. Generally allowances are given to employees to meet some particular requirements like house rent, expenses on uniform, conveyance etc.[46] In principle, all allowances are taxable in the form of taxable wages unless plainly exempted.[47]

---

[44] Ibid

[45] Taxation of Salaried Employees Pensioners and Senior Citizens, Tax Payers Information Series 31, (2011), p 25, Available at http://www.incometaxindiapr.gov.in/incometaxindiacr/contents/tpi/Tax-Salaried-Employees.pdf, consulted 3 June, 2014, [here in after Tax Payer Information]

[46] Heads of Income, The Institute of Chartered Accountants of India, P12, available at: http://www.icaiknowledgegateway.org/littledms/folder1/chapter-4-heads-of-income.pdf, consulted 11 June, 2015, [here in after Heads of Income]

[47] Tax Payer Information, *supra note 45.* For instance, in India House Rent Allowance (H.R.A.) granted to a person by his employer to meet expenditure incurred on payment of rent in respect of residential accommodation occupied by him is exempt from tax to the extent of least of the following three amounts:
a) House Rent Allowance actually received by the assessee
b) Excess of rent paid by the assessee over 10% of salary due to him
c) An amount equal to 50% of salary due to assessee (If accommodation is situated in Mumbai, Kolkata, Delhi, Chennai) 'Or' an amount equal to 40% of salary (if accommodation is situated in any other place).

In Ethiopia, the income tax laws impose an obligation on employers to withhold tax under the withholding scheme every time an employee is paid unless the payment is expressly made tax-exempt by the Proclamation.[48] Employees may be entitled to different payments such as allowances particularly for housing and transportation. Thus, employers committed to pay allowances have an obligation to withhold tax so far as it is not exempted. Under the Federal Income Tax Proclamation, house and transportation allowances are not exempted.[49] Even laws issued subsequent to the income tax law do not exempt *house and transportation* allowances.[50]

In addition, transport allowance is generally given to government employees to compensate the cost incurred in commuting between place of residence and place of work. An amount uptoRs.800 per month paid is exempt. However, in case of blind and orthopedically handicapped persons, it is exempt up to Rs. 1600p.m. *See,* Gurminder, *supra note 1*, p 36 and 38 respectively.

[48] For instance, *see* Income Tax Proclamation No. 286, *supra note 1*, Art 51 (1). Amhara National Regional State income Tax Proclamation, 2011, Art. 52(1), Pro.no. 189/2011, (as amended), *Zikre Hig*, year 16, no. 27, [here in after ANRS Income Tax Proclamation No. 189], Tigray National Regional State income Tax Proclamation (as amended), 2010, Art. 53(1), Proc. no. 180/2010, *Neg. Gaz.*, year 17, no. 23, [here in after Tigray Income Tax Proclamation No. 180].

[49] See Income Tax Proclamation No. 286. Id, Art. 13 provide exemptions from employment income.

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 inter-national usage or custom normally and usually exempted from the payment of in-come 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

In the following section, taxation of allowance incomes, particularly 'house and transportation' are discussed based on instances of some federal and one regional governmental institution.

---

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.

[50] *See* Council of Ministers Income Tax Regulation, 2002, Art. 3, Pro.no. 78/2002, *Fed. Neg. Gaz*., year 8, no. 37, , [here in after Income Tax Regulation No. 78/2002], Ethiopian Revenue and Customs Authority income tax exemption Directive, 2009, Art. 4, Dir.no. 21/2009, [here in after Directive No. 21/2009]

Note that: we have two types of *transportation allowances* exempted from taxation. The first one is "allowances in lieu of means of transportation granted to employees under contract of employment" which is provided under art 3(b) of Income Tax Regulation No. 78/2002. This provision is further elaborated by Directive No. 21/2009 under art 4(1) as follows: *"የመዘዋወርያ አበል ከግብር ነጻ እንዲሆን የሚፈቀደው በአሰሪው /ቀጣሪው/ እና ተቀጣሪው ዉይም ሰራተኛው መካከል በተደረገው የስራ ውል ውስጥ በግልጽ በተመለከተ እና በስራ ጸባይ ምክንያት በመዘዋወር ለሚከናወን ተግባር ሲውል ብቻ ነው"።* That is, Transportation allowance will be exempted provided that there is an express stipulation in the contract of employment and only for a work to be done through travel. [Translation mine]. The second one is "amounts paid to employees in reimbursement of traveling expenses incurred on duty". This is the wording of art 3(d) of Income Tax Regulation No. 78/2002. This exempted amount of transportation allowance is limited. The directive provides like this: *"በወር ውስጥ ከግብር ነጻ የሚደረገው የመዘዋወርያ አበል መጠን ከሰራተኛው ጠቅላላ ደመወዝ አሰከ አንድ አራተኛ (1/4) ድረስ ብቻ ሆኖ በማንኛውም ሁኔታ ከብር 1000.00 /አንድ ሺህ/ አይበልጥም"።* (art 4(3) of Directive No. 21/2009). To mean: within a given month the amount of travelling allowance exempted from tax is limited to one fourth of the employer's salary and by any means should not exceed one thousand Birr. [Translation mine]. Any other transportation allowance is not exempted. This can be understood from the wording of art 4(2) of Directive No. 21/2009. *"በዚህ አንቀጽ ንዑስ አንቀጽ (1) የተመለከተው የመዘዋወርያ አበል ቀጣሪው በሚመድበው ተሸከርካሪ ለሚጠቀሙና ከመኖርያ ወደ ስራ ቦታ እንዲሁም ከስራ ቦታ ወደ መኖርያ ቤት ለመሄድ የሚደረገውን የትራንስፖርት ወጪ አያካትትም"።* other transportation allowance expense incurred by the employer through supply of vehicle for travelling employees in the performance of their duties or travelling to or from a place they have to attend in the performance of their duties is not exempted from taxation [Translation mine]

a. The case of Ministry of Justice

Public prosecutors under the Ministry of Justice are beneficiaries of *house and transportation* allowances free from tax.[51] The income tax proclamation imposes an obligation on employers to withhold income tax from allowances payable to employees but the Ministry of Justice is not withholding. Rather it requests the Office of the Prime Minister to allow tax exemption on house and transportation allowances payable to its public prosecutors.[52] Accordingly, the Office of the Prime Minister requested an advisory opinion concerning the official request of the Ministry of Justice from Civil Service Minister.[53] The Civil Service Minister forwarded its opinion on the issue to the Office of the Prime Minister as follows:

[51] The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.መ30-899/3, date 07 September, 2006.* E.C.

[52] The Federal Democratic Republic of Ethiopia Ministry of Justice Ref. No.ማ.ል.ድ-15/05date December 5, 2005, *cited in* The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.መ30-899/24, date 30 July 2005.* E.C.

[53] The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.መ30-899/161, date 18/6/2005E.C.cited in* The Federal Democratic Republic of Ethiopia Ministry of Civil Service *Ref. No.ሲ.ሰ.ሚ30/ጠ13/45/99, date 19/11/ 2005 E.C.* Here one may ask who is an appropriate organ to give expertise opinion on tax matters. Opinions on respect of issues relating to tax matters are termed as advance ruling. 'Advance Ruling' means written opinion or authoritative decision by an Authority empowered to render it with regard to the tax consequences of a transaction or proposed transaction or an assessment in regard thereto. In India, the power of giving advance rulings has been entrusted to an independent adjudicatory body. *See* Manual of Office Procedure, Directorate of income tax, India, Volume-III, p 3, 2003. The practice of issuing advance rulings is not as well known and established in Ethiopia as it has been in other countries. In fact, one cannot even say that they exist as distinct legal categories. However, there have been few occasions in which the Ethiopian tax authorities were asked to furnish what can only be described as an advance ruling in the circumstances. It is not clear if the tax authorities were consciously engaged in the practice of advance rulings or doing this just as a matter of administrative courtesy. See Taddese, The Ethiopian Tax System, *supra note 36,* p 337. But in the case at hand unlike the common practice, the Ministry of Civil Service is requested to give an opinion on tax matters.

በየደረጃው ለሚገኙ ዓቃብያነ ህግ እንዲፈቀድ ለአስተያየት የተላከው ጥናት በዝርዝር የተፈተሸ ሲሆን፤ ጥናቱ --- በአመዛኙ መሰረት ያደረገው ከግንቦት 2004 ዓ/ም ጀምሮ በስራ ላይ የዋለውን የዳኞች ጥቅማ-ጥቅም ነው፡፡ የዳኞች ጥቅማ-ጥቅም ውሳኔ ያገኘው በዳኞች አስተዳደር ጉባኤ ሲሆን፤ ጥቅማ-ጥቅሞቹ ከማንኛውም ገቢ ግብር ነፃ መደረጋቸውን የሚያመላክት ነው፡፡

የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን ነሐሴ 2001 ዓ.ም ያወጣውን የገቢ ግብር ነፃ መብቶች አፈጻጸም መመሪያ አንቀጽ 4 ለሰራተኞች ከሚከፈሉ የአበል ዓይነቶች መካከል ከግብር ነፃ የተደረጉ የመዘዋወርያ አበል፤ የውሎ አበል እና የአየር ፀባይ አበል ብቻ ናቸው፡፡

በተጨማሪም የሚኒስትሮች ም/ቤት የገቢ ግብር ደንብ ቁጥር 78/1994 አንቀጽ 3 ከግብር ነፃ ከተደረጉ ክፍያዎች በስተቀር ማናቸውም ክፍያ ወይም ጥቅም ለምሳሌ የቤት አበል፤ቦነስ ወ.ዘ.ተ በወር ደመወዝ ላይ እየተደመረ ግብር የሚከፈልበት መሆኑን ያብራራል፡፡ በሌላ በኩል የመኖርያ ቤት አበል ለቤት ኪራይ በቀጥታ የሚከፈል በመሆኑ መኖሪያ ቤት ለሚፈቀድላቸው ሰራተኞች ግብር የማይከፍሉ ስለሆነ አበሉ ከሚሰጣቸው ላይ ግብር መቀነሱ አሰራሩን ፍትሀዊ ስለማያደርገው ጉዳዩ በልዩ ሁኔታ ታይቶ ውሳኔ የሚሰጥበት ከሆነ ለዓቃብያነ ህግ የሚፈቀደው የቤት አበል ከገቢ ግብር ነጻ ሆኖ እንዲወሰን አስተያየት ቀርቧል፡፡[54]

The Amharic quotation can be translated as: the Ministry of Justice conducted a research regarding benefits of public prosecutors. The research mostly bases on benefits obtained by judges which became effective since May 2004 E.C. The judges' benefits are determined by the Judicial Administration council. It is indicated that these benefits are exempted from any income tax. As per Article 4 of directive no. 21/2009 issued by the Ethiopian revenue and customs authority for income exemption, allowance types exempted from income tax are only transportation allowance, per-diem and hardship allowance.

[54] The Federal Democratic Republic of Ethiopia Ministry of Civil Service *Ref. No.ሲሰሚ30/ጠ13/45/99, Ibid*

Further, except those specified under Article 3 of income tax regulation no. 78/2002, any payment or benefit such as house allowance, bonus, etc. will be computed for income tax through aggregating with salary. On the other hand, house allowance is directly payable to house rent. And as those employees who are given house in kind are exempted from taxation, imposition of tax on house allowance is unfair. Therefore if the matter is to be considered exceptionally, it is recommended that house allowance payable to public prosecutors to be exempted from taxation. [Translation mine]

Based on the legal analysis and recommendation given by the Civil Service Minister, the Office of the Prime Minister responded to the request of the Ministry of Justice as follows:

"--- *የቤትና የትራንስፖርት አበል ከማብር ነፃ ጥያቄው ከዝቢ ማብር አዋጁም ሆነ ከሚ/ም/ደንብ ቁጥር 78/1994 ጋር የሚጣረስ በመሆኑ ተቀባይነት የሌለው መሆኑን እየገለጽን ---።*"[55]

The request for tax exemption of house and transportation allowances is not accepted since it is contrary to the income tax proclamation and council of ministers income tax regulation no. 78/2002. [Translation mine]

Despite the negative response of the Office of the Prime Minister, the Ministry of Justice insisted the former to reconsider and reverse the reply it gave.[56] At this time the Office of the Prime Minister reversed the response it gave before and rewrote as follows:

---

[55] The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.መ30-899/24, date 30 July 2005.E.C.*

[56] "*ከጸ/ቤታችን ሐምሌ 30 ቀን 2005 ዓ.ም. በቁጥር መ30-899/24 በተጻፈ ደብዳቤ የዓቃቢ ሕግ ጥቅማ ጥቅምን በተመለከተ በጻፍነው ደብዳቤ ላይ ያላችሁን ዝርዝር ምክንያቶች በመግለጽ ቢድጋሚ እንዲታይ ነሐሴ 3 ቀን 2005 ዓ.ም.*

"... ለዓቃቤያነ ሕግ የሚሰጠው --- የመኖሪያ ቤትና የትራንስፖርት አበሉ ታክስ የማይከፈልባቸው መሆኑን እንገልፃለን::"[57]

House and transport allowances payable to public prosecutors are exempted from tax. [Translation mine]

Unfortunately, there is no law which authorizes the office of the Prime Minister to aid such kinds of blessings/to rule on this matter. Thus, the letter of the Ministry of Justice, though it achieves the intended purpose at the expense of rule of law, obviously reduces its integrity. Because it would be better and more legally acceptable for it to follow legally acceptable means.[58]

በቁጥር 01/ጸ-3/125/128/5 በተጻፈ ደብዳቤ መጠየቃቸው ይታወቃል::" When translated*:* It is known that on August 3, 2005 E.C. with Ref. No. 01/ጸ-3/125/128/5 you have requested reconsideration on the reply given regarding benefits of public prosecutors on July 30, 2005 E.C. with Ref. No. መ30-899/24 [Translation mine]. Federal Democratic Republic of Ethiopia Ministry of Justice Ref. No. 01/ጸ-3/125/128/5 date *3 August,* 2005 E.C., *cited in* The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.መ 30-899/3, date 07 September, 2006. E.C.*

[57] The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.መ 30-899/3, date 07 September, 2006.E.C.*

[58] Legitimate authority to grant employment income tax exemption rests on:

a) The House of Peoples Representatives, through proclamation, as it has so far done, for instance, in Article 13 of the Income Tax Proclamation No. 286.

b) Council of ministers as authorized by art 13(e) of the income tax proclamation No. 286. and income tax regulation No. 78/2002, *supra note 50*

c) Ministry of Finance and Economic Development (MoFED) as authorized by art 13(d)(iii) of the income tax proclamation No. 286. So far, MoFED has granted an income tax exemption by a circular to the Cuban medical persons working in Addis Ababa Bureau of Health. *See* Amanuel Asefa, Ethiopia's Tax Treatment of Expatriate Academic Staff: Study of the Legal Regime and Practice in the Public Higher Education Institutions, 2013, unpublished, LL.M Thesis, Mekelle University, p 43. *See* also Income Tax (as amended) Proclamation, 2010, Art 42(e), Pro.no.693 /2010, *Fed. Neg. Gaz*, year 17, no. 3, MoFED "may exempt any income taxable under this Proclamation for economic, administrative or social reasons."

The Ministry of Justice, taking the advantage of its membership to the council of ministers, could lobby the council or the Ministry of Finance and Economic Development (MoFED) to come up with such exemptions since the council as well as MoFED are authorized by law to do so. It is also known that the Ministry of Justice is an institution responsible for the enforcement of laws. Most of the Ministry's employees have legal knowledge/are legal practitioners. It is quite obvious that the Ministry of Justice is supposed to know and adhere to the existing laws of the land more than any other institution or entity. Thus, it is presumed that they know how any law can be utilized or amended. As mentioned above, there is no tax law which exempts to withhold tax on house and transportation allowances. However, the Ministry of Justice acts otherwise. Furthermore, it is not clear how the Office of the Prime Minister was convinced by the latter request of the Ministry of Justice, which it says as it contains detailed reasons for its request. However, the Office of the Prime Minister reversed its former decision and allowed grant of exemption with no justification.

The Persistence Act of the Ministry of Justice is preposterous. Clearly there is no legal ground for its request other than what is happening in the judicial organ (but contrary to the tax laws) and used as benchmark for its research on the specific issue. The Ministry of Justice conducted research examining benefits payable to the federal judges which is made free from any income tax. Basically, the research conducted is acceptable and it is logical to claim

---

d). Ethiopian Revenue and Customs Authority as authorized by art 27 of income tax regulation No. 78/2002. For this effect the Ethiopian Revenue and Customs Authority issued income tax exemption Directive No. 21/2009. *Supra note 50.*

equal/fair treatment of its prosecutors like that of judges. Nevertheless, the income tax exemption regarding benefits of judges was not legal. And it was not lawful to claim similar treatment like those benefited at the expense of the law. Quite the opposite, the Ministry of Justice, as an organ responsible to co-operate with the tax authority for the enforcement of tax laws[59], should have challenged the unlawful act of the judicial institution rather than striving to share fruits obtained unlawfully.

We cannot say the trend arose out of ignorance whether these incomes are taxable or not because the Ministry of Justice was informed by the response of the Office of the Prime Minister in the former reply that its request is contrary to the income tax laws.

In general, the letters of Ministry of Justice sent to the Office of the Prime Minister raise so many questions. Why the Ministry of Justice request grant of tax exemption for its employees on their house and transportation allowances knowing that these incomes are not exempted? Why does the Ministry of Justice prefer the Office of the Prime Minister to allow exemptions knowing that it is not authorized to do so? What motivates the Ministry of Justice to challenge the prior negative response of the Office of the Prime Minister?

[59] All Federal and Regional government authorities and their agencies, Bodies, Kebele Administrations and Associations shall have the duty to co-operate with the Tax Authority in the enforcement of this Proclamation. Income Tax Proclamation No. 286, *supra note 1*, art 41 (1)

b. The Case of Federal Ethics and Anti-Corruption Commission

The Federal Ethics and Anti-corruption commission's investigators and prosecutors receive *house and transportation allowances* free from taxation. This is because the Federal Ethics and Anti-corruption commission, like the Ministry of Justice wrote a letter to the office of the Prime Minister to ask tax exemption of house allowances payable to the commission's investigators and prosecutor. The Amharic version of the letter is:

"መሥሪያ ቤታችሁ መስከረም 22 ቀን 2006 ዓ.ም. በቁጥር 10/መመ6-ፈ6/135 በጻፈው ደብዳቤ --- በየደረጃው ለሚገኙ የኮሚሽኑ መርማሪና ዐቃቢያነ ሕግ ተፈቅዶ የነበረው የቤትና የትራንስፖርት አበል ክፍያ ከወቅቱ የኑሮ ሁኔታ ጋር ሊመጣጠን በሚችል መልኩ እንዲሻሻል እና የቤት አበሉ ከግብር ነፃ እንዲሆን በማለት ጠይቋል።"[60]

The Federal Ethics and Anti-corruption commission wrote a letter via Ref. No. 10/መመ6-ፈ6/135 on September 22, 2006 E.C. to request increase on the existing house and transport allowances payable to the commission's investigators and prosecutors at all level taking in to account the current living condition. It also requested the house allowance to be exempted from taxation. [Translation mine].

The Office of the Prime Minister with no delay and with additional exemption, which was not requested by the Commission, corresponds positively as follows:

[60] Federal Ethics and Anti-corruption commission Ref. No. 10/መመ6-ፈ6/135 date 22 *September, 2006* E.C, *cited in* The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.መ30-899/7, date 28 September, 2006.*

"--- የመኖርያ ቤትና የትራንስፖርት አበሉ ታክስ የማይከፈልባቸው መሆኑን እናስታውቃለን::"[61]

To put it in English: … the Office of the Prime Minister here by notifies that house and transportation allowances are exempted from tax [Translation mine]. The immediate response of the office of the Prime Minister revealed that the decision given to the request of the Ministry of Justice was taken as a precedent which is bad lesson.

The Federal Ethics and Anti-corruption commission like the Ministry of Justice is duty bound to withhold tax from the income payments and then remitting the same to the government. In addition, it is obligated to cooperate with the Tax Authority in the enforcement of the tax laws. Despite these multiple obligations, the Commission acts contrary to the income tax regime.

c. The Case of Ethiopian Revenues and Customs Authority (ERCA)

As discussed in section 2.2 below, the main functions of the revenue authority are to collect the taxes and ensure compliance of the tax laws by tax payers and withholding agents. As mentioned below, ERCA tries to discharge its responsibility. For instance, it wrote a notice for all concerned withholding agents to withhold properly from payments including allowances they paid to their employees. However, ERCA failed to fully ensure compliance of tax laws particularly, with respect to the above withholding institutions. ERCA, knowing that these institutions are not withholding, remains silent.

[61] The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.ም* 30-899/7, date 28 September, 2006.

Recently, ERCA itself like the Ministry of Justice and the Federal Ethics and Anti-Corruption Commission requested the office of the Prime Minister to provide similar treatment to its prosecutors on their allowance incomes. The original wording of the letter it wrote is that:

> *"... ባለሥልጣን መስሪያ ቤቱ ከመንግስት የተሰጠውን ኃላፊነት በብቃት ለመወጣት እንዲችል በሥራቸው ልዩ ባህሪ ምክንያት የራሳቸው ዐቃቢያነ ሕግ ካላቸው ተቋማት አንዱ በመሆኑና እነዚህ ባለሙያዎች የታክስ ማጭበርበርንና የኮንትሮባንድ ንግድን በመዋጋት ረገድ ያላቸው ድርሻ የላቀ እንደሆነ በመግለጽ በሌሎች አቻ ተቋማት ውስጥ ተግባራዊ እየተደረገ ያለውን የዐቃቢያነ ሕግ ጥቅማጥቅም ከባለስልጣኑ የደመወዝ ስኬል ጋር በማመጣጠን እንዲፈቀድ አቅርቧል::"*[62]

The Authority is one of those institutions which have their own prosecutors owing to their very particular nature. In order to discharge its responsibility competently and as its prosecutors play great role in tackling tax evasion and contraband, it claimed similar entitlement of allowances payable to other similar institutions' prosecutors taking in to account the authority's salary scale. [Translation mine]

The office of the Prime Minister responded as follows:

> *"በመሆኑም ለጀማሪ ዐቃቢያነ ሕግ የቤት አበል ብር 1760.00፣ ለከፍተኛ ዐቃቢያነ ሕግ II እና I ብር 1850.00፣ ረዳት ም/ዋና ዐቃቢያነ ሕግ እና ዐቃቢያነ ሕግ ብር 2000.00 እንዲሁም ትራንስፖርት አበል ብር 600.00 ለሁሉም እንዲከፈል የተወሰነ መሆኑን እየገለጽን የመኖሪያ ቤትና የትራንስፖርት አበል ከገቢ ግብር ነፃ መሆኑን እናስታውቃለን::"*[63]

[62] Federal Democratic Republic of Ethiopia, Ethiopian Revenues and Customs Authority *Ref.No*. 1.01/173/07, date 10 February, 2007 E.C. *cited in* The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.*ሙ 240-899/2, date 04 March, 2007 E.C.

[63] The Federal Democratic Republic of Ethiopia Office of the Prime Minister *Ref. No.*ሙ *240-899/2, date March 04, 2007 E.C.*

Accordingly, house allowance for beginner prosecutors Birr 1760.00 (one thousand six hundred Birr), senior prosecutors level II and I Birr 1850.00 (one thousand eight hundred eighty Birr) and assistant vice chief prosecutor and chief prosecutor are entitled to Birr 2000.00 (two thousand Birr). In addition all prosecutors are to be paid Birr 600.00 (six hundred Birr) transport allowance. And both house and transport allowances are exempted from taxation. [Translation mine]

Since the ERCA itself secured exempted allowances for its prosecutors like that of the above institutions, it fails to ensure the compliance of tax laws in relation to allowance. As a result, the ERCA will not have the moral courage to challenge others non-compliance of tax laws. That is, to condemn others, one must be innocent. This reminds me of the well known saying: "Practice what you preach."

d. The Status and Effect of Letters Written by the Office of the Prime Minister

In the preceding discussion, it is observed that the Office of the Prime Minister granted exemptions for those who requested them. Here several questions deserve consideration, these include: Is the Office of the Prime Minister authorized to grant tax exemptions? Is the Office of the Prime Minister unaware of how taxes are levied and exempted? What is the legal effect of letters of the Office of the Prime Minister? Can the tax authority be bound by these letters?

The executive branch is responsible to administer and enforce tax laws, in the course of which it issues regulations, decrees, circulars, and general rulings ("executive rules").[64] It is in the very nature of this branch of the government that it is also vested with quasi-judicial power whereby it applies and interprets the law to individual cases to arrive at rulings and decisions.[65] Determination of scope of executive's roles to interpret and enforce tax laws is the most difficult task of tax officials in developing and transition countries.[66] It is clear that the legislature is authorized for enacting the law, but what is the proper scope for administrative interpretation? There are also further issues in relation to the extent of detail in executive rules such as the type of document to be issued; the nomenclature of the document; the authority to issue the document (tax administration, minister of finance, cabinet); the effective date of the document; and the legal effect to be given to the executive rule.[67] These points at issue can be hard to answer because there is considerable dissimilarity in application by revenue authority.[68] The legal effect a particular type of executive rule is determined taking in to account a country's general constitutional and administrative law, doctrines of legislative interpretation advanced by courts of that country or passed by law

[64] Frans, *supra note 29,* p 19.
[65] Ibid. Rulings are similar to what courts would do in specific cases except that rulings make use of hypothetical cases or transactions and they apply to cases with similar factual situations set out in hypothetical case or transaction of a ruling. *See* Taddese, the Ethiopian Tax System; *supra note 36, p 365.*
[66] Id, p. 41
[67] Ibid
[68] Ibid

and particular provisions in tax laws.[69] However, these executive rules must be consistent with constitutional and statutory law.[70]

As discussed above, the basic legal framework calls for taxation according to the rule of law. To this end, one development in tax legislation achieving international acceptance is to abolish discretionary power of the Minister of Finance or any other government official to allow exemptions or to negotiate tax agreements.[71] Unlike this international progressive practice, the income tax proclamation of Ethiopia authorizes the Ministry of Finance and Economic Development (MOFED) to use discretionary power on specified grounds and up to a limited amount.[72] Research conducted in Latin America and the Caribbean asserted that tax payers have perceived this practice as something that create opportunity for wide spread corruption and discrimination among tax payers.[73]

---

[69] Ibid

[70] Id, p 19

[71] Arturo, J., Detailed Guidelines for Improved Tax Administration in Latin America and the Caribbean, 2013, P 49, available at http://www.usaid.gov/sites/default/files/LAC_TaxBook_Entire%20Book%20-%20ENGLISH.pdf, consulted 9 June, 2014, [here in after Arturo]

[72] Article 42 sub-articles (b)&(c) Provides:
In addition to any powers specifically vested in him in this Proclamation the Minister of Finance and
Economic Development may:
(b) in his discretion, waive tax up to an amount of birr 100,000 in cases of grave hardship due to natural or supervening calamity or disaster, or in cases of exceptional personal hardship not attributable to negligence or any failure on the part of the taxpayer to discharge any duty under this Proclamation; and
(c) no amount of tax in excess of Birr 100,000 shall be waived except with the approval of the Council of Ministers. Income Tax Proclamation No. 286 *supra note 1*

[73] Arturo, *supra note 71*

At this time, many countries have a constitutional or statutory provision that authorize exemptions only by a law of general application.[74] With respect to income from employment, Ethiopia has detailed rules governing exemptions. The income tax proclamation, income tax regulation and income tax exemption directive at different levels allow tax exemptions. Despite the existence of these enabling legislations, the institutions mentioned above lobbied the Office of the Prime Minister to extend the scope of exempted incomes.

Here the concern with regard to the act of the Office of the Prime Minister is not the amount of money forgone due to grant of exemptions but the issue of rule of law. That is, the very idea of Office of the Prime Minister issuing these letters goes against the principle of legality.

e. The Case of Amhara National Regional State (ANRS) Supreme Court

The practice of using letters to challenge tax laws is not limited to the above mentioned federal institutions. In the Amhara National Regional State (ANRS) too, the regional Supreme Court experienced similar practice. The ANRS income tax regulation provides that "house rent allowances shall be excluded from computation of income taxable under schedule 'A'".[75] The regulation under article 3(2) authorized the ANRS Bureau of Finance and Economic Development (BoFED) only to determine the amount of payment excluded from being computed for income tax purpose. As per the

[74] Id, *p 50*

[75] Amhara National Regional state Income Tax Regulation, 2003, Art. 3(1)(g), Pro.no. 4/2003, *Zikre Hig*, year 8, no. 2, [here in after ANRS Income Tax Regulation No. 4/2003]

authorization, BoFED issued a directive which determines payment types and amounts exempted from income taxation.[76] This directive provides that '*house allowance*' payable to cabinet members is free from taxation. The rest of ANRS government employees who are entitled to *house allowance* are not entitled to exemption. This shows that the directive issued by BoFED was inconsistent with the income tax regulation issued by ANRS council. Because any ANRS government employee who is entitled to *house allowance* has right to receive a certain amount of money free from tax like what is determined recently by a directive.[77]

As a result, directive no. ገመ5/1995 was opposed by ANRS Supreme Court. The Supreme Court wrote a letter to the regional administration head office, the content of which is:

> *መመሪያ ቁጥር ገመ5-1995 የክልሉ መስተዳድር ም/ቤት ከአወጣው ደንብ ቁጥር 4/1995 ጋር የሚይጣጣም ሰለመሆኑ እና ለካቢኔ አባላት የተወሰነው የቤት አበል ከገቢ ግብር ነፃ ሲሆን በዳኝነት ተቋሙ ተሹመው በማገልገል ላይ ያሉ ዳኞች የሚከፈላቸው የቤት አበል የገቢ ግብር እንዲከፈልበት መደረጉ ተመሳሳይ አፈፃፀም የሌለው መሆኑን በመግለጽ ማስተካከያ እንዲደረግ በቁጥር አብክ/ጠ/263/01/06 በ12/02/2006 ዓ/ም ለአብክመ ር/መስተዳድር ጽ/ቤት ጥያቄ ቀርቧል፡፡*[78]

[76] Amhara National Regional State Bureau of Finance and Economic Development for determination of payment types and amounts exempted from income taxation Directive, 1995, Dir.no. ገመ-5/1995, [here in after ANRS BoFED directive No. ገመ-5/1995]

[77] ANRS Finance and Economic Development Bureau for determination of payment types and amounts exempted from income taxation Directive, 2006, Art. 3, Dir.no.ገባ-13/2006, [here in after ANRS BoFED directive No. ገባ-13/2006]. This directive repealed directive no. ገመ5/1995. The new directive No.ገባ-13/2006, determines those who are entitled to totally exempted house allowance and of partially exempted, which is discriminatory.

[78] Amhara National Regional State Supreme Court, Ref. No.አብክ/ጠ/470/01/ date 17/04/2006

When translated: Directive No.*ገመ*-5/1995 is not consistent with Regulation No. 4/1995 that was issued by the regional administration council. House allowance payable to judges is not exempted while such payment to that of cabinet members is exempted which causes dissimilar treatment in implementation. And thus we hereby requested the ANRS administration head office for its correction via letter with Ref. No. አብክ/ጠ/263/01/06 on 12/02/2006. [Translation mine]

Accordingly, the ANRS administration head office wrote a letter regarding the matter to the ANRS Civil Service Bureau and BoFED as follows:

"የርዕሰ መስተዳድር ጽ/ቤት " ... " ለአብክመ ሲቪል ሰርቪስ ቢሮ በኤድራሻ በግልባጭ ለገ/ኢ/ልማት ቢሮ በተጻፈ የቤት አበል አከፋፈል ለዳኝነት አካሉም በተመሳሳይ እንዲፈጸም ጉዳዩ ተጣርቶ የጽሁፍ ምላሽ እንዲሰጥ ጠይቋል። ነገር ግን እስካሁን ምላሽ አልተሰጠም።"[79]

The ANRS administration head office wrote a letter to the ANRS Civil Service Bureau in its address and to BoFED via copy that payment of house allowance should be made similarly to employees of the judicial organ too and the matter to be investigated and responded in written form. But response is not yet given. [Translation mine].

Following the delay in response, the ANRS Supreme Court responded and communicated the ANRS procurement, finance and property administration supportive process owner under the Supreme Court as follows:

"---" ስለሆነም በጉዳዩ ላይ ስልጣን ያለው አካል መመርያ ቁጥር ገሙ5/01995 እስኪያሻሽል ድረስ ለዳኞች የተወሰነው የቤት አበል የገቢ ግብር ሳይከፈልበት እንዲቆይ ማስፈለጉን

[79] ANRS administration head office Ref. No. 11/74/*መ/ሠ*-12 date 12/03/2006 *cited in* The Amhara National Regional State Supreme Court, Ref. No.*አብክ/ጠ*/470/01/. *Ibid*

እስታውቃለሁ፡፡ የዞን ከፍተኛ ፍ/ቤት የማሻ/ፋይ/ን/አስተዳደር የስራ ሂደትም በዚሁ መሰረት እንዲፈፀም ግልባጭ ተደርጎለታል፡፡[80]

"---" until directive no. ገመ5/1995 is amended by an authorized organ; house allowance payable to judges should remain untaxable. The zonal high court procurement, finance and property administration process owner is also communicated through a copy to make payment as per this notice. [Translation mine]

Here, there is a basic question regarding the act of ANRS Supreme Court. *How should a directive inconsistent with a regulation be challenged*? *Is refusal to comply with it an appropriate measure?* The writer of this article is of opinion that it is not. It is known that when a legally recognized right is taken away or interfered by a law subordinate to the law that vests the right, nobody is authorized to take self-help mechanism. Anybody who believes that his/her right is taken away by a law, which is subordinate, is required to take the matter to the judicial organ which is mandated to check whether a right is actually violated or not.[81] Had it not been the case, there would have been no need of dispute settlement organ. But contrary to this universally accepted

[80] The Amhara National Regional State Supreme Court, Ref. No. *አብክ/ጠ*/470/01/, *Ibid*

[81] A regulation that extended the scope of the tax law, changed its conditions, or altered the meaning of the law would have to be declared illegal and inapplicable by the courts. *See*, Frans, *supra note 29*, p 44. It is possible to deduct that a right secured by regulation cannot be taken away by a directive. And in case where a directive contradicts with a regulation, it should be declared inapplicable by courts. In addition to this, it was possible to take the matter to the attention of ombudsman institution. The institution is authorized to "supervise that administrative directives issued, and decisions given, by executive organs and the practices thereof do not contravene the constitutional rights of citizens and the law as well." See, Institution of the Ombudsman establishment Proclamation, 2000, Art 6(1), Pro.no.211/2000, *Fed. Neg. Gaz.*, year 6, no. 41, [here in after Institution of the Ombudsman establishment Proclamation, 2000]

practice, the ANRS Supreme Court challenged the directive that affects right of its judges through a letter. This act is contrary to the purpose for which it is established. It also amounted to abuse of power.

1.2. The Principle of Equality

Principle of equality is another mechanism used to limit taxing powers of governments. In a modern democratic community, acts of legislature should respect the fundamental principle of non-discrimination.[82] "Because it is in the nature of laws to classify or discriminate, the principle of equality demands treating likes alike".[83] This is also true for tax laws which, like all legislations, must be consistent to the tenet of the principle of equality.[84] The principle of equality has two meanings, one is essentially procedural and the other one is substantive.[85] The procedural equality deals that the law must be applied completely and impartially, regardless of the status of the person involved.[86] This means that no one may receive either preferential or

[82] Yoseph, *supra note 26*, P 1197
[83] Ibid
[84] J.L.M. Gribnau & C. Peters, Introduction, in Legal Protection Against Discriminatory Tax Legislation: The Struggle for Equality in European Tax Law 1 (Hans L.M. Gribnau ed., Kluwer Law International 2003) [hereinafter Equality in Europe] *Cited in* Yoseph *Id*. It can be viewed as an application of the concept of legality, under which the law must be applied without exception to all those in the same circumstances. Frans, *supra note 29, p.* 5. Difficulties arise, however, when they have to be given operational contents. For HE, there are questions about both the definition of "equals" (e.g., equality of income or welfare, endowment or outcome, at a given point in time or over the life cycle) and the specification of "equal tax treatment" (e.g., equality in absolute tax payments or in tax payments relative to income). *See* Howell, *supra note 16, p.64*
[85] Frans, *supra note 29*, p.5
[86] Ibid

discriminatory treatment in the application of the law or may be denied procedural rights to challenge application of the law to him or her.[87]

The substantive meaning of the principle of equal treatment starts from the position that persons in equal circumstances should be treated equally.[88] Without clarification, this principle does not mean very much, because it admits that people who are not in the same circumstances can be treated differently.[89] In Ethiopia, equality principle has constitutional status.[90] Here, in relation to the topic under the spotlight, employees in the same circumstances should be treated equally. However, practically employees in the same circumstances are treated differently in respect of their allowance incomes. Under the legality principle discussed above certain categories of employees of the Ministry of Justice, the Federal Ethics Anti-Corruption Commission, the ERCA and the Federal Judicial organ are entitled to tax exemptions on their allowance incomes. The exemptions made for the above mentioned government institutions purely violate the underlying principle of equality. The employees of these institutions are entitled to preferential treatment. But employees of other governmental institutions who are entitled to allowances are not given similar treatment. For instance, the writer of this article is an employee of Bahir Dar University, which is a governmental

[87] Ibid
[88] Ibid
[89] Ibid
[90] All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or other status. FDRE Constitution, *supra note* 36, Art. 25.

institution; who is entitled to house allowance. However, this house allowance has been taxable by computing it with his salary since 18-06-2005 E.C.[91]

Thus, the practices of the above mentioned governmental institutions including the one that allows the tax exemptions through letters, i.e., Office of the Prime Minister are against basic constitutional principles of legality and equality.

2. The Role of Withholding Agents and Response of Tax Authority

With respect to taxation of employment income, three parties are involved-namely the employee, the employer and the tax authority. Under the subsequent sub-sections the roles of the withholding agents and tax authority in tax administration will be discussed.

2.1. The Role of Withholding Agents

Taxation law imposes various duties on different groups of persons.[92] These comprise the duty to give information to tax authorities about one's own or other person's business, the obligation to report a tax return, the obligation to

[91] Bahir Dar University Office of V/president for Business and Development wrote a letter to Plan, Budget and Finance process owner which its content is that *"--- የፌደራል ዋና ኦዲተር በሰጠው አስተያየት መሰረትና በከፍተኛ ትምህርት ተቋማት የአስተዳደር ካውንስል በተቀመጠው አቅጣጫ መሰረት ለመምህራን ከሚከፈለው የቤት አበል ላይ እና ለድህረ ምረቃ ተማሪዎች ከሚሰጥ ድጋፍ ላይ ከየካቲት ወር 2005 ዓ.ም ጀምሮ ግብር እየተቆረጠ እንዲከፈል እንዲደረግ እናሳስባለን።።* when translated "--- as per the recommendation given by the Federal Auditor General and higher institutions administrative council direction, house allowance payable to instructors' and stipend payable to post graduate students are subject to tax as of February 2012.[Translation mine]. Bahirdar University Office of V/president for Business and Development Ref. No. 1/8928/2.6.3 Date 18-06-05 [here in after Bahirdar University Ref. No. 1/8928/2.6.3]

[92] Lee and Richard, *supra note 2*, p 42.

pay tax, and the obligation to withhold tax from payments made to other persons.[93]

Under the withholding tax system, persons obliged to withhold income tax and pay it to the government are called "withholding agents." Being the withholding agent by law, the employer is involved in collecting income tax from wages. Employers collect the PAYE withholding tax, although the employees are responsible to pay, under the PAYE provisions. Employees whose earnings have been liable to PAYE withholding are considered to have paid the gross (pretax) amounts of money due from them.[94]At first they compute, collect, and account for the income tax on wages and save the tax into the government accounts.[95] It is when the withholding agents discharge these duties that the standard of the PAYE system determined.[96] Administrative and collection provisions impose on employers the duty to withhold and to transfer, and comparable penalty and interest provisions will apply to those who fail to withhold or transfer.[97]

When analyzed, the law and practice of withholding agents under the Ethiopian income tax laws, the laws impose an obligation on employers to collect tax under the withholding scheme every time an employee is paid unless the payment is expressly made tax-exempt by law. From the

[93] Ibid
[94] Id, P 61
[95] Koenraad, v., The Pay-As-You-Earn Tax on Wages, *in* Victor Thuronyi, (ed.), *Tax Law Design and Drafting*, International Monetary Fund, Vol. 2, 1998, p 13 [here in after Koenraad]
[96] Ibid
[97] Lee and Richard, *supra note 2, p 61*

perspective of *house and transportation allowances*, as long as no law exempted those payments, employers have an obligation to withhold if any. But practically the federal governmental institutions, which I have discussed above, do not withhold tax from *house and transport allowances* they paid to their employees.

Moreover, there used to be and there are also institutions do not withhold from *house and transport allowances* they paid to their employees. Indeed, my employer, Bahir Dar University, used to treat house allowance as exempted from tax and did not withhold from house allowance it paid to instructors[98]until 18-06-2005 E.C. Another instance is the case of House of Peoples Representatives. ERCA in its Inter-Office Memo requested its legal counsel and amendment group to forward its recommendation that the House of Peoples Representatives unlike the House of Federation is not withholding income tax from the payees' *house and transport allowances;* and it requested recommendation on that.[99] The finding of the group was the act of the House of Peoples Representatives is against what is provided under the income tax proclamation, income tax regulation and income tax directive.

[98] Bahir Dar University Ref. No. 1/8928/2.6.3, *supra note 91*

[99] *የፌደሬሽን ምክር ቤት የቋሚ ኮሚቴ አባል አመራሮች የቤት፣ የትራንስፖርት፣ የመዘዋወርያ እና የስልክ አበል እንዲሁም ተጨማሪ አበልን ከወር ደመወዛቸው ጋር ተደምሮ የስራ ግብር ተቀናሽ የሚደረግ ሲሆን ነገር ግን የህዝብ ተወካዮች ምክር ቤት ከላይ የተጠቀሱትን ጥቅማ ጥቅሞች በደመወዝ ላይ በመደመር የስራ ግብር የማያስከፍል በመሆኑ በተገለፀው ልዩነት ላይ ከህግ አንፃር አስተያየት እንዲሰጣቸው በመጠየቃቸው የህግ አስተያየት በቡድኑ እንዲሰጥበት ጠይቃችኋል።* House, transport, travelling and phone allowances as well as additional allowance payable to members of standing committee of House of Federation are taxable by computing with their monthly salary. However, the House of Peoples Representatives is not withholding these allowances from its members. As a result, the legal counsel committee is requested to forward its recommendation on this difference. [Translation mine]. Ethiopian Revenue and Customs Authority *Ref.No.ሕ/ም/ማ*29/2003 Date 30/11/03.

"--- የቤት አበል፤ የቤት ስልክ ወጪ፤ ተጨማሪ አበል ከገቢ ግብር ክፍያ ነፃ ያልተደረጉ ሲሆን --- የፌደሬሽን ምክር ቤቱ በግብር/ታክስ አሰባሰብ በኩል እየተከተለ ያለው አሰራር በህግ የሚደገፍ መሆኑን በመግለፅ ይህንን አሰተያየት ልከናል።"[100]

House allowance, cost of fixed telephone, additional allowances are not exempted from income taxation. Hence, it recommended that the practice of the House of Federation in respect of tax collection is legally acceptable. [Translation mine]. Generally, the above discussions prove that, the withholding agents failed to comply with the provisions of income tax laws which impose an obligation to withhold from payments they made to their employees.

2.2. The Response of Ethiopian Revenues and Customs Authority (ERCA)

The main objective of a revenue authority is to collect the taxes and duties owed as per the tax laws and to do this in such a way that will maintain trust and confidence in the tax system and its administration.[101] As long as taxes are determined by law(s), the tax administrator is empowered to execute the provisions of the law(s).[102] In the process of tax administration authority is

---

[100] Ethiopian Revenue and Customs Authority *Ref.No.ሕ/ም/ማ*/29/2003, *Id*

[101] Forum on Tax Administration, Compliance Risk Management: Managing and Improving Tax Compliance, 2004, p 7. The tax administration is the division of the government tasked with collecting taxes. Available at http://www.oecd.org/tax/administration/33818656.pdf, consulted 12 May, 2014, [here in after Forum on Tax Administration]. *See Doug and Anton, infra note 100*, Detailed Guidelines for Improved Tax Administration in Latin America and the Caribbean, 2013, P 18.

[102] Doug, P., and Anton, K., Detailed Guidelines for Improved Tax Administration in Latin America and the Caribbean, 2013, P.18, available at http://www.usaid.gov/sites/default/files/LAC_TaxBook_Entire%20Book%20-%20ENGLISH.pdf, consulted 9 June, 201, [here in after Doug and Anton*]*

responsible to: foster voluntary tax compliance by taxpayers as per the tax laws, administer the tax laws fairly and impartially, make tax compliance easier for the taxpayer, monitor compliance and reduce tax evasion, enforce the country's tax laws in cases of non-compliance, use its resources efficiently and effectively, and ensure to keep tax officials honest and reinforce the legitimacy of the tax system.[103]

The tax administrator checks the filing and payment accordance of employers and make sure that they have abided by the law in computing and remitting the withheld tax by conducting audits where necessary.[104]Tax administration with qualified and accountable personnel is almost the most relevant requirement for achievement of "tax potential" of the state.[105] The efficiency of a tax system is not determined only by appropriate legal regulation but also by the efficiency and integrity of the tax administration.[106] In many countries, especially in developing countries, small amounts of collected public revenue can be explained by either incapability of the tax administration in realization of its duty, or with some degree of corruption.[107] Jenkins underlines that the tax system can never perform better than its tax administration, but even the best tax administration would surely unable to transform a poor tax system

[103] Arturo, *supra note 71*, pp 25-26
[104] Koenraad, *supra note 95*, p 13.
[105] Gloria M., tax administration, procedural justice, tax payers' attitude and tax compliance among small business income earners in Arua district, Makerere University, 2011, p.8, available at http://www.mubs.ac.ug/docs/masters/acc_fin/Tax%20administration,%20procedural%20justice,%20tax%20payers%20attitude%20and%20tax%20compliance%20among%20small%20business%20income%20earners.pdf, consulted 29 May, 2014, [here in after Gloria]
[106] Ibid
[107] Ibid

into a well-operating one.[108] Tax legislation demanding high willful deference and administrative control, but enforced by a weak tax administration and unskilled withholding agents and collected from involuntary tax payers will not generate the required revenue, nor achieve the proposed allocation of the tax burden, or realize the planned distribution of the tax benefits.[109]

In the Ethiopian Federal Government, tax administration is entrusted to the ERCA.[110]Accordingly, the ERCA wrote a letter that dictates all government offices and development enterprises as well as other enterprises and institutions to withhold from payments they made to their employees in the following manner:

> *ጉዳዩ፡- የመንግስት መ/ቤቶችና ልማት ድርጅቶች እንዲሁም ሌሎች ድርጅቶችና ተቋማት ከተቀጣሪዎቻቸው ሊቀንሱት የሚገባውን የሥራ ግብር ይመለከታል፤*
>
> *--- በገቢ ግብር አዋጅ ቁጥር 286/94 አንቀጽ 13 እና በገቢ ግብር ደንብ ቁጥር 78/94 አንቀጽ 3 ከግብር ነፃ ከተደረጉ ገቢዎች በስተቀር ማናቸውም ክፍያ ወይም ጥቅም (ለምሳሌ የቤት አበል፤ ቦነስ፤ የዓመት ፈቃድ ክፍያ፤ የአገልግሎት ካሣ --- ወዘተ) ከወር ደመወዝ ጋር እየተደመረ ግብር እንደሚከፈልበት አዋጁና ደንቡ በግልጽ ያመለክታሉ፡፡*[111]

Re:-Employment income tax to be withheld by all government offices and public enterprises as well as other enterprises and institutions

---

[108] Ibid

[109] Koenraad, *supra note 95*, p 18

[110] Income tax proclamation No. 286, *supra note 1*, Art. 38(1), Ethiopian Revenues and Customs Authority Establishment, 2008, Art. 6, Pro.no. 587/2008, *Fed. Neg. Gaz*., year 14, no 44, [here in after ERCA Pro. No. 587]

[111] Ethiopian Revenue and Customs Authority *Ref.No.*4ኦሠ-54/96 Date 19/12/2000

Except those exempted under Article 13 of the income tax proclamation and Article 3 of the income tax regulation No. 78/94, any payment or benefit (such as house allowance, bonus, annual leave payment, compensation for service, etc) are subject to tax through aggregating with their monthly salary as per the proclamation and regulation. [Translation mine]

To get emphasis of the notice, the ERCA requested all ministers, authorities and agencies to cooperate in forwarding this message to their responsible offices as follows:

"ስለዚህ ሁሉም የሚኒስቴር እና የባለሥልጣን መ/ቤቶች እንዲሁም ኤጀንሲዎች ለተጠሪ መ/ቤቶቻቸሁ ይህንኑ መልዕክት በተቻለ ፍጥነት በማሳወቅ በአዋጁና በደንቡ መሰረት እንዲፈጽሙ ጥብቅ ማሳሰቢያ እንድትሰጡልን የተለመደ የሥራ ትብብራቸሁን እንጠይቃለን::"[112]

When translated in to English: the ERCA requested all ministers, authorities and agencies to cooperate in communicating this notice seriously to those offices responsible to them to act as per the proclamation and the regulation.[Translation mine]

Practically, when scrutinized whether the ERCA is actually discharging its duty based on the above discussion, the answer is no! The ERCA, rather than challenging acts contrary to the tax laws, requested grant of tax exemption on allowances of its prosecutors by citing unlawful exemptions made to prosecutors of other institutions.

The tax authority has sufficient information regarding payments made to employees and whether employers are complying with the law or not. This is

[112] Ibid

because employers are required to maintain wage withholding records for each employee, containing entitlement to personal allowances, other deductions authorized by the tax authority, totals of taxable wages and PAYE withheld, and pay the withheld tax to the Tax Authority within thirty (30) days of the end of each calendar month.[113]

Despite the existence of clear information as to non- compliance of the law by those who are duty bound to withhold and co-operate with the tax authority in the implementation and enforcement of the income tax proclamation, the tax authority took no measure against the actions of these withholding institutions. Thus, the tax authority has failed to monitor compliance and administer the tax laws fairly and impartially which obviously reduce public trust in the tax administration.

Anyone who fails to withhold or under withholds he shall be made to pay the full amount of the tax to the Tax Authority.[114] The law also provides civil and criminal sanction for non-withholding agents. Regarding civil liability, a withholding agent that fails to withhold tax in accordance with the income tax proclamation is personally liable to pay to the Tax Authority the amount of tax which has not been withheld.[115] In addition, an agent who fails to withhold tax in accordance with the income tax Proclamation shall be liable

[113] Income tax proclamation No. 286, *supra note 1*, Art 51(3). In addition, ERCA knew that the Ministry of Justice and the Federal Anti-Corruption Commission are not withholding income taxes from allowances payable to their public prosecutors and prosecutors and investigators respectively. Hence, ERCA requested similar entitlement for its prosecutors and lastly secured. See discussion under section 2.1.1 sub-section C above.
[114] Id, art 53(5)
[115] Id, art 90(1)

for a penalty of 1,000 Birr for each instance of failure to withhold the proper amount.[116]

Here one may ask: Can the letter of the Office of the Prime Minister limit the tax authority from taking legal action against those not withholding? The answer is absolutely "no". Not only a letter but also a law contrary to the income tax law will not prevent it from taking appropriate action.[117] Rather it provides a sanction against those who aid for its violation. That is:

> *A person who aids, abets, incites, or conspires with another person to commit a violation against this Proclamation also commits an offence under this proclamation and shall be subject to prosecution, and shall on conviction be liable to a fine and imprisonment not in excess of the amount of fine or period of imprisonment provided for the offence aided or a betted.*[118]

The income tax proclamation also provides additional sanction against those who obstruct tax administration. A person who, otherwise impedes or attempts to impede the administration of the Proclamation, commits an offence and is liable on conviction to a fine of not less than 10,000 Birr and not more than 100,000 Birr, and imprisonment for a term of two years.[119]

However, the tax authority remains silent despite legal authorization which enables it to challenge the letters and practices of withholding agents and those who aid them to act contrary to the law.

---

[116] Id, art 90 (3)
[117] Notwithstanding anything to the contrary in any other law, the Tax Authority shall be empowered to investigate any statements, records and books of account submitted by any taxpayer at any time. Id, art 38(2)
[118] Id, art 101
[119] Id, art 98 (b)

3. Concluding Remark

Legality principle in taxation requires that any tax must have a firm basis in law. This principle gives rise to another principle that the tax administration may not conclude an agreement on tax liability with the taxpayer. This is because when the statute says that tax is due, it must be strictly applied, and it is not within the power of the tax administration to agree to reduce the amount of tax. The basis for the prohibition of such agreements is based on the idea that tax law as being of public order. This means that the tax law has a special status as a statute that is essential to an organized society, similar to that of criminal law, on which agreement between the police authorities and the criminal is not possible either.

In Ethiopia, the income tax proclamation particularly federal provides that every person having income as defined by law shall pay income tax in accordance with this law. In case of income derived from employment, the law imposes an obligation on employers to withhold from any payment they made to their employees unless exempted by law.

Despite the absence of a law that exempts house and transportation allowances payable to employees, the Office of the Prime Minister through letter grant exemption to public prosecutors of the Ministry of Justice, prosecutors and investigators of the Federal Anti-Corruption Commission and prosecutors of the ERCA. Resorting to letters to grant exemption on income derived in the form of house and transportation allowances is against the principle of legality. This is because for one thing issuance of a letter does not amount to issuance of law. Furthermore, the organ that issued these letters is

not authorized to grant exemption. The act of granting exemption via letter not only violates the principle of legality, it is also contrary to the principle of equality. Simply put, employees of other institutions who are entitled to same allowances are not beneficiaries of the same exemption. Persons found in like circumstances are treated differently.

The principles of legality and equality are not respected because the ERCA fails to ensure compliance of the income tax law. The ERCA, not only fails to assure compliance but is also itself involved in violation of the tax law.

The United Nations Security Council Targeted Sanction and Its Impact on Economic, Social and Cultural Rights [*]

Nega Ewunetie Mekonnen [**]

Abstract

The Security Council has imposed a number of sanctions on targeted individuals and states. These days it has preferred targeted sanctions[1] to the general ones. These targeted financial sanctions and travel bans were also imposed on the families of the targeted and designated individuals. This article focuses on the impact of the smart or designer sanctions on the economic, social and cultural rights of targeted individuals and their families. It discusses the legality of these measures taken against the targeted individuals and their respective family members. The substantive human rights of targeted individuals and their families, inter alia, the right to property, health, work, and the right to education of targeted individuals and their families can be violated. Because of the absence of procedural guarantees in the area targeted individuals cannot defend themselves against the Security Council's action. The author will discuss how these procedural and substantive human rights are violated and the related issue of the right to effective remedies.

---

[*] The original wider version of this article was written as LL.M. thesis at the University of Groningen, the Netherlands, 2008.

[**] LL.B.(Addis Ababa University), LL.M.(the University of Groningen, the Netherlands) , Lecturer in Law, Bahir Dar University, School of Law. The author can be reached at beleteeng@yahoo.com. The author is grateful to the Editor-in –Chief of Bahir Dar University Journal of Law and the three anonymous reviewers for their critical and scholarly comments.

[1] Targeted sanctions are also referred to as smart sanctions. "These sanctions directly target supposed violators of international law instead of the innocent population.'' Andrew Hudson, Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights, *Berkeley Journal of International Law*, Vol. 25, Issue 2, ,2007, p. 205. "[I]n addition to freezing of assets, other smart sanctions include suspension of aid, the denial and limitation of access to foreign financial markets, trade embargoes on arms and luxury goods, flight bans and the denial of international travel, visas and educational opportunities.)'' *Ibid,* Jane Boulden and Thomas Weiss eds., 2004, as quoted by Andrew Hudson.

Key Terms: Listing and Delisting of targeted individuals, Security Council, Socio Economic and Cultural Rights, Targeted Sanction

Introduction

When the United Nations was established in 1945 as an international organization the *raison d'etre* was the maintenance of international peace and security.[2] The United Nations system was designed to deal with states which are the principal subjects of international law and the Security Council was empowered to take actions against states in response to threats to international peace and security.[3] Therefore, it had never been thought to sanction individuals during the San Francisco Conference. Financial sanctions, commodity boycotts, arms embargoes, and travel bans, replaced general trade sanctions as the preferred instruments of the United Nations policy.[4] The Security Council in its campaign against international terrorism adopted Resolution 1373(2001) as a tool of targated sanctions to freeze the funds of Al-Qaeda terrorists and their allies, and to block "the travel of designated individuals.''[5] It has to be noted that before the period of the mentioned resolution, the United Nations had already adopted such tools in its different sanction regimes. For example, sanctions through S/RES/1173(1998) which imposed targeted financial sanctions against the UNITA political movement in Angola, its senior officials and their immediate families , and sanctions

[2] Grant L. Willis, Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson, from the Selected Works of Grant L. Willis,2010, Available at: http://works.bepress.com/grant_willis/1

[3] *Ibid*.

[4]David Cortright and George A. Lopez, Reforming Sanctions,: *in* David M. Malone (ed.), *The Security Council from the Cold War to the 21 st Century*, Lynne Reiner Publisher, Colorado, London, 2004, P.169.

[5] *Ibid*.

against targeted Taliban officials and their immediate families through Security Council Resolution 1267(1999) and Security Council Resolution 1333(2000).

An attempt is made by the Security Council to exempt some humanitarian transactions or basic needs of both the targeted individuals and their families from the targeted sanctions.[6] But the effort of exemption has another problem with regard to the substantive rights of targeted individuals and their family members. Can victims of targeted sanctions challenge the acts of regional organizations, like the Council of the European Union, as the acts of the Council not as the acts of Security Council (when the former implements the resolutions of the latter), or member states? This is another point of discussion.

Security concerns and the maintenance of international peace and security are some of the reasons for imposing such targeted sanctions. Regional human rights courts (especially the European Human Rights Court) fail to review substantively cases of listings for security reasons. But what about the aforementioned rights of individuals? Would the maintenance of international peace and security, and the security of the nations be endangered simply because targeted individuals are allowed to challenge the acts of the United

[6] Here we can come up with different kinds of exemptions adopted in the United Nation's sanction regime.
For example in case of : S/RES/1333 (2000) - exemptions can be granted from the imposed travel ban if it would promote discussion of a peaceful resolution. S/RES/1452 (2002)- exemptions can be granted to frozen funds or other financial assets or economic resources to cover "basic expenses" or "extraordinary expenses" of the targeted individual.

Nations and regional organizations? It is a well-developed jurisprudence that victims of human rights violations including victims of economic, social and cultural rights violation should have access to a court and claim remedies. This question calls another issue – the proportionality of the measures taken.[7] To what extent can the Security Council limit economic social and cultural rights of targeted individuals and their families when imposing (economic) sanctions?

Another important and related point is the issue of effective remedy. As targeted individuals (victims) do not have standing before the International Court of Justice and because of the functional immunity of the Security Council, victims will obviously not be able to bring the question of remedy before the international, regional or domestic courts.[8]

This article is divided into sections and concluding remarks. The Security Council and its relation to human rights protection in general will be discussed in the first section. This section examines the duty of the Security Council and comprising states to observe human rights when taking enforcement actions (imposing sanctions) . The second section addresses the issues around the impact of the Security Council sanction on the economic, social and cultural rights of the targeted individuals and their families. Issues

[7] Erika de Wet, Human Rights Limitations to Economic Enforcement Measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime, *Leiden Journal of International Law*, Vol.14, No.2, 2001, P.293.

[8] It has to be noted that currently legal challenges have been presented to the national courts of Belgium, Switzerland, the Netherlands, Pakistan, Turkey, the United States and the United Kingdom. See the Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities (hereinafter the Report of the Analytical Support and Sanctions Monitoring Team).

of effective remedies for violations of economic, social and cultural rights will be raised in the third section which shall be followed by concluding remarks.

1. The Security Council and Human Rights

This section focuses on what some scholars call "the human rights paradox''.[9] Since the 1990s human rights have been one of the reasons for the Security Council to impose sanctions regimes. Here, human rights violations are taken as the threat to international peace and security in the language of Article 39 of the United Nations Charter. However, even if human rights reasons can be causes for the Security Council to impose sanctions regimes, its act may also lead to violations of human rights of individuals. Even if scholars call these facts the human rights paradox, it does not seem that there is a real contradiction between them. Except for some human rights that are non-derogable[10], there are justifiable grounds for limiting human rights. Protecting

[9] August Reinisch , Developing Human Rights and Humanitarian Law : Accountability of the Security Council for the Imposition of Economic Sanctions, *the American Journal of International Law*, Vol. 95, No.4, 2001, as Quoted at Note 14, P.852.

[10] According to Article 4(2) of the International Covenant on Civil and Political Rights the following are non- derogable human rights: the right to life article, prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent, prohibition of slavery, slave-trade and servitude, prohibition of imprisonment because of inability to fulfill a contractual obligation, the principle of legality in the field of criminal law, the recognition of everyone as a person before the law, and freedom of thought, conscience and religion. The nature of these non-derogable human rights has been described by the Human Rights Committee as follows:

The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would

the rights and freedoms of others can be raised as a ground of limitation. Therefore, these two conflicting interests must be reconciled at some point. It is imperative to establish the Security Council's human rights obligations first before arguing that it should respect human rights of the innocent population at large in the targeted state or the human rights of targeted individuals and their families while imposing sanctions. So, in this regard, it is imperative to establish that the Security Council is bound by human rights.

The following sub-sections will discuss whether the Security Council (its member states) is bound by human rights institutionally as an international organization.

1.1. Accountability and Responsibility of the Security Council as an International Organization and the Liability of Member States

We can address the issue of liability of the Security Council from the perspective of the responsibility of international organizations: whether international organizations in general are bound by human rights. In this sub-section the question of whether or not members (comprising states) of the Security Council would be liable for the acts of the Council will be examined.

---

ever be justified. The reference in article 4, paragraph 2, to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3. On several occasions the Committee has expressed its concern about rights that are non-derogable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party. (Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, paragraph 7, 2001)

1.1.1 Accountability and Responsibility of the Security Council as an International Organization

By virtue of Article 7(1) of the Charter of the United Nations, the Security Council is one of the six principal organs of the United Nations.[11] As provided in Articles 24, 39-41, and other pertinent provisions of the Charter, the Security Council is primarily responsible for the maintenance of international peace and security. As it has been clearly provided under Article 23(1) of the Charter the Security Council consists of fifteen members of the United Nations, five permanent members and ten non-permanent members.[12]

International organizations including the United Nations as international legal persons possess rights and duties distinct from their member states.[13] The International Law Commission (ILC) also provides that "[e]very international wrongful act of an international organization entails the international responsibility of the international organization.''[14] According to the Commission, the internationally wrongful act of an international organization consists of either an action or omission and: (a) is attributed to the international organization under international law; and (b) constitutes the

[11] These six principal organs of the United Nations are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat.

[12] The Republic of China, France, Russia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America are permanent members of the Security Council. The General Assembly elects ten other Members of the United Nations to be non-permanent members of the Security Council.

[13] C.F.Amerasinghe, *Principle*s *of the Institutional Law of International Organizations*, Second Edition, Cambridge University Press, Cambridge, 2005, P.10.

[14] ILA Committee on the Accountability of International Organizations , as quoted by Nigel D. White, *Infra* at Note 20, P. 94.

breach of an international obligation.[15] As a matter of principle, an international organization that has an an international legal personality is responsible for its acts.[16] Therefore, the United Nations as an international person has its own rights and duties.

1.1.2. The purposes and the principle of the United Nations

One can also see the liablity of the Security Council from the the angle of the purposes and the principle of the United Nations. The Security Council is bound by the fundamental principles and values as enshrined in the Charter and the Universal Declaration of Human Rights.[17] The preamble of the Charter makes it clear that the United Nations reaffirms fundamental human rights, and the dignity and worth of the human person. Moreover, the acivement of "[…] international cooperation in solving international problems of an economic, social, cultural or humanitarian character are also some of the purposes of the United Nations.''[18] Therefore, as an international organization with rights and duties, the Security Council is in general bound by human rights and in particular when it imposes sanctions regime.

1.1.3. The Liability of Member States

The most impotant question to be addresed here is whether members of the Security Council (both permanent and non-permanent members) are liable for violations of human rights as a state apart from the liability of the Security Council? The distinction between the organization and its member states

[15] *Ibid*.
[16] *Ibid.*
[17] *Id.*, P. 93.
[18] The Charter of the United Nations, 1945, Article 1(3).

with regard to powers, rights, duties and liablities is the character of international organizations.[19] So, the act of the Council (including imposing sanctions regimes) will not be taken as the act of member states. In addressing this issue, Nigel D. White argues that:

> *At the level of organizational decision making though, human rights obligations are directly applicable to the Security Council. The fact that it is made up of states and that the permanent members may have too great an influence on particular decisions does not shift responsibility for Security Council decisions from the organ to the states. Once a decision of the Council is made it is a reflection of its will, not just an amalgamation of member states*.[20]

Therefore, institutionally speaking it is only the United Nations not its members that will be liable for human rights violations. But there are cases in which members of the Security Council may be liable for human rights violations. For instance if we take economic, social and cultural rights, as almost all members of the Security Council are also parties to the Covenant on Economic, Social and Cultural rights, by virtue of Article 2(1) of the Covenant, they are liable for economic, social and cultural rights violations of their nationals and residents.

According to the European Court of Human Rights in the *Bosphorus* judgment, state action in taking measure to discharge its obligation under international organizations is justified if the relevant organization protects

[19] *Id.*, P. 82.

[20] Nigel D. White , Applicability of Economic and Social Rights to the UN Security Council,: *in* Baderin, M., and Corquodale R., (eds.) *Economic, Social and Cultural Rights in Action*, Oxford University Press, New York, First Edition, 2007, PP., 96-97.

fundamental rights and the measures taken are equivalent to what the European Charter on Human Rights provides.[21] Even if this is the jurisprudence of a regional human right system, we can argue by the same analogy that one of the purposes and objectives of the United Nations Charter is the promotion of human rights. International human right instruments like the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights and others that protect the economic, social and cultural rights of targeted individuals and targeted family members, are adopted by the organs of the United Nations. Therefore, members of the Security Council cannot invoke their obligation in the United Nations for violating human rights if their measures are not "proportional and equivalent" and in line with Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. At this juncture another important point can be raised: what about the obligation of member states of the Security Council as provided under the United Nations Charter? The Charter, under Article 103, provides:

> *In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligation under any international agreement, their obligations under the present Charter shall prevail.*

Does this article contravene the case law in the *Bosphorus* judgment? Can member states invoke this article to violate economic, social and cultural rights in the targeted state? The intention of the drafters does not seem to

[21] European Court of Human Rights, Grand Chamber, *Bosphurus Hava Yollari Turim Ve Ticaret Anonim Sirketi Vs.Ireland* ,Para.155.

envisage the "primary" purposes and objectives of the Charter (promotion of human rights is one of the purposes and objectives of the Charter).[22] But it seems to envisage other "secondary" obligation imposed by the Council, under Articles 25 and 41 of the Charter.[23] For instance, member states must accept their obligation under the Charter over conflicting obligations in trade agreements.[24]

---

[22] Nigel D. White, *Supra* note 20, P.100.

[23] *Ibid.* However, some scholars argue that according to the teleological interpretation of Article 103 of the United Nations Charter the Security Council's decisions are binding on member states over conflicting conventional human right obligations. See Maurizo Arcari, Limits to Security Council Powers under the UN Charter and Issues of Charter Interpretation, *Polish Year Book of International Law*, 32, 239, 2012, p. 248.

[24] *Ibid.* According to the view of the Human Rights Committee there are cases under which a state party may not be duty bound to comply with the resolutions of the Security Council. The Human Rights Committees states:

As to the merits, the State party must take responsibility for the implementation of Security Council resolution 1267 (1999) and related resolutions. It is not correct to say that the State party is bound to implement sanctions imposed by the Security Council. Article 103 of the Charter does not apply because the Security Council was acting ultra vires in adopting the resolutions that imposed the sanctions. Thus, the resolutions are not "obligations" within the meaning of Article 103. In imposing sanctions on individuals as part of its efforts to combat terrorism, the Security Council has exceeded its powers under the Charter. While the resolutions setting out the sanctions regime were adopted under Chapter VII, that does not mean that they are binding on Members of the United Nations, since a body must adopt decisions that are within its powers. The oversight of Member States and legal precedent are now the only constraints on the Security Council preventing it from imposing its will through a contrived finding of a threat to international peace and security. The Security Council must act in accordance with the purposes and principles of the United Nations, with the customary interpretation of the Charter and with international legal precedent. The authors in this case are not a threat to international peace and security as defined in Article 39 of the Charter of the United Nations. Recourse to Chapter VII is admissible where a situation has massive cross-border repercussions. In the alternative, recourse to Chapter VII has always been contested by certain States, indicating a lack of opinio juris. Given the lack of opinio juris, resolution 1267 (1999) and related resolutions are contra legem: the fight against an "invisible" enemy does not dispense with the obligation to respect the Charter as currently interpreted. (Views the Human Rights Committee under Article 5, Paragraph 4, of the

1.2. Legal Basis for the Liability of the Security Council

The question of the liability of the Security Council for human rights violations can be answered by taking into account the fundamental principles of the United Nations, peremptory norms of international law, and general principles of law.

1.2.1 Fundamental Principles of the United Nations

As it is provided under Chapter VII of the Charter of the United Nations, the Security Council is responsible for the maintenance and restoration of international peace and security. Article 39 of the Charter provides:

> *The Security Council shall detrmine the existence of any threat to the peace, breach of the peace, or act of agrssion and shall make recommnedations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain international peace and security.*

Accordingly, the Security Council has been using sanctions regimes as tools to maintain and restore international peace and security. There is no clear provision in the Charter of the United Nations that shows whether in doing so the Security Council is bound by human rights. In this regard White argues that even if the Security Council and other organs of the United Nations are duty bound to promote and protect[economic, social and cultural rights] "there is little in the Charter that suggests it is itself bound by human rights."[25]

Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 1472/2006, Para. 5.6)

[25] *Id.*, P.92.

Even Article 41of the Charter, which is about non-military measures of the Security Council including imposing sanctions regimes, is silent on the duty of the Security Council to respect human rights in imposing sanctions regimes. But does the absence of a clear provision in the Charter mean that the Security Council is allowed to violate human rights? Before making conclusion, it is important to closely examine other pertinent provisions of the Charter in light of Article 41of the Charter.

Some provisions of the Charter (Articles 1(1) and 55) are pertinent to the issue at hand.[26] From the reading of Article 1(1) of the Charter we can understand that one of the purposes of the United Nations is the maintenance of international peace and security. In doing so, the United Nations (the Security Council as one of its principal organs)[27] has to observe principles of justice and international law. Here as an international organization, the Security Council is duty bound to observe human rights enshrined in different international and regional human rights instruments. It is also important to note the achievement of international cooperation in promoting and encouraging respect for human right and for fundamental freedoms as the other purpose of the United Nations in general and the the Security Council in particular.[28] According to Article 55 of the Charter, the United Nations is

[26] Roger Normand, A Human Rights Assessment of Sanctions: The Case of Iraq, 1990-1997, *in*: Van Genugten, Willem J.M. and de Groot, Gerard A.(eds.) *United Nations Sanctions*, Intersentia, Antwerpen-Groningen-Oxford,1999, PP. 24-25.

[27] Article 7(1) of the Charter establishes seven principal organs. One of these seven principal organs is the
Security Council.

[28] The Charter of the United Nations , *Supra* note 18, Article 1(3).

duty bound to promote higher standards of living, full employment, and conditions of economic and social progress and development. From the close reading of the aforementioned articles of the Charter we can understand that, in one way or another, the United Nations is duty bound to respect and even to protect human rights.

Article 24(2) of the Charter is pertinent to the issue at hand. According to this article the Security Council in discharging its duties provided in paragraph 1 of the same article should act in accordance with the purposes and principles of the United Nations. This is supported by Roger Normand who wrote as follows:

> *[...], under both the Charter and international law, the Security Council's enforcement powers are limited by human rights and humanitarian standards. Article 24 of the Charter directs the Council 'to act in accordance with the Purposes and Principles of the United Nations' in the use of its authority to maintain peace and security. Among the most fundamental 'Purposes and Principles' listed in Article 1 is the promotion of human rights. Indeed, the Preamble to the Charter begins by stating its determination 'to reaffirm faith in fundamental human rights and in dignity and worth of human person'.*[29]

Therfore, according to Article 24(2) of the Charter (even without resorting to other articles of the Charter) we can conclude that the Security Council must be abided by by human rights when it imposes sanctions according to Article 41 of the Charter.

[29] Roger Normand, *Supra* note 26, PP. 24-25.

We can also address this issue from the perspective of the duty of the United Nations to promote human rights. Promotion and violation of human rights cannot go hand in hand. The United Nations cannot promote human rights if at the same time it violates these rights. Therefore, even if the primary responsibility of the United Nations is the promotion of human rights, it is also duty bound not to infringe upon human rights in general, and when it imposes sanctions regimes in particular. As Roger Normand points out the Security Council should act in accordance with humanitarian and human rights principles.[30]

1.2.2. General Principles of Law

The liability of the Security Council for human rights violations, in general, and in imposing sanctions regimes in particular can be established from the perspective of general principles of law. As the International Law Commission (ILC) states:

> *Human rights obligations, which are increasingly becoming an expression of the common constitutional traditions of states, can become binding upon [organizations] in different ways: through the terms of their constituent instruments; as customary international law;*

[30] *Id.*, P.25. Roger Normand argues that:
The Security Council's human rights obligations are not identical to those of a state. […] [W]hen confronting threats to peace and security the Council may require some latitude of action beyond allowed to states. Yet by either standard, the Security Council obliged to act in accordance with human rights and humanitarian principles when perusing collective action. The contrary view, that the Security Council is free to violate these principles, ignores not only the Charter but also common sense.

> *or as general principles of law or if an [organization] is authorized to become a party to human rights treaty.*[31]

It is obvious that as the United Nations has not ratified and cannot ratify international or regional human rights instruments it is not a party to human rights instruments.[32] Therefore, even if the United Nations has neither ratified nor acceded to these human rights instruments, it will be liable to those human rights principles that become general principles of international law and that can be seen as authoritative interpretation of human rights obligations.[33] So, in addition to the duty of the United Nations to respect human rights in imposing sanctions that arise from the interpretation of the pertinent provisions of the Charter, the Security Council is also bound by basic human rights and it is responible for any violation arisisng out of targated sanctions against states or individuals.[34]

1.2.3. Peremptory Norms of International Law

Another ground for the United Nations to be bound by human rights is peremptory norms of international law. Even if the customary law status of human rights is more controversial, economic embargoes "seem to qualify as customary rules.''[35] Here peremptory norms of international law come into the picture. Some basic human rights norms "have attained the status of non-

[31] ILA Committee , *Supra* note 14, P. 95.
[32] Iain Cameron, UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights, *the*
Nordic Journal of International Law, Vol. 72, No., 2, 2003, P.167.
[33] Ibid.
[34] Nigel D. White , *Supra* note 20, P. 95.
[35] August Reinisch, *Supra* note 9, PP.859-860.

derogable, peremptory norms in the sense of *jus cogens* obligations.''[36] The effect of the Security Council resolution (arms embargo on Bosnia) was taken as a violation of the peremptory norms of *jus cogens*.[37] In this regard Judge Lauterpacht said:

> *[...], it is not contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of jus cogens or requiring a violation of human rights. But the possibility that a Security Council resolution inadvertently or in an unforeseen manner lead to such a situation cannot be excluded. And that, it appears, is what has happened here. On this basis, the inability of Bosnia-Herzegovina to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that the access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on members of the United Nations, albeit unknowingly and absurdly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of jus cogens.*[38]

Even if if this statement is the separate opinion of the judge it tells us some thing about the direct or the indirect effect of the Security Council resoulution on human right violations. Therefore, the Security Council is not only duty

[36] *Ibid.*
[37] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosinia-Herzegovinia V. Yugoslavia), Provisional Measures II*, Order of 13 September 1993, ICJ Reports 1993, P.325, Separate Opinion Lauterpacht, Para. 102.
[38] *Ibid.*

bound to respect these peremptory norms of *jus cogens,* but also "a resolution which [violated] *jus cogens* must then become void and legally ineffective.''[39]

In *Ahmed Ali Yusuf, and Al Barakaat International Foundation V. Council of the European Union, and Commission of the European Communities, supported by United Kingdom of Great Britain and Northern Ireland*, the applicants alleged that the breach of their right to make use of their property, breach of the right of a fair hearing and breach of their right to an effective judicial remedy as a breach of peremptory norms of *jus cogens*. With regard to the right to property, the Court seems to conclude that this right falls under the peremptory norms of *jus cogens*. But according to the Court it is only an arbitrary deprivation of the right to property that can be regarded as contrary to peremptory norms of *jus cogens.*[40]

As far as the right to be heard is concerned, the Court also decided that as the Security Council adopted the Guidelines of the Sanctions Committee for the conduct of its work, it intended to protect the fundamental rights of persons in particular their right to be heard.[41] And also the Court makes it clear that the European Community institutions do not have power of checking and reviewing the acts of the Security Council and the Sanctions Committee.[42]

---

[39] *Id.*, Para. 104.

[40] Court of First Instance, *Ahmed Ali Yusuf, and Al Barakaat International Foundation V. Council of the*
European Union, and Commission of the European Communities, supported by United Kingdom of Great
Britain and Northern Ireland, Judgement, 21 September 2005, Para.293.

[41] *Id.*, Para. 312.

[42] *Id.*, Para. 321.

Concerning the alleged breach of the right to an effective remedy, taking into account the legitimate objectives pursued, the interest of maintaining peace and security, and the setting up of the Sanctions Committee, the Court rejected the alleged breach of the applicants' rights to an effective remedy.[43]

Even if this case is important to show that the Security Council must take into account the peremptory norms of *jus cogens*, the concept of *jus cogens* is poorly argued in the case. If we take the stand of the Court and recognise the aforementioned breaches as a breach of the norm of *jus cogens*, no derogation is permitted from such norms. But the Court provides grounds or conditions under which the limitation of those rights is justified. Whether or not the right to property, fair hearing and judicial remedy fall within the realms of peremptory norms of *jus cogens* is questionable because "it is acknowledged that *jus cogens* forms a core of international rules that must be respected in all circumstances.''[44]

In the above paragraphs different grounds under which the Security Council is duty bound to respect human rights when it takes an enforcement action in general and in imposing sanctions in particular under Chapter VII the United Nations Charter have been discussed. However, there are also different lines of counter arguments that may lead to conclude to the contrary. These counter arguments mainly focus on the major tasks and functions of the Security Council, i.e., the maintenance and restoration of international peace and security. As Reinisch states:

[43] *Id.*, Paras. 344-6.
[44] August Reinisch, *Supra* note 9, P.859.

> *The most prominent theory, which 'liberates' the Security Council from any legal constraints, is based on the argument that the Council, as the main 'executive' organ of the United Nations, was deliberately exempted from legal limits when fulfilling its major task of securing world peace and security. According to this view, that exemption conforms [to] the general tendency which prevailed in drafting the Charter; the predominance of the political over the legal approach. This approach maintains that its peace preserving and peace restoring function can be carried out best when the Council freely decides if, when, against whom, and how to react threats to and breaches of world peace and security. This condition is reinforced by the fact the Security Council is not 'a law enforcement' organ.*[45]

However, it should be born in mind that the Charter is both a legal and political document. And also, as we have already seen, the peace maintaining and restoring function of the Security Council has its own limitations. The Security Council being an executive organ of the United Nations, it is duty bound to observe human rights principles. The predominant position taken during the preparatory works of the Charter cannot be taken as a sole reason to discharge the Council from observing the principles of the United Nations.[46] At the San Francisco Conference an amendment was proposed by the delegation of Ecuador stating that '[i]n the fulfillment of the duties inherent in its responsibility to maintain international peace and security, the Security Council shall...respect and enforce and apply the principles or rule of existing law was not accepted.'[47] Another counter argument is based on the textual interpretation of the Charter. "This view is mainly based on a literal

[45] *Id.*, P. 855.
[46] *Id.*, P.856.
[47] *Ibid.*

and systematic interpretation of the Charter, which does not include an express provision requiring the Security Council to respect international law.''[48] In the absence of a clear provision to that effect it would be unreasonable to conclude so. Because the subsequent practice of the Security Council does not support this line of argument and conclusion, and it also violates the principles of interpretations provided in the Vienna Convention on the Law of Treaties.[49] According to this Convention "[a] treaty [should] be interpreted [...] in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose.''[50] In interpreting a treaty, *inter alia*, subsequent practices in the application of the treaty should be taken into account, as a supplementary means of interpretation.[51]

Because of the limitations imposed on the powers and functions of the Security Council under Article 24 (2) of the Charter; and the recognition given to human rights, it is difficult to conclude that the Security Council is not bound by human rights.

Traditionally, acts of aggression, breaches of international peace and security through armed conflict, and armed conflicts that are threat to international peace and security are considered to be the concerns of the Security Council under Article 24 and Chapter VII of the Charter. Emerging trends suggest that

[48] *Id.*, P.858.
[49] Vienna Convention on the Law of Ttreaties, concluded at Vienna on 23 May 1969.
[50] *Id.*, Article 31(1).
[51] *Id.*, Articles 31(3) (b) and 32.

phenomena other than armed conflicts are also considered to be threats to international peace and security. According to Nico J. Schrijver:

> *Recently, the Security Council also appeared to embark on the path of interpreting the law-if not creating law-by making pronouncements in a general sense, i.e. not in a specific situation of a particular conflict, but for example, on the threat to peace as a result of the large-scale violation of human rights, international terrorism or the spread of what has so dramatically but correctly been called* "*diseases of mass destruction, such as AIDS.''* [52]

This is the recent interpretation given to the term "threat to peace'' in the Charter of the United Nations. Schrijver describes this change as follows:

> *The [...] change is the drastically different interpretation of the term* "*threat to peace''. [...] More attention was soon devoted to* "*positive peace'', a legal order based on the other global values reflected in Article 1, Paras. 2 to 4. Now there exists a consensus in the United Nations that threats to peace do not only result from wars between and within states, but also from the spread of weapons of mass destruction, international terrorism, transnational organized crimes, infectious diseases, and even-if not yet in the practice of the Security Council – from serious poverty and under development and from serious environmental pollution.* [53]

The same issue was raised in the Resolution of the General Assembly adopted in the 2005 World Submit Out come:

> *We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter.*

[52] Nico J . Schrijver, The Future of the Charter of the United Nations: *in* A. von Bogdany and R. Wolfrum, (eds.) *Max Planck Year Book of United Nations Law,* Vol. 10, 2006, P. 7.
[53] *Ibid.*

> *We rededicate ourselves to support all efforts to uphold [...] international cooperation in solving international problems of an economic, social, cultural or humanitarian character and the fulfilment in good faith of the obligations assumed in accordance with the Charter.*[54]

From these paragraphs it can be understood that nowadays, in addition to armed conflict, violations of human rights including economic, social and cultural rights are also considered as threats to international peace and security. According to this concept, international peace and security can be maintained and restored not only by avoiding armed conflict, but also by solving violations of human rights including economic, social and cultural rights.

The following statement of the former United Nations Secretary-General Kofi Anan clearly shows this new development, i.e., the place given to economic, social and cultural rights violations as threats to international peace and security. Kofi Anan says "I am also concerned that we have tended to focus so much on hard threats, forgetting the soft threats, which can be equally disruptive such as the fight against poverty, the HIV epidemic, environmental degradation, inequality and the desperation that some people live under." [55] Therefore, if human rights issues are considered as threats to international

[54] General Assembly Resolution 60/1, 2005 World Summit Outcome, Para. 5, at <http://nestor.rug.nl/webapps/portal/frameset.jsp?tab_id=_149_1&url=/bin/common/course.pl?course_id=33528>, (Consulted 04 April 2008)

[55] William Felice, *Respecting, protecting and fulfilling economic and social rights: a UN Security Council?, Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, at* www.du.edu/korbel/hrhw/workingpapers/2004/19-felice-2004.pdf (Consulted 04 April 2014)

peace and security and become the concern of the Security Council, it is logical and legally pausable to conclude that the Security Council is bound by human rights including economic, social and cultural rights.

2. Targeted Sanctions as Violations of Economic, Social and Cultural Rights of Targeted Individuals and their Families

Targeted sanctions do not only aim at targeted individuals, but they are also some times targeted at the immediate families of the targeted individuals. The legality of targeting these immediate family members of the targeted individuals will be discussed. In this section how targeted sanctions violate economic, social and cultural rights of the targeted individuals and available remedies will be discussed.

2.1 Targeted Family Members

Many resolutions of the Security Council in addition to targeting individuals, who are the targets of the sanction, they also target family members of such individuals. Financial sanctions and travel restrictions imposed on the officers of the Haitian military and police were also imposed on their immediate families (Resolution 917 /1994). Resolution 1177/1999 imposed financial sanctions on designated senior officials of UNITA and adult members of their immediate families designated pursuant to Resolution 1127/1997. Resolution 1127/1997 also imposed travel ban on the same list of officials and adult member of the family. In Resolution 1132/1997 the Council imposed travel restriction on members of the military junta of Sierra Leone and their families. The same travel restriction was imposed on designated individuals associated with armed rebel groups and on their families.

Here, one question will be raised: why do these family members of the targeted individuals become victims of the sanctions regimes of the Security Council? Are they targeted because they themselves were involved in the alleged activities, or because of their family tie with the targeted individuals? The legality of the measures taken by the Security Council depends on the answers given to these questions. If these family members themselves were engaged in the alleged activities, financial sanctions and travel restrictions imposed on them can be justified. Financial sanctions imposed on the assets and the property of the family members may also be justified if they are used by the targeted individual in achieving the alleged activities. "A confiscation of property used in crime, even when this belongs to a third party [family members], is not a denial/deprivation of property [...].''[56] In other words the question is , "is this property being frozen because it is suspected that the main target could otherwise easily circumvent the sanctions, or is this property being frozen to punish the family members for being a family?''[57] However, if they have been targeted simply because of their family relationship with the targeted individuals, that would amount to collective punishment.

Even if the family members themselves are not involved in the alleged activities, if their property is used by the targeted individuals, the measure taken by the Security Council cannot be regarded as a collective punishment and illegal.The same is true with regard to travel restrictions. If the family

[56]Iain Cameron, *Supra* note 32, P. 189.
[57] *Ibid.*

members themselves are engaged in the alleged activities, then the sanctions targeted against them would be justified. However, if the opposite is true, the measures violate rights of these family members and amount to guilt by association.

The aforementioned resolutions of the Security Council seem to impose a blanket sanction as opposed to the targeted one. The resolutions give the Sanctions Committee the power to list the targeted individuals and their family members. It is not clear whether the Committee will look into issues raised by this writer, or simply impose the sanctions because of their family ties. One rationale may be speculated: what if the family members are in no way involved? Is the sanction imposed against these family members to pressurize the suspect into greater cooperation? This may be justified from the point of view of security reasons. But it is difficult to invoke the same justification from the point of view of the human rights of family members. The following discussion on the violations of substantive rights of targeted individuals is also applicable for targeted family members' substantive human rights.

2.2 Substantive Rights

As it has been pointed out targated sanctions give rise to the violation of economic, social and cultural rights. Human rights are interrelated; the violation of economic right may result in the violation of social and cultural rights. For instance, the enjoyment of social rights reqires some one to have access to adequate food, clothing and housing, and the right of families to

assistance.[58] For the enjoyment of these social rights one needs to have access and the right to some economic rights.[59] These economic rights are the right to property, the right to work, and the right to social security. [60] In the following sections the author will discuss how targeted sanctions can affect these interrelated economic, social and cultural rights.

2.2.1. The Right to Property

Especially in the case of targeted financial sanctions the most important right that will be violated and which is also the cause for the violation of other economic, social and cultural rights, is the right to property. As the right to property is an economic right which will be highly affected by targeted financial sanctions, the first point of discussion focuses on this right.

The right to property gives different rights to the owner/possessor. The right to *usus, fructus and abusus* are rights of an owner recognized by the law of property. A possessor has the right of *usus* and *fructus.* Targeted financial sanction in one way or another violates these rights of the owner/possessor.

> *Targeted financial sanctions include " [...] measures known as "blocking'' or "freezing'' of assets of the targeted state, group, or individual. For all intents and purposes, blocking is equivalent to freezing, as both entail a change in the legal status of targeted entities. While title to blocked or frozen assets remains with the*

[58]Asbjorn Eide ,Economic, Social and Cultural Rights as Human Rights, *in* Asbjørn Eide, Catarina Krause, and Allan Rosas(eds.), *Economic, Social, and Cultural Rights: A Textbook*. Martinus Nijhoff Publishers/Brill Academic Publi, 1995, p. 20.
[59] *Ibid.*
[60] *Id*., p. 21.

> *targeted person or entity, the exercise of powers and privileges normally associated with ownership is protected [...] Blocking or freezing is specifically understood to mean the prohibition of all transfers, transactions, or other dealings with all real, personal, tangible, or intangible property, as well as the blocking of direct or indirect interest or interests in property, whether present, future, or contingent.*[61]

What should be understood is that targeted financial sanction, especially blocking or freezing of assets, does not mean confiscation. But even if the property or the asset frozen is not confiscated, as the right of the individual over the assets or the property is denied, we can say there is a limitation on the right to property. "Freezing'' or "seizure'' is temporarily prohibiting the transfer, destruction, conversion, disposition, or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.[62] The rationale behind freezing of assets and bank accounts may be to prevent the financing of terrorism.[63] But it is "difficult to see how long term freezing of all of the person's assets can be justified as 'necessary in democratic society.''[64]

Freezing is totally different from confiscation. Confisication refers to a penality or a measure taken by a court of law as a result of a criminal offense;

---

[61] Natalie Reid, Sue E. Eckert, Jarat Chopra, and Thomas J. Bierstekert, Targeting Financial Sanctions: Harmonizing National Legislation and Regulation, Practices: *in* David Cortright and George A. Lopez (eds.), *Smart Sanctions, Targeting State Craft*, Roman and Littlefield Publishers, Inc., Lanham, Boulder, New York, Oxford, 2002, P.74.

[62] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Funding of Terrorism, Warsaw, 2005, Chapter I Art. 1(g).

[63] Iain Cameron ,*Supra* note 32, P. 181.

[64] *Id.*, P.189.

and it will give rise to the deprivation of all the rights on the property. [65] So, as far as the severity of the limitation of the right to property is concerned, confiscation seems to be the sever one. Freezing of assets is a provisional measure. However, freezing may have also the same effect as confiscation on the right of the targeted individual. This is because the asset can be freezed for unlimited period of time, and the effect will a denial of property. [66]

In the jurisprudence of the European Court of Human Rights three cumulative criteria should be fulfilled to limit a right: there should be law promulgated by a competent authority, the limitation should have a legitimate aim, and the limitation should be 'necessary in a democratic society'. If we take the case of freezing of assets by the Security Council, at a regional (the European Union), or national level, there is no competent national, regional or international authority to promulgate law. And the purpose behind this limitation, *inter alia*, is the war on terror, which can be taken as a legitimate aim. What should be decided on a case by case basis and which is of course the controversial criterion is the third one. This criterion calls for the so called principle of proportionality. Whether or not the limitation is proportional to the anticipated legitimate aim is the issue. In this regard Cameron says:

> *[...] what sort of proportionality test to be applied? Proportionality in ECtHR (and European Court of Justice, ECJ) case law means a test of both […] reasonable relationship between the measure and aim to be achieved. If the issue is simply to balance the threat to international peace and security in the abstract with the infringement of the civil*

[65] Council of Europe Convention, *Supra* note 62, Chapter I Art. I(d).
[66] Iain Cameron, *Supra* note 32, P. 189.

> *right of property a temporary freezing entails, then the scales can be assumed to come down on the side of maintaining international peace and security. This is probably the most important purpose of the UN, and courts will be, and should be, cautious of going against the determination of the Security Council.*[67]

So, the principle of proportionality and other related issues can be decided by the Court if and only if all material facts are examined by it. As it has been discussed the Court of First Instance does not review substantively the decision of the Council of the European Union.[68] If the Court cannot review the decision substantively it can hardly decide on the issue of proportionality. Cases of targeted financial sanctions have not yet been brought before the European Court of Human Rights. Should a case ever be brought before it, because of lack of substantive information it will not be able to decide on this issue. Therefore, the legitimacy of limitations on the right to property cannot be ascertained by a court of law. One can imagine what would happen to a case brought before national courts. Because of security reasons national courts would also not have the opportunity to review the case substantively and decide on the issue of proportionality. In the case of the European Court of Human Rights the margin of appreciation is given to the member state. This wider margin of appreciation cannot be tested against the standard of the

[67] *Id.,* P. 190.

[68] It has to be noted that according to the Lisbon Treaty of 1 December 2009 the European Court of First Instance has been replaced by the European General Court. This treaty amends the structure of the European Court of Justice and creates a judicial body composed of the Court of Justice, the General Court, and the specialized courts. As most of the cases in this article were brought before the Court of First Instance, this author will use the term " the Court of First Instance'' thorugh out this article.

Court if in the first place it lacks the opportunity to review the case substantively.

2.2.2. The Right to Health, Education and Work

Travel restrictions and visa bans are imposed as targeted sanctions in addition to financial sanctions. Travel restrictions and visa bans may give rise to the violation of some economic, social and cultural rights. Travel restrictions and visa bans may also directly or indirectly affect cultural, scientific, or sports activities and festivities. These travel restrictions may also violate the right to education if one has to attend his education abroad. "Visa bans may also deny elites privileges that they covet such as sending their children abroad to educate.''[69]

Targeted financial sanctions could also affect the financing of the education of the family members, medicine or medical treatments. In addititon, "[a]viation sanctions result in a loss of revenue for the affected airline company, which is often state owned, and may cause unemployment and a loss of income for those whose business depends on the targeted airline''[70]. All these are clear violations of economic, social and cultural rights. By the same analogy, when financial sanctions are imposed on the targeted individual's assets and business, indirectly this may affect the right to work of persons employed by the targeted individual. It is obvious that if the assets and business of the targeted individual are frozen, this may cause

[69] David Cortright and George A. Lopez, *Sanctions and the Search for Security Challenge to the UN Action*, Lynne Reiner Publisher, London, 2002, P.136.
[70] *Id*., P.135.

unemployment and loss of income to the targeted individuals and workers employed under them.

It should be remembered that there is an attempt to exempt some transactions and travel restrictions for the sake of humanitarian and religious purposes. This will be discussed in the following subsection.

2.2.3 Humanitarian Exemptions

One of the aims of imposing targeted sanctions is to avoid/reduce the unnecessary suffering of the innocent population. However, targeted sanctions should not also at the same time cause unnecessary suffering on the targeted individuals and their dependents. The concept of unnessary suffering is used in the context of international humanitarian law to strike the balance between submission of the enemy and humanity. The International Court of Justice defines unnecessary suffering as "a harm greater than that avoidable to achieve legitimte military objectives.''[71] By borrowing the concept of unnecessary suffering from international humnaitarian law it is possible to argue that the sanction imposed on targeted individuals should not cause a greater harm than that avoidable to achieve the intended objecitves. In the comprehensive sanction of Iraq an attempt was made to exempt some transactions for humanitarian purposes. Because of the human right of targeted individuals the same should also be done insofar as targeted sanction is concerned.

[71] *The Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep.1996, Para.78.

The Security Council in resolutions 1267 and 1373 and 1390 said nothing with regard to humanitarian exemption. It was Resolution 1542 /2002 for the first time expressly provides provisions for humanitarian exemptions. This Resolution exempts some transactions from the targeted sanction. Among other things, the Resolution exempts funds, financial assets or economic resources that are necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicine and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or services charges for routine holding or maintenance of frozen funds or other financial assets or economic resources.[72]

States are duty bound to notify exemptions to the Sanctions Committee established pursuant to Resolution 1267/2002. The exemption will be granted by the state if the Committee has not decided negatively within 48 hours.[73] Extra ordinary expenses are exempted provided that such determination has been notified by the state of nationality or residence to the Committee and has been approved by the Committee.[74]

The Resolution does not provide a guideline on the basis of which the Committee may grant or refuse the exemption. It seems that the discretion of granting and refusing excemptions is exclusively given to the Committee.

[72] Security Council Resolution 1452/2002, Article 1 (a) at www.un.org/docs/scres/2002/sc2002.htm (Consulted 04 April 2014)
[73] *Ibid.*
[74] *Id.*, Art. 1(b).

Granting or denial of exemption also seems to be affected by the political decision of the Committee, which cannot be reviewed and challenged by an independent and impartial organ. If the Committee decides negatively, it is unlikely that the state of nationality or residence of the targeted individual would go to the extent of granting such exemption. In doing so, the concerned state may end up with violating the Charter of the United Nations (contrary to Articles 25 and 103 of the Charter). Threfore, the fate of the targeted individual falls in the hands of his/her state of nationality or residence and the Sanctions Committee. In the absence of an independent and impartial organ to review the decisions of the Sanctions Committee, adopting a resolution by itself cannot be regarded as a measure in protecting the right of targeted individual.

In addition to these limitations, even if the exemption is granted many practical problems are seen in relation to the amount of money. For instance, a good amount of money may not satisfy the need of rich people even to finance their and their families' normal living expenses.[75] The absence of an objective standard to determine the amount of money needed to finance the aforementioned expenses of the targeted person and his/her families may make things complicated. If the exemption cannot finance the basic needs of the targeted individual and his/her families, mere exemption would be meaningless. As it has been discussed the right to property (an economic right) is a basic right which is the basis for the realization of other economic, social and cultural rights. Therefore, whenever exemption is granted the utmost care should be taken in determining whether or not the exempted

[75]Iain Cameron, *Supra* note 32, P.177.

amount of money would finance the basic needs of the targeted individual and his/her family members.

3. Remedies for Targeted Sanctions that Cause Violations of Economic, Social and Cultural Rights

This section considers if there is any possibility to claim remedies for those whose economic, social and cultural rights are violated following targeted sanctions by the Security Council (the Sanctions Committee), or violations of these rights arising out of wrongful (improper) listing of regional organizations like the European Union, and by the state of nationality or residence of the targeted persons.

3.1. The United Nations System

When it comes to the remedies available for the targeted individual against the Security Council, as has beenpointed out, victims of targeted sanctions do not have a means of challenging the acts of the Council (the Sanctions Committee) in the United Nations system. The principal judicial organ of the United Nations, the International Court of Justice, is not expressly empowered in the Charter or in its Statute to review the acts of the Security Council. By virtue of Article 34 of the Statute of the International Court of Justice only states can be parties in its contentious jurisdiction. So, the United Nations cannot be a party to a dispute and, therefore, neither can it bring an action nor an action can be brought against it. Even the Court has never clearly expressed that either it has or has no jurisdiction to review the acts of the Security Council. The International Court of Justice does not directly

address these questions and it has impliedly reviewed some cases.[76] However , even if the Court has jurisdiction to review the acts of the Security Council, as individuals can not appear before it as parties they would not have availed themselves of its jurisdiction.

With regard to the jurisdiction of the state of nationality or residence of the targeted individual, it does not have jurisdiction either. This is because of the functional immunity of the United Nations. Some international organizations including the United Nations are immune from the jurisdiction of national courts.[77] This is provided in the Convention of the Principles and Immunities of the United Nations. Article II, Section 2 of the Convention reads:

> *The United Nations [the Security Council], its property and assets wherever located and by whosoever held , shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.*[78]

However, it should be remembered that immunity by itself does not waive the liability of the United Nations .[79] In this regard White argues that "even if immunity is still applicable and there is no waiver of immunity by the executive head, the organization [the United Nations] remains bound by its obligations to provide adequate alternative procedures for settling disputes.''[80]

---

[76] August Reinisch, *Supra* note 9, P.865.
[77] Nigel D. White, *Supra* note 20, P. 95.
[78] Convention on the Privileges and Immunities of the United Nations, 1946.
[79] Nigel D. White, *Supra* note 20, P. 105.
[80] *Ibid*.

The International Court of Justice addressed the same issue in the following manner:

> *[... The] Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.*
>
> *The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29 of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that the the United Nations shall make provisions for pursuant to Section 29.*[81]

But if we closely look into Article VIII, Section 29 of the Convention it is difficult to conclude that the section is applicable and pertinent to the issue at hand. The section reads:

> *The United Nations shall make provisions for appropriate modes of settlement of:*
>
> *(a) disputes arising out of contracts disputes involving any official of the United Nations or other disputes of a private law character to which the United Nations is a party;*

[81] *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Right*s, ICJ.
Rep. 1999, Para.66. Here the International Court of Justice refers to Article VIII, Section 29 of *the Convention on the Privileges and Immunities of the United Nations*, 13 February 1946.

> *(b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary General.*

As we can understand from the reading of this quote, the section is applicable to disputes of a private law character or disputes involving officials of the United Nations. Claims arising out of targeted sanctions are neither disputes of a private law character nor disputes involving officials of the United Nations. As the claims of targeted individuals against the United Nations will be an international claim, the targeted individual lacks competence to bring the claim. So, targeted individuals are out of the ambit of this section. The competence to bring an international claim is for states as they are subjects of international law. In this regard the International Court of Justice in its advisory opinion stated that:

> *Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and settlement of claims....This capacity certainly belongs to the state ; a state can bring an international claim against another state [international organization, mutatis mutandis] such a claim takes the form of a claim between two political entities, equal in law, similar in form and both the direct subjects of international law...*[82]

Even if victims (targeted individuals) lack the competence to bring an international claim against the United Nations (the Security Council), they can avail themselves of the protection of their state of nationality or residence. In inter-state relations it is common for states to give this diplomatic

[82] *Reparation for the injuries Suffered in the Service of the United Nations,* ICJ Rep.1949 P.174.

protection for their nationals or residents.[83] Though diplomatic protection is given by a state to its national or residents and it can bring an international claim against another state, *mutatis mutandis*, as states and international organizations are subjects of international law, this claim can also be brought against an international organization including the United Nations.

In the absence of other means of compensation,

> *Arbitration might be a fall back option where no other legal recourse is available. In cases where international organizations enjoy immunity from suit before national courts, they are required to agree to alternative dispute settlement of their 'private law dispute' to prevent a denial of justice. A strong policy argument can be made that this requirement holds true even if an issue cannot be identified as a dispute of a private law character. There is no justification for recognizing human rights, including access to courts, without providing any viable remedy against an entity such as the United Nations that is quite capable of violating these rights.* [84]

Therefore, even if currently we do not have a means of compensating victims of targeted sanctions for the violations of their economic, social and cultural rights, the United Nations as the gurdian of human rights is expected to design some schemes of compensating these victims.

---

[83] *Ibid.* The Court incidentally discusses the issue of diplomatic protections by states in discussing the issue as
to whether international organizations (the United Nations) can bring international claim against a state in
respect of the damage caused to the victim or to persons entitled through him.

[84] August Reinisch, *Supra* note 9, P. 867.

3.2 Regional Court: The European Court of Human Rights

Though it is not possible to bring cases against the United Nations (the Security Council), it is possible to bring a court action against member states of regional human rights instruments, and possibly against regional organizations for violations of economic, social and cultural rights following targeted sanctions. It is common for individual complaints to bring cases against their states of nationality or residence before regional human right courts like the European Court of Human Rights. The European Court of Human Rights seems to exercise jurisdiction over states that violate human rights in implementing the resolutions of the Security Council. However,

> *[...] the European Court of Human Rights is still unlikely to allow claims instituted against an organization's member states, either individually or collectively, for human rights violations attributable to the organization, although certain recent developments may ultimately lead to a fundamental change of attitude in this respect.*[85]

In *Matthews V. United Kingdom* the European Court of Human Rights decided in favour of human rights violations on the part of United Kingdom stemming from the European Commision (hereinafter EC) act.[86] Though the Court can not directly challenge the acts of the EC as it is not a party to the European Convention on Human Rights, it said that "the Convention does not exclude the transfer of competence to international organizations provided that convention rights continue to be secured. Member states' responsibility

[85] *Id.,* P.868.
[86] *Ibid.*

therefore continues even after such a transfer.''[87] Here though the Court does not directly challenge the acts of the EC, we can conclude that indirectly it reviewed the acts of the EC.

In implementing the listings of the Security Council (the Sanctions Committee), the Council of the European Union has adopted a number of regulations. All regulations of the Council are adopted on the basis of the listings of the Security Council (the Sanctions Committee). The European Union regulations are updated to incorporate and adjust changes in the Security Council's list, and these regulations are domestically applied in the member states and take precedence over national law.[88]

It has been contested that the European Union does not have power to adopt these regulations and violate the rights of targeted individuals. Regulation (EC) No. 337/2000 was adopted by the European Union to implement the Security Council's Resolution 1267 and Regulation (EC) No. 467/2001 was added to implement the Security Council's Resolution 1333.[89] The European Union aslo adopted Regulation No. 2580/2001 and others to establish a list managed by European Union.[90]

Unlike the delisting procedure of the Security Council's Sanctions Committee, in the European Union system enlisted persons or entities have

[87] The European Court of Human Rights, *Matthews Vs. the United Kingdom*, Judgment,18 February 1999, Para.32.
[88] David Cortright and George A. Lopez (eds.), *Supra* note 61, P.48.
[89] Provisional draft report on UN Security Council and European Union black lists, Para.20, at < http: //www.libertysecurity.org/article1716.html> (Consulted 20 April 2008)
[90] *Ibid.*

the possibility of challenging the Council's decision before the European Court of First Instance and the European Court of Justice.[91] In this regard it

[91] The case of Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (joined cases C-402/05 P and C-415/05 P; hereinafter ''the Kadi judgment'') concerned the freezing of the applicants' assets pursuant to European Community regulations adopted in connection with the implementation of Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002), which, among other things, required all UN member States to take measures to freeze the funds and other financial resources of the individuals and entities identified by the Security Council's Sanctions Committee as being associated with Osama bin Laden, al-Qaeda or the Taliban. In that case the applicants fell within that category and their assets had thus been frozen – a measure that for them constituted a breach of their fundamental right to respect for property as protected by the Treaty instituting the European Community (''the EC Treaty''). They contended that the EC regulations had been adopted ultra vires.
On 21 September 2005 the Court of First Instance (which on 1 December 2009 became known as the ''General Court'') rejected those complaints and confirmed the lawfulness of the regulations, finding mainly that Article 103 of the Charter had the effect of placing Security Council resolutions above all other international obligations (except for those covered by jus cogens), including those arising from the EC treaty. It concluded that it was not entitled to review Security Council resolutions, even on an incidental basis, to ascertain whether they respected fundamental rights.
Mr Kadi appealed to the CJEC (which on 1 December 2009 became known as the Court of Justice of the European Union). The appeal was examined by a Grand Chamber jointly with another case. In its judgment of 3 September 2008 the CJEC found that, in view of the internal and autonomous nature of the Community legal order, it had jurisdiction to review the lawfulness of a Community regulation adopted within the ambit of that order even if its purpose was to implement a Security Council resolution. It thus held that, even though it was not for the Community judicature to examine the lawfulness of Security Council resolutions, it was entitled to review Community acts or acts of member States designed to give effect to such resolutions, and that this would not entail any challenge to the primacy of that resolution in international law.
The CJEC concluded that the Community judicature had to ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, were designed to give effect to resolutions of the Security Council. The judgment contained the following relevant passages:
In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 Les Verts v Parliament [1986] ECR 1339, paragraph 23). (Taken from Miša Zgonec-Rožej, Introductory Note to the European Court of

can be said that the European Union system is by far better than the Security Council's Sanctions Committee. At least the political decision of the Council of the European Union is open to be challenged by a court of law. In this respect, the rights to be heard and judicial remedy seem to be protected, which is not of course in the Security Council's system.

Here it is important to discuss *the Yusuf and Kadi case.* The Court of First Instance does not seem it would review the regulations of the Council of the European Union as these regulations are adopted based on the resolutions of the Security Council. The Court said:

> *In particular, if the Court were to annul the contested regulation, as the applicants claim it should, although the regulation seems to be imposed by international law, on the ground that act infringe their fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicants ask the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.*[92]

The Court by invoking the powers and functions of the Security Council in maintaining international peace and security under Chapter VII and the duty

---

Human Rights: Nada vs. Switzerland, International Legal Materials, Vol. 52, No.1, 2013, p. 290)

[92] Court of First Instance, Ahmed Ali Yusuf, and Al Barakaat International Foundation V. Council of the European Union, and Commission of the European Communities, supported by United Kingdom of Great Britain and Northern Ireland, Judgment, 21 September 2005, Para.293.

of member states under Article 103 of the Charter, concluded that it does not have jurisdiction to review the legality of the acts of the Security Council (the Sanctions Committee). [93] However, the Court seems to conclude that if the resolutions of the Security Council violate peremptory norms of *jus cogens*, it can have the power of indirect judicial review.[94] According to the Court, even if the applicants have the rights to be heard, the immunity of the Security Council is justified by public interests in the maintenance of international peace and security.[95]

Therefore, by invoking these and other reasons, the Court refuses to adjudicate on the application for the annulment of the regulation of the Council. How can security reasons be invoked at the expense of the fundamental rights of the applicants? One can clearly see how the right to be heard of the applicants both at the United Nations and at the European level is denied.

The Court seems to consider the acts and regulations of the European Community not as a separate and independent act of the Union, but as an act of the Security Council. That is why it invoked the duty of member states of the United Nations under Article 25 and the functions and the duty of the Security Council under Chapter VII of the Charter. Here the Court of First Instance follows a different jurisprudence from the European Court of Human Rights.

[93] *Id.*, Para.270, 272-5.
[94] *Id.*, Para. 277,281-2.
[95] *Id.*, Para. 343-4.

The European Court of Human Rights in its *Bosphorus* judgement hints the possiblity of judicial review. In the language of the Court, state's action in taking measure to discharge its obligation under international organizations is justified if the organization protects fundamental rights and measures taken are equivalent to what the European Convention of Human Rights provides.[96] From this judgement one can conclude that the jurisprudence of the European Court of Human Rights protects the right to be heard of individuals listed by the Council of the European Union. The European Court of First Instance, in its reasoning except invoking the peremptory norms of *jus cogens*, does not go far as the European Court of Human Rights.

The jurisprudence of the European Court of Human Rights and the European Court of First Instance in handling claims of delisting in implementing the resolutions of the Security Council (listings of the Sanctions Committee) has been discussed. But what if the European Union itself draws up a list of individuals based on the resolutions of the Security Council? Can individuals challenge this as the act of the Council of the European Union, not as the act of the Security Council? As has been discussed the Court of First Instance in the *Yusuf and Kadi* case considers the annulment of the Community's regulations adopted in implementing the listings drawn up by the Security Council (the Sanctions Committee) as indirectly annulling the resolutions of the Security Council.

[96] European Court of Human Rights, *Supra* at Note 21.

Unlike Resolution 1267, Resolution 1373 gives the power of drawing up lists of individuals to member states. "In the context of the European Union [also], the lists were established by the Council of the European Union.''[97] Following the lists drawn up by the Council of the European Union, cases were brought before the Court of First Instance. In the cases brought before the Court, even if the Court is not as such supposed to review the acts of the Security Council (the Sanctions Committee), it failed to review cases substantively.[98] The decision of the Council of the European Union

> *[...] was annulled as a consequence of procedural flaws. Yet [...] the CFI [the Court of First Instance] did not undertake a substantive review of the decision- that is, a review of whether it was correct that the applicants had been listed or of whether there was in fact no sufficient basis for placing them on the list. The Council subsequently improved its procedure in line with requirements as set out by the Court. [...] The CFI judgements clearly exposed the procedural flaws in the decision making process, and they send a message as to what is expected in this process, However, the most difficult issue relating to a substantive review of the decision taken was left untouched, even at EU level*.[99]

Though reviewing procedurally the decisions of the Council of the European Union can be taken as an achievement by itself, the Court has gone only half way in protecting the right of listed individuals. If the Court cannot review substantively the decisions of the Council of European Union, one cannot conclude that the right of individuals is protected from the arbitrary or not

[97] August Reinisch, *Supra* note 9, P. 802.
[98] *Id.*, P.798.
[99] *Id.*, P.803.

well-founded decisions of the Council. The rationale behind the failure to review substantively may be security reasons, or it may be considered that courts are not the right organs to review the substance of the decision.[100] However, this issue should also be seen from the angle of the rights of listed individuals. As the question of reviewing the resolutions of the Security Council (listings done by the Sanctions Committee) cannot be raised here, if the Court reviews substantively the decisions of the Council of Europe, it will not amount to interfering in the activities of the Security Council (the Sanctions Committee).

3.3 Domestic Courts

If claims of remedy/compensation are brought before regional human right courts like the European Court of Human Rights, it is presumed that domestic remedies have already been exhausted. However, available and accessible domestic remedies might/not be exhausted. If an individual has a claim that his/her economic, social and cultural rights have been violated by his/her state of nationality or residence in discharging its regional or international obligations, it is clear that he can challenge such acts of the state before domestic courts. For example, in the Youssef Nada Ebada (a listed individual) vs. the Office of the Attorney General of Switzerland, the Federal Criminal

[100] *Id.*, P.801.

Tribunal in Bellinzona awarded Mr. Nada 5,951 Swiss francs.[101] Ali Ghaleb Himmat also was awarded a judgment for a similar complaint.[102]

4. Concluding Remarks

Though it is not expressly provided in the Charter of the United Nations, the Security Council is bound by human rights including economic, social and cultural rights. Even if there are arguments to the contrary, purposes and principles of the United Nations, practices of the Security Council in conducting its duties and functions, one way or the other, show that the Security Council is bound by human rights.

According to the European Court of Human Rights in the *Bosphorus* judgment, state action in taking measure to discharge its obligation under international organizations is justified if the relevant organization protects fundamental rights and the measures taken are equivalent to what the European Convention on Human Rights provides. One of the purposes and objectives of the United Nations Charter is the promotion of human rights. International human right instruments like the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights and others that protect economic, social and cultural rights of targeted individuals and targeted family members, are adopted by the organs of the United Nations. Therefore, members of the Security Council cannot invoke their obligation in the United Nations for economic, social and cultural rights violations of their targeted nationals or residents if their measures are not

[101] The Report of the Analytical Support and Sanctions Monitoring Team, *Supra* note 8.
[102] *Ibid.*

"proportional and equivalent" and in line with Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. Therefore, in addition to the liability of the Security Council, member states of the United Nations or regional organizations like the European Union can be liable for the violation of economic, social and cultural rights of targeted nationals or residents.

Unlike comprehensive sanctions, targeted sanctions against individuals are imposed by the process of listing and delisting. There is no independent and impartial organ at the United Nations level that reviews and challenges the political decision of the Sanctions Committee. Listing processes done at regional level by the Council of the European Community can be challenged before the Court of First Instance and the European Court of Justice. Even if cases are brought before these courts, the courts do not substantively review the decisions of the Council. They merely try to review procedurally the listings drawn up by the Council.

Because of its functional immunity listings drawn by the Security Council (the Sanctions Committee) cannot be challenged at regional and national levels. However, the European Court of Human Rights, though it does not expressly claim jurisdiction, it tries to review measures of member states taken in discharging their obligations under the Charter of the United Nations. According to this Court, there is a violation of human rights (economic, social and cultural rights) if the protection given by the international organization is not proportional to the right given under the European Convention on Human Rights. Cases of targeted sanctions have never been brought before the European Court of Human Rights. If cases are brought before it, it is expected

that the Court, unlike the Court of First Instance, will review substantively listings done by the member states. So, in that respect a better protection can be expected from the European Court of Human Rights than the Court of First Instance.

Though this end may be achieved by imposing targeted sanctions, it is also important to think about the economic, social and cultural rights of the targeted individuals and their dependents (families). Financial sanctions highly affect the economic, social and cultural rights of these individuals. Travel restrictions also, directly or indirectly, contribute to the violation of economic, social and cultural rights.

There is an attempt by the Security Council (the Sanctions Committee) to exempt some transactions from the financial sanctions and the travel restrictions. The Sanctions Committee has been given a wide discretion either to grant or deny such exemptions. What makes things worse is that the decision of the Committee is final. Like the listing and delisting processes, the decision of the Sanctions Committee cannot be reviewed and challenged before an independent and impartial body. Even if the exemptions to finance some humanitarian and basic needs are granted, it is complained that the exempted amount of money is not enough to finance the needs.

Another problem as far as listing targeted individuals concerned is the lack of distinction between targeted individuals and their (immediate) family members. Resolutions of the Security Council targeting individuals at the same time they also target their (immediate) family members. It is not clear whether these (immediate) family members are targeted because of their

family relationship with the person targeted or they themselves are engaged in the alleged activities. From the point of view of security reasons, the act of the Security Council can be justified. But it remains questionable if the same justification can be given when we see the problem from the angle of the human rights of family members of targeted individuals.

CASE COMMENT

Applicability of Period of Limitation in Rural Land Disputes: Case Comment

Daniel W Ambaye (PhD)♠

1. Introduction

Land has been an important socio-economic asset to the Ethiopian rural population in that agriculture employs 84 percent of the population and contributes about 40 percent to the national economy.[1] Land is a collective property of the state and the people of Ethiopia and hence not subjected to sale and exchange.[2] Farmers and pastoralists are entitled to obtain land for farming and grazing free of charge. Land related conflicts in Ethiopia are rife in that they are estimated to be in between one third and one half of all civil cases appearing in woreda courts.[3] In Amhara region only, it is estimated that such land related cases have constituted more than 70 percent of all cases

♠ Dr. Daniel W Ambaye is an assistant professor at the Institute of Land Administration of Bahir Dar University, and can be reached at danambaye@yahoo.com.

[1] According to the 2007 Ethiopian National Housing and People's Census, rural population represented 84% of the general population. Agriculture contributed to the National GDP about 50% in the past several years but for the coming GTP II, its share is lessen to about 40% (see for example UNDP, Ethiopia: Quarterly Economic Brief, Third quarter 2014, p. 1, accessible http://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CC4QFjAC&url=http%3A%2F%2Fwww.et.undp.org%2Fcontent%2Fdam%2Fethiopia%2Fdocs%2FEconomic%2520Brief-%2520Third%2520Quarter-2014.pdf&ei=iMWfVcndD4W7sQG1oJ3IDg&usg=AFQjCNGKdjJ6UZf3WGQTJ82g6VxfMBNA8w).

[2] Federal Democratic Republic of Ethiopia (FDRE) Constitution, Article 40 (3).

[3] Deininger, K, et.al, 2012, The Land Governance Assessment Framework: Identifying and Monitoring Good Practice in Land Sector, The World Bank, Washington DC. p.104

reaching woreda courts[4]. Many rural land dispute cases reached the cassation court, and of which those related to period of limitation have created substantial impression and implication on farmers' land rights.

The Federal Supreme Court Cassation Division holds two apparently different decisions in respect of land which was claimed to be held by defendants for several years. While the court denied the application of the period of limitation (extinctive prescription) defense in respect of state land, it allowed similar defense to apply in respect of privately held land. The cassation court's decision has created confusion and stir controversy among judges of lower courts as the justification for holding different stand is neither clear nor persuasive.

The purpose of this case comment is to shed light on the concepts of both acquisitive and extinctive prescriptions and comment whether the court's decisions upheld today is really in line with the intention of the land policy that we adopt. This comment is mainly based on the different decisions delivered by the Federal Supreme Court Cassation Division (FSCCD) during the past several years. The ambiguous nature of the applicability of the period of limitation principle on landholdings and the double stands that the court holds and which discriminates between private and state holdings encourage us to prepare this comment.

[4] ILA, 2015, Assessment of the Implementation of Rural Land Laws in Amhara Nation Regional States, Institute of Land Administration, A study sponsored by the Land Administration To Nurture Development (LAND) of USAID, Unpublished.

2. Conceptualizing Prescription

2.1 Prescription defined

According to Black's Law Dictionary, period of prescription is the period fixed by local law as sufficient for obtaining or extinguishing a rights through lapse of time.[5] The principle of prescription first appeared in the Roman laws and the Romans were successful in developing two types of prescriptions: acquisitive and extinctive.[6] The difference between the two is merely the effect of lapse of time upon the right prescribed. While acquisitive prescription[7] is the acquisition of a right by lapse of time, extinctive prescription[8] is the extinction of a right by lapse of time. Extinctive prescription is not a mode of acquiring ownership, but acquisitive prescription is. Extinctive prescription is a mode of extinguishing an obligation or right in person, and is based on the principle of the limitation of actions. It is a defense through which it is generally possible to resist a claim on the sole ground that the claimant neglected for a certain period of time to exercise the action or the right on which it is based.

[5] Garner, B.A. (ed.) 2004, Black's Law Dictionary, West, 9th ed.

[6] Johnston, D. 1999, Roman Law in Context, Cambridge University Press, Cambridge. Pp. 53-54; Sherman, C., 1911, Acquisitive Prescription: Its Existing World-Wide Uniformity, Yale School of Law *Faculty Scholarship Series.* Paper 4442, p. 143.

[7] Also known as *usucaption* by the Romans, and *Adverse Possession* by the English

[8] Also known as period of limitation and statute of limitation in civil law and common law countries respectively. The Ethiopian Civil code refers to it as *period of prescription* and *period of limitation* exchangeabley.

2.2 Purpose of prescription

The purpose and effect of prescription is to protect defendants. There are three reasons justifying such protection, namely:[9]

(a) A plaintiff with good causes of actions should pursue them with reasonable diligence;

(b) A defendant might have lost evidence to disprove a stale claim; and

(c) Long dormant claims have more cruelty than justice does in them.

Acquisitive prescription is based on the need to assure certainty and stability of ownership. As for the limitative prescription, it rests on the need to guarantee the property status of individuals and families against the disturbance caused by too-long delayed claims.[10] The only objects of acquisitive prescription can be physical property and certain immovable real rights. Extinctive prescription, on the other hand applies in general to all interests or actions.[11] In other words, extinctive prescription applies as a defense to any action that arose in law of obligations and other areas of law while acquisitive prescription fulfills a more important role in the context of law of property.

Prescription is set in many jurisdictions to protect persons against claims made after disputes have become stale, evidence has been lost, memories

[9] *Halsbury's Laws of England*, 4th edition).
[10] Aubry & Rau, Property, Vol.2, 1966, West Publishing co. Louisiana State law Institute p. 320
[11] Sherman, Supra note 6.

have faded, or witnesses have disappeared.[12] Further, it can be also said that the defendant should not live under constant insecurity because of the failure of the plaintiff to demand or exercise his/her rights.

2.3 Prescription under Ethiopian law

Both acquisitive and prescriptive prescriptions are recognized under the Ethiopian Civil Code, as well. Acquisitive prescription (usucaption) as a mode of acquiring ownership title through possession that is free, exclusive and continuous is recognized under articles 1168 and1150 of the civil code. From the reading of the code, one can easily deduce that acquisitive prescription applies in respect of property, which means to obtain a title or a right over a certain property. The code also provides various extinctive prescriptions (period of limitations) in different parts of the code.[13]

With respect to acquisitive prescription, the Civil Code under Art. 1168 (1) states that "The possessor who has paid for fifteen consecutive years the taxes relating to the ownership of an immovable shall become the owner of such immovable…." In order for acquisitive prescription (usucaption) to apply, there are two basic requirements to observe. One requirement is that the immovable must be possessed and used for 15 consecutive years. It is not clear whether the defendant should possess the land in good faith or in adversary-against the will of the owner. However, from the readings of both

[12] Encyclopedia of Britannica

[13] See for example, Art. 903, 973, 944, and 1000 (succession); Art. 1192 (corporeal chattels); Art. 1366 (servitude); Art. 1845-56 (General Contract); Art. 2023 & 2024 (debts); Art. 2143 (tort liability 2 years); and Art. 2454 (donation),

article 1147 and 1854, it may be possible to deduce that good faith is not a necessary element for prescriptions. As per Article 1147 even if someone starts as holder (which was in good faith), it is possible to act manifestly adverse and in bad faith and then entitled to benefits of prescription. Moreover, Article 1854 clearly provides that bad faith does not have effect, at least in relation to limitation periods and this suggest the general stance of Ethiopian law. On the other hand, while in the civil law countries good faith is a necessary element, in the common law it is not.[14] What matters is whether the owner has then after claimed back his property or not. The civil code simply settles with the long term usage of the land. But, one addition is that the possession and use of the property should be continuous and uninterrupted.[15] The second requirement under the law is payment of land or property tax in one's name. The defendant must show that he had been paying tax in his own name for 15 years in order to claim *usucaption* as a defense. Thus, a *usufractuary* who pays land tax in the name of the bare land owner may not claim to have acquired the ownership of the land.[16]

Usucaption is usually applied on immovable[17] which in this sense refers to buildings and land.[18] However, Art. 1168 explicitly excludes rural *rist* land,

[14] In Justinian and French law while the period for usucaption for property held with good faith is 15-20 years, for those which were held in bad faith is 30 years. See for example, Aubry & Rau, *supra* note 10.

[15] Civil Code, Art. 1169, 1851

[16] Civil Code, Art.1314 (2).

[17] Although mostly applicable to immovables, acquisitive prescription can also apply to movables. For instance, Article 1192 states that the owner of a corporeal chattel shall lose his rights when he does not exercise his right for ten years for failure of not knowing its existence.

[18] Civil Code, Art. 1130.

land which is commonly owned by family in accordance with custom, from being acquired by *usucatption*. This is because, during the adoption of the code in the 1960s, most rural land (especially in northern Ethiopia) was held under the customary kinship system, which was known as *rist* system.[19] The *rist* tenure allows any member of a family to claim a land of his ancestors whenever he wishes, and he would not be denied such right irrespective of his absence from the locality or his engagement in other non farming activities.[20] *Rist* right was considered as the most sacred property institutions and that is why the Civil Code did not disturb the custom. This does not mean, however, that the rule would not be applicable to other types of land which were held under private ownership. It was well known fact that much of the urban land and the rural land found in the southern territories of the country was held under private ownership and was subjected to free transaction such as sale, mortgage and bequest.[21] A similar provision is provided under Art. 1493 that provides, "land owned by an agricultural community may not be acquired by *usucaption*." This refers to the communal land such as grazing land or other form of land resource held by the village community in common, and is not subject to sale or mortgage.[22] Furthermore, property that falls under public domain (Art. 1445-1448) may not be alienated or acquired by good faith or

[19] Daniel W Ambaye, 2013, Land Rights and Expropriation in Ethiopia, PhD dissertation, Stockholm, p. 43.

[20] See generally Hoben, A., 1973, Land Tenure among the Amhara of Ethiopia: The dynamics of the cognatic descent, Chicago/London.

[21] Bahru-Zewde, 1991, A History of Modern Ethiopia, 1855–1974, Addis Ababa, Addis Ababa
University Press, pp. 191-192 ; PAUSEWANG, S. 1982. *Peasants, Land and Society: a Social History of Land Reform in Ethiopia*, Munchen, Weltforum-Varlag., p. 36.

[22] See Article 1489 and the following.

usucaption.[23] But, the code seems deliberately excluding from such exception state land that is found in rural or urban area. This gives us the impression that state land which might be held by squatters could be converted to private property through usucaption. After all, state land was the source of private *rist* land for many generations.[24]

As opposed to acquisitive prescription/usucaption, the Ethiopian Civil code adopts different period of limitation (extinctive prescription) clauses for different claims. The subject matter of this comment is, however, the one related to contractual relations. The general provision concerning period of limitation is stated under article 1845 of the civil code which states, "[u]nless otherwise provided by law, actions for the performance of a contract, actions based on the non-performance of an act and actions for the invalidation of a contract shall be barred if not brought within ten years." This date starts to be counted one day after the due date. It is clear that period of limitation (extinctive prescription) has in mind the protection of the defendant, for it is unfair or unwise to allow the plaintiff or claimant more than ten years to raise his claim against the defendant.

Irrespective of their difference on the effect of prescription, there are rules common to both acquisitive prescription and extinctive prescription concerning interruption[25]; establishment, enforcement and waiver[26] of both

[23] Arts. 1454 and 1456 of CC. The civil code lists those properties that may be categorized under public domain, and not state land, especially one which is found in rural or urban areas as reserve land. State land is not necessarily under public domain.
[24] See Bahiru, supra note 21, p. 191.
[25] Civil Code Art.1851 & 1852
[26] See Art. 1854-1856 of Civil Code.

types of prescriptions. As per Article 1169 of the code, those provisions related to general contract concerning period of limitation/extinctive prescription shall *mutatis mutandis* apply to acquisitive prescription.

3. Rural Land Rights in Ethiopia

Under the current tenure arrangement, the ownership of all urban and rural land as well as natural resources is vested in the state and the people of Ethiopia. Peasants and pastoralists are guaranteed with access to land for cultivation and grazing free of charge.[27] Any property they establish on the land and any improvement they made to the land is considered as private property and subject to free transfer.[28] The existing Federal Rural Land Administration and Use Proclamation No. 456/2005 and other similar regional rural land proclamations ensure the constitutionally guaranteed land right by creating access to rural land free of charge. This land right is known as 'holding right" which provides farmers and pastoralists a right which is not restricted by time limit. [29] The bundle of rights the "holding right" endows on farmers and pastoralists are rights of use and enjoyment, lease/rent, donation, and inheritance.[30] This, in effect, is an ownership short of sale and mortgage; it is a right above possession and usufruct, but below ownership. The Constitution also guarantees landholders with security of tenure by reducing

[27] See generally Article 40(3-5) of FDRE Constitution
[28] Arts. 40(1), (2) &(7) of FDRE Constitution
[29] Art. 2(4) cum. Art. 7 of the FDRE Rural Land Administration and Land Use Proclamation, Proclamation No. 456/2005.Negarit Gazeta. Year 11, No. 44. (hereinafter referred as Proc. 456/2005)
[30] Id., Art. 2(5).

state arbitral power in taking farmers land, except in cases where the land is needed for public purpose activities.[31] In such cases, the government is entitled to expropriate the land upon advance payment of compensation commensurate to the value of the property on the land. This guarantee is implemented in practice through land registration and issuance of certificates.

Proclamation No. 456/2005 recognizes three types of landholdings under article 2 sub-articles 4, 12 & 13, namely: Private holding, communal holding and state holding. This arrangement is similar to that of the land tenure arrangement during the imperial era, except that *rist* land is changed with holding right. There was then and now communal land which is designated for common use of the local community, and state land put under the direct control and administration of the central state or local administrative bodies.

Land sale and mortgage is prohibited because of the fear that this would result in displacing farmers from their land. The government believes that state and public ownership of land is the best solution to protect the peasants against market forces. In particular, it has been argued that private ownership of rural land would lead to massive eviction or migration of the farming population, as poor farmers are forced to sell their plots to unscrupulous urban speculators, particularly during periods of hardship.[32] This shows the government does not want to see any policy measure or legal provision or court decision that exacerbates displacement of farmers from their land. For

[31] Art. 40(8) of FDRE Constitution.

[32] Daniel W. Ambaye (2012) Land Rights in Ethiopia: ownership, equity and liberty in land use rights, FIG Working Week, Rome, Italy, p. 5; see also MOIPAD. 2001. Federal Democratic Republic of Ethiopia Rural Development Policies, Strategies and Instruments (Amharic). Addis Ababa: Ministry of Information, Press and Audiovisual Department

example, the provision dealing with rent states that farmer and pastoralists may lease a size of their land "in a manner that shall not displace them."[33] In many of the regions, rental period for crop production is restricted to few years, such as two to five years,[34] in order to avoid the problem of physical and economic displacement. This is based on the fear that farmers might be induced to rent the entire of their landholding and thereby suffer then after. In the absence of alternative urban economy (service and industry) that can absorb the rural unemployed, it would be chaotic and unwise to create possibilities that encourage massive rural urban migration.

4. Court Decisions on Prescription

In this part we shall look only into those cases that reached the Cassation Division. The decisions are generally classified into two one being that allows period of limitation/ extinctive prescription defense while the other is one that denies this defense.

In a case between *Jemal Aman vs. Tewabech Ferede*[35](herein after 69291), a case started in Guffa woreda of Arusi Zone of Oromia Region, the respondent applied in woreda court to reclaim her land which she transferred to the claimant by antichresis[36]upon reception of birr 1020. The woreda court

[33] Art. 8(1) of Proc. 456/2005.
[34] For detail comparison see Daniel, supra note 32.
[35] FSCCD, Civ. File No. 69291, Federal Supreme Court Cassation Division Decisions, Vol. 13, P. 423-425.
[36] "A contract of antichresis is a contract whereby the debtor undertakes to deliver an immovable to his creditor as a security for the performance of his obligations" (Art. 3117

decided that Jemal may keep only one third of the land in return for the money he gave her and should return two third of it to Tewabech. Thereupon, Jemal appealed to Arusi High Court which nullified the contract as invalid and decided in favor of Tewabech saying that contract of anticherisis was illegal. Up on another appeal made by Jemal, the Oromia Supreme court reversed the decision of the high court. But the current respondent, on her part, made an appeal to the Oromia Regional Supreme Court Cassation court that affirmed the decision of the High Court.

Finally, Jemal (the current claimant) appealed to the FSCCD on the grounds of basic error of law, because the lower court couldn't consider the period of limitation defense he raised in his argument. He claimed that he was using the land for eleven consecutive years (cultivation, constructed a house and planted trees on it) and as a result, Tewabech's claim was barred by period of limitation, as per Aricle 1845 of the Civil Code. The Cassation court did not consider the period of limitation objection, but rather reasoning its decision on a different ground-the exchange of money for land amounts to sale[37] of land which is against the constitution, and hence the agreement was void. The court specifically states that the Constitution vested ownership of land under the state and the people and thereby prohibited sale. Further, it declared that since article 40(4) guarantees the holder of a land from being evicted from the

CC). Of course, it was not clear whether they had this type of agreement except it was drawn by the court itself. The agreement was to receive 1020 birr in exchange to transfer part of the land for *indefinite* period of time, which for all practical purposes looks like anichresis agreement.

[37] Again this was the assumption drawn by the court rather than being articulated or indicated in the arguments of the parties. The obscurity of the agreement made lower courts to assume it as antichresis and the cassation court as sale.

land, the holder, in this case, the current respondent could not be displaced from her land because of the contract. Therefore, the contract was declared void and the preliminary objection was rejected.

The Cassation Court changed its position in the *Shelema Negese vs. Fayissa Mengistu*[38] case (herein after referred as 69302) which was started in Nono Banja woreda and continued all the way through Jima High Court and the Oromia Supreme Court. In this case, the present respondent (Fayissa) was the plaintiff and he requested the woreda court for return of his land from the present claimant (Shelema)- the defendant in woreda court-who was in possession of the land. The defendant responded at the woreda court that he occupied the land after he bought eucalyptus trees grown on the land from the plaintiff's father who changed his address and died sometime later. The seller (plaintiff's/Fayissa's father), left the kebele soon after and started to live in another kebele, and the land had been under the control of the defendant for 12 consecutive years. The woreda court thereupon decided in favor of the plaintiff because the defendant did not deny that the land belonged to plaintiff's father. The defendant has also raised period of limitation defense since he used the land for 12 years without any interruption. However, the courts in Oromia region rejected the defense and consistently decided in favor of the plaintiff.

The Cassation court on the other, without referring to the original contract/sale of trees and thereby the land, rather focused on the issue of

[38] FSCCD, Civ. File No. 69302, Federal Supreme Court Cassation Division Decisions, Vol. 13, P. 426-429, Tahsas 20, 2004 E.C.

period of limitation raised by the defendant/present claimant. It says that holding right of farmers is protected by Art. 40(4) of the constitution, but when this right is interfered with, and when the plaintiff wishes to bring a case, the period of limitation to bring a case against the interferer is not indicated either in the constitution or the federal and regional rural land proclamations. For this reason, the court was forced to apply article 1845 which is the general rule on period of limitation that applies to contract, and to other areas where period of limitation is not clearly given as per article 1677 of the civil code. The court, however, never mentioned nor justified the reasoning that it adopted in its previous decision, the *Jemal Aman vs. Tewabech Ferede* case where it ordered the return of the land because the source of the possession was illegal. In the present case, it may be argued, that the source of the occupation was the purchase of the trees on the land which in effect means purchase of land.[39]

The third important case, *Kuta-ber Woreada kebele 13 Administration vs. Habtu Molla* (71204)[40], was initiated in Kuta-Ber Woreda of the Amhara Region. The current respondent was working as security guard for the Ethiopian Roads Authority (ERA) when the road from Kuta-Ber to Delanta was constructed in 1973 E.C. The claimant lived for the past 29 years in a house which was given to him by the company (ERA); upon its completion of the road, ERA gave him the house as a compensation for his work. Now the

[39] See for example Article 1133 of the Civil Code which says trees and crops shall be intrinsic elements of the land, and until they are separated, they are considered as part of the land. And the fact that the seller of the trees left the area for good by moving to another kebele shows that the intention or agreement was sale of the land.

[40] FSCCD, Civ. File No. 71204, Federal Supreme Court Cassation Division Decisions, Megabit 10, 2004 E.C. Unpublished.

claimant asked him to surrender the land on which the house was constructed, since the land is required for other public purpose activity. The respondent, on the other, claimed that the land was given to him as compensation and since he lived there for 29 years without interruption, the action should be barred by period of limitation. The woreda court rejected the defense on the basis that the land was occupied illegally. The defendant appealed to the South Wello High Court which decided in his favor by stating that the claim was barred by period of limitation as pert article 1168(2) and 1845 of the civil code. This was again confirmed by the region's Supreme Court. The claimant appealed to the cassation court stating that period of limitation should not be applied to an illegally occupied land.

The Cassation court however reasoned its decision on a different ground. In summary, it articulated that according to the existing federal and regional rural land proclamations, land can be acquired only through government grant, bequeath from family, or through lease arrangement, and no other means. Also the federal and regional constitutions equally showed that land is not subject of sale or exchange. In this case, receiving land as compensation by the respondent from ERA was declared by the court as illegal and unconstitutional. Since the object of the contract concluded by ERA and the respondent was illegal, the contract is said to be void and the respondent could not raise period of limitation as a defense. But the court did not refute why the period of limitation and usucaption arguments raised by the respondent were not accepted except that the current laws do not allow the modality of land acquisition. What is more, the court has failed to comment

on the fact that the land was acquired long before the current legislations and constitutions. The respondent received the house together with the land from ERA during the previous government (Derg), and had been using it for 29 years. The court invalidates the agreement based on the current laws, why not those laws operational by that time? More surprisingly, the court did not clarify whether article 1168 or article 1845 could be applied in respect of state land or not. While in the previous case (69302), the court focuses on the period of limitation irrespective of the source of acquisition that is, in my opinion purchase of land, in here it prefers to focuses on the source of acquisition. It is not clear why the court usually avoids or fears to apply usucaption or period of limitation in respect of state land once the right is stalled.

In *Gishe Woreda Land Administration and use office vs. Getu Terefe*,[41] the Land Administration office (claimant) brought a case against Ato Teshome Tefera and the current respondent (Wro Getu Tefera) to return back the land they inherited from their father, because they had already in their possession enough land.[42] Ato Tefera claimed that he had no land under his possession, and as a result, he was excluded from the litigation that continued between the current disputants. The current respondent (Wro. Getu Terefe) defended in the woreda court saying that the land belonged to her since she used it for more than 15 years, and also because she was entitled to inherit it. The woreda court decided in favor of the present claimant and ordered the return of six

[41] FSCCD Civ. File No. 93013, Federal Supreme Court Cassation Division, Tir 30, 2006E.C. Unpublished.

[42] It is not known whether their holding in the beginning was above the legally prescribed maximum holding which is 7 hectares.

land plots, which were under her control, to the claimant. The current respondent appealed to the North Shewa High Court, but without success. Then, she appealed to the Amhara Supreme court Cassation Division which accepted her appeal and decided on her behalf based on FSCCD Case No. 69302 that barred cases based on period of limitation when they are instituted after 10 years.

The current claimant on its turn appealed to the FSCCD which entertained the case since it believed on the existence of fundamental error of law. The FSCCD in Case file No 93013 argued that its previous decision (69302)[43] was misquoted by the Amhara Supreme court cassation division. It states that the previous decision on period of limitation has been applied in respect of private holder who had failed to claim his inheritance right for more than ten years. On the other hand, in the current case (93013), the claimant who failed to exercise its right is a land administration organ, not an individual and the previous case may not be applied to this case. The court argued that land administration power is entrusted on regional governments and this right may not be barred by limitation despite the user's control of the land for longer period without any disturbance. This means, a land administration institution may force or sue a landholder to surrender the land any time it thinks necessary irrespective of the fact that the person put the land under his control for many years. This would affect tenure security since long time settlement or issuance of certificate would not protect the holder of the land.

[43] Shelema Negese vs. Feyissa Mengistu

In the same vein, the court held similar decision in a case between *Checkol Kume vs. North Achefer Land Administration office*, FSCCD File No.96203.[44] In this case, the claimant pleaded to the cassation court that lower courts decided in favor of the respondent by ordering the return of land which had been under his possession for 16 years and for which he had received land certificate. The claimant indicated that he received the land during the redistribution period and certificate was issued for him then after and hence the respondent's claim should be barred by limitation. The respondent, on the other hand, without denying the facts raised, said that the land was originally acquired illegally, and it has the right to reclaim and cancel the certificate. The cassation court again argued that as a land administration institution, its right of state land reclamation could not be barred by limitation. It further declared that the fact that period of limitation concerning reclamation of state land is not indicated under federal and state rural land laws shows that the intention of the legislator is to provide the institution unlimited right.

5. Comments

From the above decisions one can gather several conflicts in the court's opinion. In the first case (69291), the court rejected the period of limitation argument on the basis that the source of the land acquisition was unconstitutional or illegal and thereby the agreement was void, even if the land remained for several years in the hand of the party who raised period of limitation argument.

[44] FSCCD Civ. File No. 96203, Federal Supreme Court Cassation Division, Miazia 9, 2006E.C. Unpublished.

Even though one may accept this argument, the court immediately changed its stand in the second case (69302) where the party argued on the basis of period of limitation where the land was acquired through purchase of trees on the land. Purchase of trees and control of the land for several years does not amounted as purchase of land for the court. But, the reading of article 1133 of the CC shows that "trees…shall be an intrinsic element of the land until they are separated therefrom." This means, the sale of trees on the land (without cutting or separating from the ground) amounts to transfer of land as well, which should be considered as unconstitutional on the same basis as the previous decision. But, the court preferred to ignore this fundamental element and jumped to another argument which is period of limitation. In adopting period of limitation argument, the court reasoned that because neither the constitution under article 40 nor the federal/regional rural land administration proclamations include a provision on period of limitation, the court was forced to cite article 1677(2) cum 1845 to apply period of limitation. Article 1677(2) generally states that the provisions of the general contract may *mutatis mutandis* be applied to certain obligations arising out of non-contractual basis. As a result, article 1845 which is the general rule of period of limitation concerning contractual matters was applied by the court to deny the claimant of the land from demanding land requisition, since the land was under the control of the defendant for more than ten years. Again one may be persuaded by this reasoning except that the court lacks consistency on the "source" of land acquisition argument it raised before.

What is even more interesting comes in the third case (71204) where the respondent had controlled the land for 29 years. In this case, the land administration organ, i.e., the claimant reclaimed the land because the land was transferred to the respondent illegally. The court disregarded its previous decision on period of limitation and reached its decision on rather different ground. The court again returned back to its "source" reasoning it followed in the first case (69291). It states that the way the respondent received house/land from ERA was illegal based on the current constitution and rural land proclamations. This reasoning is flawed because the court uses the laws retroactively to invalidate land acquired before 20 years.[45] How could it be possible to undone land received during the Derg era based on the current law; if that is the case, then logic requires us to condemn as illegal all land purchased during the imperial era.

There is also another line of argument mentioned by the court on certain level but boldly asserted in its two latter decisions (93013 and 96203). This argument states that land administration power is given to regional land administration organs which among others entrusts them with protecting state land from illegal land grabbers. This means, they may demand clearance of illegal land grabbers from state land in order to protect and conserve or put the land to the best interest of society.[46] However, it is not clear whether land acquired in such a way may be successfully defended when the government

[45] Even if the source of land acquisition in many parts of the region is the land redistribution carried out in two different periods (1983 & 1989 E.C), land distribution was not held in this particular area. The land administration organ has neither argued on such basis.

[46] See also articles 52(5)(d); 89(5) of the FDRE Constitution and Article 17 of the Proclamation 456/2005 that gives the power of land administration to regional states.

fails to claim it back within a given period of time. As already mentioned above, under the civil code, only properties which fall under "public domain" and another, categorized as "agricultural communal land" which are exempted from rule of usucaption. Whether state land is also exempted from this rule is not clear. The cassation court, nonetheless, presumed it from the silence of the laws. In the last case (96203), it says that the fact that period of limitation is missing from the constitution and the federal and state rural land laws show that the intention of the legislator was not to limit the state (land administration organ) from reclaiming its land whenever it thinks necessary. While in its previous decision (71204) it reasoned that absence of period of limitation in both the constitution and rural and legislations may be reconstructed from Art. 1677 and 1845, in the last case, absence of the rule means, its complete disregard. It means since period of limitation is not included in the law, the land administration organ is not needed to be bounded by period of limitation. Why is that the same situation (absence of period of limitation) open to two different meanings for two bodies, unless the court has forgotten its own previous decision? Where does the court found that land administration organ is free from such restriction or state land cannot be acquired through usucaption?

The other point is that the court in nowhere tried to argue in favor or against the rule of usucaption even if period of limitation and usucaption are two sides of the same coin. What is the reason that article 1168 is totally evaded by the court, even if it is raised by parties in their defenses; the court has neither accepted nor rejected the arguments related to usucaption. There was a

perfect scenario in the last two cases where the landholders argued that they used the land for more than 15 years and for which they received landholding certificates. This means they had been paying tax for all this period and relied on the reliability of the certificates. They cited article 1168 as a defense, but the court had just evaded it and simply refused to entertain the argument. The fact that land certifications may be easily cancelled after so many years because the land administration claims that the land was held illegally or the certificate was granted mistakenly means every person is under the risk of losing his land. This definitely will create tenure insecurity unless the power of the land administration organ can be restricted by lapse of some time. This encourages the land administrations organs not to be diligent in protecting state land on timely basis.

6. Concluding remarks

The above decisions of the FSCCD consistently show that there is no predictability in the court's decision and this creates persistent confusion in lower courts. Even regional supreme courts could not understand the FSCCD interpretation so as to follow it in their future similar decisions, and that is why we see similar cases having been repeatedly reaching the cassation court. The justification for discriminatory interpretation of the period of limitation in respect of private and state landholdings seems blurry, since the protection provided under article 40(3) of the constitution equally applies to both state and individual landholdings. It is not clear whether the concept of "public domain" under the civil code should similarly apply to rural state land as well. This line of argument becomes problematic since it is not clearly ruled out

either in the legislations or the court's rulings. Unless it is indicated by legislation that state land cannot be held through adverse possession, it would be unjustified to protect the power of land administration organ's power of state land reclamation from period of limitation.

In the meantime, the court rather need to strive to the stability of property rights once certificate is issued for them, and an established property should not be disturbed because of the indolence of land administration organs who failed to discharge their responsibilities on time. In this regard, the use of usucaption in relation to rural land may be helpful. In this way it is possible to ensure the constitutional protection of common ownership of land by the people and a clear guidance which is known and predictable is necessary to be included in our rural land proclamations.

የተመረጡ ፍርዶች

የሰ/መ/ቁ.76394

ህዳር 18 ቀን 2005 ዓ.ም

ዳኞች :- ተሻገር ገ/ሥላሴ

አልማው ወሌ

ዓሊ መሐመድ

አዳነ ንጉሴ

ተኽሊት ይመስል

አመልካች :- አቶ ወርቁ ወ/ፃድቅ - አልቀረቡም

ተጠሪ :- የአቶ ተስፋዬ ወ/ሥላሴ ወራሾች

1. ወ/ሮ ወዴ ምዕራቡሽ
2. ወ/ሪት ትርሲት ወ/ሥላሴ
3. ወ/ሪት እህቴ ተስፋዬ ወ/ሥላሴ
4. ወ/ሪት ገነት ተስፋዬ ወ/ሥላሴ
5. አቶ ብሩክ ተስፋዬ ወ/ሥላሴ
6. አቶ ብርሃኑ ተስፋዬ ወ/ሥላሴ
7. አቶ ናስፍ ተስፋዬ ወ/ሥላሴ

መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

ለዚህ የሰበር ክርክር መነሻ የሆነው ጉዳይ በአሁኑ የሰበር አመልካች ከሳሽነት የተጀመረው በፌ/የመ/ደ/ፍርድ ቤት ሲሆን ተጠሪዎች ደግሞ ተከሳሾች ነበሩ፡፡ ከሳሽ ሚያዚያ 28 ቀን 2002 ዓ.ም ባቀረቡት ክስ ከነኛ ተከሳሽ ባለቤትና ከተራ ቁጥር 2-7 ያሉ ተከሳሾች አውራሽ ጋር የሽርክና ውል የነበረን ሲሆን በውላችን መሰረትም ከመካከላችን አንደኛው ከሞተ መብቱ ለወራሽ እንደማይተላለፍ የተስማማን ሲሆን ተከሳሾች አቶ ተስፋዬ ወ/ሥላሴ ከሞቱ በኃላ በሽርክና ውል መነሻ የተቋቋመውን ድርጅት ተከራይተው የሚሰሩትን ሰዎች (ተከራዮች) በማስለቀቅ ለራሳቸው ለመያዝ በሚያደርጉት ጥረት መግባባት ያልቻልን ስለሆነ በሽርክና ውሉ መሠረት ጉዳዩ በሽምግልና እንዲታይ እንዲታዘዝ ሆኖ በሽምግልና እንዲታይ የማይስማሙ ከሆነ ደግሞ የሽርክና ውሉ ፈርሶ ድርሻችን ተለይቶ እንዲወሰን ሲሉ ጠይቀዋል፡፡

ተጠሪዎች ለክሱ የመጀመሪያ ደረጃ መቃወሚያና በአማራጭ መልስ ያቀረቡ ሲሆን መቃወሚያውም ከዚህ በፊት ከሳሽ በዚሁ ጉዳይ ላይ ክስ አቅርበው የፌ/የመ/ደ/ፍርድ ቤት በመ/ቁ/ 40977 ክስ የማቅረብ መብት የላቸውም ሲል መዝገቡን የዘጋው ስለሆነ በፍ/ሥ/ሥ/ሕ/ቁ/5 መሠረት በዚያው ጉዳይ እንደገና ክስ ማቅረብ አይችሉም የሚል ሲሆን በአማራጭ ባቀረቡት መልስ ደግሞ በመካከላችን የሽርክና ውል የለም ብለው ተከራክረዋል፡፡

ጉዳዩን በመጀመሪያ ደረጃ የተመለከተው ፍርድ ቤትም የቀረበውን መቃወሚያ በተመለከተ በመዝገብ ቁጥር 40977 ተከራካሪ ወገኖች የተለያዩ ከመሆናቸውም ሌላ የተያዘው የፍሬ ነገር ጭብጥ አሁን ክስ ከቀረበበት ጉዳይ የተለየ በመሆኑ ተከሳሾች የፍ/ሥ/ሥ/ህ/ቁ/5ን ጠቅሰው ያቀረቡት መቃወሚያ ተቀባይነት የለውም ካለ በኋላ በፍሬ ጉዳዩ ላይ በሰጠው ፍርድ ከሳሽ የሽርክናው ማህበር ሰነዶች ናቸው በሚል ያቀረቧቸው ውሎች ብቻ በመሆናቸውና የሽርክና ማህበር ነው የሚሉትም በንግድ ህጉ መሰረት የንግድ ስም የሌለው፣ በንግድ መዝገብ ያልተመዘገበ እና የመመስረቻ ፅሁፍ የሌለው በመሆኑ በከሳሽና በነኛ ተከሳሽ ባለቤትና ከተራ ቁጥር 2-7 ተከሳሾች አውራሽ መካከል የሽርክና ማህበር ውል የለም፡፡ የሽርክና ማህበር ባልተቋቋመበት ደግሞ እንዲፈርስ ጥያቄ ሊቀርብ ስለማይችል ከሳሽ በፍ/ሥ/ሥ/ህ/ቁ. 33(2) መሠረት ክስ የማቅረብ መብት የላቸውም ብሏል፡፡

ጉዳዩ በይግባኝ የቀረበለት የፌ/ከ/ፍርድ ቤትም የይግባኝ ባዩን ይግባኝ በፍ/ሥ/ሥ/ህ/ቁ/337 መሠረት በመዝጋት ይግባኝ ባዩን በማሰናበቱ አመልካች በስር ፍርድ ቤቶች ብይን/ትዕዛዝ ላይ መሰረታዊ የሆነ የህግ ስህተት ተፈፅሟል በሚል የሰበር አቤቱታቸውን ለዚህ ችሎት ያቀረቡ ሲሆን የቅሬታ ነጥቡም ሲጠቃለል፡- ከሟች አቶ ተስፋዬ ወ/ሥላሴ ጋር ለመኪና ጋራዥ ሥራ የሚሆን ቦታ የአፈር ኪራይ እየከፈልን በህብረት ለመስራት ህዳር 17 ቀን 1967 ዓ.ም የህብረት ስምምነት ውል ፈፅመን እየሰራን እያለ ቦታው ለውሃ ማጠራቀሚያ መንግስት ስለወሰደው በምትኩ በቀድሞ ከፍተኛ 23 በአሁን አጠራር ቂርቆስ ክ/ከ/ቀበሌ 08/09 ቦታ ተሰጥቶን ቁጥሩ 826 የሆነ ቤት ሰርተን የመጀመሪያውን ውል የካቲት 27 ቀን 1979 በተፃፈ አዲስ ውል በመተካት ስንዋዋል የንግድ ፈቃዱ በሟች ስም እንዲሆንና ተሻራኪዎቹ የጋራዡን ሥራ በአንድ መልክ እንድናስተዳድር፣ ፈቃዱ በስሙ የሆነው ተሻራኪ ቢሞት በህይወት ባለው ተሻራኪ ስም እንዲሆንና በውርስ እንደማይተላለፍ በማድረግ ከ38 ዓመት በላይ የጋራ ባለሀብት በመሆን የቆየን ሆኖ ሳለና ክሱን ለማስረዳት በቂ ሰነዶችን አቅርቤ እያለሁ የስር ፍርድ ቤቶች ያቀረብኩትን ክስ በፍ/ሥ/ሥ/ህ/ቁ/ 33(2) መሰረት ውድቅ ያደረጉት ተገቢነት የለውም የሚል ነው፡፡

ተጠሪዎች በሰጡት መልስ፡- አመልካች እና ሟች ተስፋዬ ወ/ሥላሴ የጋራ የሆነ ቤትም ሆነ ቦታ ኖሯቸው አያውቁም፣ አመልካች የሽርክና ማህበር አለ የሚሉት በንግድ ህጉ መሰረት ያልተመዘገበ፣ የመመስረቻ ፅሁፍና የመተዳደሪያ ደንብ የሌለው በመሆኑ የስር ፍርድ ቤቶች የአመልካችን ክስ ውድቅ ያደረጉት ተገቢ ነው ብለዋል፡፡

የጉዳዩ አመጣጥ ከዚህ በላይ የተጠቀሰው ሲሆን እኛም፡- አመልካች ክስ ባቀረቡት ሀብት ላይ ጥቅም ወይም መብት የላቸውም ተብሎ ክሱ በፍ/ሥ/ሥ/ህ/ቁ 33(2) መሠረት ውድቅ የተደረገው በአግባቡ ነው? ወይስ አይደለም? የሚለውን ጭብጥ ይዘን ክርክሩን እንደሚከተለው መርምረናል፡፡

አመልካች ክስ ሲያቀርቡ በፍ/ሥ/ሥ/ህ/ቁ/ 223 መሰረት በማስረጃነት የተለያዩ ውሎችንና ሌሎች ሰነዶችን ማቅረባቸውን የመ/ደ/ፍርድ ቤት ብይን ያመለክታል፡፡ የመጀመሪያው የውል ሰነድ ህዳር 17 ቀን በ1964 ዓ.ም የአሁኑ አመልካች፣ የነኛ ተጠሪ ባለቤትና ከተራ ቁጥር 2-7 ያሉ ተጠሪዎች አውራሽ እና መንግስቱ ጋሼ የተባሉ ሰው ሆነው አቶ ነጋሽ ወሰኔ ከተባሉ ሰው ለመኪና ጋራዥ የሚሆን ቦታ ወስደው በ1960 ዓ.ም ለመኪና ማቆሚያ የሚሆን ቤት መስራታቸውን በመግለፅ እነ

ካሳሁን ቦሰና የተባሉ ሌሎች 4 ሰዎች በደባልነት ገብተው የጋቢናና የባሊስትራ ሥራ እንዲሰሩ ስምምነት ያደረጉበት ነው፡፡ እንዲሁም በውሉ የተካተቱት ሁሉም ሰዎች በነኛ ተጠሪ ባለቤትና ከተራ ቁጥር 2-7 ያሉ ተጠሪዎች አውራሽ ስም የንግድ ፈቃድ ወጥቶ የመንግስት ግብርም ሆነ ለባለይዞታው የሚከፈለውን የቦታ ኪራይ እያዋጡ ለመክፈል መስማማታቸውን ሰነዱ ይገልፃል፡፡ ከዚህ በኋላም የካቲት 27 ቀን 1979 ዓ.ም የአሁኑ አመልካች፣ የነኛ ተጠሪ ባለቤትና ከተራ ቁጥር 2-7 ያሉ ተጠሪዎች አውራሽና ወ/ሮ አስራት መንግስቴ ሆነው ቀደም ሲል ያደረጉትን ውል በማሻሻል "የንግድ የጋራ ሽርክና ውል" በሚል ባደረጉት ስምምነት ቀድሞ ጋራዡ የተቋቋመበትን ቦታ ለውሃ ማጠራቀሚያ እንዲሆን በመፈለጉ በምትኩ በከፍተኛ 23 ቀበሌ 09 ክልል ውስጥ ቦታ ተሰጥቶ የጋራዡን ስራ መቀጠላቸውን በመጥቀስ ማንኛውም ስራ ተሻራኪዎቹ በአንድ መልክ ሆነው ለማስተዳደር፣ የንግድ ፈቃዱ በስሙ የወጣ ሰው በሞት ቢለይ በህይወት ባሉ ተሻራኪዎች እንዲዛወር፣ ከጋራዡ ሥራ የሚገኘውንም ገቢ እያንዳንዱ ተዋዋይ በስራው ድርሻው ተጠቃሚ እንዲሆን ከመስማማታቸውም በላይ ሌሎች መብቶችና ግዴታዎችንም አካትተዋል፡፡ ከተጠቀሱት ውሎች በተጨማሪ ከጉዳዩ ጋር በተያያዘ የተለያዩ የመንግስት አካላት የፃፉአቸው ደብዳቤዎችን አመልካች በማስረጃነት ለስር ፍ/ቤት ስለማቅረባቸው በክርክራቸው ገልፀዋል፡፡ በዚህ መልኩ የቀረበውን ክስ ፍ/ቤቱ ውድቅ ለማድረግ የጠቀሰውም በንግድ ህጉ መሠረት የተቋቋመ ማህበር የለም በሚል ነው፡፡ በንግድ ህጋችን ቁጥር 212(1) መሠረት የሚታወቁ በንግድ ማህበሮች 6 ሲሆኑ ከእነዚህም መካከል አንዱ በዚሁ ቁጥር በንዑስ ቁጥር 1 በፊደል (ለ) ስር የተጠቀሰው የእሽሙር ማህበር ተብሎ የሚጠራው ነው፡፡ የእሽሙር ማህበር ህጋዊ ሰውነት የሌለው እንዲሁም በፅሁፍ መረጋገጥና በሌሎች ንግድ ማህበሮች የተደነገጉት የማስታወቅና የማስመዝገብ ስርዓቶች እንደማይፈፀሙበት በንግድ ህጉ አንቀፅ 272 ተጠቅሷል፡፡ ሽሪኮቹም እንደ ተራ ተዋዋይ ወገኖች የሚታዩ ናቸው፡፡ ማህበሩ ህጋዊ ሰውነት የሌለው በመሆኑ ምክንያትም የንግድ ሥራ እንቅስቃሴ የሚያደርገውም በሽሪኮቹ ስም ነው፡፡ አመልካችና የነኛ ተጠሪ ባለቤትና ከተራ ቁጥር 2-7 ያሉ ተጠሪዎች አውራሽ ያደረጉት የሽርክና ውል ከዚህ በላይ ከተጠቀሰው የእሽሙር ማህበር ባህርያት ጋር የሚመሳሰል ሆኖ እያለ የስር ፍርድ ቤቶች ከእሽሙር ማህበር ውጪ ያሉ ሌሎች በንግድ ህጉ የሚታወቁ ማህበራት ሊያሟሉ የሚገባቸውን ነጥቦች በመጥቀስ በንግድ ህጉ መሰረት የተቋቋመ ማህበር ባለመኖሩ እንዲፈርስ የሚቀርብ ጥያቄ የለም ሲሉ የፍ/ሥ/ሥ/ህ/ቁ/33(2)ን ጠቅሰው የአመልካችን ክስ በብይን ውድቅ ማድረጋቸው መሰረታዊ የሆነ የህግ ስህተት የተፈፀመበት ሆኖ በማግኘታችን ተከታዩን ውሳኔ ሰጥተናል፡፡

ው ሳ ኔ

1. የፌ/የመ/ደ/ፍ/ቤት በመ/ቁ/53795 በቀን 08/03/2004 ዓ.ም በዋለው ችሎት የሰጠውን ብይን እንዲሁም የፌ/ከ/ፍ/ቤት በመ/ቁ/116705 በቀን 09/05/2004 ዓ.ም በዋለው ችሎት የሰጠውን ትዕዛዝ በፍ/ሥ/ሥ/ህ/ቁ/348(1) መሰረት ሽረናል፡፡
2. በአመልካችና የነኛ ተጠሪ ባለቤትና ከተራ ቁጥር 2-7 ያሉ ተጠሪዎች አውራሽ መካከል የተቋቋመው የእሽሙር ማህበር በመሆኑ አመልካች ባላቸው የሽርክና ስምምነት መሰረት ክስ የማቅረብ መብት አላቸው ብለናል፡፡ ስለሆነም ፌ/የመ/ደ/ፍርድ ቤት ወደ ፍሬ ነገሩ በመግባት የግራ ቀኙን ማስረጃዎች በመስማትና በመመዘን አግባብ ባለው ህግ መሰረት የበኩሉን ፍርድ በጉዳዩ ላይ እንዲሰጥበት ክርክሩን በፍ/ሥ/ሥ/ህ/ቁ/341(1) መሰረት መልሰናል፡፡
3. የዚህን ፍርድ ቤት ወጪና ኪሳራ የግራ ቀኙ ወገኖች የየራሳቸውን ይቻሉ ብለናል፡፡ መዝገቡ የተዘጋ ስለሆነ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

የሰ/መ/ቁ.25664

ግንቦት 07 ቀን 2000 ዓ.ም

ዳኞች :- ዓብዱልቃድር መሐመድ

ተገኔ ጌታነህ

መድኅን ኪሮስ

ዓሊ መሐመድ

ሡልጣን አባተማም

አመልካች :- አቶ ተገኝ ይማም - አልቀረቡም

ተጠሪ :- እነ አቶ ካሳሁን ደሳለኝ - ቀረቡ

መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

<u>ፍ ር ድ</u>

ክርክሩ የተጀመረው በፌ/መ/ደ/ፍ/ቤት ሲሆን የአሁን ተጠሪዎች ነሐሴ 7 ቀን 1996 ዓ.ም ፅፈው ባቀረቡት የክስ ማመልከቻ እህታችን ወ/ሮ ያልጋ ደሳለኝ እና አቶ ተገኝ ይማም ተጋብተው እየኖሩ ሳሉ እህታችን ጥቅምት 11 ቀን 1982 ዓ.ም ከዚህ ዓለም በሞት ስለተለየች አብረው የሠሩትን ቤትና አብረው ያፈሩትን ሌላ ንብረት ለእኛው ለሟች ወራሾች ግማሹን እንዲሰጡን እንዲወሰንልን በማለት ክስ አቅርበዋል፡፡

የአሁኑ አመልካች ደግሞ በታህሳስ 23 ቀን 1996 ዓ.ም ጽፈው ያቀረቡት መልስ ክሱ በፍ/ብ/ሕ/ቁ/1000(2) እና 1845 መሠረት በይርጋ ቀሪ ሊሆን የሚገባው ነው፡፡ ከሟች ጋር ከግብረ ሥጋ ግኙኝነት በስተቀር የጋብቻ ግንኙነት አልነበረንም፡፡ ቤቱ የግል ንብረቴ ነው፤ የሌሎቹን

ንብረቶች ግምትም የተጋነነ ነው፡፡ በመሆኑም ክሱ ውድቅ ሆኖ ልሰናበት ይገባል በማለት ተከራክረዋል፡፡

ፍ/ቤቱም የግራ ቀኙን ክርክር ካዳመጠ በኃላ ክሱ በይርጋ ቀሪ አይሆንም፡፡ ተከሳሾቹ የሚችን ግማሽ ንብረት ለከሳሾች እንዲያስረክቡ በማለት ወስነዋል፡፡ የፌ/ከ/ፍ/ቤትም የቀረበለትን ይግባኝ ከተመለከተ በኃላ የሥር ፍ/ቤቱን ውሳኔ አጽንቶታል፡፡

የሰበር አቤቱታውም የቀረበው የሥር ፍ/ቤቶች የሰጡትን ውሳኔ በመቃወም ሲሆን አመልካች ያቀረቡት ቅሬታ ክሱ የቀረበው ሟች ከዚህ ዓለም በሞት ከተለዩች ከአስራ ሦስት ዓመት በኃላ በመሆኑ በፍ/ብ/ሕ/ቁ/1000(2) እና 1845 መሠረት በይርጋ ቀሪ መሆን ያለበት ነው፡፡ የሥር ፍ/ቤቶች የይርጋ ክርክሬን ውድቅ በማድረግ በእኔ ላይ የሰጡት ውሳኔ መሰረታዊ የሕግ ስህተት ያለበት በመሆኑ የፌ/መ/ደ/ፍ/ቤት የሰጠው ውሳኔና ፌ/ከ/ፍ/ቤት የሰጠው ትዕዛዝ እንዲሻሩልኝ የሚል ነው፡፡

ይህ የፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎትም አቤቱታውን ከመረመረ በኋላ ክሱ በይርጋ አይታገድም መባሉ በአግባቡ መሆን ያለመሆኑን ለመመርመር እንዲቻል አቤቱታው ያስቀርባል የሚል ትዕዛዝ ሰጥቷል፡፡

ተጠሪዎች ደግሞ ባቀረቡት መልስ እህታችን ከሞተች አስራ አምስት አመት ሳያልፍ ነው ክስ የመሰረትነው በመሆኑም ክሱ በፍ/ብ/ሕ/ቁ/1000(2) መሠረት በይርጋ ቀሪ የሚሆንበት የሕግ ምክንያት የለም፡፡ የፍ/ብ/ሕ/ቁ/1845 ደግሞ ተግባራዊ የሚሆነው ውልን መሠረት በማድረግ በሚቀርቡት ክርክሮች ላይ እንጂ የውርስ ክርክርን በሚመለከት አይደለም፡፡ በዚሁ ምክንያት ክሱ በይርጋ የሚታገድበት ምክንያት ሊኖር አይችልም፡፡ ክሱን በጊዜው ለማቅረብ ያልቻልነውም ከተጠሪዎቹ አንዱ የሆነው አቶ ካሳሁን ደሳለኝ በሻዕቢያ መንግስት የተከፈተብንን ወረራ ለመመከት በመዝመቱ ምክንያት ሳይሰማ በመቅረቱ ምክንያት ነው፡፡ የሥር ፍ/ቤቶች የሰጡት ውሳኔም የሚነቀፍበት መሰረታዊ የህግ ስህተት የሌለው በመሆኑ የሰር ፍ/ቤት ውሳኔ እንዲፀና እንዲወሰንልን በማለት ተከራክረዋል፡፡

በበኩላችን ደግሞ ክሱ በይርጋ ቀሪ ሊሆን ይገባል ወይስ አይገባም የሚለውን ጭብጥ በመያዝ መዝገቡን እንደመረመርነው በፍ/ብ/ሕ/ቁ1000(2) መሠረት የይርጋ ጥያቄ የሚነሳው ክርክሩ እየተደረገ ያለው በወራሾች መካከል ሲሆን በመሆኑና በዚህ ጉዳይ ክስ የቀረበው በወራሽ ላይ ባለመሆኑ ክሱ በዚሁ የሕግ ቁጥር መሠረት በይርጋ ቀሪ ሊሆን የሚችልበት ምክንያት የለም ብለናል፡፡

በሌላ በኩል ደግሞ ክርክሩ እየተካሄደ ያለው በወራሾችና ወራሽ ባልሆኑ ሰዎች መካከል በመሆኑ ተጠሪዎች የእህታቸውን ንብረት የያዙትን አመልካች ንብረቱን እንዲያካፍላቸው ለመጠየቅ የሚከለክላቸው ወይም በጊዜ እንዳይጠይቁ የሚያደርጋቸው ህጋዊ ምክንያት በሌለበት ሁኔታ ክስ ሳይመሰርቱ ከአስር አመት በላይ የቆዩበትን ሁኔታ ስንመለከት ጥያቄው የይርጋ ክርክር ሊያስነሳ የሚችል ሆኖ አግኝተነዋል፡፡ በመሆኑም አመልካች ያነሱበትን የይርጋ መቃወሚያ አግባብነት ከፍ/ብ/ህ/ቁ1677 እና 1845 አንፃር መታየት የሚገባው ግዴታው ከውሉ የተገኘ ባይሆንም በፍትሐብሔር ህጉ አራተኛ መፀሐፍ በአንቀጽ 12 ስር የተመለከቱት ስለ ውሎች በጠቅላላው የተቀመጡት ድንጋጌዎች በግዴታው ላይ ተፈፃሚ ይሆናሉ፡፡ በእርግጥ የአንዳንድ ግዴታዎችን አመጣጥ ወይም ዓይነት በመመልከት ከተጠቀሰው አንቀፅ ሥር ከተመለከቱት ደንቦች የተለዩ ድንጋጌዎች በህግ ተመልክቶ ከተገኘ እነዚህ በተለይ የተመለከቱት ድንጋጌዎች አግባብነት እንደሚኖራቸው በተጠቀሰው ቁ.1677(2) ተመልክቷል፡፡

ወደያዝነው ጉዳይ ስንመለስ ተጠሪዎች የመሠረቱትን ክስ በተመለከተ በተለይ አግባብ ያለው የይርጋ ደንብ የለም፡፡ የግዴታውን አመጣጥ ወይም አይነት በሚመለከት አግባብ ያለው የይርጋ ደንብ ከሌለ ደግሞ በፍ/ብ/ሕ/ቁ1845 የተደነገገው የአስር አመት ገደብ/ይርጋ/ ሊፈፀምበት እንደሚገባ ግልፅ ነው፡፡ ክሱ የቀረበው ሟች ከዚህ ዓለም በሞት በተለዩ ከአስራ ሦስት አመት በኋላ በመሆኑም በዚሁ የይርጋ ደንብ ተቋርጧል ማለት ነው፡፡ እውነታው ይህ ከሆነ ደግሞ የሥር ፍ/ቤቶች በይርጋ ረገድ የቀረበውን የአመልካች መቃወሚያ ውድቅ ያደረጉት ያለአግባብ ከሕጉ ውጪ ነው፡፡ ከዚህ የተነሳም አቤቱታ የቀረበበት ውሳኔ መሰረታዊ የህግ ስህተት የተፈፀመበት ነው ለማለት ችለናል፡፡

ው ሣ ኔ

1. አቤቱታ የቀረበበት የፌ/መ/ደ/ፍ/ቤት በመ/ቁ/31726 ህዳር 1 ቀን 1997 ዓ.ም የሰጠውና የፌ/ከ/ቤት በመ/ቁ/34855 ግንቦት 8 ቀን 1998 ዓ.ም ያፀናው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁ/348(1) መሠረት ተሽሯል፡፡ ይፃፍ፡፡
2. ተጠሪዎች በአመልካች ላይ የመሠረቱት ክስ በይርጋ ቀሪ ሆኗል በማለት ወስነናል፡፡ ይፃፍ፡፡ ውሳኔው የተሰጠው በድምፅ ብልጫ ነው፡፡
3. ወጪና ኪሳራን በተመለከተ ግራ ቀኙን ወገኖች የየራሳቸውን ይቻሉ ብለን መዝገቡን ዘግተን ወደ መ/ቤት መልሰናል፡፡

የማይነበብ የአራት ዳኞች ፊርማ አለበት

የልዩነት ውሳኔ

እኔ በአራተኛ ተራ ቁጥር የተሰየምኩት ዳኛ አብላጫው ድምጽ ተጠሪዎች የሚች እህታቸው ወ/ሮ ያልጋ ደሳለኝ ከተጠሪው ጋር በጋብቻ በነበረችበት ወቅት አፍርታ የነበረውን ቤትና ሌሎች የጋራ ንብረቶች ተጠሪው እንዲያካፍላቸው ያቀረቡት ጥያቄ በፍትሐብሔር ህግ ቁጥር 1677 ንዑስ አንቀጽ 1 እና በፍትሐብሔር ህግ ቁጥር 1845 መሠረት በይርጋ ስለሚታገድ ተቀባይነት የለውም በማለት በሰጠው ውሳኔ ያልተስማማሁ በመሆኑ በሀሳብ ተለይቻለሁ፡፡

የክርክሩ ፍሬ ጉዳይ ከላይ በግልፅ እንደተቀመጠው የተጠሪዎች አውራሽ የሆነችው ወ/ሮ ያልጋ ደሳለኝ ከዚህ ዓለም በሞት የተለየችው ጥቅምት 11 ቀን 1982 ዓ.ም ነው፡፡ ተጠሪዎች አመልካች የሚችን የውርስ ንብረት እንዲያካፍላቸው ለፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ክስ ያቀረቡት ነሐሴ 7 ቀን 1995 ዓ.ም ነው፡፡ ተጠሪዎች የሚች ውርስ በአመልካች እጅ መሆኑን ያወቁት በሐምሌ ወር 1993 ዓ.ም እንደሆነ የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት መጋቢት 7 ቀን 1996 ዓ.ም በሰጠው ብይን በግልጽ ተመልክቷል፡፡ ይኸም ሲሰላ፣ ተጠሪዎች የወራሽነት ጥያቄውን በፍትሐብሔር ሕግ ቁጥር 999 መሠረት ያቀረቡት ሚች ከሞተች ከአስራ ሦስት አመት ከአስር ወር ውስጥ የሚች ንብረት በአመልካች እጅ መሆኑን ካወቁበት ሁለት ዓመት እንደሆነ ያመለክታል፡፡

ከላይ የተመለከቱት ፍሬ ጉዳዮች ሲመዘኑ ተጠሪዎች ክስ ያቀረቡት በፍትሐብሔር ሕግ ቁጥር 1000 ንዑስ አንቀጽ 1 የተመለከተው የሦስት አመት የይርጋ ገደብም ሆነ የፍታብሔር ህግ ቁጥር 1000 ንዑስ አንቀጽ 2 የተደነገገው የአስራ አምስት አመት የይርጋ ገደብ ከማለፉ በፊት ቢሆንም አብላጫው ድምጽ ከላይ የተገለጸውን ውሳኔ የሰጠው በፍትሐብሔር ህግ ቁጥር 1000 ንዑስ አንቀጽ 2 የተደነገገው የይርጋ የጊዜ ገደብ የሚያገለግለው ክርክሩ በሚች ወራሾች መካከል በሚደረግነት ጊዜ እንጂ የሚች ወራሾች ወራሽ ካልሆነ ሰው ጋር በሚከራከሩበት ጊዜ ተጠቃሽነትም ሆነ ተፈፃሚነት የለውም የሚል የሕግ ትርጓሜ በመስጠት ነው፡፡ ተጠሪዎች ያቀረቡት ክስ በፍትሐብሔር ሕግ ቁጥር 1677/1/ እና በፍትሐብሔር ሕግ ቁጥር 1845 መሠረት በይርጋ ይታገዳል የሚል ውሳኔ ሰጥቷል፡፡ በእኔ በኩል ይህ አብላጫው ድምጽ በሰጠው የህግ ትርጓሜና ውሳኔ የማልስማማው በሚከተሉት ምክንያቶች ነው፡፡

1. በሚች ወራሾች መካከል የሚነሱ ክርክሮችን በመሰረታዊነት በሁለት ክፍል ማየትና በእነዚህም ክርክሮች ላይ ተፈፃሚነት የሚኖራቸውን፣ የይርጋ ድንጋጌዎች ለመረዳት ይቻላል፡፡ የሚች ያለኑዛዜ ወራሾች፣ በሚች ጠቅላላ የኑዛዜ ወራሾችና በሚች ልዩ የኑዛዜ ስጦታ ተቀባዮች መካከል በመጀመሪያ ክርክር የሚነሳው በውርስ ማጣራት ሂደት ውስጥ የውርስ አጣሪው የፍታብሔር ሕግ ቁጥር 971 እና በፍታብሔር ሕግ ቁጥር 972 መሠረት የሚችን የኑዛዜና ያለኑዛዜ ወራሾች እንደዚሁም የውርስ ንብረቱ የሚከፋፈልበትን ሁኔታ ሲያሳውቃቸው ነው፡፡ የሚች ወራሾች የውርስ አጣሪ ሀሳቡን ከገለፀ በኋላ የሚች ኑዛዜ ነው ተብሎ በአጣሪው እውቅና የተሰጠውን የኑዛዜ ሰነድ በመቃወም ወይም አጣሪው ስለውርሱ ንብረት አከፋፈል ያቀረበውን የውሳኔ ሀሳብ በመቃወም እርስ በርሳቸው ወይም ከውርስ አጣሪው ጋር የሚከራከሩበት ሁኔታ ይኖራል፡፡

   የሚች ወራሾች ከላይ በተገለፁት የህግ ድንጋጌዎች መሠረት የውርስ አጣሪውን የውሳኔ ሀሳብ የሚቃወሙ ከሆነ ሀሳቡን የሚቃወሙበት የጊዜ ገደብና የአጣሪው ውሳኔ ፈራሽ እንዲሆን ክስ የሚያቀርቡበት የይርጋ የጊዜ ገደብ በፍታብሔር ህግ ቁጥር 973 እና በፍታብሔር ህግ ቁጥር 974 ተደንግጓል፡፡ ህግ አወጭው በሚች የኑዛዜና ያለኑዛዜ ወራሾች መካከል ዉርሱ እየተጣራ ባለበት ሂደት በፍታብሔር ቁጥር 973 እና በፍታብሔር ቁጥር 974 መሰረት ይፈታል በሚል እምነት የይርጋ የጊዜ ገደቦችን አስቀምጧል የሚል እምነት አለኝ፡፡ ሕግ አውጪው በሚች ውርስ አወራረስ ሥርዓት ውስጥ መሠረታዊና ቁልፍ የሥራ ሂደት አድርጎ የሚመለከተው

የውርስ ማጣራት ሂደትን ሲሆን የሚችን ውርስ በአግባቡ ለማጣራት ይቻል ዘንድ አንድ መቶ ዘጠኝ የሚሆኑ ድንጋጌዎችን ማለትም በፍታብሔር ህግ ቁጥር 942 እስከ ፍታብሔር ህግ ቁጥር 1051 ደንግጓል፡፡ ሆኖም የሚች ውርስ በእነዚህ ድንጋጌዎች መሠረት በአግባቡ የማይጣራ በመሆኑ በሚች ወራሾች መካከል በፍርድ ቤቶች የሚካሄዱ ክርክሮች ይታያሉ፡፡ ስለሆነም በሚች ወራሾች መካከል የሚደረገው ክርክር ባህሪ በመለየት በፍታብሔር ህግ ቁጥር 973 እና በፍታብሔር ህግ ቁጥር 974 የተደነገጉት የይርጋ ድንጋጌዎች ተፈፃሚ በሚሆኑበት አግባብ ለህጉ ትርጓሜ መስጠት ሲገባ በወራሾች መካከል ውርሱ በሚጣራበት ጊዜም ሆነ ከዚያ በኃላ ለሚነሱ ክርክሮች የፍታብሔር ህግ ቁጥር 1000/2/ የይርጋ ገደብ ተፈፃሚነት ያለው መሆኑን የሚያሳይ ትርጓሜ መስጠቱ ተገቢነት ያለው አይደለም፡፡

2. በሁለተኛ ደረጃ በሚች ወራሾች መካከል ክርክር የሚነሳው የሚችን ውርስ የማጣራት ሂደት ከተዘጋ በኃላ በተለይም የሚች ንብረት ክፍፍል ከተደረገ በኃላ ነው፡፡ የሚች ውርስ ንብረት በወራሾች መካከል መከፈል ያለበት ሁሉም የሚች ወራሾች ወይም ወኪላቸው በተገኘበት መሆን እንዳለበትና የሚች ውርስ ክፍያ አንደኛው ወራሹ ወይም ወኪሉ በሌለበት የተፈፀመ እንደሆነና ክፍያውን ዳኞች ካላፀደቁት በቀር ፈራሽ እንደሚሆን የፍታብሔር ሕግ ቁጥር 1080 ንዑስ አንቀፅ 1 ይደነግጋል፡፡

የሚች አንደኛው ወይም ከአንድ በላይ የሆኑ ህጋዊ ወራሾቹ በሌሉበት ወይም ወኪላቸው ባልተገኙበት ሁኔታ ይልቁንም ሚች ሌላ ወራሽ እንደሌለው በመቁጠር የሚች ውርስ ሲከፈል የነበሩት የሚች ወራሾች የሚችን ንብረት ተከፋፍለው ቢወስዱ የሚች ውርስ ሲከፈል ያልነበረው ወራሽ ክፍያው ፈራሽ እንዲሆንና እሱ ባለበት እንደገና የውርስ ንብረቱ ተከፍሎ ድርሻው እንዲሰጠው መጠየቅ እንደሚችል የፍታብሔር ህግ ቁጥር 1080 ንዑስ አንቀጽ 2 ይደነግጋል፡፡ እሱ በሌለበት የሚች ወራሾች የሚችን ንብረት ተከፋፍለው የደረሰ የሚች ወራሽ በፍታብሔር ህግ ቁጥር 1080 (2) መሠረት የተደረገው የውርስ ንብረት ክፍያ እንዲፈርስና የእሱ ድርሻ እንዲሰጠው መጠየቅ የሚችልበትን የይርጋ የጊዜ ገደብ በተመለከተ በፍትሐብሄር ህግ ቁጥር 1080 ንዑስ አንቀጽ 3 ተደንግጓል፡፡ ይኸውም የውርስ ክፍያ ሲከናወን ያልነበረው ወራሽ ክፍያውን ካወቀበት በአንድ ዓመት ጊዜ ውስጥ ወይም በማናቸውም ሁኔታ ቢሆን ሚች

ከሞተበት ቀን አንስቶ በአስር ዓመት ጊዜ ውስጥ ካልቀረበ ጥያቄው ውድቅ እንደሚሆን በግልጽ ተደንግጓል።

ስለሆነም በሚች ወራሾች መካከል የሚች ውርስ ከተዘጋ በኃላ የሚኖረው ክርክር የውርስ ሀብቱን ያካፍለኝ የሚል መሆኑና እንደዚህ አይነት ጥያቄ ሊቀርብ የሚችለው የሚች ውርስ ክፍያ መደረጉን ካወቀበት በአንድ ዓመት ውስጥ ወይም ሚች ከሞተበት ጊዜ አንስቶ ደግሞ በ 10 አመት ውስጥ ካልቀረበ ተቀባይነት እንደሌለው የፍታብሔር ሕግ ቁጥር 1080 ንዑስ አንቀጽ 3 በግልጽ በሚደነግግበት ሁኔታ የፍታብሔር ሕግ ቁጥር 1000 የይርጋ ድንጋጌዎች በወራሾች መካከል ለሚደረግ ክርክር ተፈፃሚነት ያላቸው ናቸው በማለት አብላጫው ድምጽ የሰጠው ትርጉም አሳማኝ ሆኖ አላገኘሁትም።

3. ከላይ በተራ ቁጥር አንድና ሁለት ለመግለጽ እንደሞከርኩት የሚች ወራሾች የሚች ውርስ በመጣራት ሒደት ላይ እያለም ሆነ የሚች ውርስ ከተዘጋና የውርስ ክፍያ ከተፈፀመ በኋላ የሚያቀርቡትን ክርክር በምን ያህል ጊዜ ውስጥ ማቅረብ እንደሚገባቸው በፍትሐብሔር ሕግ ቁጥር 973፣ በፍትሐብሔር ሕግ ቁጥር 974 እና በፍትሐብሔር ሕግ ቁጥር 1080 ንዑስ አንቀጽ 3 ላይ ተደንግጓል። እነዚህ የይርጋ የህግ ድንጋጌዎች ባሉበት የፍትሐብሔር ህግ ቁጥር 1000 በሚች ወራሾች መካከል ያለን የይርጋ የጊዜ ገደብ ለመወሰን ነው የተቀመጠው የሚለው ትርጓሜ ከመያዙ በፊት የእነዚህን ድንጋጌዎች ዓላማና የተፈፃሚነት ወሰን በትኩረት ማየት ይጠይቃል።

በእኔ በኩል ከላይ የተገለፁትን የይርጋ ድንጋጌዎች ህግ አውጪው በወራሾች መካከል የሚነሳውን ክርክር ለመዳኘት አስቦ የደነገገ ሲሆን የፍትሐብሔር ህግ ቁጥር 1000 የይርጋ ድንጋጌዎች ግን የሚች ሕጋዊ ወራሽ በሆነ ሰውና የሚች ወራሽ ባልሆነ ሰው መካከል የሚችን ውርስ ንብረት አስመልክቶ የሚደረገውን ክርክር የጊዜ ገደብ ለመወሰን የደነገጋቸው ናቸው ብዬ አምናለሁ። ህግ አውጪው የፍትሐብሔር ህግ ቁጥር 1000 ድንጋጌዎች የሚች ወራሾች ያልሆኑ ሰዎች በሚያደርጉት ክርክር ተፈፃሚነት እንዲኖረው በማሰብ የደነገገ መሆኑን ከፍትሐብሔር ሕግ ቁጥር 999 እስከ ፍትሐብሔር ህግ ቁጥር 1002 ያሉትን ድንጋጌዎች ያስቀመጠበትን አግባብ በማየት ለመረዳት ይቻላል። የእነዚህን ድንጋጌዎች ርዕስና አቀማመጥ ስንመለከት

- የፍትሐብሔር ሕግ ቁጥር 999 የወራሽነት ጥያቄ /1/ መሠረቱ
- የፍትሐብሔር ሕግ ቁጥር 1000 /2/ ጥያቄው ለማቅረብ የተወሰነ ጊዜ

- የፍትሐብሔር ሕግ ቁጥር 1001 /3/ ውጤቱ
- የፍትሐብሔር ሕግ ቁጥር 1002 /4/ ልዩ የኑዛዜ ስጦታ የተደረገላቸው ሰዎች በማለት ከአንድ እስከ አራት ተከታታይ ቁጥር በመስጠት ደንግጓቸዋል፡፡ ይህንንም በማድረግ ህግ አውጪው ከፍትሐብሄር ህግ ቁጥር 999 እስከ 1002 የተደነገጉት ድንጋጌዎች ተከታታይና ተያያዥነት ያላቸው በተለይም ከፍትሐብሔር ሕግ ቁጥር 1000 እስከ ፍትሐብሔር ህግ ቁጥር 1002 የተደነገጉት ድንጋጌዎች በፍትሐብሔር ህግ ቁጥር 999 የተደነገገውን መሠረታዊ መርህ ለማስፈፀም የሚረዱ ዝርዝር ድንጋጌዎች መሆናቸውን የሕግ አቀራረጽ ጥበብንና የድንጋጌዎች አደረጃጀትን በመጠቀም ለማሳየት ሞክሯል፡፡

ስለሆነም የፍትሐብሔር ህግ ቁጥር 1000 ድንጋጌዎች በራሳቸው ተነጥለው የሚቆሙና የሚተረጎሙ ሳይሆኑ ህግ አውጪው መሠረታዊ መርህ ነው በማለት በግልጽ ካስቀመጠው የፍትሐብሔር ህግ ቁጥር 999 ጋር ተያያዥነት ያላቸውና በይዘትም ሆነ በትርጓሜያቸው ከዚሁ ጋር መታየት ያለባቸው የወራሽነት ጥያቄ መሰረታዊ መርህ እንደሆኑ በግልጽ በርዕሱ ላይ በማመልከት ህግ አውጪው የደነገገው የፍትሐብሔር ህግ ቁጥር 999 አንድ ሰው ዋጋ ያለው የወራሽነት ማስረጃ ሳይኖረው ውርስን ወይም ከውርሱ አንዱን ክፍል ብቻ በእጁ ያደረገ እንደሆነ እውነተኛው ወራሽነቱ እንዲታወቅለት እና የተወሰዱት የውርስ ንብረቶች እንዲመለስለት በዚህ ሰው ላይ የወራሽነት ጥያቄ ክስ ለማቅረብ እንደሚችል የሚደነግግ ሲሆን የፍትሐብሔር ህግ ቁጥር 1000 ደግሞ እውነተኛው ወራሽ፣ ወራሽ ካልሆነው ሰው ላይ የውርስ ንብረቱ እንዲመለስለት ክስ የሚያቀርብበትን የይርጋ የጊዜ ገደብ የሚደነግግ ነው፡፡

ስለሆነም በእኔ በኩል የፍትሐብሔር ህግ ቁጥር 1000 ድንጋጌዎች የሚች እውነተኛ ወራሽ የሆነ ሰው የሚች ወራሽ ካልሆነ ማናቸውም ሰው ላይ የውርሱን ንብረት ለማስመለስ የሚያቀርበውን ክስ የይርጋ የጊዜ ገደብ የሚይደነግጉ መሆናቸው አከራካሪ አይደለም፡፡ አከራካሪው ጉዳይ የፍትሐብሔር ህግ ቁጥር 1000 ንዑስ አንቀጽ 1 እና የፍትሐብሔር ህግ ቁጥር 1000 ንዑስ አንቀጽ 2 የተፈፃሚነት ወሰንና አተረጓጎም ነው፡፡ ስለሆነም የሚች ውርስ ንብረት ክፍያና ከሚች ውርስ ሊደርሰኝ የሚገባው ድርሻ አልደረሰኝም በማለት የሚች ወራሾች በሌሎቹ ውርሱን በተካፈሉት ወራሾች ላይ የሚያቀርቡት ክስ የይርጋ የጊዜ

ገደብ በፍትሐብሔር ህግ ቁጥር 1080 ንዑስ አንቀጽ 3 የተደነገገ በመሆኑና የፍትሐብሔር ህግ ቁጥር 1000 አንቀጽ 2 የሚች ወራሽ የሚች ወራሽ ካልሆነ ሰው የውርሱን ንብረት ለማስመለስ የሚያቀርበውን የይርጋ የጊዜ ገደብ የሚደነግግ በመሆኑ ተጠሪዎች ያቀረቡት የወራሽነት ጥያቄ አስራ አምስት አመት ያልሞላው በመሆኑ በይርጋ አይቋረጥም የሚል የሀሳብ ልዩነት አለኝ፡፡

4. ከላይ በዝርዝር ያስቀመጥናቸው የውርስ ህግ ልዩ የይርጋ ድንጋጌዎች ባሉበት ሁኔታ አብላጫው ድምጽ የፍትሐብሔር ህግ ቁጥር 1845ን ለመጠቀም መሞከሩ የፍታብሔር ህግ ቁጥር 1845 ድንጋጌን የሚቃረን ነው፡፡ ምክንያቱም የፍታብሔር ሕግ ቁጥር 1845 ተፈፃሚነት የሚኖረው "ህግ በሌላ አኳኋን ካልወሰነ በስተቀር" እንደሆነ በግልጽ ይደነግጋል፡፡ በያዝነው ጉዳይ በሟች ወራሾች መካከል የሚደረገውን ክርክር የይርጋ የጊዜ ገደብ የፍትሐብሔር ህግ ቁጥር 973 የፍትሐብሔር ህግ ቁጥር 974 እና በፍትሐብሔር ህግ ቁጥር 1080 ንዑስ አንቀጽ 3 ተደንግጓል፡፡ የእነዚህን ድንጋጌዎች መሰረታዊ ዓላማና የተፈፃሚነት ወሰን በመተርጎም በሟች ወራሾች መካከል የሚነሳውን ክርክር የይርጋ የጊዜ ገደብ መወሰን በሚቻልበት ሁኔታ ህግ አውጪው አንድ ወራሽ ወራሽነቱ እንዲታወቅለትና የውርስ ንብረት እንዲመልስለት ወራሽ ባልሆነ ሰው ላይ የሚያቀርበውን ክስ ለመዳኘት በማሰብ የደነገገውን የፍትሐብሔር ህግ አንቀጽ 1000፣ በወራሾች መካከል ባለ ክርክር ተፈፃሚነት ያለው ድንጋጌ ነው የሚል ትርጓሜ መስጠትና በወራሾችና ወራሽ ባልሆኑ ሰዎች መካከል የሚደረገውን ክርክር የይርጋ የጊዜ ገደብ የሚደነግግ የውርስ ሕግ ድንጋጌ ስለሌለ የፍትሐብሔር ህግ ቁጥር 1845 ተፈፃሚነት ሊኖረው ይገባል በማለት አብላጫው ድምጽ የሰጠው መደምደሚያ ከላይ ባነሳኋቸው ምክንያቶች ተገቢ ናቸው ብዬ ስለማላስብ የፍትሐብሔር ህግ ቁጥር 1000 ንዑስ አንቀጽ 1 እና 2 ድንጋጌዎች በአመልካችና በተጠሪዎች ጉዳይ ተፈፃሚነት ያላቸው ናቸው፡፡ የተጠሪዎችም የወራሽነት ክስ በይርጋ የሚታገድ አይደለም በማለት በልዩነት ወስኛለሁ፡፡

የማይነበብ የአንድ ዳኛ 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 5 issue No.2 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.

Manuscript submission:

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).

Proofs

Contributions will be copy edited when necessary. When the editing is major, typeset proofs will be sent to authors for final approval before printing. The *Journal* reserves the right to withdraw an offer of publication should an author fail to assist the *Journal* throughout the editorial process.

Complimentary Copy

Authors will be provided with a complimentary copy of the issue of the *Journal* in which their contribution appears.