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JOURNAL OF ETHIOPIAN LAW

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Standard of Compensation for Expropriation of Foreign Investment in Ethiopia: the Tension between BITs and Municipal Law

*Martha Belete Hailu**

1. Introduction

Investment relationships involve international law and municipal law. While through international investment law protection is extended to foreign investors, the regulation of the investment, including its admission, is governed by the municipal laws of the host state. At times, the rights and protections guaranteed by international investment law need the municipal law of the host state for its implementation. One such scenario is the payment of compensation for expropriated or nationalized investments. While the international law focuses on guaranteeing against expropriation and sets the norm for compensation, the municipal law of the host state chips in providing the details for assessment of compensation and manner of payment; hence requiring coherence between the two planes of laws.

Like many other countries, Ethiopia has signed bilateral investment treaties (BITs) and other international investment agreements that give protection to foreign investment and issued investment legislations. There are also other domestic legislations relevant for the regulation of foreign investment. The article looks in to the interaction between the BITs the country signed and the relevant domestic legislations with the aim of assessing the policy coherence between the two planes of laws and assessing if sufficient protection has been extended to foreign investment. To this end, the next part gives a general note on investment protection. The third part looks into the concept and types of taking in international investment law and municipal law of Ethiopia. The fourth section assesses the two competing norms of compensation that have gained prominence in international investment jurisprudence and traces their development. It is followed by assessment of compensation standard as reflected in the BITs signed by Ethiopia and its municipal legislations. The

*LL.B (AAU), LL.M (UWC), PhD Candidate (Martin Luther University of Halle Wittenberg), Lecturer, Addis Ababa University School of Law. E-mail: martha.b.hailu@gmail.com. I am very grateful for my colleagues Muradu Abdo and Yazachew Belew for their comments on earlier drafts of this article. I am also thankful for the two anonymous reviewers. All errors remain mine.

norm of compensation for unlawful expropriation is also briefly dealt with. Concluding remarks are made at the end.

2. Protection of Investment: General Remark

By investing in a foreign country, foreign investors subject their investment to less known environment of the host country and hence need protection. One mechanism resorted to by many states for protecting and promoting foreign investment is through the signing of BITs. BITs aim at protecting and promoting foreign investment between the contracting States Parties by granting a number of rights to foreign investors.[1]

The development of BITs began in the 18th century with the signing of treaties of friendship, navigation and commerce (FNC). The primary concern of FNCs was trade relations as they were designed at a time when commerce was largely restricted to trading in goods by merchants and did not contemplate direct investment by corporations.[2] The treaties also extend to military matters. The investment protection provisions of these treaties mainly focused on the protection of property in the country of another party.[3] Alien treatment, including freedom of worship and travel within the host state, was also included in the FCN.[4] The treaties of FCN were used by countries until the beginning of the 1960s in which period modern bilateral investment treaties surfaced.

Following the signing of the first modern BIT between West Germany and Pakistan in 1959, their conclusion has been one of the most active areas of public international law making in the last decades.[5] By the end of 2012, the

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[1] Stephan W. Schill, Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses, Berkley Journal of International Law, Vol. 27 No. 2, (2009), p. 498

[2] M Sornarajah, The International Law on Foreign Investment, (3rd ed., Cambridge University Press, 2010), p 210

3. Alireza Falsafi, Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate, Syracuse Journal of International Law and Commerce, Vol. 36, (2008-2009), p 46

[4] Sornarajah, supra note 2, p. 210

[5] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, International Lawyer, Vol. 24, (1990),p 655

total number of BITs concluded reached 2,857.[6] Though the number of BITs signed in recent years has decreased, they still play an important role in international investment rule making.[7]. The fact that these bilateral investment treaties can be negotiated in such a manner to suit the mutual interests of the parties[8] and the absence of a comprehensive multilateral agreement on the area contributed to the popularity of the BITs.

While BITs extend protection, the regulation of the foreign investment is left for the municipal law of the host state. Municipal law of the host state also play an important role in the settlement of investor-state disputes. In the process of settling investment disputes, tribunals will be faced with the inevitable task of choosing the applicable substantive law the decision of which will be based on either of the four possible sources of choice of law rules.[9] The tribunal, however, has three set of substantive law irrespective of which choice of law rule it applies.[10] These are: the municipal law of the host state, the investment treaty itself and general principles of international law.[11]

The application of municipal law in international disputes has been one of the points being debated for some time. In mid 1920s, the Permanent Court of International Justice (PCIJ) ruled in *Certain German Interests in Polish Upper Silesia* that 'municipal laws are merely facts which express the will and constitute the activities of States…The court is not called upon to interpret the

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[6] UNCTAD, World Investment Report 2013: Global Value Chains: Investment and Trade for Development, , (United Nations Publication, Switzerland, 2013), p 101

[7] The number of BITs signed in 2009 was 82 as opposed to meager 33 in 2011 and 20 in 2012- the lowest annual number in a quarter century. For number of BITs signed in 2009, see UNCTAD, World Investment Report 2010: Investing in a Low-Carbon Economy, (United Nations Publication, Switzerland, 2010), p. 81

[8] Sornarajah supra note 2, p 183

[9] The four sources are: first, where there is a contractual relation between the investor and the host state or entity of the host state, this contract may contain a choice of law provision. Second, the arbitral rules governing the reference to arbitration may also contain a default choice of law. Article 42(1) of the ICSID Convention and Article 35(1) of the UNCITRAL Rules as revised in 2010 are good examples in this regard. Third, the *lex loci arbitri* might supply the choice of law rule if the arbitral rules are silent on this point. Fourth, the choice of law rule might be derived from the legal system which gives effect to the international treaty- public international law. Zachary Douglas, The Hybrid Foundations of Investment Treaty Arbitration, British Yearbook of International Law, Vol. 74, (2003), p 194

[10] Ibid

[11] Ibid

[municipal] law as such…'.[12] According to the Court, municipal law will be assessed to determine whether the state was in conformity with its obligations towards other states while applying it.[13] The International Court of Justice (ICJ) in Barcelona Traction reflected a different view in that while it applied international law, it emphasized the need, in certain circumstances, to refer to municipal law.[14] Municipal law was relevant to the extent that international law needed to refer to it to determine the existence of rights relevant on the international plane.[15]

On the specific issue of foreign investment, the major sources of international law on foreign investment are bilateral investment treaties, supplemented by custom, general principles of law and judicial decisions.[16] As mentioned earlier, investment treaties are international instruments that are entered into by States that lay down international standards of protection. The beneficiaries of these protections are the investors-entities or individuals- that are in turn subject to municipal law, which also governs the underlying investment that the treaty addresses.[17] It is in view of this interplay between international and municipal law that Douglas referred the investment treaty regime as having 'hybrid or *sui generis'* character.[18] This interplay between the two laws is more emphasized in cases of disputes. 'Investment disputes are about investment, investments are about property and property is about specific rights over things cognizable by the municipal law of the host state.'[19] Thus, ascertaining the property right requires reference to the municipal law of the host state. The municipal law of the host state determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests while the investment treaty supplies the classification of an investment and thus prescribes whether the right *in rem* recognized by the municipal law is subject to the protection

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[12] Certain German Interests in Polish Upper Silesia (Merits), Judgment, (25 May 1926), PCIJ Series A. No. 7, p 19
[13] Ibid
[14] Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports (1970), p.3, Paragraph 38.
[15] Monique Sasson, Substantive Law in Investment Treaty Arbitration: the Unsettled Relationship between International Law and Municipal Law, (Kluwer Law International, 2010), p. xxiii
[16] Sornarajah *supra* note 2, pp 79ff
[17] Sasson *supra* note 15, p. xxv
[18] see Douglas *supra* note 9, p. 153 and Sasson *supra* note 15, p. xxv
[19] Douglas *supra* note 9, p. 197

afforded by the investment treaty.[20] Though the investment treaties provide protection for the investment, which is property, they do not contain substantive rules of property law, requiring *a renvoi* to a municipal law.[21] The application of municipal law to international investment disputes is not limited to determining existence of a particular right. Holdings of investment tribunals indicate that municipal law is relevant in determining whether the investment is held in the territory of the host state, its validity, the nature and scope of the rights making up the investment and whether they vest on a protected investor, the conditions imposed or assurances granted by national law for the operation of the investment, as well as the nature and scope of the government measures allegedly in breach of the international investment agreement.[22]

3. Taking of Property

One protection extended to foreign investors through the BITs is the guarantee against taking of their investment/property/. Taking of property through nationalization and expropriation is an old phenomenon in the regulation of foreign direct investment. There are different ways in which the property of a person might be taken. One such way is confiscation, which refers to the taking or appropriation of the private property for a public use without payment of compensation.[23] Countries declare the estate, goods or belongings of a person who has been found guilty of some crime, to be forfeited for the benefit of the public treasury as a punishment.[24] The other two ways of taking are nationalization and expropriation. Both nationalization and expropriation involve the taking of property on a permanent basis. However, 'nationalization is often associated with the "indigenization" programs of countries (particularly Latin American countries) which entailed the conversion of substantial foreign private property to local state ownership.'[25] Nationalization

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[20] Id., p. 198

[21] Ibid and Sasson supra note 15, p. xxx

[22] Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law international, 2009), pp 93-94

[23] Richard J. Hunter Jr., Property Risks in Business, Currents: International Trade Law Journal, Vol. 15, (2006), p 28

[24] Ethiopia is one such country that sets the confiscation of property as punishment for crimes. See article 98 and 260 of the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No 414/2004.

[25] Ralph H. Folsom, Michael Wallace Gordon and John A. Spanogle, Jr., International Business Transactions, (2nd ed., West Group, St Paul Minn, 2001), §32.5

is often thought to define a taking of property by government with the intention to have the government itself become owner and operator,[26] whereas in expropriation it is not necessary that the state becomes owner or beneficiary of the property taken. While expropriation is an individual or personal act, nationalization measures, on the other hand, reflect changes brought about in the State's socio economic structure (land reforms, socialization of industry or of some of its sectors, exclusion of private capital from certain branches of the national economy).[27] And again only privately owned property will be affected by nationalization while national governments can expropriate property held by government body as well as privately owned property.[28]

The government of Ethiopia has issued a new investment proclamation and regulation in 2012.[29] The proclamation under Article 25 gives protection to foreign investors by guaranteeing their investment against expropriation except for public interest and only in conformity with the requirements of the law. Even then, adequate compensation, corresponding to the prevailing market value will be paid.[30] This compensation is to be paid in advance.

From the reading of Article 25, one can gather that the law has already assumed two classes of takings: expropriation and nationalization. This assumption, however, becomes meaningless when one looks at sub Article 3 of article 25 which assimilates the two classes of taking when it requires that 'nationalization' is to be used interchangeably with 'expropriation'. As indicated above, there is a difference between the terms 'expropriation' and 'nationalization' as the former applies to individual measures taken for public purpose while the latter involves large scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests

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[26] Ibid

[27] F.V.Garcia Amador, Louis B. Sohn and Richard R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens, (Oceana Publications, 1974), p 48

[28] Muradu Abdo, Ethiopian Property Law: A Text Book, (Addis Ababa, September 2012), p 353

[29] Investment Proclamation No 769/2012 and Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012. A new drat investment regulation has been proposed and is under consideration. The draft makes few changes like renaming the Ethiopian Investment Agency as Ethiopian Investment Commission and it will also mae the Commission accountable to the Prime Minister.

[30] Article 25/2 of the Investment Proclamation No 769/2012

into the public domain.[31] This approach, actually, is not typical of the Ethiopian Investment law. Most bilateral investment treaties also do not differentiate between expropriation and nationalization although it is generally recognized in legal doctrine that there are substantial differences between these concepts.[32] The Ethiopian investment law also uses the terms interchangeably irrespective of the difference in meaning conveyed by each.

The taking of property through expropriation can be conducted either directly or indirectly. Direct taking refers to a situation in which the state, through a decree or other means, expressly acknowledges that it takes or will take the property. In such circumstances, there is no doubt that the property has been taken as the state itself acknowledges it. The importance of this manner of taking property, however, has declined in the past years as states no longer want to be perceived as posing a threat of expropriation. Instead, states have resorted to an indirect way of taking.

The term indirect expropriation encompasses a range of acts and omissions of the state which deprives the person the benefit of his/her property/investment. Different BITs and other International investment agreements use different terminologies, like measures equivalent to expropriation, measures tantamount to expropriation, creeping expropriation, etc., to refer to indirect expropriation. Though there could be slight difference in the meaning attributed to the terms, all of them refer to indirect expropriation.[33] The study of indirect expropriation

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[31] Rudolf Dolzer and Margrete Stevens, Bilateral Investment Treaties, (Martinus Nijhoff Publishers, the Netherlands, 1995), p. 98 foot note 263

[32] Id., p. 99

[33] De facto expropriation, constructive expropriation, disguised expropriation, consequential expropriation are some of the terms used to signify indirect expropriation. A Creeping expropriation denotes an expropriation accomplished by a cumulative series of regulatory acts or omissions over a prolonged period of time, no one of which can necessarily be identified as the decisive event that deprived the foreign national of the value of its investment W. Michael Reisman and Robert D. Sloane, Indirect Expropriation and Its Valuation in the BIT Generation, British Yearbook of International Law, Vol. 74, (2003), p 128 Consequential expropriation, on the other hand, involve the deprivations of economic value of a foreign investment, which, within the legal regime established by a BIT, must be deemed expropriatory because of their causal links to failures of the host state to fulfill its paramount obligations to establish and maintain an appropriate legal, administrative, and regulatory normative framework for foreign investment. Ibid.

takes us back to two early international decisions on expropriation.[34] The tribunals in these cases recognized indirect expropriation by establishing two important things: i) that a state may expropriate property, where it interferes with it, even though the state expressly disclaims any such intention and ii) that even though a state may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.[35] Unlike direct expropriation, the express acceptance of the state of its action is irrelevant to conclude that it has expropriated the property. And again, the mere rendering of the right useless suffices to consider interference on property right an expropriation. In recent years also several tribunals have acknowledged that states may accomplish expropriation in ways other than by formal decree and often in ways that may conceal expropriatory conduct with coating of legitimacy.[36] A prominent example would be the Iran-US Claims Tribunal established in the aftermath of the 1979 Iran revolution which resulted in the expropriation of several US investments. The tribunal in Starrett Housing Corporation Vs Iran held that:

> …[it] is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[37]

As we can see from the holding of the tribunal, the central point in investigating existence of expropriation is the extent of interference that the investor suffers and not as such on the form or content of the state measure or intention of the state. Accordingly, different types of government measures, like deprivation of profits, exorbitant taxation, measures substantially interfering with the management or control of a business enterprise, harassment

[34] The two cases are *Certain German Interests in Polish Upper Silesia* (Germany Vs Poland), (1926), PCIJ Report Series A.No. 7 and *Norwegian Ship owners Claims* (Norway Vs U.S), (1922). See Christie, infra note 35.

[35] G.C Christie, What Constitutes a Taking of Property Under International Law, British Yearbook of International Law, Vol. 38, (1962), p 311. See also Reisman and Sloane, supra note 33

[36] Reisman and Sloane, Supra note 33, p. 121

[37] Starrett Housing Corporation Vs Islamic Republic of Iran, 4 Iran-US CTR, (1983), 154 as cited by Newcombe and Paradell, supra note 22, p 326

of employees, annulment and cancellation of property rights and licenses etc, may be considered as expropriation.[38]Many of the measures which are found to be indirect expropriation may also fall under the police power of the state and the question remains as to how one can distinguish between indirect expropriation and non compensable regulatory taking. In this regard, three criteria have been identified by international tribunals in distinguishing between the two: the degree of interference with the property right, the character of governmental measure i.e, the purpose and context of the governmental measure and the interference of the measure with reasonable and investment backed expectations.[39] For the state's interference to constitute indirect expropriation, the interference needs to be substantial and severely affect the property right of the person. But again a question would arise whether one should consider only the effect of the government's measure on the individual or the purpose and context of the government's measure must be included in the consideration. Using either of the two criteria to the exclusion of the other would lead to different results even in cases with similar facts. If one considers only the effect of the measure, also known as 'sole effects test', an expropriation will be found to have occurred where a regulatory measure, or series of measures, is sufficiently restrictive; whereas through the employment of 'purpose' test a legitimate public purpose may, in certain circumstances, in and of itself suffice to cast a measure as being in the nature of the normal exercise of police power, and hence non compensable, regardless of the magnitude of its effect on investment.[40] A balanced approach, which consists of weighing the purpose of the measure with its effect on the investment, is the predominant approach used by tribunals.[41] That is, there needs to be proportionality between the purpose sought to be achieved through the measure

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[38] Blocking of access to a plant and government takeover of a key supplier, prohibition on re export of equipment, creation of state monopolies and other forms of arbitrary conduct depriving the investor of the benefit of its property, forced sale and requisition of land are some examples in which international tribunals have found indirect expropriation to exist. See Newcombe and Paradell, supra note 22, pp. 327-328

[39] OECD, Indirect Expropriation and the Right to Regulate in International Investment Law, Working Paper on International Investment, No. 2004/4, (September 2004), p. 10

[40] L. Yves Fortier and Stephen L. Drymer, Indirect Expropriation in the Law of International Investment: I know it when I See it, or *Caveat Investor*, ICSID Review: Foreign Investment Law Journal, Vol. 19 No 2, (2004), p. 300

[41] OECD supra note 39, p. 15

and the effect of the measure on the investment for the measure to be a regulatory measure.

3.1 Expropriation under Ethiopian law

Expropriation in Ethiopia is governed by laws issued by the Federal government as well as the regional governments. On the federal level, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation 455/2005 and Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes Council of Minister Regulation no 135/2007 are the major laws governing expropriation. The matter of expropriation is also governed by the Re-Enactment of Urban Land Lease Holding Proclamation 272/2002 with regard to land held under the urban land lease holding system. In addition to these proclamations, the 1960 Civil Code provisions which are consistent with the other laws play a gap filling role. And it is in this Code that we can find definition of the term expropriation proceeding. Accordingly, Article 1460 of the Civil Code defines expropriation proceedings as 'proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for public purposes.'

Though the concept of compensation is not included in the definition, the subsequent provisions of the code deal with it and hence one can include compensation as element of the expropriation law. Following the 1974 revolution and subsequent change in political ideology, land became property of the State. Under the current Constitution also land is jointly owned by the government and nations, nationalities and people wherein the government is given the power to administer it on behalf of the latter.[42] Accordingly, Article 1460 of the Civil Code needs to be read harmoniously with the Constitution and hence the word 'owner' in the civil code must be read to mean "landholder who owns property situated upon the land".[43] The terminology 'indirect expropriation' is employed in the Civil Code which allows the competent authorities to take the property of individuals for the purpose of setting up installations or construct works without undergoing through expropriation

[42] Article 40 of the Constitution of the FDRE
[43] Muradu Abdo *supra* note 28, p. 359

proceeding.[44] One limitation is that the construction works or installations should not seriously impair the rights of the property owner or notably reduce the value of the immovable, in which case resort to the normal expropriation proceeding is required. And again, it is in cases where the work needs to be executed within less than a month's time and where the work can be carried out without impairing the normal exploitation of immovable that the authorities may resort to indirect expropriation (Article 1486). One restriction on this right of the authorities is that actions which would impair the right of a person on dwelling houses are not allowed (Article 1487). Compensation will be paid for the owner of the property for the damage caused by the works and installations done by the authorities.

The purpose of the provisions on indirect expropriation under the civil code seem to emanate from the fact that sometimes the state must urgently undertake a public work on private property for such a short period of time that compliance with normal expropriation procedures might not make sense.[45] Whatever the purpose of the provisions might be, one thing we can clearly see is that the meaning attributed to the concept of 'indirect expropriation' in the Civil Code is quite different from the meaning of indirect expropriation in international investment jurisprudence that we have seen above. One can even say that indirect expropriation as is incorporated in the bilateral investment treaties, including the ones signed by Ethiopia, is unknown under the Ethiopian domestic law of expropriation.

4. Norms of Compensation

States have the sovereign right under international law to take property held by nationals or aliens for economic, political, social or other reasons.[46] Expropriation and nationalization of the alien's property is considered as inalienable right of the host state. However, such taking must be accompanied by the payment of compensation. Unlike the right of the state to expropriate, there is no single universally accepted norm of compensation for expropriation. In this regard, we have two distinct groups whose difference is particularly

[44] Article 1485 of the Civil Code
[45] Muradu Abdo supra note 28, p. 362
[46] UNCTAD, Expropriation: UNCTAD Series in Issues in International Investment Agreements II, (United Nations Publications, Switzerland, 2012), p. 1

observed in cases of large scale takings. The first group, composed of the developed, capital exporting countries, push for the payment of full and prompt compensation according to international law while capital importing countries argue full and prompt compensation is not the norm under international law and call for appropriate compensation.

At any given period in history, the legal norms governing taking of foreign property have been determined by the economic, political and social processes of the time.[47] From about the mid 19th century to the First World War, during which time the legal policies relating to compensation were formulated, the international scene was dominated by European cultures wherein the state played a comparatively negative role, protecting a regime of laissez-faire, and assuring the sanctity of private wealth.[48] Accordingly, States' intervention was limited to the regulation of private property and the government's power to take private property was exercised rarely and for a limited purpose.[49] And again, as expropriation of foreign property was an isolated and uncommon phenomenon then, it was never a matter of national policy.[50] It was at this time in history that the payment of full compensation[51] as a standard of compensation for expropriation has been introduced. In the absence of contrary treaty provision, payment of full compensation was even made a condition for the legality of the taking.[52]

The full compensation norm, which was introduced at a time where there was minimum intervention in private property, was latter on challenged while things have taken a different route during the twentieth century with changes in economic, political and social conditions of states. One significant change of the twentieth century is the direct interference and participation of the state in the national and international economic order.[53] With this change in political circumstances, foreign wealth deprivations have become subjects of national

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[47] Frank G Dawson and Burns H Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, Fordham Law Review, Vol. 30(4), (1962), p. 728
[48] Id., pp. 728-729
[49] Id., p. 729
[50] Seymour J. Rubin, Nationalization and Compensation-A Comparative Approach, The University of Chicago Law Review, Vol. 17, (1950), p 459
[51] Please see the discussion infra for definition of 'full compensation'
[52] Dawson and Weston, supra note 47, p. 729
[53] Id., p. 730

policy.[54] As such, the 'full compensation' norm was put to the litmus where mass nationalizations have been undertaken by different countries due to reforms in their domestic policies. Countries started to question the application of 'full compensation' norm for large scale expropriations and hence the divide between the capital importing and capital exporting countries. Resisting the 'full compensation' norm, the capital importing countries pushed for 'appropriate compensation' norm as is implanted in the Calvo Doctrine.

Authors like Montt argue that the introduction of the Calvo Doctrine, and hence the divide between the two worlds, precedes the reform programs undertaken in many of the Latin American and Eastern European countries.[55] Rather, it was the resistance by the capital importing countries of the concept of 'diplomatic protection' as it existed in the late 19th century that contributed to the formation of a group advocating for 'appropriate compensation'. Tracing back the investor protection regime in earlier times in history, one can find the reliance of foreign investors on diplomatic protection they get from their home states. Diplomatic protection through the espousal of claims of investors developed in an era of colonialism and imperialism wherein States exercise all possible means-political, economic and military-to protect their nationals' interests abroad.[56] During the nineteenth and early twentieth centuries, the exercise of diplomatic protection by powerful states was often accompanied by 'gun boat diplomacy'- the threat or the use of force to back up diplomatic protection claims.[57] The Great Powers' use of forcible self-help to advance the claims of their citizens living or investing abroad transformed diplomatic protection into an institution well-suited to major abuses.[58] To make things worse, the Great Powers were extending this 'gun-boat diplomacy' on, sometimes, exaggerated and erroneous facts. The real and perceived abuses of diplomatic protection led Latin American states to resist its use, particularly in

[54] Id., p. 731

[55] Santiago Montt, State Liability in Investment Treaty Arbitration: Global, Constitutional and Administrative Law in the BIT Generation, (Hart Publishing, 2009), pp. 32 ff

[56] Newcombe and Paradell supra note 22, p. 8. At the time, the use of force in the exercise of diplomatic protection was not inconsistent with international law. Id., p. 9. The use of force as a means of settling dispute was prohibited following the adoption of the UN Charter. See article 2/3 and 2/4 of the UN Charter.

[57] Id., p. 9

[58] Montt supra note 55, p. 36

its more interventionist form, [59]and it was as a response to this abuse of diplomatic protection that the Calvo Doctrine and Clause were designed.[60]

What we find at the core of the Calvo Doctrine is equality between foreigners and nationals. This equality signifies that foreigners are to receive similar treatment and enjoy similar rights and protection as is given to nationals.[61] Nonetheless, equality can also be understood to mean 'equality is the maximum' and that the responsibility of governments toward foreigners cannot be greater than the responsibility of governments towards their own citizens.[62][63] However, this notion of equality as originally incorporated in the Calvo Doctrine changed its feature in subsequent years. The expectation of developing countries concerning standard of protection to property of aliens was changed which significantly altered the substantive law of expropriation in which the standard became compensation that the state deems appropriate.[64]

This position of the capital importing countries was the cause for the heated debate following the mass expropriations undertaken by the Governments of Mexico and Russia in the 1930s.[65] In each case the expropriating state

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[59] Newcomb supra note 22, p. 9

[60] Montt supra note 55, p. 36. As Mexico once argued, equality of treatment was established to defend 'weak states against the unjustified pretension of foreigners who, alleging supposed international laws, demanded a privileged position'. Ibid. Montt also asserts that, contrary to what is usually assumed, the Argentinean jurist and diplomat Carlos Calvo did not create the Doctrine; rather, he attributes real authorship of the Doctrine to the Venezuelan jurist Andrés Bello.

[61] Id., p. 39

[62] Id., pp. 39-40

[63] Shan, on the other hand, argued that what the Calvo Doctrine does is emphasize on the rejection of superiority or imperial prerogative of powerful states and their national, which in other words makes the Calvo doctrine a doctrine of 'anti super state'. Consequently, unlike national treatment, 'anti super state' does not deny or reject the special privileges that host countries often grant or reserve to their own nationals. See Wenhua Shan, Calvo Doctrine, State Sovereignty and the Changing Landscape of International Investment Law, in Wenhua Shan, Penelope Simons and Dalvinder Singh, (eds.) Redefining Sovereignty in International Economic Law, (Hart Publishing, 2008), p 249

[64] Montt supra note 55, p. 56. In the second half of the twentieth century, all discussions of minimum standards and the national standard turned out, in reality, to be about expropriation and compensation, and nothing more. Thus, the *classic* claim—the nineteenth century Calvo Doctrine, whose aim had not been to erode the rule of law but to terminate forcible self-help through national treatment—was transmuted into a new and *opportunistic* one: expropriation without compensation. Id., p. 57.

[65] Mexico, undergoing a revolution that had begun with the fall of Porfiorio Diaz in 1910-had enacted an agrarian reform program that would dispossess large number of foreign land

disclaimed any obligation to pay full compensation to the foreign nationals affected by the measure; it rather offered the expropriated landowners only the partial deferred compensation available to its own citizens under applicable domestic law.[66] This view was in stark contrast to what was being pushed for by the developed countries and the prevailing norm in the 19th century for limited (small scale) takings: adequate, prompt and effective compensation, also known as the 'Hull rule'.[67]

Adequate compensation is agreed to mean full compensation. Though 'full compensation' has not been defined, many commentators agree that it includes the full market value of the expropriated investment as well as the anticipated earnings or future profits.[68] In the valuation of expropriated investment, those advocating for the hull rule of compensation favor the market value as it takes

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owners, who had bought property in the country under the investment-friendly Diaz regime. Russia has also undertaken a comprehensive program of nationalization by the Bolsheviks after the October 1917 revolution. Agrarian reform in Eastern European countries following the first world war triggered dispute between Romania and Hungary as residents of Transylvania who had opted to retain their Hungarian nationality when the region was transferred to Romania found themselves dispossessed when the Romania government decided to extend to Transylvania a land reform program already in effect in other regions of Romania. See O. Thomas Johnson Jr., and Jonathan Gimblett, From Gunboats to BITs: The Evolution of Modern International Investment Law, in Karl P. Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011, (Oxford University Press, 2012), pp. 661-662

[66] Id., p. 662

[67] This difference of position was reflected in a correspondence between the Mexican Minister of Foreign Affairs and US Secretary of State Cordell Hull. The Mexican position emphasized the non discriminatory nature of the country's agrarian reforms and asserted that:

> [T]here does not exist in international law any principle universally accepted by countries, nor by the writers of treaties on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. Nevertheless, Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner; but the doctrine which she maintains of the subject […] is that the time and manner of such payment must be determined by her own laws.

For which Secretary Hull responded:

> The government of the United States merely adverts to a self evident fact when it noted that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose without provision for prompt, adequate and effective payment therefore.

For more on the correspondence, see Andreas F. Lowenfeld, International Economic Law, (Oxford University Press, 2008), pp 475-481 and Johnson and Gimblett, supra note 65, p 664.

[68] Sornarajah *supra* note 2, pp. 413-414

future profitability into account.[69] The meaning of 'appropriate compensation', however, was far from being agreed upon. Different legal publicists attempted at defining 'appropriate compensation'. Newcombe, for example, defines 'appropriate' compensation as signifying something less than full fair market value, providing more flexibility in the amount, manner and timing of payment.[70] Sornarajah also concurs with this view as he defines appropriate compensation standard as 'a reference to a flexible standard which could range from the payment of full compensation, the amount of future profits lost, to the payment of no compensation at all in circumstances where the foreign investor had visibly earned inordinate profits from his investment and the host state had no benefits at all from it.'[71]

The United Nations General Assembly Resolution 1803 under paragraph 4 recognizes the right of States to expropriate private property provided the owner is paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. The US argued that appropriate compensation under the Resolution is to mean adequate compensation[72] and concluded that the resolution represents a consensus of the economically developed and less developed countries.[73] To the dismay of the US the meaning of 'appropriate' was contested by other countries as some were suggesting that it allowed for less than full compensation. The adoption of the Charter of Economic Rights and Duties of States by the General Assembly in 1974 gave the matter a rest. The charter under article 2.2/c affirmed the right of each state:

> [t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, <u>taking into account its relevant laws and regulations and all circumstances that the state considers pertinent.</u> (emphasis added)

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[69] Id., p 451

[70] Newcombe and Paradell supra note 22, p. 377

[71] Sornarajah supra note 2, p. 446

[72] Ibid

[73] Johnson and Gimblett supra note 65, p. 680

Hence, under the charter, the obligation of a state that expropriates the property of an alien is, in the end, defined solely by the law of that state.[74] And the Declaration on the Establishment of a New International Economic Order, Resolution 3201, prohibits the home states from exerting any economic, political or other pressure on the taking state to get redress for their nationals.[75] Leaving aside the debate as to whether resolutions of the General Assembly have a law creating effect, these resolutions, at the least, indicate a desire on the part of the states to reject full compensation as the sole standard of compensation.[76]

We have seen earlier that BITs are currently important sources of international investment law which extend various forms of protection to foreign investors, one example being the guarantee against expropriation without compensation. They also cover standards of compensation. Contrary to the past experience where there is difference of position with regard to the standard of compensation for nationalization, BITs almost across the board, adopt similar standard of compensation for both large scale and small scale takings. And the standard adopted is 'prompt, adequate and effective' compensation or the Hull rule.[77] It is to be noted that not all BITs use similar language in their choice of a particular standard of compensation as many set a standard of full compensation based on 'market value', actual market value' or 'fair market value'.[78] Despite the difference in terminology used by the BITs, they all refer to the standard of 'full compensation'. This was asserted by international investment tribunals where the phrases 'prompt, adequate and effective compensation', 'fair market value' and 'actual value' were all interpreted as requiring full compensation.[79] One question that can be raised in this regard is whether the consistent acceptance of a particular norm in the bilateral investment treaties will convert the norm into a principle of international law.

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[74] Id., p. 681

[75] Resolution 3201, after recognizing the permanent sovereignty of States over their natural resources and the right to nationalization or transfer of ownership to its nationals, states in paragraph 4/e that 'no state may be subjected to economic, political, or any other type of coercion to prevent the free and full exercise of this inalienable right.'

[76] Sornarajah supra note 2, p. 446

[77] Id., p. 416

[78] Newcombe and Paradell, Supra note 22, p. 383

[79] Id., p. 384 referring to article 4(c) of Egypt Greece Treaty in Middle East Case, Article 1110 NAFTA in Metalclad, Vivendi and Siemens cases

It is unlikely that such a view can be taken of BITs in general as, despite the fact that BITs reflect considerable consensus with respect to their structure and main content, they show diversity in the actual wording of provisions and in the level of protection and treatment stemming from those provisions.[80] And again, the fact that many of them provide for valuation of compensation to be made by national authorities make the possibility of such treaties creating a norm as to the standard of compensation remote.[81]

4.1 Compensation Standard under BITs Signed by Ethiopia

From the perspective of developing countries, BITs are viewed as a tool for attracting foreign direct investment. As opposed to capital exporting countries whose goal of signing BITs is protection of present and future investment by their nationals, the basic goal of the capital importing developing countries is encouragement of future investment.[82] As such, even if their goal is different, developing countries subscribe to the idea of signing BITs with as many developed capital exporting countries as possible. Proliferation of south-south BITs has also been witnessed in the past years.

In an effort to attract foreign investment to the territory, the government of Ethiopia has been signing BITs with developed as well as developing countries. As of end of June 2012, the country has signed 29 BITs.[83] A cursory look at these BITs shows that the Hull rule of 'Adequate, Prompt and Effective' compensation is adopted in the BITs signed with developed as well as developing countries, albeit the wordings used are different. Many of the BITs qualify the term 'adequate' to refer to the 'market value' of the investment on the day the expropriation measure was taken or publicly known. While the BITs between Kuwait and Ethiopia and France and Ethiopia use the term 'actual value', the BITs between Sweden and Ethiopia, Netherlands and Ethiopia and Austria and Ethiopia use the term 'fair market value' in describing the word 'adequate'. Article 6/1/b of the BIT with Kuwait reads: 'Such compensation shall amount to the <u>actual value</u> of the expropriated

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[80] Anna Joubin-Bret, BITS of the Last Decade: A Ticking Bomb for States? In Catherine A. Rogers and Roger P. Alfors, (eds.), <u>The Future of Investment Arbitration</u>, (Oxford University Press, 2009), p. 150
[81] Sornarajah *supra* note 2, p. 416
[82] Salacuse *supra* note 5, p. 661
[83] UNCTAD *supra* note 6, p. 231

investment….' While the BIT between Netherlands and Ethiopia under article 6/c states: 'the measures are taken against prompt, adequate and effective compensation. such compensation shall represent the fair market value of the investment immediately before the moment the measure or impending measures become public knowledge….'

The BIT between India and Ethiopia uses a different terminology where it refers to 'fair and equitable compensation' but again qualifies it to mean the market value of the investment at time of expropriation. Article 5 in relevant part states:

> Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation …except… against fair and equitable compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge…(emphasis added)

With regard to the other two elements of the Hull Rule, the BITs specifically mention that the compensation must be effectively realizable (paid in a convertible currency) and payment must be made promptly (without undue delay). All in all, one can conclude that the BITs which are signed by the government of Ethiopia contain the Hull rule of compensation for both direct and indirect expropriations and nationalization.

4.2 Compensation Standard under Domestic Legislations

i. Investment Law

Regarding the standard of compensation, Article 25/2 of the investment proclamation seems to embrace the 'adequate' compensation standard in a similar manner as the BITs wherein it states 'adequate' compensation corresponding to the prevailing market value, shall be paid in cases of both expropriation or nationalization of an investment for public interest. But it becomes a bit complicated when we see the standard applicable for cases of nationalization under Article 25/3 of the same. The provision stipulates that 'nationalization' results in the payment of appropriate or adequate compensation. The question, then, will be what is the standard of compensation

in cases of nationalization; adequate or appropriate? Daniel argued that different adjectives added to the word compensation are there to give more emphasis rather than having separate legal significance.[84] The author of this article humbly disagrees with this assertion at least as far as compensation for nationalized foreign investments are concerned. As discussed in previous sections above, the terms 'adequate' and 'appropriate' compensation have significant difference in the jurisprudence of international investment protection and it has been a bone of contention for some years. In the face of all debate that took place between the capital importing and exporting countries and the stand taken by the General Assembly, it cannot be concluded that the prefixes do not have separate legal significance.

ii. Other Laws on Expropriation

In Ethiopia, like in many other countries, though the government has the power to expropriate the property of the landholder, such power is limited as such action can be taken only against the payment of compensation. In this regard, Article 40(8) of the FDRE Constitution puts an obligation on the government to pay in advance compensation commensurate to the value of the property expropriated. The standard that is employed in the Constitution is 'commensurate compensation', which unfortunately is not defined either in the Constitution or Proclamation 455/2005. The Merriam Webster Dictionary defines the term as 'equal in measure or extent or corresponding in size, extent, amount, or degree'[85] while the Amharic version of the Constitution refers to 'ተመጣጣኝ' compensation. Hence, we can understand the term 'commensurate compensation' to mean an amount which is equivalent to the value of the property expropriated, without expecting mathematical equality between the compensation and the value of the expropriated property.[86] This deviation from equivalence in payment of compensation is also comprised in the Civil Code provisions for compensation.

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[84] Daniel W/Gebriel, Compensation During Expropriation, in Muradu Abdo (Ed.), Land Law and Policy in Ethiopia Since 1991: Continuities and Changes, Ethiopian Business Law Series, Vol. 3, (November 2009), p. 206
[85] See <http://www.merriam-webster.com/dictionary/commensurate> [accessed on February 25, 2013]
[86] Muradu supra note 28, p. 381

The underlying goal of compensation, as envisaged in the Civil Code, is to put the affected person to the position s/he would have been had the harm complained of did not materialize. Article 2090 of the civil code stipulates 'unless otherwise provided, the damage shall be made good by awarding the victim an equivalent amount in damages' and the damages due shall be equal to the damage caused to the victim by the act giving rise to the liability.[87] Here, the whole idea of compensation is to put back the victim to the position he/she would have been had the harm complained of did not materialize. When this principle is applied to expropriation cases, 'the purpose of determining the amount of compensation would be to arrive at an amount which would neither permit the public to enrich at the cost of the affected person nor the latter to enrich at the detriment of the public…rather [I]t would be to put the affected person into the position that would have existed had the expropriation not taken place.'[88]

Article 2090 leaves a room for deviation from the rule of equivalent compensation when it provides the phrase 'unless otherwise' at the beginning. This indicates that the equivalence principle has an exception which may entail the award of compensation which is more or less than the harm incurred.[89] One such exception is expropriation. The Amharic version of Article 1474/1 of the Civil Code, in relevant part, states that '…መሬቱን ከማስለቀቅ የተነሳ *በደረሰውና በተረጋገጠው* ጉዳት ልክ ይሆናል።' This is translated to mean '…equal to the amount of *present* and *certain* damage caused by the expropriation'[90] (emphasis added). This provision limits compensation to present and certain damage. This limitation implies that future loss is not compensable although certain to occur[91] and as such consequential damage like loss of profit and transportation cost are disregarded.[92] This is in stark contrast to the concept of adequate compensation which is endorsed in the BITs signed by the country and the investment proclamation.

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[87] Article 2091 of the Civil Code

[88] Muradu supra note 28, p. 379

[89] George Krzeczunowicz, The Ethiopian Law of Compensation for Damages, (Addis Ababa University, Faculty of Law, 1977), p 79

[90] The English version of the code is different as it speaks of compensation equal to 'actual damage' caused by expropriation.

[91] Krzeczunowicz supra note 89, p. 173

[92] Muradu supra note 28, p. 380

This deviation from the principle of equivalence can also be traced in Proclamation 455/2005. The cumulative reading of articles 7 and 8 of the proclamation shows that the compensation will be paid for expropriated property situated on the land, permanent improvement to the land and permanent or temporary loss of the land. In the first category of compensable property falls buildings, fences, utilities, trees, crops, perennial crops, protected grass, etc. The basis for determining the amount of compensation for such property, which is located in rural areas, as provided under article 7/2 is the replacement cost of the property. In cases where the property expropriated is situated on urban land, the law provides for the lowest possible threshold for determining the amount of compensation when it stipulates under article 7/3 that the amount may not be less than the current cost of constructing a single room low cost house in accordance with the standard set by the concerned region. Here, the Regulation for payment of compensation[93] chips in by providing that the amount of compensation for a building will be determined on the basis of the current cost per square meter or unit for constructing a comparable building. Such amount will include the current cost for constructing floor tiles of the compound, septic tank and other structures attached to the building as well as the estimated cost for demolishing, lifting, reconstructing, installing and connecting utility lines of the building.[94] This applies for buildings located both in urban and rural areas. One should note that consequential damages like cost of removal, transportation, and erection of the building will only be paid as compensation for property that could be relocated and continue its service as before.[95]

The second category of compensable interest under the expropriation proclamation is permanent improvement made on land. Article 7/4 stipulates that the compensation for permanent improvement to land shall be equal to the value of capital and labor expended on the land. As such, this amount will be determined by computing the machinery, material and labor costs incurred for clearing, leveling and terracing the land, including the costs of water reservoir

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[93] Council of Ministers Regulation on the Payment of Compensation for Property Situated on Landholdings Expropriated for Public Purposes, Regulation No 135/2007
[94] Article 3/2 of Regulation 135/2007
[95] Article 7/5 of Proclamation 455/2005

and other agricultural infrastructural works in cases of permanent improvements to rural land.[96]

The permanent or temporary loss of land holding is also compensable. Proclamation 455/2005 provides for two possible ways of compensating the person whose land holding has been expropriated: land to land compensation and monetary compensation. While the proclamation under article 8/3 indicates that a substitute land will be given for a rural land holder whose holding has been expropriated, article 15 of the regulation specifically mentions that the possessor of rural land used for growing crops or a protected grass, whose holding has been expropriated for public purpose will, as much as possible, be provided with a plot of land capable of serving a similar purpose. This will be effected when the *wereda* administration confirms that a substitute land is available within its locality (Article 8/3). Land to land compensation is also available for expropriated urban land holding. According to article 8/4 of the Proclamation, an urban land holder whose land holding has been expropriated will be provided with a plot of urban land the size of which will be determined by the urban administration. The main source of controversy regarding land to land compensation in urban areas is the size and location of the substitute land.[97] There is no requirement that the substitute land should be of equal size as the expropriated land, which can lead to grudge of the expropriated land holder. And again, the expropriated land might be located in the centre of town where there is relatively developed infrastructure while the substitute land could be located in undeveloped area, adding to the dissatisfaction.

In addition to or in lieu of land to land compensation, as the case may be, the land holders of both rural and urban land are entitled to payment of displacement compensation. Displacement compensation for rural land holders represents the compensation given for the loss of land itself[98] and the amount of the compensation is equivalent to ten times the average annual income the holder secured during the five years preceding the expropriation. This amount will be limited to the average annual income secured during the five years in cases where the *wereda* administration confirms the availability of a substitute

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[96] Article 9 of Regulation 135/2007
[97] Daniel supra note 84, p. 228
[98] Id., p 215

land.[99] Where the expropriated property and land holding is located in urban areas, the holder will be paid a displacement compensation equivalent to the estimated annual rent of the demolished dwelling house, or be allowed to reside free of charge for one year in a comparable dwelling house owned by the urban administration.[100] This applies mutatis mutandis to demolished business house. When an urban land lease holding is expropriated prior to the expiry of the lease year, the holder will be provided with a similar plot of land and will be paid a displacement compensation equivalent to the estimated annual rent of the demolished dwelling house. Alternatively, he/she may be allowed to reside free of charge for one year in a comparable dwelling house owned by the urban administration.[101] The displacement costs paid to the urban land holder are to be paid in addition to the compensation paid for the property situated on the land.

4.3 Standard of Compensation for Unlawful Expropriation

International law recognizes the sovereignty of a State over resources found within its territory. And the taking of foreign property by the state is *prima facie* lawful; subject to conditions like public purpose, non discrimination, due process and payment of compensation.[102] Two questions can be raised in relation to the last element. First, would the failure of the state to pay compensation for the expropriated property, while all the other three conditions are fulfilled, make the expropriation illegal? Some commentators observe that numerous awards of the Iran-United States Claims Tribunal "*recognize the payment of prompt compensation to be a consideration relevant to the lawfulness of a taking under customary international law*".[103] On the other hand, authors like Sornarajah argue that the non-payment of compensation will not make the expropriation illegal provided the other conditions are fulfilled; rather, unlawful expropriation creates an obligation to pay restitutionary

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[99] Article 8/1 and 8/3 of Proclamation 455/2005. The justification for fixing this amount is unknown. See Daniel for further discussion on the argument whether such amount is commensurate to the property right lost, Id., p 216.
[100] Article 8/4/b of proclamation 455/2005. Where the house demolished is a business house, this provision applies mutatis mutandis.
[101] Article 8/4
[102] Sornarajah supra note 2, p. 406
[103] Brower CN and Brueschke JD, The Iran-United States Claims Tribunal, (Kluwer Law International, The Hague, 1998), p. 499 as cited by UNCTAD supra note 46, p. 43

damages. [104] The practice of the European Court of Human Rights also aligns to this approach. Accordingly, the court distinguishes between inherent illegality of a taking, for example a taking which is not in the public interest, and illegality due to the non-payment of compensation wherein the first category triggers automatic application of a higher compensation standard.[105]

The second question with regard to this element relates to the rule that will be followed for compensation in cases of illegal/unlawful takings. The PCIJ in Chorzow Factory Case laid down an important principle of compensation for illegal taking. It stated

> …reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed…. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[106]

This principle has been an important principle in the determination of compensation to be paid for illegal taking as it has been employed by many international tribunals, including the Iran-US Claims Tribunal. Implementing this principle in expropriation cases requires the consideration of *damnum emergens*, the value of the expropriated enterprise, including tangible property, contract rights, and intangible valuables such as business good will; and *lucrum cessans*, lost profits.[107] Accordingly, the foreign investor whose enterprise has been illegally expropriated is entitled to the payment of the value of the expropriated enterprise as well as a reasonable profit that has been lost. This is reflected in different international decisions which declare that it is '… universally accepted rule of law that an investor cannot be fully compensated for the going concern value of his expropriated interests unless he is awarded

[104] Sornarajah supra note 2. P. 364
[105] UNCTAD supra note 46, p. 44
[106] Case Concerning the Factory at Chorzow (Germany v Poland), PCIJ Report Series A, No 13, (September 13, 1928), p 47
[107] Reisman and Sloane supra note 33, p. 136

both the damage that has been sustained as a result of the taking and the reasonably ascertainable 'profit that has been missed'.'[108]

BITs adopt the Hull Rule of compensation for direct and indirect expropriations. In some forms of indirect expropriation, like in the case of creeping expropriation, one can identify illegal taking as it involves an accumulation of acts and omissions over time which depreciates the value of the property, with the state denying existence of expropriation and hence subsequent failure to pay compensation. And again, it is difficult to see how an expropriation accomplished by a series of ostensibly valid measures that collectively deprive an investor of its property right, could be considered to have fulfilled the due process requirement for a lawful expropriation.[109] This leads us to the conclusion that in cases of creeping expropriation, the Hull rule of compensation must be seen in light of the principle devised in the Chorzow Factory case.

What we have under the Hull rule is the requirement that compensation must be 'adequate, prompt and effective'. In many of the BITs 'adequate' is qualified to mean the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known.[110] The market value of an enterprise in modern economic terms is not the enterprise itself but rather the stream of profits it can be expected to produce over its lifetime.[111] At this point one may raise a question as to the applicability of the Chorzow Factory principle as it will entitle the investor to be over compensated as he/she is entitled to the value of the expropriated property (which includes the stream of profit) and lost profit. Some argue that despite the double count, the distinction serves a useful policy purpose in so far as it permits international tribunals to penalize egregious expropriations and, hopefully, to deter them in the future.[112]

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[108] Brice M Clagett, Just Compensation in International Law: The Issue before the Iran-US Claims Tribunal, in Richard B. Lillich, (ed.), IV The Valuation of Nationalized Property in International Law, (1987), p 42 as cited by Riseman and Sloane supra note 33, Footnote no 98
[109] Id., 137
[110] The BITs Ethiopia signed with Germany, Belgian-Luxembourg Economic Union and Equatorial Guinea are just few of the examples.
[111] Reismand and Sloane supra note 33, p 137
[112] Ibid.

Coming to the issue of indirect expropriation under Ethiopian law, as indicated in section above, the domestic legislations on expropriation do not recognize the concept in a similar manner as it is reflected in the BITs the country signed.

5. Conclusion

Foreign investment is a vital tool for economic growth and prosperity of states. All countries, whether rich or poor, seek foreign capital as an important element for the development of their economy. The flow of foreign investment is influenced by, among other things, the legal framework the host state provides. The legal framework on the promotion and regulation of investment is derived from the national law of the host state, the contract the host state concludes with the individual investor and international law, particularly bilateral investment treaties. Achieving the goal of investment promotion and protection requires coherence among the different sources of law for investment. Integrating the investment policy framework into an overall development strategy and ensuring coherence among the three sets of rules is challenging. In this respect, UNCTAD proposes that there should be coherence and synergy at both the national and international level. If what is committed internationally by the host state is different from what is provided in the host state's municipal law, which is equally applicable, then the protection accorded on the international level loses its meaning.

In this short article, an attempt is made to show that this synergy and coherence is lacking in the international and national investment policy of Ethiopia. This is particularly so in areas of expropriation and standard of compensation. While on the international level the BITs recognize the concept of indirect expropriation, this concept is understood somehow differently in the national legislation. And again, while the BITs adhere to the 'adequate, prompt and effective' standard of compensation, otherwise known as 'Hull Rule', the national legislation seems to use both the Hull Rule and 'adequate standard'; concepts which entail different obligation. This is despite the fact that all policies that impact on investment need to be coherent.

Systematizing Knowledge about Customary Laws in Ethiopia

Gebre Yntiso∗

1. Introduction

Ethiopia has numerous customary laws developed and practiced since time immemorial. Since recent years, these customary institutions of dispute and conflict handling mechanisms received growing attention as evidenced by an increase in research activities, publications, and policy interest. In 2008, the French Center for Ethiopian Studies published an edited volume titled 'Grassroots Justice in Ethiopia'.[1] Two years later, the Ethiopian Arbitration and Conciliation Center published two edited volumes and one annotated bibliography on 'Customary Dispute Resolution Mechanisms in Ethiopia'.[2] In 2013, the Justice and Legal Systems Research Institute published an edited volume titled 'Law and Development, And Legal Pluralism'.[3] Of the many research projects of masters and doctoral programs at Addis Ababa University, some focused on customary laws in Ethiopia.[4] Why is there so much interest now on a theme that seems to have been overlooked for so long?

The rise of interest in customary laws may be explained in terms of several factors. First, there exists a growing realization that customary laws are deeply rooted and widely used in all corners of the country despite the introduction of the codified modern legal system (largely adopted from Europe) in the 1960s. Several studies point to the fact that rural communities (to a large extent) and

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∗Department of Social Anthropology, College of Social Sciences, Addis Ababa University. My deepest appreciation is due to those who contributed to this article directly or indirectly. The paper benefited from inputs by Dr. Susanne Epple (my wife), Dr. Yeraswork Admassie, Dr. Kassahun Berhanu, and the two anonymous reviewers, whose scholarly criticisms and constructive comments were invaluable.

[1] A. Pankhurst and Getachew Assefa (eds.), Grass-roots Justice in Ethiopia (2008), French Center for Ethiopian Studies.

[2] Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), Customary Dispute Resolution Mechanisms in Ethiopia (2011; 2012, vol. 2), Ethiopian Arbitration and Conciliation Center.

[3] Elias Stebek and Muradu Abdo (eds.), Law and Development, And Legal Pluralism in Ethiopia (2013), The Justice and Legal Systems Research Institute.

[4] Fekade Azeze, Assefa Fiseha, and Gebre Yntiso (eds.), Annotated Bibliography of Studies on Customary Dispute Resolution Mechanisms in Ethiopia (2011), The Ethiopian Arbitration and Conciliation Center.

urban residents (to some extent) prefer the customary laws to the formal counterpart.[5]

Second, the global tendency to promote indigenous knowledge since the 1970s led to the recognition of the customary laws as part of the indigenous knowledge repertoire along with others, such as traditional medicine and folk environmental knowledge.[6] In short, the global trend of promoting indigenous knowledge and the rights of local communities contributed to the rise in research interest in customary laws as well.

Third, the Ethiopian Government's official determination since the early 1990s to respect cultural diversity and the constitutional recognition of customary laws (Art. 34:5 and 78:5)[7] also created a favorable environment for research undertaking. Article 34:5 reads, "This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute." There exists also a growing interest on the part of some Ethiopian researchers to unveil the customary laws of their own groups.

Fourth, research interest in customary laws has increased due to the inter-ethnic, inter-religious, and political conflicts that Ethiopia has been experiencing in last two decades. The difficulty of resolving such conflicts through the state law warrants the need to use customary mechanisms by government authorities. Tirsit Girshaw wrote, "Most wars today are fought within rather than between countries. Hence, it is not only important but also compulsory for governments … to think about indigenous conflict resolution mechanisms, since they are very powerful tools for solving such conflicts."[8]

Finally, before the enactment of the 2009 Charities and Societies Proclamation that limits the involvement of certain civil society organizations in advocacy

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[5] Pankhurst and Getachew (eds.), cited above at note 2, p. v; Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 4, (2011), p.xii.

[6] A. Pankhurst and Gebre Yntiso, "Local Knowledge and Relevant Technology in Ethiopia", in Shiferaw Bekele (ed.), Culture and Development in Ethiopia, (2012), p.81-82 (in Amharic).

[7] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 34:5 and 78:5, Proc. No. 1, Neg. Gaz. Year 1, No. 1.

[8] Tirsit Girshaw, "Indigenous Conflict Resolution Mechanisms in Ethiopia", in Ministry of Federal Affairs (ed.), First National Conference on Federalism, Conflict and Peace Building , (2004), p.50.

and rights issues, many non-governmental organizations used to work on peace initiatives and sponsor projects and studies on dispute and conflict handling issues.[9] In short, availability of funds created a favorable environment for research engagement in this field.

It can be argued that these golden opportunities for research and publication on customary laws apparently lacked conceptual clarity; common understanding of the core values and issues worth exploring; common recognition of the challenges and limitations of using customary laws; and clear picture of their potentials and prospects. The failure to differentiate such key concepts as dispute vs. conflict and dispute settlement vs. conflict resolution has been hampering communication and common understanding. Most of the studies undertaken to date are largely isolated ethnographies. There is deficiency of a comprehensive perspective to formulate social theories and/or social policies. Gabriele Hoehl wrote, "lacking systematic knowledge and proper concepts of how to handle conflicts…entities [in Ethiopia] are mostly unable to coordinate their activities even towards crisis management."[10] Given the growing interest to understand customary laws by scholars and government sectors, more studies and publications are expected in the future. Thus, it is high time to rectify the existing deficiencies and develop systematic research strategies.

This paper is written with firm conviction that research on customary laws in Ethiopia and beyond could be systematized to produce results that are amenable to comparative analysis, scientific generalization, and practical application. The idea of knowledge systematization (with latitude for deviation and adaptation) can be accomplished though clarity of concepts that have been used interchangeably and confusingly; identification of the values and virtues that enhance the legitimacy and enduring popularity of customary laws; and promotion of comparative research to pave the way for comprehensive understanding of customary laws.

This paper is primarily based on literature review. Limited ethnographic accounts based on the writer's own research have also been used to provide

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[9]Gebre Yntiso, Understanding the Dynamics of Pastoral Conflict in Lower Omo Valley, (2011), p.82.

[10] G. Hoehl, "Exploring and Understanding Conflicts", in Ministry of Federal Affairs (ed.), First National Conference on Federalism, Conflict and Peace Building, (2004), p.114.

illustration. Apart from the general literature review, the author significantly benefited from three volumes on customary laws in Ethiopia that he co-edited. Between September 1988 and December 1998, he undertook doctoral dissertation research in Metekel Zone (Benishangul-Gumz Region, Ethiopia), which enhanced his knowledge about the customary laws of the Gumz people. In 2010 and 2011, the writer had the opportunity to carryout research on intra- and inter-ethnic dispute/conflict handling mechanisms among the Dassanech and the Nyangatom people in South Omo Zone, Southern Nations, Nationalities, and Peoples Region (SNNPR), Ethiopia. Field data were collected through key informant interviews, focus group discussions, observations, and document reviews.

2. Towards Conceptual Clarity

The Concept of Alternative Dispute Resolution (ADR) was conceived in the United States by legal practitioners and law professors with the intention to reform the justice system through the introduction of non-litigant methods.[11] In England, the history of voluntary conciliation and arbitration goes back to 1850 where these methods were used to address industrial disputes.[12] The early advocates of ADR with the reformist agenda in the US sought the non-litigant model from customary laws, which were viewed as more humane, therapeutic, and non-adversarial.[13] Ugo Mattei and Laura Nader [14] argued that ADR was used as a disempowering tool "to suppress people's resistance, by socializing them toward conformity by means of consensus-building mechanisms, by valorizing consensus, cooperation, passivity, and docility, and by silencing people who speak out angrily." Historical parallel and resemblance to this argument comes from the 1850s England that witnessed "the highest hopes of abolishing strikes completely by the most ruthless application of arbitration".[15]

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[11] L. Nader, "Controlling Process in the Practice of Law: Hierarchy and pacification in the movement to reform dispute ideology", Ohio State Journal on Dispute Resolution, vol. 9, (1993), p.1.

[12] J. Hicks, "The Early History of Industrial Conciliation in England", Economica, No. 28, (1930), p.26.

[13] K. Avruch, "Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice", Conflict Resolution Quarterly, Vol. 20, No. 3, (2003), p.352. Also read: K. Avruch, A Historical Overview of Anthropology and Conflict Resolution, (http://www.aaanet.org/press/an/0907/avruch.html) last visited on 20 March 2014.

[14] U. Mattei and Laura Nader, Plunder: When the rule of law is illegal, (2008), p.77.

[15] Hicks, cited above at note 12, p.26.

The new profession of ADR in the US and the historical application of some of the methods in England are different from the customary laws practiced in Ethiopia and perhaps in other non-western countries. While the western ADRs were instituted later in time to address disputes and conflicts outside of the formal courts, the customary laws in Ethiopia existed long before the introduction of the formal law. Therefore, the common ADR terminologies such as dispute, conflict, negotiation, mediation, arbitration, conciliation, dispute settlement, conflict resolution, conflict management, and conflict transformation (all western concepts) should be used in customary law studies after scrutinizing and redefining their meanings, approaches, and purpose.

It is to be recalled that, half a Century ago, two prominent anthropologists (Paul Bohannan and Max Gluckman) espoused a debate on whether universal categories and terminologies should be used to depict the legal systems of different societies. Bohannan advocated for the use of native terms to be accompanied by ethnographic meaning, arguing that using universal categories act as a barrier to understanding and representing the legal systems in different cultures.[16] Gluckman, on the other hand, argued in favor of translating native concepts into English, stating that excessive use of local terms serve as a barrier to cross-cultural comparison of legal practices.[17] As Kevin Avruch[18] rightly stated, the etic approaches that allow comparative analysis and the emic approaches that provide much deeper and contextualized insights are equally important in dealing with dispute/conflict.

It is the conviction of the author of this paper, that the translation of local terminologies into Anglo-American equivalents makes sense only when the English meanings are in good order. However, the vast literature on customary laws in Ethiopia includes ADR terms that have been used interchangeably and confusingly. Since the terminological usages would have discrete implications for the outcome of a dispute/conflict situation, ensuring conceptual clarity becomes indispensable. For analytical purpose, the terms that require differentiation are categorized into three: types of incompatibility (dispute and

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[16]P. Bohannan, "Ethnography and Comparison in Legal Anthropology", in Laura Nader (ed.), Law in Culture and Society, (1969), p. 403.
[17] M. Gluckman, "Concepts in the Comparative Study of Tribal Law", in Laura Nader (ed.), Law in Culture and Society (1969), p. 353.
[18] K. Avruch, Culture and Conflict Resolution, (1998), p.60.

conflict), methods of handling incompatibility (negotiation, mediation, arbitration, and conciliation), and approaches to ending incompatibility (dispute settlement, conflict management, conflict resolution, and conflict transformation). This section attempts to clarify the meanings of these concepts; find out whether they have equivalent practices in Ethiopia; and reflect on the aptness of their usage in the Ethiopian literature. In this paper, as part of the knowledge systematization effort, the concept of 'customary laws' has been used intentionally avoiding the interchangeable use of such terminologies as 'indigenous laws', 'traditional laws', 'informal laws', and 'customary dispute/conflict resolution mechanisms.'

2.1 Types of Incompatibility

In the literature, there exists lack of uniformity in the use of the terms dispute and conflict. While some writers stress differences between the two, others use them interchangeably.[19] In the Ethiopian literature on customary laws, the terms dispute and conflict have not been adequately differentiated. In the book 'Grassroots Justice in Ethiopia', the titles of 10 out of 11 chapters carry the term dispute,[20] but nowhere in the volume it is made clear whether the choice was meant to convey the message that the issues discussed in the book are about disputes, not conflicts. Likewise, the two volumes on 'Customary Dispute Resolution Mechanisms in Ethiopia'[21] failed to differentiate the usage of the two concepts. Many chapter contributors to these two books and others published in Ethiopia used dispute and conflict without providing operational definitions and at times interchangeably.

In order to ensure conceptual clarity in the field of dispute/conflict handling research, this paper adopted John Burton's[22] approach that describes dispute as a short-term disagreement between two persons or groups over a specific set of facts and/or issues that are negotiable in nature, and conflict as a long-term and deeply rooted incompatibility associated with seemingly "non-negotiable" issues between opposing groups or individuals. Non-negotiable issues include, among others, denial of basic human rights and deprivation of essential

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[19] B. Spangler and Heidi Burgess. Conflicts and Disputes, (http://www.beyondintractability.org/essay/conflicts-disputes) last visited on 12 May 2014.
[20] Pankhurst and Getachew (eds.), cited above at note 1, p. i-ii.
[21] Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 2.
[22] J. Burton, Conflict: Resolution and Prevention, (1990), p.2

economic resources such as land and water.[23] A specific dispute, if not settled, could turn into conflict, not the other way round. It is beyond the scope of this paper to delve into the argument that conflict is inevitable and useful for change.

2.2 Methods of Handling Incompatibility

The common methods employed to address individual or group disputes/conflicts outside of the formal court include negotiation, mediation, conciliation, and arbitration.[24] The four methods of alternative dispute resolution, as practiced in western societies, vary in their respective meanings and approaches. In the Ethiopian literature on customary laws, these terms are not sufficiently differentiated from each other and from their usage in ADR literature. Tirsit stated, "Mechanisms like reconciliation and arbitration are common features of indigenous conflict resolution mechanisms"[25] Wodisha Habtie noted that negotiation, mediation, and arbitration exist as distinct methods among the Boro-Shinasha.[26] Jetu Edossa wrote, "In Ethiopia, the use of mediation process as a customary method of dispute resolution has been practiced for centuries."[27] It is not clear whether these three authors used those terms after confirming their exact matches with ADR usage.

In some studies, conciliation and mediation are used interchangeably as if they are the same.[28] There are works that show the existence of a connection between mediation and arbitration. For example, Dejene Gemechu wrote, "[T]he *qaalluu* court mediates and assists the disputants to negotiate, but whenever its efforts fail, it evolves into arbitration. Taking into consideration

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[23] B. Spangler, Settlement, Resolution, Management, and Transformation: An Explanation of Terms,(http://www.beyondintractability.org/essay/meaning-resolution) last visited on 12 May 2014.

[24] A. Sgubini, Mara Prieditis and Andrea Marighetto, Arbitration, Mediation and Conciliation: Differences and similarities from an International and Italian business perspective, (http://www.mediate.com/articles/sgubinia2.cfm) last visited on 13 January 2014.

[25]Tirsit Girshaw, cited above at note 8, p.49.

[26]Wodisha Habitie, "The Nèèmá - Conflict Resolution Institution of the Boro-Šinaša", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), Customary Dispute Resolution Mechanisms in Ethiopia (2011), p.438-440.

[27]Jetu Edossa. "Mediating Criminal Matters in Ethiopian Criminal Justice System: The prospects of restorative justice, Oromia Law Journal, vol. 1, No. 1, (2012), p.100.

[28]Dejene Gemechu, "The Customary Courts of the Waliso Oromo", in Gebre Yntiso, Fekade Azeze and Assefa Fiseha (eds.), cited above at note 26, p. 256-257.

the interests of both parties, the final decision is pronounced by the judges."[29] Among the Nuer, according to Koang Tutlam, kinsmen and elders arrange mediation to determine the fine and ask the culprit to pay compensation to the victim.[30] In the western ADR context, as discussed later, mediators do not suggest a solution (conciliators do suggest non-binding agreement ideas), and arbitration results are final and legally binding.

The interchangeable and differential usage of these concepts clearly suggests the existence of a challenge associated with borrowing foreign terms to represent local practices in different contexts without establishing comparability. This section attempts to discuss the meanings of the four concepts and the actual ADR proceedings (private in nature) so that researchers could establish the presence or absence of resemblance with the proceedings of customary laws (public in nature) before using them.

Negotiation is a mechanism where the parties that are directly involved meet to resolve their differences and reach an agreement on their own without the involvement of a third party.[31] If conducted without influence and intimidation, negotiation is known to be the most efficient and costless approach to handle a dispute/conflict. Since it is conducted based on the principle of give-and-take and willingness to ease tension, private negotiators are expected to opt for compromise. Apart from this specific and narrow usage, the term negotiation is flexibly and broadly employed to refer to any discussion aimed at finding a middle ground, be it in the context of mediation, conciliation, or early phase of arbitration.

Mediation as dispute/conflict handling method involves an appointment of a neutral and impartial third party (a mediator, often a trained person or a legal expert) to facilitate dialogue between conflict parties and help them reach at a mutually acceptable agreement without imposing a biding solution.[32]

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[29] Id., p.263.
[30] Koang Tutlam, "Dispute Resolution Mechanisms of the Nuer", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), id., p. 412.
[31] Assefa Fiseha, "Business-related Alternative Dispute Resolution Mechanisms in Addis Ababa", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), Customary Dispute Resolution Mechanisms in Ethiopia, (2012), vol. 2, p.245.
[32] M. LeBaron-Duryea, Conflict and Culture: A Literature Review and Bibliography, (2001), p. 121.

Mediation is often preferred over litigation because the former is faster, fair, efficient, cheaper, confidential, and addresses the unique needs of parties. The main principles of mediation are voluntarism, being non-binding, confidentiality, and being interest-based. The parties are free to reach at or withdraw from negotiated agreements. In order to facilitate the resolution of a conflict, a mediator performs a series of activities. The mediator is expected to understand the perspectives of the parties, set ground rules for improved communication, encourage them to discuss in good faith and articulate their interests or concerns, remind them to make decisions on their own, and convince them to remain committed to peaceful result. In meditation parties may be represented by lawyers who argue their case, advocate for their clients, and negotiate on their behalf.

The 1960 Civil Code of Ethiopia does not clearly recognize mediation procedure. According to Assefa Fiseha, it appears that the Ethiopian Civil Code combines mediation and conciliation.[33] The Ethiopian Arbitration and Conciliation Center is reported to have prepared and submitted a draft mediation law, which is under consideration by committees in the House of Peoples' Representatives.[34] One might wonder whether mediation as practiced in the west is consistent with the customary laws where non-professionals handle disputes/conflicts in public. Researchers of customary laws should also bear in mind the fact that a mediator in the ADR context would not dictate the process, make a judgment, or suggest any solution.

Conciliation (or reconciliation) is another dispute/conflict handling method that involves an appointment of a neutral and impartial third party (a conciliator) to assist parties to reach a satisfactory agreement. Conciliators are appointed based on their experiences, expertise, availability, language, and cultural knowledge. Louis Kriesberg and Bruce Dayton stated that there are four important dimensions of reconciliation that parties expect for the process to succeed: truth, justice, regard and security.[35] Conciliation and mediation have a lot in common, and sometimes the two terms are used

[33]Assefa Fiseha, cited above at note 31, p. 247.

[34]Girmachew Alemu, Introduction to the Ethiopian Legal System and Legal Research, (http://www.nyulawglobal.org/globalex/ethiopia.htm) last visited on 15 April 2014.

[35] L. Kriesberg and Bruce Dayton, Constructive Conflicts: From Escalation to Resolution, (2012), p.305.

interchangeably.[36] In both methods, the parties retain the power to select their conciliators, the venue, the language, the structure, the content, and the timing of the proceedings. Both techniques are flexible, time and cost-efficient, confidential, and interest-based. The parties also retain autonomy to make the final decision without imposition by a third party. The difference between conciliation and mediation is that a conciliator could play direct/active roles in providing non-binding settlement proposal. The Ethiopian Civil Code (Articles 3318-3324)[37] duly recognizes the conciliation procedure and provides details about, among others, the role of conciliators and the conciliation proceedings.

Arbitration is the fourth major dispute/conflict handling method where parties voluntarily present their disagreement to an unbiased third party arbitrators or arbitral tribunals. Arbitrators are expected to apply the law and start the proceedings after receiving a written consensus (arbitration agreement) from the parties on the content of their disagreement and their willingness to accept in advance the 'arbitral award' - the verdict issued after hearing. Arbitral proceedings are conducted under strict rules of confidentiality (not open to the public). Like mediation and conciliation, arbitration is supposed to be efficient, easier, faster, cheaper, and relatively flexible. Parties are free to choose their arbitrators, the venue, the language, and the timing of the arbitral proceedings. Arbitration is different from mediation and conciliation in that (1) arbitrators have the power to administer a legally enforceable award and (2) parties lose control over their ability to make a decision on their own. Arbitral awards are enforced even internationally because of the 1958 New York Convention on the Recognition of and Enforcement of Foreign Arbitral Awards. As practiced in the West, the decisions of arbitrators are final and binding and cannot be reversed even by the formal courts unless the arbitration agreements were invalid.

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[36] C. Morris, Definitions in the Field of Conflict Transformation, (http://www.peacemakers.ca/publications/ADRdefinitions.html#reconciliation) last visited on 13 January 2014.

[37] Civil Code of the Empire of Ethiopia, 1960, Art.3318-3321, Proc. No. 165, Neg. Gaz. Year 19, no. 2.

Arbitration as an ADR method is legally recognized in Ethiopia and has been used to handle different disputes/conflicts.[38] Although the procedure seems to be similar to western practices, Assefa noted that arbitration in the Ethiopian context is becoming more expensive and that arbitral awards are not necessarily final and binding as courts tend to accept appeals from parties dissatisfied with the decisions of arbitrators.[39]Such court interference is inconsistent with the principles of arbitration and unfairly diminishes the relevance and credibility of the method. It would be interesting to know whether there exist customary courts in Ethiopia that apply the formal law, require the submission of written arbitration agreements, and conduct hearings protected from the public.

2.3 Approaches to Ending Incompatibility

The ending of a conflict takes four major forms: dispute settlement, conflict management, conflict resolution, and conflict transformation. In the Ethiopian literature, the terms dispute settlement, conflict resolution, and conflict management are not sufficiently differentiated (sometimes used interchangeably), while conflict transformation is a new concept the local equivalent of which is yet to be found. The following discussions are expected to clarify the common usage of the four approaches thereby avoiding confusion and interchangeable use.

Dispute Settlement is an approach that removes dispute through negotiation, mediation, conciliation, and arbitration. A dispute is settled (rather than resolved, managed or transformed) because it represents an easily addressable short-term problem that emanates from negotiable interests. Establishing the facts of the dispute and satisfying the interests of disputants are among the basic conditions to be met for successful dispute settlement. Depending on the methods employed, a third party may use persuasion, inducement, pressure, or threats to ensure that the disputants arrived at satisfactory settlement. A dispute settlement strategy aims at ending the dispute through compromises and concessions without addressing the fundamental causes or satisfying the basic

[38]Tilahun Teshome, "The Legal Regime Government Arbitration in Ethiopia: A synopsis", Ethiopian Bar Review, vol. 1, No. 2, (2007), p. 128-30; Civil Code of the Empire of Ethiopia, cited above at note 37, Articles 3325-3345.
[39]Assefa Fiseha, cited above at note 31, p. 253 & 255.

demands of the disputants.[40] Since it does not change the existing structures and relationships that caused disputes, the efficacy and durability of the settlement approach (compared to the resolution and transformation approaches) are considered to be limited.

Conflict Management refers to the process of mitigating, containing, limiting or controlling conflict temporarily through third party intervention. Conflict management steps are taken with the recognition that conflicts cannot be quickly resolved, and with the conviction that the continuation or escalation of conflicts can be somehow controlled as an interim measure. The conflict management process would succeed only when the conflicting parties have respect for the integrity, impartiality, and ability of the third party. However, the strategy neither removes conflict nor addresses the underlying causes.[41] As Merton Deutsch noted, the main intention is to make the situation more constructive and less destructive to the conflicting parties through lose-lose, win-lose, or win-win results.[42] Conflict management must soon be followed by other strategies to resolve the problem permanently.

Conflict management as defined in ADR has equivalent cultural and religious practices in Ethiopia. For example, among the Orthodox Christians, a priest would hold the holy cross and pronounce religious injunction on adversaries to temporarily halt offensive actions. In some cultures, offenders take refuge with individuals and institutions believed to have cultural and religious sanctity to protect them against revenge.[43]

Conflict Resolution is an approach that removes the underlying causes of conflict decisively. Peter Wallensteen defines conflict resolution as "a situation where conflicting parties enter into an agreement that solves their central incompatibilities, accept each other's continued existence as parties and ease all violent action against each other."[44] From this definition it is apparent that

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[40] J. Burton and Frank Dukes, Conflict: Practices in Management, Settlement and Resolution, (1990), p.83-87.
[41] J. Lederach, Preparing for Peace: Conflict Transformation Across Cultures, (1995), p. 16-17.
[42] M. Deutsch, The Resolution of Conflict: Constrictive and Destructive Processes, (1973), p. 8 & 17.
[43] Alemu Kassaye, "Blood Feud Reconciliation in Lalomama Midir District, North Shoa", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.),cited above at note 26, p.166; also see Gebre Yntiso, cited above at note 9, p.41.
[44] P. Wallensteen, Understanding Conflict Resolution (3rd ed., 2012), p.8.

conflict resolution follows a mutual understanding about a problem to be solved and a firm commitment to address the root causes of conflict. This can be accomplished through changes in behaviors, attitudes, structures, and relationships that incite or perpetuate conflict. The resolution approach leads to a long-term solution. The role of a third party is to facilitate communication and enable conflict parties make a comprehensive agreement. Resolving conflicts, as opposed to settling disputes, demands more than establishing the facts or satisfying the interests of the parties. It is equally important to note that conflict resolution may not remove all differences or may not lead to major structural changes to avoid future relapse of conflict.

Conflict Transformation may be described as the deepest level of change that results from improved and accurate understanding of the conflict. Conflict transformation underlines the need for major structural and relational changes to avoid relapse of conflicts due to similar causes. Apart from the structures and relations, those issues and interests that led to conflicts are expected to change to allow the establishment of a new system and a new environment. In this regard, the transformational approach seems to have an interest in conflict aftermath or post-conflict peace building processes. John Paul Lederach, the leading advocate and proponent of conflict transformation, wrote:[45]

> Transformation provides a more holistic understanding, which can be fleshed out at several levels. Unlike resolution and management, the idea of transformation does not suggest we simply eliminate or control conflict, but rather points descriptively toward its inherent dialectic nature. Social conflict is a phenomenon of human creation, lodged naturally in relationships. It is a phenomenon that transforms events, the relationships in which conflict occurs, and indeed its very creators. It is a necessary element in transformative human construction and reconstruction of social organization and realities.

The gist of Lederach's argument is that conflict (created by people in some kind of relationships) transforms the creators and the relationships. If unchecked or left alone, it could have destructive consequences for the conflicting people. However, such adverse effects (hostile relations and negative perceptions) can be modified through long-term and sustained processes that involve education, advocacy, and reconciliation to improve

[45] J. Lederach, cited above at note 41, p.17.

mutual understanding and transform the people, relationships, and structures for better. Hence, conflict transformation is explained more in terms of healing and major structural change with positive implications for social transformation and nation building.

3. Values and Virtues of Customary Laws

The studies undertaken thus far in Ethiopia indisputably reveal that customary laws are deeply rooted in cultural and religious values and widely practiced throughout the country. Especially in the countryside, it seems that comparatively fewer cases are taken to the state court[46] and that most plaintiffs (more than 76% according to Dejene) withdraw cases filed with formal institutions before proper investigation.[47]It is equally important to acknowledge the fact that the degree of resistance to the formal law depends on the level of state penetration or the intensity of state influence, which gets weaker from the center to the periphery. For example, the researcher's own observations in Metekel Zone (Benishangul-Gumz Region) and parts of South Omo Zone (SNNPR) point to the popularity and intensive use of customary laws. Although the activities of customary courts are not legally sanctioned, many professionals and practitioners in the justice sector sincerely admit today that these courts have been helpful in terms of reducing the workload of the formal courts. In their efforts to address inter-ethnic conflicts, government officials have been openly co-opting influential customary authorities and judges of customary laws. This section focuses on the core values, perspectives, and functions that contribute to the perpetuation, resilience, and in some cases dominance of customary laws. Some five key variables have been identified to show the merits of customary laws in Ethiopia. It is hoped that future researchers in the field would find these variables to be useful entry points to build on.

3.1 Restoration of Social Order

In places where people live in settings of strong networks of kinship, clanship, ethnicity, and other social groupings, disputes/conflicts between individuals are

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[46]Woubishet Shiferaw, "Spirit Medium as an Institution for Dispute Resolution in North Shoa: The Case of Wofa Legesse", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.),cited above at note 26, p.194-195.
[47]Dejene Gemechu, cited above at note 28, p.271.

likely to engulf much larger groups. Unlike the formal courts that define justice in terms of penalizing perpetrators, customary courts focus on larger groups (e.g., families, communities, clans, etc.) that may have been drawn into the trouble from both the perpetrator's and the victim's sides. This is because discords are viewed not only as isolated individual differences to be addressed but also as disconcerting social disorder to be restored. The restoration of social order is ensured only when the larger groups, far beyond the actual perpetrators and victims, drawn into the dispute/conflict come to grips with it and move forward, leaving the trouble behind them. Hence, the deliberations of customary courts often end with repentance of the perpetrator's group and the forgiveness of the victim's group thereby bridging the social divide and healing the social scar.

In 1999, the author witnessed reconciliation processes between two Gumz families in the presence of their respective relatives and neighbors to resolve an adultery case. When a young married woman admitted to have been impregnated by a young man in the same village, the case was brought to the attention of elders and clan leaders, who immediately summoned the family and relatives of the impregnator and those of the young woman's husband (who was away from the village for education). The problem between the two families was resolved through repentance and forgiveness in the absence of the husband expected to agree to the deal upon his return to the village. From the books on customary laws that the author edited, it is apparent that families and large groups, in many parts of Ethiopia, are involved during the handling of disputes and conflicts initiated by individuals or small groups.[48]

The staging of a forum for group involvement in a customary peacemaking process is meant not only to resolve disputes/conflicts but also to avoid possible relapses and spillover effects, and ensure social order and community peace. Hence, justice and peace are served at the same time. It can be argued that in communities with a strong sense of social bonding and group loyalty, customary laws are better suited for transformation of hostility to solidarity at both individual and group levels without creating a winner-loser situation. In view of this fact, the customary laws exhibit irrefutable superiority over the

[48]Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 2.

formal law, which focuses only on the prosecution of the perpetrator, a measure that does not lead to community peace.

3.2 Quest for Truth

The second important quality of customary laws is their unique and unparalleled strength in discovering the truth that would otherwise pose challenges for the formal justice system. The police would find offences committed under secrecy and in the absence of any evidence to be difficult or impossible to investigate. In the context of customary laws, the victim's side is not expected to open up for discussion and forgiveness before the disclosure of truth. Hence, the primary role of customary judges is to discover the facts through confession or investigation. In closely organized communities, people do not hesitate to expose culprits, and it is not uncommon for family members to testify against their loved ones involved in unlawful acts. Customary courts rarely convict alleged perpetrators based on circumstantial evidence, and offenders rarely get away with wrongdoing for lack of witness/evidence.

Telling the truth is given high value for practical and religious reasons. On the practical side, the social life of people in communities is built around mutual trust. People make agreements and entrust things to each other without any third party in witness or any record in evidence. If the social contract of trust was allowed to crumble, the consequence for individuals and society at large would be grave. For example, untrustworthy individuals risk being dishonored and disgraced in their own families and communities. A society would become dysfunctional without its basic principles that govern the behaviors and actions of its members. Hence, there exists a great deal of social pressure to tell the truth.

Regarding the religious aspect, telling lies while under oath is associated with a betrayal of faith that might have supernatural consequences. The following quotes reveal the value attached to truth and the association with belief systems. Among the Nuer, "The disputants swear an oath of innocence and the person who doesn't tell the truth is bound to suffer misfortune."[49] Among the Waliso Oromo, "Customary courts attempt to prove the truthfulness of cases through the flow of information, directly from the disputants. Both parties are

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[49]Koang Tutlam, cited above at note 30, p. 425.

expected to be honest in providing information….It is believed that the *waaqa* easily identifies the truthfulness and falsity."[50] In short, customary laws employ divine weight as well to extract the truth.

3.3 Public Participation

The notion of public participation in the context of customary laws is explained in terms of the involvement of community members in a dispute/conflict handling process. As opposed to the closed and confidential ADR proceedings of the west, customary laws allow people to attend the public deliberations and provide opinion about the validity or falsity of evidence provided and/or the fairness of verdict reached. This was the case, until the 1936 Italian occupation, with the customary justice system of the Government of Ethiopia, where the Imperial Courts invited bystanders and passerby to attend hearings and air their opinion.

According to Assefa Fiseha[51] and Abrham Tadesse[52], public participation in the administration of justice characterizes the customary laws of Tigray and Sidama respectively. Dejene wrote, "Apart from direct participation, [among the Oromo] the community provides information and suggests ideas on the issue under litigation. Such informal discussions and public views are important to arrive at consensus at the end of the day. The final decisions are the outcome of these various views and suggestions from the community."[53]Among the Nuer, the open procedures and participation of the community members in the administration of customary justice tend to limit the possibility for corruption and nepotism.[54]

Why is popular participation so important? First, the involvement of community members as observers, witnesses, and commentators increases the credibility and transparency of customary laws. Second, non-confidential proceedings help to put public pressure on parties to honor and respect

[50]Dejene Gemechu, cited above at note 28, p.261-262.
[51]Assefa Fiseha, "Customary Dispute Resolution Mechanisms in Tigray", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 26, p.366-367.
[52]Abrham Tadesse, "Customary Conflict Resolution among the Sidama", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), id, p.123.
[53]Dejene Gemechu, cited above at note 28, p.261-276.
[54]Koang Tutlam, cited above at note 30, p. 429.

agreements. Non-compliance to a customary court decision is rare mainly because nonconformity is likely to be interpreted as rebellion against community values and interests. Finally, since customary judges pass decisions in the presence of community observers, the possibility for corruption and prejudiced judgment is limited.

3.4 Collective Responsibility

Collective responsibility refers to a situation where social groups take the blame for offenses perpetrated by their members and the responsibility for the consequences. This principle is widely practiced in cultures where group identification and group control mechanisms are strong, and where the idea of individualization of crimes is not common. In such societies, to redress offenses, retaliatory acts are taken against unsuspecting members of a perpetrator, sometimes in the form of collective punishment. Hence, families and relatives of wrongdoers often take the initiative to make peace and avoid retribution. The customary judge(s) may require the perpetrator's family, lineage, or clan to take responsibility, express repentance as a group, and contribute towards compensation for the victim.[55]In Dassanech and Nyangatom, South Omo Zone, government authorities seem to employ the principle of collective responsibility to put pressure on communities to apprehend and bring criminals to justice.

One might challenge the appropriateness of holding communities/groups responsible for offenses committed by individuals. The rationale behind blame-sharing may better be understood in some contexts. First, it represents a tacit recognition that the family or the group to which the perpetrator belongs failed to detect, discourage, stop or report unjustified offenses, and therefore, they should take some responsibility. Second, when the verdict involves costly compensation to the victim's group, the principles of reciprocity, solidarity, and sharing are often evoked to help members in trouble. Third, in a situation where the group (rather than the individual offender) is the target of retribution, the cost of not taking collective responsibility could be much higher than sharing the blame and the fine.

[55]Assefa Fiseha, Gebre Yntiso, and Fekade Azeze, "The State of Knowledge on Customary Dispute Resolution in Ethiopia", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 26, p.30.

One might also wonder whether sharing of the consequences of wrongdoing would not encourage repeated perpetration. However, since it is an unpleasant experience for any group to go through such trials and tribulations that tarnish group reputation and image in society, repeated offenses may strain the relationship between the perpetrator and his group and lead to harsher measures such as humiliation, ostracism, expulsion from community, capital punishment, etc. In other words, there exist internal mechanisms to discourage and control offenders. On the whole, under ideal situation, collective responsibility for any wrongdoing is not a virtue worth pursuing. Under the contexts discussed above, however, it seems to serve important purpose worth appreciating.

3.5 Accessibility, Efficiency and Affordability

In Ethiopia, the formal law is inaccessible to a significant proportion of rural communities due to distance, efficiency, and affordability factors, not to mention the popularity deficiency. Most rural communities lack easy physical access to the formal courts because the District Courts are located in the Woreda (District) capitals, far away from most villages. Traveling to a Woreda capital to file a case would, undoubtedly, incur costs: money, time, and energy. Moreover, it creates inconveniences associated with the following: language barriers (where the local languages are not used in courts), facing unfamiliar and intimidating judges, repeated court appearances, and delays. Although quasi-formal social courts exist in villages, their mandates are limited to civil cases and petty crimes the punishments of which do not exceed one-month jail term and a 500 Birr fine.

On the other hand, the customary laws represent alternatives that fairly adequately address the gaps and challenges. The customary judges, who are sometimes appointed and entrusted by the parties and who speak the local languages, are readily available in every locality and provide speedy services free of charge (or for a nominal fee). Hence, the customary courts are more affordable and more accessible. Unlike the formal courts, which are complicated and known for rigidity, customary courts are characterized by flexibility and simplicity, which make the latter more efficient. Inconveniences and dissatisfactions associated with repeated court appearances, unbearable

delays, intimidating court procedures, and corruption are limited in customary courts.

4. Template for Comparative Research

Studies on customary laws may be undertaken in a variety of ways depending on their purpose and design. In this section, with the idea of knowledge systematization in mind, attempts are made to outline and explain salient variables useful for understanding the structures and procedures of customary courts and the state of legal pluralism in Ethiopia, which is unique in some ways. It is assumed that systematic study of customary laws requires a structured research approach that ensures the collection and analysis of comparable data.

4.1 The Structure of Customary Courts

This sub-section attempts to identify the judicial levels and frameworks, the identity and legitimacy of judges, and their terms of office. It needs to be noted that despite the constitutional provisions (i.e., Articles 34:5 and 78:5, discussed later), the customary courts lack space within the formal court. Hence, the structure discussed in this section relates to the customary courts.

Regarding court levels, some customary courts are hierarchically organized and have procedures for appeal, while others lack hierarchy and possibility for appeal. When it is deemed necessary to handle discords without delay and complication, cases may be transferred from a higher to a lower level court.[56] The absence of hierarchical structure does not deter complainants from taking their cases to other parallel levels for rehearing[57]. Some customary courts such as the Mad'a of the Afar people handle different types of cases[58], while others such as those among the Wolayita are specialized to handle only specific

[56] Gebre Yntiso, "Arra: Customary Dispute Resolution Mechanisms of the Dassanech", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 31, p.65.

[57] Debebe Zewde, "Conflict Resolution among the Issa Community", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 26, p.348; Mesfin Mesele, "Customary Dispute Resolution in Tach Armachiho Woreda, North Gondar", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 31, p.181.

[58] Kahsay Gebre, "Mad'a - The Justice System of the Afar People", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 26, p.326.

cases.[59] While the judicial levels and frameworks vary from society to society, flexibility seems to be one of the characterizing features of customary laws.

Customary court judges are known for their wisdom, impartiality, knowledge of their culture, rhetoric skills or convincing power, and rich experience in dispute/conflict handling. Apart from such well-versed individuals, influential clan leaders, ritual specialists, religious leaders, senior elders, village administrators, and lineage heads often participate in customary courts. The power of the customary judges emanate from at least four sources: consent of the parties, administrative position (e.g., clan chief), participation in rituals as in the case among the Sidama[60] and the Dassanech[61], and in some cases from leadership in religious institutions as in some parts of Amhara.[62] The identity of judges as prominent individuals and their power derived from secular and spiritual sources contribute to their legitimacy.

The terms of office of judges vary depending on the sources of their authority. The role of those judges appointed by parties in dispute/conflict end the moment the discords are handled. However, judges who acquired authority by virtue of their religious or administrative posts or by performing rituals may continue to serve until their formal replacement unless they are required to step down for legitimate reasons, such as inability to function, poor performance, and malpractice. While individuals with excellent record of service are invited to join the panel of judges repeatedly, those who failed to meet expectation are rarely given another chance. It can be noted that judges are under close public scrutiny and this helps to ensure their impartiality and competence for the task.

4.2 The Procedures of Customary Courts

This sub-section focuses on events/activities that span from the occurrence of an incident to its eventual closure. These include: reporting cases, evidence collection and verification, deliberation and verdict, closing rituals, and enforcement mechanisms. Reporting cases to customary courts is a collective

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[59]Yilma Teferi, "Mediation and Reconciliation among the Wolayita Ethnic Group", In Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), id., p.106.
[60]Abrham Tadesse, cited above at note 52, p. 122-23.
[61] Gebre Yntiso, cited above at note 56, p.61.
[62]Birhan Assefa, "Yamare Fird: Customary law in Wogidi-BorenaWoreda, South Wollo", in Gebre Yntiso, Fekade Azeze, &Assefa Fiseha (eds.), cited above at note 26, p.139.

responsibility rather than a matter to be left to those directly involved. Family members, relatives, neighbors or anyone who has knowledge about the dispute/conflict is expected to report. In many cases, the culprit or his/her kin would admit guilt and report incidents to ensure quick conciliation. It is also a common practice for the party of the victim to file a case with the judicial body instead of resorting to vengeance.

The ultimate objective of customary courts is genuine conciliation after the disclosure of the truth. The truth is expected to surface through confession or public investigation that may involve review of evidence and witness testimony. Thanks to the high value accorded to truth, serious offenses committed under secrecy and in the absence of witness find solution through customary laws. The judges remind disputants to restrain themselves from doing things that can derail the process, hurt feelings, and exacerbate social disorder. Apart from those directly involved in disputes/conflicts and their witnesses, representatives of the parties (often family members) and ordinary spectators of the deliberation may be asked to air their views and comments in the interest of reconciliation and community peace.

When guilt is admitted or proven with evidence, a case comes to closure, and verdict will be passed often by consensus, although it does not preclude coercion (when persuasion fails). The offender's group may have to pay compensation to the victim's side, and express sincere repentance, which is often reciprocated with forgiveness from the victim’s group. Regarding compensation, there exist significant variations across cultures. In some societies, fixed payment regimes exist, while in others fines are specified by judges or the parties based on the severity of the offence and sometimes the economic capacity of the offender to afford. Compensations may be paid immediately, in piecemeal over short period of time, or as a long-term debt to be inherited by generations as in the case among the Dassanech.[63]

Most customary court rulings end with closing ritual performances that involve sacrificial animals, expression of commitment to agreements, cursing wickedness and nonconformist behaviors, and blessing righteousness and conformity. Such rituals of partly divine content are believed to deter

[63] Gebre Yntiso, cited above at note 56, p.67.

rebellious tendencies and avoid possible relapse to discord. Besides the mystified harm that rituals are believed to inflict on the defiant, social pressure (e.g., defamation, ostracism, etc.) and physical measures (e.g., punishment, property confiscation, etc.) may be used to enforce customary court decisions. Handing an offender to the formal justice system is also viewed as dealing with the disobedient.

4.3 Legal Pluralism

Legal pluralism is explained in terms of the co-existence of more than one legal system in a given social field.[64] Sally Merry, who distinguished between 'classical legal pluralism' (that focused on the intersections of the colonial law and customary laws of the colonized) and the 'new legal pluralism', argued that the latter "places at the center of investigation the relationship between the official legal system and other forms of ordering that connect with but are in some ways separate from and depend on it."[65] Internal diversity within the state system, where various state sectors may be competing for authority also represents legal pluralism. Likewise, the non-state legal systems (of which customary laws represent one variant) are characterized by plurality of practices. The customary laws are also differentiated both within and across ethnic groups. In this paper, therefore, the concept of legal pluralism is employed to refer to:

a) the coexistence of and the relationships between the state law and the non-state laws, and

b) the coexistence of and relationships among various legal practices within customary laws.

Typology. For analytical purpose, five normative legal regimes (one state law and four non-state laws) have been identified in Ethiopia. These include: (1) the codified law introduced in the 1960s and the subsequent laws issued later in time; (2) the numerous customary laws characterized by both commonalities and differences between and within ethnic groups; (3) the *Sharia* Courts that have been in existence for long time, recognized by the three successive governments, and currently operating with jurisdiction over family and

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[64] S. Merry, "Legal Pluralism", Law and Society Review, vol. 22, No. 5, (1988), p.870.
[65] S. Merry, cited above at note 65, p.873.

personal issues;[66] (4) the certified commercial arbitration forums that provide arbitration and mediation services in commercial, labor, construction, family and other disputes;[67] and (5) the spirit mediums, believed to operate as mediators between humans and God and accepted by followers as representing dispute/conflict handling institutions.[68] While Sharia Courts and the commercial arbitration forums have clear legal grounds to operate, the customary laws and spirit mediums largely function based on public acceptance and preference.

Relations. The relationship between the state law and the customary laws is an important area of study. The Ethiopian Constitution (Articles 39:2and 91:1) provides, in broad terms, for the promotion of the cultures of nations, nationalities and peoples of in the country. Article 34:5 makes more specific and direct reference to adjudication of disputes relating to personal and family laws in accordance with customary laws, with the consent of the parties to the dispute. Article 78:5 also states that the House of People's Representatives and State Councils can give official recognition to customary courts. Thus far, however, neither the particulars of Article 34.5 have been determined by law nor the official recognition stipulated in Article 78:5 has been given.

Therefore, the actual interactions between the state law and the customary laws are arbitrary, inconsistent, unregulated, and quite unpredictable, to say the least. One extreme situation is where the two legal systems unofficially recognize each other and cooperate to the extent of transferring cases and/or exchanging information.[69] There are instances where government authorities and customary judges work together in peace-making processes or addressing

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[66] Mohammed Abdo, "Sharia Courts as an Alternative Mechanism of Dispute Resolution in Ethiopia", in Gebre Yntiso, Fekade Azeze, and Assefa Fiseha (eds.), cited above at note 31, p.261.

[67] Assefa Fiseha, cited above at note 31, p.241.

[68] Woubishet Shiferaw, cited above at note 46, p. 183-184.

[69] Mamo Hebo, Land, Local Custom and State Policies: Land Tenure, Land Disputes and Dispute Settlement among the Arsii Oromo of Southern Ethiopia, (2006), p.129-131; Gedewon Addisse and Fekade Azeze, "Customary Conflict Resolution Mechanisms among the Hadiya", in Gebre Yntiso, Fekade Azeze & Assefa Fiseha (eds.), cited above at note 26, p.100-101; Seyoum Yohannes, "Customary Dispute Resolution Mechanisms of the Irob Ethnic Group", in Gebre Yntiso, Fekade Azeze, & Assefa Fiseha (eds.), id., p.175.

inter-ethnic conflicts.[70] There are also situations where the formal and customary courts operate side-by-side exhibiting indifference and tolerance.[71] At another extreme, both get antagonistic, especially when one intervenes in the domains and activities of the other.[72]There is a need to regulate the relationship between the two legal systems and avoid anomalous practices.

Since little is known about the Ethiopian legal pluralism, the following questions await answers from researchers. What is the source of legitimacy of each legal practice? What are common features shared by all? What are their internal and external differences? What kinds of relationships exist among them? Are there categories of people who prefer certain laws over others? What are the criteria for choice of legal practices? What are the strengths and weaknesses of each practice? The answers to these questions and information on whether each institution is currently getting weaker or stronger and the reasons behind for such trend are expected to enhance knowledge about the state of legal pluralism in Ethiopia and its future.

Limitations of Customary Laws. The customary laws are criticized for the following limitations, among others: gender insensitivity, weak procedural fairness in adjudication and punishment, breach of human rights, lack of uniformity, and incompatibility with changing contexts. There are cases where customary courts overstretched their powers to handle homicide and pass death sentences. Sometimes convicted offenders are subjected to harsh physical punishment and torturous public humiliation. Hence, the application of some customary laws obviously violates the classic liberal rights (e.g., privacy, personal dignity, bodily integrity). Some of the injustices against women often overlooked by customary laws include: lack of women's participation in customary courts, denial of women's rights to property, marriage of rape

[70]Mesfin Mesele, cited above at note 57, p.197-201; Gebre Yntiso, cited above at note 56, p.73; Birhan Assefa, cited above at note 62, p.151; Israel Itansa, "The Quest for the Survival of the Gada System's Role in Conflict Resolution," in Gebre Yntiso, Fekade Azeze, & Assefa Fiseha (eds.), cited above at note 26, p.313.
[71]Wodisha Habitie, "Almaburi: Customary Conflict Resolution Mechanisms of the Berta", in Gebre Yntiso, Assefa Fiseha, and Fekade Azeze (eds.), cited above at note 31, p.125; Gebre Yntiso, cited above at note 56, p.73.
[72]Yewondwesen Awlachew, "Yejoka Qic'a: Conflict Resolution Mechanisms of the Seven House Gurage", in Gebre Yntiso, Fekade Azeze, & Assefa Fiseha (eds.), cited above at note 26, p.59; Alemu Kassaye, cited above at note 43, p.175-176.

victims to perpetrators, female genital cutting, denial of women's rights to divorce, arranged/forced early marriage, etc.

Since customary courts are localized, diverse, and unwritten, formulating a uniform law appears to be hardly attainable (if not totally impossible). In today's world where trans-nationalism, multiculturalism, and rapid social transformation are bridging the global and local divide, the compatibility of customary laws to the changing contexts and the new world order has become a crucial issue to be understood. Ethiopia has signed numerous international conventions and agreements, and the compatibility of the customary laws to such instruments and documents needs to be investigated. Therefore, research on customary laws should clearly spell out the broad spectrum of pros and cons to ensure comprehensive and balanced understanding.

5. Conclusion

In Ethiopia, customary laws have received growing attention by researchers due to multiple reasons discussed in the introduction. This unprecedented study of customary legal practices, however, did not lead to comprehensive knowledge amenable to comparative analysis, scientific generalization, or policy application such as legal system reform. This warrants the need to systematize knowledge about customary laws through a combination of measures.

First, the western concepts borrowed from the ADR literature must be clarified and their comparability to the customary practices should be established. Hence, the meanings and contexts of key terms (dispute, conflict, negotiation, mediation, arbitration, conciliation, dispute settlement, conflict resolution, conflict management, and conflict transformation) have been discussed with the hope to avoid confusing and inappropriate usage. Future researchers are expected to contribute to the conceptual clarity through careful choice and application of terms. Second, to explain the growing recognition of customary laws and their indispensability, efforts have been made to identify five variables (namely, restoration of order, quest for truth, public participation, collective responsibility, and accessibility) that represent the core values and virtues worth recognizing. Future studies are expected to add to these initial findings and broaden our perspectives. Third, in order to ensure comparative

study of customary laws, a prerequisite for advancing academic and policy interests, it is advisable to share common research approaches. With this in mind, a provisional template that captures the salient features of the customary court proceedings and other important variables has been proposed.

As long as scientific studies verify the relevance and popularity of customary laws, there is a need to establish coherent and harmonized legal systems where the jurisdictions of the various institutions and their relationships are identified and defined. Such a step should start with recognition as per the Constitution of Ethiopia. However, there are certain concerns that need to be addressed before taking any action aimed at reforming the legal systems. First, efforts to ensure cooperative relations between the formal and customary laws may lead to manipulative state intervention that would erode the legitimacy and integrity of the customary courts. Second, given the association of customary laws with violation of human rights and other limitations listed above, the state might find it rather difficult to embrace or accommodate the customary laws. Such concerns could be addressed through the systematic research approach proposed in this paper. On the whole, although the focus of this paper is on customary laws in Ethiopia, the ideas, approaches, and arguments raised here may apply to customary laws under similar situations elsewhere in the world.

Telecommunications Services Liberalization in Ethiopia: Implications for Regulatory Issues

Yazachew Belew[†]

Introduction

Beginning from the 1980s and 1990s almost all nations have abandoned monopoly practices in the supply of telecommunications services. Nations have long started reaping the benefits of competition delivered through privatization and liberalization. Ethiopia has, however, remained to be one of the only few countries where monopoly of telecommunications services is forced to trek. And apparently there may not be a change in policy any time soon for the official narrative dubbed telecommunication 'cash-cow' to be milked only by the state, [1] signifying the intention to comfortably ride on the monopoly. Whether this stance is tenable, and if so, for how long, is debatable, though, especially in view of Ethiopia's impending accession to join the World Trade Organization (WTO). It is widely expected that some WTO Members will mount negotiation pressure on Ethiopia to open her telecommunications market to foreign competition. Will Ethiopia give in to such pressure? Officials vow not to bow at all, but we cannot be certain about that at this stage of the accession negotiation. However, in view of existing accession experiences, we can validly maintain that Ethiopia may embrace some degree of liberalization in the telecommunications sector as a concession to join the world trading club.

[†]LL.M in *Commercial and Corporate Law* (University of London, Queen Mary College, Centre for Commercial Law Studies), LL.B (AAU), Lecturer at the School of Law (AAU) and former judge at the Supreme Court of the State of Oromia and the Federal First Instance Court. E-mail: yazachewbelew@gmail.com . I am greatly indebted to Prof. Dr Marcus Krajewski, and my colleagues Muradu Abdo and Seyoum Yohannes for thier insightful comments on earlier draft of the article. I also thank the annonymous assessors. All the errors are mine.

[1] E.g., Prime Minister Hailemariam Desalegn's'interview with'*Financial Times* Ethiopia's leader aims to maintain tight reign on key business (http://www.ft.com/cms/s/0/c0985378-c5ef-11e2-99d1-00144feab7de.html#axzz2dUwHRdnM) last accessed on August 30, 2003. See also his address to National Forum for Business in June 2013 in Addis Ababa "Ethiopia telecom to remain state-monopoly," (http://www.africareview.com/Business---Finance/Ethiopia-telecom-sector-to-remain-a-stat e-monopoly/-/979184/1896796/-/9hitv4/-/index.html) last visited on August 30, 2013.

The author argues that a closer examination of available legal and policy documents pertaining to telecommunications Ethiopia has put in place since 1996 suggests liberalization is possible, if not probable. This evidence points, if not conclusively, in the direction of Ethiopia liberalizing her telecommunications sometime in the future.[2] Liberalizing telecommunications services hitherto under public monopoly certainly rasies important issues of regulation.The purpose and tools of regulating monoply are different from those of competiton. Experineces show that the transition form monoploy to competiton in the secor requires effective regulation. This article analyzes the efficacy of Ethiopia's telecommunications regulatory framework to manage a smooth transition from the entrenched monopoly to a working competiton if and when Ethiopia decides to open the sector to competiton. The focus in this regard is on major regulatory principles. The analysis is made against the backdrop of global telecommunications services reform and Ethiopia's policy in the sector. Inevitably, however, the analayis is far from complete. Identifying the latest policy stance of the Ethiopian government on telecommunications liberalization remains a difficult exercise while explaining such stance also requires cross-cutting interdisciplinary approach. Although the article has tried to be as comprehensive as possible, it still does not cover all regulatory issues (e.g. financial and technical aspects of regulations are not addressed). The analysis of regulatory issues, for obvious reason, is also purely theoretical.

The article has two Sections. Section I summarizes the factors behind the global reform of telecommunications leading to liberalization, and discusses telecommunications services reform in Ethiopia. It highlights the arguments raised by the Ethiopian government in defense of its monopoly and investigates available evidence pointing to liberalization. In view of Ethiopia's impending accession to the WTO, the Section also analyzes whether the multilateral forum helps drive telecommunications liberalization in Ethiopia. Section II takes up regulatory issues of telecommunications liberalization in Ethiopia and makes a

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[2]There is no official schedule but the late Prime Minister in 2009 said that liberalization could be postponed for a significant time; see his "Interview with" *Reuters* in 2009 as quoted in Ethiopia Would Resist Pressure from the Rich World to Fast-track Liberalization, (http://www.ethiopianinvestor.com/index) last visited on March 25, 2013.

normative assessment of the legal and regulatory framework Ethiopia has put in place since 1996. The article closes with a conclusion.

I. General Overview of Telecommunications Services Reform and Ethiopia's Approach

1. General Overview: Shifting Grounds

Telecommunications (herein after 'telecom') services have been undergoing reforms since the 1980s and the 1990s. This sub-section discusses two of the major reforms: a) the shift from natural monopoly to market competition, and b) the emergence of a multilateral regime governing international trade in telecom services that impacts national regulatory framework.

A. From Natural Monopoly to Market Competition

The supply of telecom services through state-owned operators has been subject to challenge and re-examination since the last decades. This phenomenon, described as a 'wave of institutional reform sweeping the world'[3] has led to the shift away from monopoly to competition.This shift has been induced generally by the strong currents of pressure from business demands and advances in technology.[4] Economic integration increased businesses' reliance on efficient and reliable telecom services,[5] but state-owned monopoly operators failed to meet these demands.[6]As telecom services became one of the determinant factors affecting competitiveness, businesses could no longer disregard the quality, price, variety and cost of telecom services they could obtain.[7] The advent of modern telecom technology has lowered the costs of services and improved the

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[3]R. Samarajiva, "The Role of Competition in Institutional Reform of Telecommunications: Lessons from Sri Lanka," Telecommunications Policy, Vol. 24(2000), p.699.

[4]For additional forces, see A.Buckingham *et el* "Telecommunications Reform in Developing Countries," in I.Walden (ed.), Telecommunications Law and Regulations (2009), pp.767-777.

[5]P.Low and A.tya Matto, Reform in Basic Telecommunications and the WTO Negotiations: The Asian Experience, WTO Staff Working Paper (February 1998), p.8 (http://www.wto.org/english/res_e/reser_e/pera9801.pdf) last visited on April 5, 2013.

[6] S.J. Wallsten,"An Econometric Analysis of Telecom Competition, Privatization, and Regulation in Africa and Latin America," Journal of Industrial Economics, Vol. XLIX, No.1 (2001), p.2.

[7] L.Tuthill, "Users' Rights? The Multilateral Rules on Access to Telecommunications," Telecommunications Policy, Vol. 20, No.1 (1996), p.89.

quality of services.[8] Technology has also made it difficult for governments to defend the long-held assumption that telecom is best supplied through natural monopoly.[9] Modern technology has also armed consumers with the technical ability with which they beat domestic regulations.[10] Pressure from international financial institutions and debt crisis were also responsible for telecom reform in certain developing countries.[11] The WTO Agreement on Basic Telecommunications has also significantly contributed to the liberalization of telecom services.[12]

Finally it should be noted that the transition from monopoly to competition has been made possible by the careful choice and implementation of a series of policy measures and instruments. These include adopting a telecom sector policy, liberalization of the sector and adopting a new pro-competitive regulatory framework implemented by an independent regulatory body; modernizing the incumbent (including corporatization and privatization) and attracting new entrants are also part of the reform.[13] But one can hardly find a country that has taken all the measures and adopted all the instruments at once, and/or applied a given instrument to its maximum limit; sequencing and progressiveness characterize the reform of telecom.[14]

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[8]P. Low and A. Matto, Cited above at note 5 and S.J. Wallsten, Cited above at note 6
[9]Ibid.
[10]Call-back service and the Internet are good examples.
[11]See generally, C. Djiofack-zebaze and A.Keck, "Telecommunications Services in Africa: The Impact of WTO Commitments and Unilateral Reform on Sector Performance and Economic Growth," World Development, Vol.37, No.5 (2009), and J.C. Ratto-Nielsen, "A Comparative Study of Telecommunications Reform in East Asia and Latin America," International Journal of Public Administration, Vol. 27, No.6 (2004).
[12] M. Fredebeul-Krein and A. Freytag, "Telecommunications and WTO Discipline: An Assessment of the WTO Agreement on Telecom Services," Telecommunications Policy, Vol.21. No.6 (1997), p.477.Some 69 countries representing 90% of world trade in telecom services have agreed to liberalize their telecom markets at the adoption of the Agreement on Basic Telecommunications. Ibid.
[13]For detailed analysis of these measures, seeA.Buckingham *et el,* Cited above at note 4, pp.781-787.
[14]C. Fink A.Mattoo and R.Rathindran, Liberalizing Basic Telecom: The Asian Experience, World Bank Working Paper No. 2718(2001), p.2, (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=634429) last visited on April 5, 2013.

B. The Emergence of Multilateral Regime on International Trade in Telecom Services

Dwelling on WTO's General Agreement on Trade in Services (GATS) governing international trade in telecom services, a well explored subject[15] is not the objective of this sub-section. Nonetheless, a brief description of some of its features as they pertain to telecom services is imperative in view of Ethiopia's impending accession to the WTO.The GATS framework governing telecom services consists basically of the General Obligations,[16]the Schedules of Specific Commitments, [17] the Annex on Telecommunications and the Reference Paper. We briefly look at the Annex and the Reference Paper which are specific to the telecom sector.

i. The Annex on Telecommunications (AT)

The AT contains obligations which kick in only when there is specific commitment in a service sector other than telecom.[18] Section 5(a) of the AT obliges a WTO Member to make sure that suppliers of scheduled service of other WTO Members are allowed access to and use of public telecom transport networks and services on terms and conditions which are reasonable and non-discriminatory.The AT guarantees effective use of telecom services to the supplyof scheduled services other than telecom so that trade concessions negotiated at the WTO may not be frustrated due to lack of access to and use of telecom services.[19] The AT does not also contain or lead to any market-access

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[15]For a detailed account of negotiating history and outcomes see, M.C.E.J. Bronckers and P. Larouche, "Telecom Services and the World Trade Organization," Journal of World Trade, Vol.31, No.3 (1997); M. Bronckers and P. Larouche, "A Review of the WTO Regime for Telecom Services," in K.Alexander and M.Adenas(eds.), The World Trade Organization and Trade in Services, (2008).

[16]The most-favored-nation principle (Article II (1) is one of the most important general obligations under the GATS.

[17]The schedule of commitments forms an integral part of the GATS ((Article XX (3)). It contains market access and national treatment obligations as well as additional obligations, if any, of a member (Article XVI-XVIII).

[18]Section 5(a) of the AT

[19]See L.Tuthill, Cited above at note 7 and Marco C.E.J. Bronckers and P. Laouche, Cited above at note 15 and Marco C.E.J.Bronckers and P. Larouche, Cited above at note 15. Section 5(b) of the AT lists certain rights of use and access the exercise of which can also be subject to

or national treatment obligations.[20] Thus in the absence of any specific commitment in the telecom sector by Ethiopia, a firm from a WTO Member cannot invoke the AT to commercially supply telecom services in Ethiopia.

ii. The Reference Paper (RP)

The RP contains a set of regulatory principles aimed at addressing the fear that domestic telecom regulatory regime could be used for trade distorting purpose.[21]The RP is optional for WTO Members to adopt althugh all acceeding countries had to adhere to the RP, and it seems to be almost a mandatory part of accession package. It is meant to guide national telecom regulation. Anti-competitive practices, interconnection charges, universal service obligations, transparency in licensing, independence of a regulatory authority, and allocation and use of scarce resources are the major issues covered by the RP.[22] The regulatory principles of the RP are to be translated into domestic law safeguards to ensure market access and foreign investment commitments.[23]

2. Telecom Services Reform in Ethiopia

A. The State of Telecom Services in Ethiopia

If telephone were invented in 1876, Ethiopia (with a history of establishing the first telephone network in 1894!) would not only 'plume' herself to be one of the 'first'nations to receive the technology but also 'comfort' herself when currently left behind her African peers.Although improvements are visible[24],

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conditions and limitations under Section 5(d-f). Under Section 5(g) developing countries have the right to take exceptions to the AT (Section 5(g).

[20]See Section 5(a) of the AT and M.C.E.J. Bronckers and Pierre Laouche, Cited above at note 15, p.19

[21] W.J. Drake and E. M. Noam, "Assessing the WTO Agreement on Basic Telecommunications," in G.C. Hufbauer and E.Wada (eds.), Unfinished Business: Telecommunications after the Uruguay Round (1997), pp.41-44.

[22] The text of the RP is available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm. For further analysis of the principles vis-à-vis Ethiopia's telecom regime, see Part III of this article. All countries that have acceeded to the WTO have adopted the RP; see their accession protocols at www.wto.org.

[23]M. C.E.J. Bronckers and P. Laouche, Cited above at note 15, p.23.

[24]According to a 2010 study subscription in the mobile sector grows at a compound annual growth rate of almost 90% since 1999 and more than 100% in the past six years although it is

telecom sector performance measured in terms of penetration, quality, and price is low even by African standard. A country of more than 80million people has a teledensity (i.e. number of subscribers per hundred persons) of 0.9 for fixed line; 23.7 for mobile cellular phone and 1.5 for the Internet[25] far less than neighbouring Kenya and Uganda where telecom is fully liberalized.[26] Poor quality, limited service variety, unreliable Internet and higher costs are also 'flagships' of telecom services in Ethiopia.

Poor sector performance is not the only feature that telecom in Ethiopia shares with pre-reform history of telecoms in other countries.[27] It also shares mode of administration, nature of ownership and market structure. Telecom and postal services in Ethiopia were originally combined and provided by the same body operating under the then Ministry of Posts, Telegraphs and Telephones (PTT) until a separate enterprise called the Ethiopian Telecommunications Board (ETB) was established in 1952.[28] Thus, we may say that the yet unfinished business of telecom reform in Ethiopia began half a century ago when telecom and postal services were separated. However, it took more than four decades to introduce the next reform in which the functions of operating and regulating telecom services traditionally undertaken indistinctly and simultaneously by the same body were separated.This happened only in 1996 when these two functions were separated and became the mandates of two different institutions. The operational function was entrusted to a limited liability company named the Ethiopian Telecommunications Corporation (ETC) re-

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also said that the incumbent is unable to satisfy the ever growing demand. Improvements are said to be picking up following massive investments in fixed wireless and mobile network infrastructure, including 3G mobile technologies and a national fiber optic backbone. See D. Baron, The Impact of Telecommunications Services on Doing Business in Ethiopia, (Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectoral Associations, PSD Publications Series No.15 2010),p.7; Tables 4 &6, pp.16-19.

[25] International Telecommunication Union (hereinafter ITU) database for 2012 (http://www.itu.int/net4/itu-d/icteye/CountryProfile.aspx)last visited on July 23, 2013

[26]Ibid. The corresponding figures for Kenya respectively are 0.6, 71.9 and 32.1 while for Uganda the numbers 0.9, 45.9, and 14.7.

[27]On the pre-reform histories of telecom, see A.Buckingham *et el*, Cited above at note 4, pp.765-766.

[28]See Postal Service Proclamation,1942, Proc.No.17, Neg.Gaz.Year1,.no.4 and Establishment of the Imperial Board of Telecommunications Proclamation, 1952, Proc.No.131, Neg.Gaz. Year 12, no.5

named in 2010 Ethio-Telecom.[29] The regulatory function was given to the Ethiopian Telecommunications Agency (ETA) up until 2010 when ETA, a legally distinct federal body outside of but reporting to the ministry responsible for communication, was abolished and its powers transferred to the Ministry of Communications and Information Technology (MCIT) which is also responsible for the telecom sector.[30] The 1996 reform also introduced a new regulatory framework that enshrines pro-competition principles (more in Section II).But attempts at partial liberalization of the incumbent did fail twice.[31]

Telecom service has been under the firm grip of the monopoly of successive Ethiopian governments ever since its introduction into the country.Some blame this monopolistic market structure for the stunted telecom in Ethiopia.[32] But government officials dismiss such critics simply as misplaced on the ground that the sector's poor performance is associated not with the nature of ownership or the market structure but with corporate management.[33]No wonder corporate management reform has been a constant telecom sector policy direction in Ethiopia.[34] Themanagement contract-out to France Telecom, a foreign company that managed Ethio-Telecom for a period of two years, can be a good example in this regard.

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[29]Ethiopian Telecommunications Corporation Establishment Council of Ministers Regulations, 1996, Art.2(1) Reg.No.10, Neg.Gaz.Year 3.no 6 (Hereinafer Telecom Reg. No.10)and Telecommunications Proclamation, 1996, Art.2(3), Proc.No.49, Neg.Gaz. Year 3, no.5(Hereinafter Telecom Proc.No.49), as amended, Telecommunications (Amendment) Proclamation, 2002, Art (2(1)), Proc. No.281(Hereinafter Telecom Proc.No.281), Id, Year 8, no.28. We in fact know also of the "Ethiopian Telecommunication Authority" that preceded the ETC but this author could not find a legal text that established it

[30]Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, 2010, Arts. 24 and 36(5), Proc.No.691, Neg.Gaz. Year 17, no.1.

[31]D. Baron, cited above at note 24, pp.9-10. It is reported that 30% and 49% of the stake were offered for sell in 2002 and 2005 respectively. Ibid

[32]See for instance, Lishan Abay, Ethiopia ICT Sector Performance Review 2009/2010: Towards Evidence-based ICT Policy and Regulation, Vol. 2, (2010), p.3.

[33]For example, see Girma Biru's (former Trade Minister) interview to the media on February 17, 2009 (http://www.bloomberg.com/apps/news?pid=newsarchive&sid=adot_hJ.1pyc) last visited on April 22, 2013.

[34]See the Industrial Development Strategy (2002), the Plan for Accelerated and Sustained Development to End Poverty (ASDEP) (2005-2010) and the Growth and Transformation Plan (GTP). They all talk about improving corporate management of the state-owned telecom operator in Ethiopia.

B. Ethiopia's Approach to Telecom Services Liberalization

i. In Defense of the Monopoly

Ethiopia is one of the few countries of the world teetering on monopoly, and the only country in Africa where all forms of telecom services are held by public monopoly.[35]The Ethiopian government raises two major arguments in defense of its monopoly. The first argument is that the government is more efficient than the private sector. The justification for this is the low level of telecom network development in Ethiopia which, according to the government, necessitates monopoly until conditions become favourable for the private sector.[36] One such condition is the completion of a nationwide basic telecom infrastructure.[37]This, for example, explains the recent $1.6 billion vendor-financing agreement between Ethio-Telecom and Chinese telecom companies[38]although such significant investment in network is said to further delay liberalization.[39]

The second major argument of the Ethiopian government is universal access.The government believes that it will not achieve universal access using the private sector because the latter is interested only in 'cream skimming' by confining itself to urban and high income areas.[40] Thus, the only viable option is the back of the incumbent monopoly operator that finances universal access through cross-subsidization.[41]In the final analysis the Ethiopian government maintains that universal access must be achieved before liberalization.The question is whether universal access should always have to be achieved before

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[35]ITU (http://www.itu.int/net4/itu-d/icteye/CountryProfile.aspx) last visited on July 23, 2013. Incredibly some level of competition has been introduced even in Eritrea since 2005.Ibid. D. Baron, cited above at note 24,p. 69

[36]Industrial Development Strategy, p. 145.

[37] R.Self *et el*,"Impact of WTO Accession on Ethiopia's Telecommunication Services Sector:Revised Final Report(November 14, 2007), (unpublished, on file with the author), p.37.

[38]The project is supposed to cloth Addis Ababa with a 4-G broadband network and the rest of the country with 3-G networks.

[39]Galperin, quoted in L. Hartley and M. Murphree, "Influences on the Partial Liberalization of Internet Service Provision in Ethiopia,"Journal of Politics, (Fall 2006),p.101.

[40] See Industrial Development Strategy, pp.146-147. see also R. Self et el, cited above at note, 37, p.37

[41] Industrial Development Strategy, p.148.

liberalization.Can't liberalization itself be used to advance the goal of universal access?[42]

Of late, the most explicit defense of the monopoly in Ethiopia is offered in the form of retaining the monopoly price to finance the Ethio-Djibouti railway project. [43] Political /security concern may also justify the reluctance of governments to allow foreign control of essential services like telecom. We do not hear the Ethiopian government publicly invoking this defense; we cannot also bet that security concern is out of the equation.[44]

ii. Some Evidence Towards Liberalization

Whether the driving forces behind the global telecom liberalization are relevant in the context of Ethiopia cannot be an issue. The question is rather whether these forces are strong enough to exert sufficient pressure on the government and compel it to liberalize. Businesses in Ethiopia have suffered the impact of weak and unreliable telecom; bad telecom is reducing competitiveness and impeding access to foreign markets.[45] The country is also foregoing the real or perceived benefits of liberalization, such as revenue and business opportunities as well as reduced prices, increased penetration, improved quality and variety of telecom services. [46] We have already witnessed some individuals going around telecom regulations through the use of technology.[47]Call back service

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[42] See generally J.Mpha, "Tradable Universal Service Obligations," Telecommunications Policy, Vol. 23, No. 5(1999)

[43] Prime Minister Hailemariam Desalegn's interview, cited above at note 1.

[44]*The Economist* has made this explicit. See "Ethiopia and Kenya: Doing it my way: An Ideological competition between two diametrically opposed economic models" The Economist (http://www.economist.com/news/special-report/21572379) last visited on March 15, 2013. The perceived need to protect incumbent operators as infant industries or to facilitate orderly privatization also explains the reluctance of governments to liberalize; see C.Fink, A.Mattoo, P.Rathindran, Cited above at note 14, p.16. But we don't hear the Ethiopian government invoking this protectionism.

[45]See generally, D. Baron, Cited above at note 24.

[46]R. Self *et el,* cited above at note 37, p.38.

[47] See, for example, Anti-Corruption Prosecutor vs Kebede Tefesework & Berhanie Tafesework, Federal High Court, 15th Criminal Division, File No 113227(Yekatit 8, 2005). The Court found both defendants guilty under Articles 14(4) and 24 of Telecom Proc.No.49 and Articles 10 and 11(4) of the Telecommunications (Amendment) Proclamation No. 281/2002 and sentenced the first defendant to 3 years of rigorous terms while the second defendant was sentence to 7 years terms with a fine of Birr 10, 000. Defendants were found guilty of

and voice communication through the Internet are prohibited under the law.[48] But Internet cafés offering cheap voice telephony over the Internet are not uncommon in Addis Ababa.The Ethiopian government may not be in a debt crisis that compels it to sell the national operator. But a new, pro-liberalization pressure (i.e. WTO accession) is in the making (see iii, below).

There are also some indications that the government will embrace liberalization of telecom services. The Telecommunications Proclamation No. 49/1996 (hereianfter Telecom Proc.No.49) and the Council of Ministers Regulations No. 47/1999 (hereinafter Telecom Reg.No47) can be cited as major examples in this regard.They contain core regulatory principles that address issues of liberalization as we shall see the details in Section II. The government has also declared that it will liberalize downstream activities and value-added services while retaining its monopoly over networks.[49]It is in this vein that MCIT has issued the Value-added Services License Directive No.3/2011.[50]The other evidence pointing in the direction of liberalization is the change the government has introduced to its investment law since the pro-competitive telecom regulatory framework was put in place in 1996. Originally telecom was exclusively reserved for government but since 2002 the sector has been opened for joint investment by government and private investors.[51]

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providing call back service by bypassing the incumbent operator's network using a telecom technology alleged imported without the approval of the incumbent operator.

[48] Telecom Proc.No.49, cited above at note 29, Art.24 (3&4) as amended by Telecom Proc.No.281and Articles 8 and of the Telecommunications Fraud Offence Proclamation, 2012, Art. 10(2-4), Proc.No. 761, Neg.Gaz.Year 18,.no61.

[49]Industrial Development Policy, pp.145-146; Plan for Accelerated and Sustained Development to End Poverty (PASDEP), p. 140. The Growth and Transformation Plan (GTP) makes no mention of telecom liberalization or private sector investment.

[50]*Reuters* reported that MTN, the South African-based foreign telecom firm has been granted value-added license in 2012; see A.Maasho, Ethiopia signs $800 million mobile network deal with China's ZTE (http://www.reuters.com/article/2013/08/18/us-ethiopia-china-telecom-idUSBRE97H0AZ20130818) last visited on March 15, 2013. Per Article 3 (4) the Value-added Services License Directive No.3/2011 licensees can only use Ethio-Telecom's network or infrastructure.

[51] Contrast Investment Proclamation,1996, Art.4(5), Proc. No.37, Neg.Gaz. Year 2, no.25(repealed) with Investment Proclamation,2002, Art.5(2),Proc No.280, Neg.Gaz.Year 8, no.27(repealed) and Article 6(2) (b) of the current Investment Proclamation, 2012, Art.6(2)(b),Proc.No.769, Neg.Gaz.Year 18, no.63(hereinafter Investment Proc.No.769). The repealed Investment Proclamation No.280/2002 did not expressly exclude foreign investors

iii. Choosing WTO-driven Liberalization

Whether Ethiopia will follow autonomous/unilateral liberalization or adopt the multilateral approach under the GATS if and when she joins the WTO is an issue far from settled.The GATS is said to serve, among other things, as a forum for reciprocity-based market access negotiation and effective catalyst for domestic reform.[52] Will it also help drive telecom reform in Ethiopia?

i. The GATS as a forum for reciprocity-based market access negotiation

One reason governments participate in the multilateral liberalization is to benefit from the reciprocity-based market access negotiation.[53] Ethiopia does not have export interest in telecom service. And she is not under any pressing need for more and/or new foreign market for her goods and services to the point where she must 'sacrifice' telecom to get such market access. Alternatively she can also reciprocate by opening other sectors (than telecom) of export interest to her trading partners. Thus, the possibility of Ethiopia using her telecom as a bargaining chip to obtain *more* and/or *new* foreign market access concessions through the forum of GATS is, in my opinion, far fetched.

The reciprocity-based market access negotiation becomes rather a sticky issue if the export interests of some of Ethiopia's trading partners turn out to be the very telecom market Ethiopia wants to keep it closed to foreign firms.Some WTO Members may want market access concession from Ethiopia in the telecom services in return for accepting her as a member. And that is expected:

> If we take WTO accessions over the last decade as a guide, it is certain that Ethiopia will entertain numerous requests from WTO

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from investing in the telecom service jointly with the government.One may wonder whether foreign investors are allowed to jointly invest with the government under the current investment law. The joint reading of Article 4(2) of the Investment Incentives and Invest Areas Reserved for Domestic Investors Council of Ministers Regulation, 2012,Art.4(2), Reg.No.270, Neg.Gaz, Year 19, no.4 Council of Ministers Regulations No.270/2012 and Article 6(2)(b) of Investment Proc.No. 769 does not suggest that the areas is open for joint investment with foreign investors.

[52] For additional benefits of the GATS as a catalyst for domestic, see generally C.Fink, A. Mattoo, and R.Rathindran, cited above at note 14, pp.13-17

[53] P. Low and A. Matto, Cited above at note 5,p.20 and C.Fink, A.Mattoo, P.Rathindran, Cited above at note 14, p.14

> members to open up a significant portion of its system of telecom to competition…. a number of countries are likely to request that Ethiopia include all value-added and basic telecom (including Internet services)…Countries are almost certain to request that Ethiopia assume additional commitments under the Reference Paper…...[54]

Some WTO Members, such as the U.S.A and Canada have already requested Ethiopia to open up her telecom.[55] Experiences suggest that negotiation pressure from WTO Members in and by itself may not force a country to liberalize in the absence a policy to liberalize.[56] Ethiopia's late Prime Minister stated that the country would resist any such pressure from the rich world. Conceding the ultimate inevitability of liberalization, he hoped that liberalization could be postponed for a significant time.[57] Whether Ethiopia will subscribe to the strategy of resisting pressure, and if so, whether she will succeed, remains to be seen.But the country is warned against the cost of a stubborn resistance: Ethiopia could simply risk delaying her accession,or at the worst, her accession could even be blocked.[58] The question is how far WTO Members would go in delaying or blocking Ethiopia's accession or how far sympathetic would they become to Ethiopia as a Least Developed Country (LDC).[59]

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[54]R. Self *et el*, cited above at note 37, p. xi

[55]Lisanework Gorfu, Director of Multilateral Trade Relations and Negotiations at the Ministry of Trade, "Interview with" the weekly *Addis Fortune*, (July 14, 201, Vol.14, No.689) Ethiopian World Trade Accession to See Service Offer in September (http://www. addisfortune.net/articles/ethiopian-world-trade-accession-to-see-service-offer-in-september) last visited on August 30, 2013

[56]P.Cowhey and M. M. Klimenko, "The New International Regime for in Telecommunication Services and Network Modernization in Transition Economies," Emerging Markets Finance and Trade, Vol.40, No.1 (2004), p. 60.

[57]Prime Minister Meles Zenawi's "Interview with" *Reuters* in 2009 as quoted in Ethiopia Would Resist Pressure from the Rich World to Fast-track Liberalization, (http://www.ethiopianinvestor.com/index) , last visited on March 25, 2013.

[58]R. Self *et el*, cited above at note 37. Accession terms have to be approved by two-third majority vote of WTO's Ministerial Conference (Article XII of the Agreement Establishing the WTO). Although there is no veto system, the vote of a single country might be indispensable without which the required two-third majority might not be obtained, giving that country the opportunity to block accession.

[59]Mercantilist and hard bargaining approaches always determine outcomes at WTO negotiation despite the system's rosy ideals catering for the interests of LDCs; see Krishanan Venugopal,

ii. Using the GATS to lend credibility to current and future policy

The GATS flexibility can help Ethiopia overcome her reluctance or ambivalence to commit to telecom liberalization despite policy intentions and legal and institutional framework since 1996. Ethiopia can benefit from GATS recognition of a 'promise to future liberalization' as a binding commitment which is more credible than unilateral declaration of the intention to liberalize and also ensures that current reforms will not be reversed while future reforms will be executed.[60] This is true if the country has to avoid the twin risks of having to honor commitments (implementing liberalization) before being ready for it,or defaulting in her obligations under the GATS and compensating trading partners who lost the benefits of their concessions. However, her promise to future liberalization has to be *weak* enough not to hobble her immediately upon accession to the WTO but *strong* enough to pose the risks she must avoid. Because the promise to future liberalization is time bounded, Ethiopia will not be able throw liberalization into the indefinite future. A*weak* promise to future liberalizationcan also help Ethiopia avoid the risk of delayed or complete denial of accession to the WTO but the promise should not be a derisory one.[61] For example, Ethiopia may accept commitments in value-added services and allow foreign firms to provide such services in two phases. In the

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"Telecom Sector Negotiations at the WTO: Case Studies of India, Sri Lanka and Malaysia," ITU/ESCAP/WTO Regional Seminar on Telecom and Trade Issues, 28-30 October 2003, Bangkok, Thailand, pp.52-53, (http://www.unescap.org/tid/mtg/ituwtoesc_s51b.pdf), last visited on September 21,2013.

[60]P.Low and A.Matto, Cited above at note 5, Pp.23-.24 [They also argued that inability of governments to threaten incumbent monopoly operators with credible future liberalization is said to have contributed their poor performances and perpetual infancy] andCarsten Fink, Aaditya Mattoo, and Randeep Rathindran, cited above at note 14, pp.15-16.Several Asian countries have taken advantage of GATS flexibility by making weaker promises to review their policy at a future date. Ibid; see alsoMarchetti as quoted in C. Djiofack-zebaze and A.Keck, "Telecom Services in Africa: The Impact of WTO Commitments and Unilateral Reform on Sector Performance and Economic Growth," WTO Staff Working Paper (February 1998), p.23, note 9.

[61]According to R. Self *et el*, Cited above at note 37, Pp,xii-xiii and pp.68-70,Ethiopia has six scenarios to commit her telecom: *Scenario 1-Satus quo*: Ethiopia retains her monopoly right, makes no commitment under the GATS, but agrees to review the situation within 4 years of accession. *Scenario 2-Partial liberalization (value-added services); Scenario 3-Partial liberalization (multiple mobile operators)*; *Scenario 4- Immediate partial liberalization (one mobile operator)*;*Scenario 5- Partial liberalization (privatization)*; *Scenario 6- Full liberalization*.

first phase foreign firms provide services jointly with Ethio-Telecom after a fixed period (e.g., 5 years) following entry into the WTO. In the second phase they provide services directly on their own again 5 years after lapse of the first period. Ethiopia also needs to adopt the RP.

II. A Normtive Analysis of Ethiopia's Telecom Regulatory Framework

The transition from state-owned monopoly to market competition necessarily requires a new legal and regulatory framework capable of regulating the sector effectively. [62] Reforming governments acknowledged the significance of regulation the moment they began to introduce competition. "[T]hey….could not simply declare markets open and walk away…Simply declaring 'competitive' did not ensure that any new market entrants would, or could actually begin competing."[63] Evidently the transition required regulation to contain abuse of market power by the dominant incumbent operator vis-à-vis new market entrants, foster competition, create favorable investment climate, and narrow down development gaps.[64]

The new legal and regulatory framework for the telecom sector normally takes the form of a legislation that ushers in a new regulatory authority, addresses market liberalization, and contains core regulatory principles.[65]There is no single regulatory model that fits all and capable of easy transplantation by developing countries.[66]Thus,developing countries with a tradition of weak governance need to pay particular attention in designing the new legal and regulatory framework lest they run certain regulatory risks: permitting substantial regulatory discretion, government interference, arbitrary decision-

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[62]A. Buckingham *et al*, cited above at note 4, p. 785.
[63] ITU, Trends in Telecommunications Reform 2002: Effective Regulation (4th ed., 2002) [hereinafter ITU: Effective Regulation 2002) (http://www.itu.int/pub/D-REG-TTR.5-2002) last visitedon June 2, 2013.
[64]P. L.Smith and B. Welllenius , "Mitigating Regulatory Risks in Telecommunications," Public Policy for the Private Sector, Note No.189, (World Bank, Group, July 1999), (http://www.wto.org/english/tratop_e/serv_e/telecom_e/workshop_dec04_e/mitigating_regulatory_risk.pdf)last visited on May 6, 2013.
[65] A. Buckingham *et el*, cited above at note 4, p. 785.
[66]It is claimed that the EU model has emerged as the most popular model with reforming developing countries. Other competing models are the US model and the Australasia model of Australia and New Zealand. For more on the details of these models, see A.Buckingham *et el,* Cited above at note 4, pp.831-835.

making, unilateral licence modification and revocation, or draconian remedies, such as network asset confiscation.[67]Whatever model a country may choose, it has to adopt a regulatory strategy that aims at mitigating these regulatory risks. This strategy includes reducing agency discretion, enhancing regulatory credibility, and efficient and effective utilization of scarce resources.[68]

This Section examines Ethiopia'snew legal and regulatory framework for the telecom sector.It focuses on core regulatory principles of this new framework which are also enshrined in the WTO's Reference Paper discussed in Part I.These rules cover (a) regulatory authority;(b) licensing; (c) interconnection; (d) competitive safeguards; (e) allocation of scarce resources, and (f) universal access/service obligation.

A. Rules on Regulatory Authority

Establishing an effective telecom regulatory framework requires more than legislating substantive rules embodying core regulatory principles. It also presupposes putting in place an appropriate regulatory authority. Almost all governments that have reformed their telecom have established a regulatory authority responsible for the sector's day-to-day activities.[69]

A sound regulatory body needs to have a degree of independence, enforcement powers, neutrality, and mechanisms for resolving conflicts.[70]Reiterating the role of an independent regulatory process to achieving the goals of telecom reform and what that independence is all about,William H. Melody writes:

> It is absolutely essential that the 'competition' among the major industry players be moved from the arena of politics and bureaucracy to the marketplace, and to achieving the industry performance objectives of government policy. This will only happen if regulatory decisions are made on their substantive merits, not on the basis of political favoritism or the backdoor influence of the most

[67]See A.Buckingham *et el,* cited above at note 4, p.785.
[68]P. L.Smith and B. Welllenius, Cited above at note 64.
[69]A. Buckingham *et el*, cited above at note 4, p.787.
[70] L. H. Gutierrez and S. Berg, "Telecommunications Liberalization and Regulatory Governance: Lessons from Latin America," Telecommunications Policy, Vol. 24(2000), p. 885.

> powerful industry players. Only an independent, transparent regulatory process that is seen to be so by all affected parties and the public can achieve this.[71]

There is no consensus on what constitutes regulatory independence. It is viewed mostly through the lens of political culture.[72] That the regulator should be independent of the regulated industry, i.e. the market participants, represents the international best practice.[73] The idea is to avoid the risk of 'industry capture' in which the regulator falls under the influence of the regulated industry. In the context of telecom reform, this is translated into the practice of dividing the regulatory and operational functions and mandating each function to different institutions. And the number of such independent regulators is rising in the world with Africa in the lead.[74] Ethiopia is no exception in this regard.Regulatory and operational functions are separate and remain the mandates of legally and factually distinct institutions, i.e., MCIT and Ethio-Telecom respectively (see Section I).

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[71] W. H. Melody, "Policy Objectives and Models of Regulation," in W. H. Melody (ed.) Telecom Reform, Principles, Policies and Regulatory Practices (1997), p.21.
[72]See ITU: Effective Regulation 2002, Cited above at note 63. See also B.Guermazi, Exploring the Reference Paper on Regulatory Principles, (http://www.wto.org/english/tratop_e/serv_.../guermazi_referencepaper.doc)last visted on May 6, 2014.Guermazi was referring to an ITU colloquium titled "The changing role of Government in an era of telecom deregulation: Report of the colloquium held at ITU Headquarters 17-19 February 1993." The literature also refers to *"Independence of abilities and capabilities"* to connote a "*regulatory authority that is confident of its abilities to fulfill its mandates, arbitrate disputes in the public interest, and help fulfill overall national goals in the telecom sector.*" See ITU: Effective Regulation 2002. We also find references to *'structural independence'* to cover separation of the regulator from the operator and/or executive branch of the government; *'financial independence'* and *'functional independence'*. See generally, ITU, Telecommunications Regulation Handbook (10th Anniversary ed., 2011) (http://www.itu.int/dms_pub/itu-d/opb/reg/D-REG-TRH.01-2011-PDF-E.pdf) last visited on June 22, 2013.
[73]See for example, Article 5 of WTO's Reference Paper which reads in relevant part "The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services." Same is true for the EU, see Article a §2 of Directive 90/387 as amended by Article 1§6 of Directive 97/51 quoted in L. Borissova, "Regulatory Policy and Creation of Regulatory Authorities in the Telecommunications Sector in Central and Eastern Europe," European Journal of Law Reform, Vol. 4 (2002), p.470, note 34.
[74]ITU, (http://www.itu.int/ITU-D/ICTEYE/Regulators/Regulators.aspx#) last visited on June 22, 2013.

The other component of regulatory independence is the relationship between telecom regulator and sector-policy makers.The regulator has to be independent of the government in its day-to-day activities.[75] Independence in this context does not connote the absence of any form of supervision from any branch of the government. Nor does it 'imply independence from government policy, or the power to make policy'; rather it refers to the power to 'implement policy without undue interference from politicians or industry lobbyists.'[76]In this context, independence has two interrelated elements: (a) the degree of autonomy the regulator enjoys from political influence and control, and (b) the safeguards in place to protect the regulator from political capture.[77]

Independence from political influence and control raises issues of the form and position the regulator takes within the executive branch of the government. There is no single model on regulator's structure, though. Experiences are diverse. At one end of the spectrum is a fully independent and rule-making body represented by the US model; at the other end we find the European model in which a distinct regulator is located within the ministry responsible for communications but separated from it by 'Chinese Wall.'[78] Between the two ends of the spectrum lie other models, such as the UK's model of a quasi-independent, issue-specific advisory, investigative and enforcement body with strong links to the government.[79]As for developing countries where risks of regulatory capture are high, a regulator located outside the ministry responsible for communications is prevalent and even prescribed.[80]

Ethiopia went from one extreme to the other in her approach to the design of telecom regulator. When regulatory and operational functions in the telecom sector were separated in 1996, the country established the Ethiopian Telecommunications Agency (ETA) responsible for regulating the

[75] W. H. Melody, Cited above at note 71, Pp.19 *et seq*.
[76] Ibid.
[77] A.Buckingham *et el*, *Cited above at note* 4, p.789.
[78]Id,p.788
[79] Ibid
[80]Thus, the prescribed model for developing countries is believed to be a regulator totally separate from the line ministry responsible for communications and accountable to parliament or to a ministry responsible for economic development-a model said to be rare in practice; see Ibid.

sector.Mandated with a long list of regulatory powers, ETA was established as "autonomous federal agency,"a legally distinct body outside the structure of the then Ministry of Transport and Communications.[81] The leadership model adopted was a single-regulator, i.e. a general manager acting as a chief executive officer appointed by the government upon the recommendation of the minister (of Transport and Communications). He was to report to the minster. ETA's budget was to be drawn mainly from government-allocated funds and license fees.[82]

In 2010 the Ethiopian government abandoned the idea of a legally distinct telecom regulator located outside ministerial structure. ETA was formally abolished before it had the chance to flex regulatory muscles becasue of lack of competitition. Its regulatory powers and responsibilities have been transferred to the Ministry of Communications and Information Technology (MCIT).

Ethiopia's shift away from the model of a regulator located outside the structure of a line ministry to giving regulatory powers to the very ministry responsible for communication may not be criticized as a move necessarily in the wrong direction.Ethiopia's approach may not be in line with the so-called 'international best practice' usually prescribed for developing countries. But there is no single regulatory model that suits all developing countries. Each country is strongly advised to adopt a bespoke approach reflecting its specific market environment, legal system, institutional capacity, and political realities since developing countries themselves are not homogeneous.[83]In the absence of competitors in the Ethiopian telecom market, maintaining institutions like the ETA which was meant to regulate competition among multiple operators was only an unnecessary cost. Ethiopia had to cut on this cost by abolishing ETA and regulating her monopoly operator through MCIT. The other advantage of a regulator forming "a department within a ministry"is its

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[81] Telecom Proc. No.49, Art. 3(1).
[82]Id, Art.7.
[83] A.Buckingham and M.Williams, "Designing Regulatory Frameworks for Developing Countries," in I.Walden(ed.) Telecommunications Law and Regulation(2009), p.830. It is also submitted that the form which regulatory authority takes, its jurisdictions, powers, resources, and the degree of autonomy it needs to enjoy from the executive department of the government, etc remain issues to be settled based on a country's objective realities including political culture. See A.Buckingham *et el*, *Cited above at note* 4.787.

convenience for implementing universal service policy since it allows the government to retain political control necessary to enforce difficult but socially sensible reforms.[84] Interestingly, Ethiopia's approach does not also offend WTO's Reference Paper if she opts to adopt it at the time of accession. The Reference Paper does not require national telecom regulators to be politically independent in the sense of locating them outside the structure of the line ministry responsible for communications to satisfy the independence requirement. It only requires their decisions and procedures to be 'impartial'with respect to all market participants.[85]

Currently, Ethiopia may not need an independent regulator whose decision is not influenced by political considerations in view of the fact that the incumbent telecom operator is a state owned monopoly, itself not free from political influences.But this may not be tenable if and when the country liberalizes her telecom to attract new market entrants because the present regulatory design is fraught with the high risk of political capture because it is just a department within MCIT. It is headed by a civil servant director accountable directly to the state minister who in turn reports to the minister. The regulator does not have the structural, financial, and decisional independence. Investors need a good measure of comfort that regulatory decisions will be impartial and that all market players will be treated fairly.A regulator lacking in independence is quite worrisome for investors.[86]

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[84] L. Borissova, Cited above at note 73, p.472

[85] See Article 5 of the Reference Paper. The *impartiality* requirement under the Reference Paper may be construed to mandate separation of policy and regulatory functions with a view to insulating the regulator's decision-making process from political influences. See also Angus Henderson, Iain Gentle, Elise Ball, "WTO Principles and Telecommunications in Developing Nations: Challenges and Consequences of Accession," Telecommunications Policy, Vol. 29(2005), pp.210-212.

[86]A. Buckingham *et al*, cited above at note 4, p.789. The risks of lack of independent regulator for the investor include: discrimination against new entrants in their dealings with the incumbent operator because the government is both the owner of the incumbent operator and its regulator; implementing interconnection policy in a manner that favors the incumbent operator (e.g., on determination of interconnection tariffs); failure to ensure equitable access to scarce resources such as numbering and spectrum allocation; politically motivated decisions that have a detrimental effect on the incumbent, such as a refusal to allow the incumbent to rebalance artificially low local call tariffs. See *Ibid*.

Ethiopia may have to reform her telecom regulatory design. Taking the regulator outside ministerial structure and re-establishing it once again as an "autonomous federal agency" could be one option. But structural independence alone does not guarantee functional independence of the regulator especially in a country of entrenched weak governance and no credible history of independent institutions. Another possible option for Ethiopia is to adopt a regulator which is a semi-autonomous entity within MCIT and headed by a director general. But this requires a careful and clear regulation of the relationship between the director general and the minister in order to avoid political interference of the latter as regards decisions of the former.[87]

The relative location of the regulator, though relevant, is not the major controlling factor in the equation of regulator's independence. The crucial thing is rather the political will of the government to have an effective telecom regulator that enjoys sufficient degree of autonomy from political influence and control with adequate safeguards protecting the exercise of such autonomy. Irrespective of the location of the regulator, Ethiopia should be ready to place the "Chinese Wall" between her telecom regulator and the government so as to keep political capture of decision-making at bay. She also needs to reinforce the 'Wall' with additional rules on composition and appointment of the regulator(s), on conflict of interest as well as on financing.

B. *Rules on Licensing*

Licensing as an aspect of regulatory process in the telecom sector is a relatively recent development.[88] But it has now become typical of any regulatory framework to require telecom operators to obtain some form of license prior to launching commercial service.[89] Its use as a regulatory tool has also increased in recent years leading, among other things, to increased attention to the

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[87]It is reported that such model is not common but used to be the case in France; see L. Borissova, Cited above at note 73, pp.472-473.

[88]This has been attributed to the fact that in most markets telecom services were provided by state-owned monopolies and telecom operations were treated as public administration with other government services obviating the need for licences. See H. Intven, J.Oliver and E. SepÚlveda, ITU Telecommunications Regulation Handbook(Module 2): Licensing Telecommunications Services(http://www.itu.int/ITU-D/treg/Documentation/Infodev_handbook/2_Licensing.pdf) last visited on July 9, 2013.

[89]A.Buckingham and M.Williams, Cited above at note 83, p.851

reforms of licensing regimes.[90]Licensing does not have the same importance in all countries but it has certain common objectives to achieve.[91]It provides the necessary authorization for an operator to participate in telecom markets, often defines the rights and obligations of the operator, and enables the regulator to monitor market participants.[92] Investors in developing countries are also resorting to licensing to reduce risks of regulatory uncertainties.[93]

Ethiopia introduced a licensing regime in 1996. Thus, no person may operate a telecom service in Ethiopia without obtaining a licence.[94]Article 2(2)(j) of Telecom Reg.No.47 recognizes four different types of telecom service licences, namely public switched telecom licence, cellular mobile service licence, Internet service licence, and data communication service licence.[95]An entity which wants to provide local, national long distance or international telephony, for instance, has to obtain public switched telecom service licence.[96]All telecom licences are granted for a period not exceeding 10 years (except for public switched telecom service licence which may be granted for

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[90]P.Xavier, "The Licensing of Telecommunication Suppliers: Beyond the EU's Directive," Telecommunications Policy, Vol. 22, No. 6, p. 483.

[91]These objectives include: regulating the provision of an essential public service, expansion of networks and services (including universal services), privatization, regulating market structure, establishing a competition framework, allocation of scarce resources, generating government revenue, consumer protection and ensuring regulatory certainty. For the details on this see H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 88. For specific purposes for which licences have been actually used, see P.Xavier, Cited above at note 90, p. 483, note 1.

[92]A.Buckingham and M.Williams, Cited above at note 83, p.851

[93]Investors often seek detailed, self-contained licenses that purport to cover all key regulatory controls, and to secure limitations on the regulatory authority's freedom to amend those license terms. This approach is not without limitations, though.For more seeA.Buckingham and M.Williams, Cited above at note 83, pp.848-850.

[94]See Telecom Proc.No.49, Art.10(1). Only the police, the armed force and other services directly employed by the government for national security are exempt from licensing requirements. Ibid, sub-article 2.

[95]The disciplines on licensing are said to differ from country to country. Generally there are three approaches to licensing: individual licences (operator-specific licenses), general authorization (class licenses), and no licensing (open entry); for details see H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 88. There is also this emerging trend called 'unified licensing' regime in which case licenses are technology and service neutral in the sense that the licensee is not constrained as to the type of infrastructure it operates or the services it provides. See A.Buckingham and M.Williams, Cited above at note 83, p.854; pp.850-851.

[96]Telecom Reg.No.47, Art 2(2)(g &h)..

25 years) but can be renewed for successive periods provided that each renewal shall not exceed half of the initial period of licence.[97]

In 2011 the MCIT came up with a new rule, the Value-added Services License Directive No.3/2011. Article 2(6) of the Directive classifies value-added services into six sub-categories including Internet and data communications services. Article 6 of the Directive reduced the 10 year validity period of a value-added service license under Article 2(2)(j) of Telecom Reg.No.47 to only one year requiring renewal at the end of each fiscal year.The Directive also reduced the license fee for value-added services from Birr 100,000 under Article 4(1) of the Regulation to Birr 25, 000. But the licensee has to pay Birr 10,000 for each renewal.[98]

Currently the authority to license is vested in the MCIT[99]which grants license upon application. The applicant has to produce proof of its technical competency, financial capacity,and experience; it must also be eligible to invest in the telecom sector under the country's investment law.[100]The MCIT has to grant a licence within 90 days of the submission of an application and upon payment of the prescribed licence fee unless the application is rejected for want of material adequacy in respect of the applicant's technical competence, or financial capacity, or experience, or any information supplied.[101] The decision not to grant a licence has to be made in writing and must be reasoned out, naturally pinpointing the material inadequacy alleged to have impeded favorable assessment of the request for licence and invoked as a

[97]Renewal is subject to the conditions stated under Article 10(1-3) of Telecom Reg.No.47. These conditions are: the licensee has to apply for renewal together with its business plan at least six months before the expiry of its licence; it is not in breach of the grounds for revocation as defined under the relevant law; and agrees to upgrade its operation by replacing outdated technology with new ones.

[98] Ministry of Communications and Information Technology Value-added Services License Directive,2011, Art.6(2&3), Dir. No.3. The Ministry has reserved the right change the licensee and renewal fees. This Directive which has the effect of amending the Regulation of the Council of Ministers is not ultra-virus because the Ministry is empowered under Article 11(3) of the Regulation to modify any condition of license.

[99] Proc No. 691, cited above at note 30, Art.24(1&2)

[100]See Articles 3 and 4(1&2) of Telecom Reg.No.47

[101]Id. Article 4(1)

ground of refusal.[102]An applicant dissatisfied with the decision shall be given not less than 30 days to object the decision and seek consultation so as to improve its standing by providing additional evidence supporting its application,or amending its application. If the licensing body still believes that the applicant is unable to satisfy the material adequacy test, it shall deny licence and communicate such decision in writing.[103]

Ethiopia's approach to legally prescribing the criteria for licensing ensures transparency of the licensing process. This is commendable, but not sufficient to lend credibility and effectiveness to the regulatory process. The question, therefore, is whether Ethiopia's regulatory framework envisages limited discretionary powers and mechanisms restraining arbitrary exercise by the licensing body.

Eligibility to invest in the telecom market could be a simple issue of law that can be settled quickly and objectively by looking at the applicable investment law of the country. But other licensing criteria such as 'technical competence', 'financial capacity', and 'experience' are not clearly defined. As the requirements for each type of license are not necessarily the same it may not be important to specifically define these criteria. Presumably they are left for the determination of the regulatory body through relevant directives. MCIT's Directive No.3/2011 on value-added services license is a case in point.

The rule on 'Amendment of Licence' under Article 8 of Telecom Reg.No.47 gives a wide regulatory discretion to the licensing body.The said amendment relates to the "contents of a licence" [104](mainly the rights and obligation of a licensee) as specifically written in the licence document and defined under Article 6 of the Regulation.This amendment which we may understand as modifying[105]the original terms of a licence can be initiated in two ways: by the request of the licensee, or through the unilateral action of the licensing body. In

[102] Id. Article 5(1)
[103] Id. Article 5(1-3)
[104] 'Contents of licence' specifies the identity of the licensee, the installation to which the licence applies and its location, the type of telecom service, roll-out and service targets to be met by the licensee.
[105] The Amharic version of the provision reads 'ፈቃድ ስለማሻሻል'which means'modifying license'.

the former case the request must be 'justifiable'[106],while in the latter case the regulator must deem it necessary for reason of 'public interest'provided that it'shall not substantially affect the operational and financial viability of the licensee'.[107] There is no specific guideline under the Regulation to determine whether a proposed change is justifiable or not; what sounds feasible from the business owner's perspective could be dismissed as unjustifiable from the regulator's angle. The concept of 'public interest' is also as wide as an ocean. It could mean anything for the regulator to justify its measure. One may contend that the regulator's discretion is curbed by the requirement that the proposed measure must not 'substantially' affect the viability of the business licensed as showing 'public interest' alone is not enough to take a measure. But the Regulation still leaves the determination of substantiality to the regulator itself. What is the threshold of this substantiality? It must require some kind of researching and analyzing the business cost of the measure to targeted licensees before implementing it. Whether Ethiopia's regulator is willing and capable of doing this arduous task with its attending regulatory cost is something to be seen.

Incredibly, the licensing body also has the discretion to modify any "Conditions of Licence"[108] expressly listed down under Article 11 of Telecom Proc.No.49, which later appeared as "Duties of Licensee"[109] under Article 7 of the Regulation. Here, unlike the requirements for amending the contents of a licence discussed above, consideration of 'public interest'[110]is the only test to take action. In other words, the licensing body does not have to show, or even believe, that proposed measures will not'substantially affect the operational

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[106]Telecom Reg.No. 47, Art.8 (1)

[107] Id. Article 8 (2)

[108]"Conditions of licence" are in principle to be determined by the licensing body and must promote the economic and social objectives of the telecom sector. But the lawmaker has also specified certain conditions aimed at universal access (service to rural and other specified areas), transparency of operators (publishing service charges, and the terms and conditions of service), and priority of service to privileged customers (e.g. government or specified organizations, and compliance with technical and service standards; see Article 11(2) of Telecom Proc.No.49.

[109]The Regulation lists down some six duties of the licensee which are more or less similar with the 'conditions of license' under Article 11(2) of Telecom Proc.No.49.

[110]Article 11(3) of Telecom Proc.No. 49 expressly authorizes the licensing body to "modify any conditions of licence" if it considers it necessary in the public interest (emphasis supplied).

and financial viability of the licensee'.Under the Regulation, no amendment to contents of a licence can be ordered when the amendment causes substantial challenge to a particular licensee in question even if the amendment would have advanced public interest. But under the Proclamation the regulator can go ahead with its measure despite a proven cost to private business so long as it advances public interest. This makes it easier for the regulator to avoid the test of 'substantial cost' to a licensee under the Regulation by simply acting under the Proclamation which also serves the same purpose especially when the targeted'conditions of licence' are also already written as licence terms.

While change in content of a licence affects existing license holders, change in conditions of licence as a general measure is forward-looking, targeting only new entrants. These changes may affect conditions of competition between existing license holders and new entrants both competing in the same market segment. Thus, the regulator may have to compel/ or allow existing licence holders to comply with/adjust to the new conditions of licence within a reasonable transition period so as to make the playing field equally leveled for all market participants.

Wide regulatory discretions are not the only problems in Ethiopia's telecom service licensing regime. The regime does not put in place mechanisms by which businesses affected by regulator's decisions may have them reviewed administratively or through a judicial process although it can be taken to satisfy the reasonable period requirement of Article VI(3) of the GATS as the MICT has to make its decision to grant or to deny a license within 90 days of reciept of application.The regulator may refuse to grant licence, or to renew a licence, or may amend or refuse to amend the terms of a licence contrary to the expressed requirements of the law as discussed above. It can also revoke a licence.[111]The performance of any regulator may not be satisfactory if there are no substantive and procedural restraining mechanisms on its regulatory

[111]The grounds for revoking a licence under Article 11(1) of Telecom Reg.No.47are: failure of the licensee to fulfill its roll-out or service targets specified in the license, failure to comply with technical standards set by the regulator, violation of tariff regulation, provision of inferior service and violation of public interest-whatever it means in the eyes of the regulator! The only safeguard for the licensee under sub-2 of the same provision is that it should be given "adequate opportunity" to rectify the situations or correct its failures before its licence is revoked.

discretions and exercises.[112] In Ethiopia the wide regulatory discretions without effective review mechanism to check their exercise can also be fertile breedinggrounds for corrupt practices in addition to their potential for regulatory uncertainties and risks. MCIT should exercise its discretions wisely and judiciously. It should be guided by the country's objective in regulating her telecom sector when exercising its vast regulatory discretion.That objective is promoting the development of high quality, efficient, reliable, and affordable telecom services.[113]Thus, any exercise of regulatory discretion that does not serve this objective should be avoided or abandoned.

On the other hand, Ethiopia's telecom licensing regime sits well with Article 4 of WTO's Reference Paper, if not fully with the GATS on domestic regulation.[114] It requires a WTO Member to afford a service supplier injured by an administrative decision affecting trade in service a prompt review of the decision, and where justified, appropriate remedies. The review can be made by a body independent of the regulatory agency that took the measure. But a country is not bound to establish one merely because it joins the WTO and schedules a service sector. So the review can be made by the regulatory agency itself but the procedure for review by the agency has to be in fact objective and impartial. None of these two review mechanisms is in place in Ethiopia as the law currently stands. The Reference Paper's single concern in licensing[115] is ensuring transparency (where a licence is required) by requiring the public availability of all licensing criteria, the time required to reach a decision concerning application for licence, and the terms and conditions of individual licences.[116]As we saw above Ethiopia's licensing criteria and the terms and conditions of licences[117] as well as the length of time to decide on an

[112]B.Levy and P. T. Spiller, "The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation," Journal of Law, Economics & Organization, Vol. 10 (1994), p.202.
[113]See Article 4 ofTelelcom Proc.No. 49
[114]See Article VI (2) (a & b) of the GATS.
[115]The Reference Paper, for example, does not address when licensing is required, the nature of licensing criteria, what conditions could be attached to a given type of licence, the cost trends for licence, etc. Thus, the discipline is criticized as sketchy and weak; see, for example,B.Guermazi, Cited above at note 72.
[116]See Article 4 of the Reference Paper.
[117]Note that 'conditions of licence' under Article 11(2) of Telecom Proc.No.49 are not individualized, meaning the law does not separately talk about conditions of each individual

application for licence are all published as federal laws which can be purchased or freely available on the world wide web.[118]The Reference Paper also obliges a WTO member to notify, upon request, the applicant of the reason for denying a licence.[119] In this respect Ethiopian law has gone one step further, making it the duty of the regulator to notify the applicant of its decision in writing without waiting for the latter's request.[120]

C. Rules on Interconnection

Interconnection has never been a domestic regulatory issue in Ethiopia for the obvious reason of the monopoly, i.e., there are no other operators to interconnect.But if and when Ethiopia liberalizes her telecom market, interconnection will certainly become a key issue for regulation.Ideally, interconnection arrangements could be considered as business matters the terms of which operators negotiate.[121] But there is this risk of incumbent operator forcing new market entrants to accept unfavorable interconnection terms which frustrate competition.[122] New entrants may not have equal bargaining power with the incumbent operator while the latter may not normally have the incentive to make things easy for its new competitors. This calls for regulatory intervention of one or other form.Interconnection is also a consumer issue because in the absence of effective interconnection arrangements between telecom operators, subscribers of different telecom

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licence. It can be argued that they are applicable for all types of licences unless the regulator decides otherwise invoking its general power under Article 11(1) of the same Proclamation. See for example MCIT Directive No.3/2011 on Value-added service license.

[118] MCIT must make any new conditions of licence it introduces publicly available, for instance, by posting them on its webpage to satisfy the Reference Paper's requirement.

[119]See Article 4 of the Reference Paper.

[120]See Article 5(3) of Telecom Reg.No.47

[121] Peter L. Smith and Björn Wellenius, Cited above at note 64

[122]Interconnection terms which frustrate competition include: charging excessive rates for interconnection, delaying provision of equipment and facilities needed for interconnection, misusing of customer and competitive information, imposing limits on number of points of interconnection, imposing unnecessary stringent technical standards, supplying lower quality services to interconnecting parties, refusing to unbundle network elements. See Franco Papandrea,WTOTelecommunicationsReference Paper(http://www.acma.gov.au/webwr/_assets/main/lib310475/wto_reference_paper.pdf) last visited on August 6, 2013.

operators simply cannot communicate with each other or cannot connect with services they demand.[123]

Ethiopia's interconnection regime as provided under Article 56 of Telecom Reg.No. 47 is fairly general and far from complete. It covers only three issues of interconnection, namely the duty to interconnect, the duty to enter into interconnection agreement, and dispute resolution mechanism. It leaves financial, technical and operational matters of interconnection for future directive of the regulator[124]which is yet to come. Nor does it define or describe the elusive concept of interconnection.

The International Telecommunications Union (ITU) understands interconnection as a set of commercial and technical arrangements by which service providers connect their equipment, networks and services so that their customers can have access to the customers, services and networks of other service providers.[125] Under the WTO's Reference Paper interconnection is "linking with suppliers providing public telecoms transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier…."[126]For the European Union interconnection is the physical and logical linking of telecom networks.[127] The common element of all these definitions is that interconnection guarantees interoperability of networks and services of operators. Apparently this is also the case under Ethiopian law as we may gather from Article 56(2) of the Regulation which requires technical inter-operability and availability conditions to be fully conducive for interconnection.

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[123]H. Intven, J.Oliver and E. SepÚlveda, ITU, Telecommunications Regulation Handbook Module 3: Interconnection(http://www.itu.int/ITU-D/treg/Documentation/Infodev_handbook/3_Interconnection.pdf) last visited on August 7, 2013.

[124]Article 56(4) of Telelcom Reg. No.47

[125]H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 123

[126]Article 2.1 of Reference Paper

[127] EC Directive quoted in H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 123defines interconnection as the "physical and logical linking of public electronic communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with the users of the same or another undertaking, or to access services provided by another undertaking."

The preponderance of opinion maintains that the focus of interconnection regulation should be on dominant operators (as opposed to non-dominant ones)which have the ability to establish interconnection terms and conditions independently of competition.[128] This is also the view adopted by WTO's Reference Paper which requires interconnection with 'major supplier.'[129]The argument is that universal imposition of interconnection obligations on all operators, large and small, amounts to over-regulation while focusing on dominant operators has the added advantage of increased efficiency.[130]

Ethiopia's approach in this regard is not that plain or yet to be determined. Article 56(1) of the Regulations does not make any distinction between licensees (operators). It simply states that a licensee shall interconnect its telecoms system to the telecoms system of such other licensee. Taken as it is, this provision only establishes the duty of all telecom operators (including the incumbent, though not a 'licensee') to interconnect.Thus it is proper for the law to declare this mutual duty of operators in such general terms. The issue is whether we can/should extend Article 56(1) to cover interconnection terms and conditions which only the incumbent monopoly operator is capable of determining and manipulating independently of competition thus calling for regulatory intervention. Given the generality of the language of Article 56(1) one may hold the view that it extends to these matters, pointing to the conclusion that Ethiopia has adopted the principle of universal imposition of interconnection obligation unless we argue that such matters are among regulatory issues left for determination by future directive within the meaning of sub-4 of the same provision.

Article 56(3) of the Regulations provides that an agreement relating to interconnection shall be entered into by the licensees. Thus, in Ethiopia

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[128]H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 123

[129]See Article 2.2 of the Reference Paper. The Paper defines major supplier as "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market." Essential facilities are also defined as "facilities of a public telecommunications transport network or services that (a) are exclusively or predominantly provided by a single or limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a new service."

[130]H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 123

interconnection is a commercial matter the terms of which interconnecting parties have to determine through negotiation. This is also the main approach in many countries. The assumption is that operators are better posited than regulators to understand operational requirements of interconnection and are well equipped with the technical information to implement interconnection arrangements.[131]

As discussed above, however,the negotiation of interconnection arrangements is not among equals, and incumbent operator is likely to resort to anti-competitive behaviors leading to delay and unfair outcomes. Or negotiations may even fail. This situation calls for effective regulatory intervention through appropriate tools that promote successful negotiation. These tools include:[132] establishing guidelines in advance of negotiations, setting default interconnection terms in advance of negotiation, establishing deadlines for various stages of negotiations, establishing industry technical committees, incentivizing the completion of successful negotiations, appointing mediators, or arbitrators. While variations or combination of these tools can be used by a regulator, the Ethiopian regulator's single tool is arbitration. Article 56(5) of the Regulations requires interconnection disputes that arise in the course of negotiation to be settled by the final and binding arbitration of the regulator. This can be a serious concern in Ethiopia. Lack of expertise in technical and financial issues of interconnection given the novelty of telecom liberalization, for example, may result not only in delay but also in unnecessary regulatory intervention. Default terms of interconnection by which all parties must abide by while they negotiate or if they fail to agree within a set deadline could be more effective than arbitration in the Ethiopia context.

Finally, the fact that Ethiopia's interconnection regime leaves much regulatory issues for future directives denies us the opportunity to test its compatibility to WTO's interconnection principles contained in the Reference Paper.[133]But we

[131]Ibid.

[132]Ibid.

[133]Article 2.1-2.5 of the Reference Paper provides detailed guidelines on interconnection. It requires interconnection with major supplier at technically feasible point, under non-discriminatory terms, in a timely fashion and on cost-oriented rates. Interconnection service must be sufficiently unbundled to avoid payments for unnecessary components, procedures for

can still say that Ethiopia's law satisfies WTO's requirements of ensuring interconnection with a major supplier at technically feasible point.[134] It also satisfies the dispute resolution requirement for interconnection which has to be an independent domestic body (which could be the telecom regulator itself) within a reasonable period of time.[135]

D. *Rules on Allocation and Use of Scarce Resources*

Radio frequencies, numbering plan and right of way are usually considered scarce resources for the telecom sector. Thus, their allocation and use is subject to regulation. For example, WTO's Reference Paper under Article 6 openly recognizes the scarcity of these resources and calls upon national regulators to adopt a procedure that ensures their allocation and use to be objective, timely, transparent and non-discriminatory.With the abolition of ETA the regulation of radio frequencies is transferred to MCIT which is mandated to manage, authorize, coordinate and supervise the use of radio frequencies allotted to Ethiopia.[136]Except for the police, the armed force and other 'services directly employed' by the government the installation and utilization of radio frequency equipment is prohibited without holding a valid permit (license) for the use of frequencies.[137]MCIT also has to prepare a national frequency plan that aims at ensuring orderly, efficient and effective utilization of frequency spectrum and shall maintain a national register of frequencies.[138]

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interconnection with major supplier should be publicly available, and interconnection agreements of major supplier or its offers must be publicly available. Disputes have to be resolved by independent domestic body without delay.

[134] See Article 2.2 of the Reference Paper cum Article 56(1) ofTelecom Reg.No.47which cannot be understood to have excluded interconnection with incumbent operator which is the major supplier in Ethiopia. Read also Article 2.5 of the Reference Paper cum Article 56(2) of the same Regulation obliges operators to technical interoperability and its availability to be *fully conducive for interconnection*(emphasis). And to be fully conducive interconnection should be available at least at technically feasible point.

[135]See Article 2.5 of the Reference Paper cum Article 56(5) of Telecom Reg. No.47. The latter has not fixed a time within which the regulator has to give its arbitral award but we can assume that it has to make its decision within a reasonable time to avoid the cost of delay to operators.

[136]See Articles 6(7), 15(1), & 16(20 of Telecom Proc.No.49.

[137]Id. Article 15(2) and Article 53(1) of Telecom Reg.No.47.

[138]Id, Arts. 52(1) & 54

A license to use frequencies can be secured from MCITupon filing an application and payment of fee.[139]In making its decision MCIT shall take into account the 'present use and future needs' of the country.[140]This requirement serves the efficiency purpose of allocating frequencies as scarce resources. Yet it can also be abused by the licensing body exercising unchecked regulatory discretion. Frequency spectrum management may constitute a powerful regulatory tool to protect market, spectrum scarcity being invoked to restrict the number of new market entrants.[141]Moreover, the procedure for allocation of frequencies is not that elaborate.The scope of a license and licensing criteria are not clearly defined; the time within which MCIT has to make its decision upon receipt of application documents is not set; duration of a license and grounds of revocation, etc are not addressed.The separation of operational and regulatory functions in Ethiopia's telecom sector has resulted in the transfer of the ownership and management of numbering plan from the incumbent operator to a regulatory body under Article 7(6) of Telecom Reg.No. 47.For example, the current numbering plan was designed and introduced in 2004 by the then regulator (i.e. ETA). It was argued that the new numbering plan was designed to meet the challenges of multi-operators,support effective competition through fair allocation of numbering resources and has reserved blocks of numbers for new and innovative telecom service provisions.[142]

Numbering is another regulatory tool at the disposal of the Ethiopian telecom regulator the sacristy of which can be invoked to restrict new entry into the market thereby hampering competition. Commentators warn that mere transfer of management of numbering plan from incumbent to a regulatory authority is not enough to foster competition; the former might have already secured large numbering blocks for its own use leading to inefficient use of numbers as well as giving it a competitive advantage over new entrants.[143] Surprisingly, however, the Ethiopian law on numbering plan is far less than rudimentary;

[139]Id. Article 53(1&2).

[140]Article 16(4) of Telecom Proc.No.49. The same range of frequency may also be assigned to different users on a time-sharing basis. Ibid.

[141]B.Guermazi, cited above at note 72

[142] New Numbering Plan for Telecommunications Services, (http://www.eta.gov.et/numbering%20plan%20(Implemented.pdf) last visited on August 14, 2013

[143]A.Buckingham and M.Williams, Cited above at note 83, p. 878

only a single sub-article is devoted to numbering plan. A number of critical regulatory issues are left unattended. For example, whether operators shall pay for number usage, number portability, and the procedures for allocation of numbers are not addressed at all.

Ethiopian law guarantees new entrants to the telecom market certain real property rights which they need to meet their roll-out and service obligations under their licences.Operators have right of way over any land to install, repair, improve, examine, alter or remove a telecom line including the right to fly telecom lines upon any building. They also have the right to cut down any tree obstructing telecom line as well as the right to compulsorily acquire any privately possessed land which they may need for network roll-out such as erecting microwave transmissions.[144]

The creation of a right of way over the property of others involves a very simple process in Ethiopia. A telecom operator should give only a ten-day written notice to possessors or owners of the property to be encumbered by the servitude.Any objection by the possessors or owners has to be filed with the telecom regulator within the same notice period.The regulator must afford both parties the opportunity to be heard before it reaches a decision sustaining the objection, or subjecting the exercise of the right to conditions it thinks fit.[145]The right of way over private property is free of charge; operators are liable to pay fair compensation only if they cause damage to the property in the course of exercising their right of way.[146]

E. Rules on Competitive Safeguards

The debate about the ideal regulatory model for the telecom sector is not limited to issues of how to design the regulatory authority. It also extends to designing the legal regime (sector-specific rules vis-à-vis generic competition law) governing competition once the sector is open for market.Generally there are three approaches to the issue:[147]The first approach is the exclusive use of

[144]Article 18(1-3) & Article 21 of Telecom Proc.No..49
[145]Id. Article 18(4-6)
[146] Id. Articles 18 20(1)
[147] See R. Alemu, Regulation of Competition in the Liberalized Telecommunications Sector in Sub-Saharan Africa: Uganda's

competition law enforced by regular courts. New Zealand was the only example until it abandoned the approach in 2001. The second approach is the exclusive use of sector-specific rules in which generic competition rules are incorporated into primary legislations governing telecom.Developing countries prefer this approach to overcome the gap created by the absence of antitrust jurisprudence and regulation.[148]Nigeria, Uganda and Ghana have also adopted this approach.[149] The third approach, common in the majority of countries that liberalized telecoms, is a co-regulatory approach in which competition law supplements and complements sector-specific rules.[150]

Ethiopia's regime of competition regulation for the telecom sector is a combination of sector-specific rules and generic competition law. The sector-specific rules regulate certain issues of competition, such as entry (licensing), interconnection, technical standards,scarce resources, charges and tariffs.The sector-specific rules, however, do not address other anti-competitive practices. For example, the incumbent operator, given its dominant position in the market, could pose a serious challenge to competition by engaging in anti-competitive behaviours such as refusal to deal, predatory and excessive pricing, tying and bundling of services, anti competitive cross-subsidization, etc. Thus, it is submitted these anti-competitive practices are subject to generic competition law in Ethiopia.[151]

In Ethiopia the regulation of competition in telecom is split not only between sector-specific rules and generic competition law but also between sector-specific regulator and generic completion regulator. Sector-specific rules are

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Experience,(http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/south-africa-conference-on-competition-law.pdf), last visited on September 17, 2013.

[148]A.Buckingham and M.Williams, Cited above at note 83,p.841

[149] See R. Alemu, Cited above at note 147

[150]This approach is also adopted by the EU where member states had a long history of public monopoly before liberalization. In the EU sector-specific rules were the trend especially during the early days of transition from monopoly to competition, but emphasis shifted to generic completion law when liberalization process was over around 2002, thus, national telecom regulators were authorized to 'roll back' their sector-specific rules as competition was maturing; see A.Buckingham and M.Williams, Cited above at note 83, p.840

[151] Generic competition rules are enshrined mainly in the Trade Competition and and Consumers' Protection Proclamation, 2013, Proc.No. 813, Neg.Gaz. Year 20, no.28

the jurisdiction of the telecom sector regulator, i.e., the MCIT. Generic competition law falls under the jurisdiction of the Trade Competition and and Consumers Protection Authority(which is accountable to the Ministry of Trade). While the two sets of rules may successfully operate simultaneously (supplementing and completing each other), their practical enforcement by two different federal institutions could pose a challenge. This 'split regulatory approach' of Australia is thought to be unsuitable for developing countries where coordination and coherency between government institutions is generally lacking.[152]

WTO's Reference Paper under Article 1.1 calls upon members to put in place appropriate measures that prevent anti-competitive practices of major telecom suppliers. It does not prescribe any specific measure as appropriate nor does it define anti-competitive practices. These matters are left for the determination of members. The generic competition law of Ethiopia defines and prohibits anti-competitive practices including abuse of dominance. Its disciplines are also applicable to telecom firms including the dominant incumbent operator and on all telecom services except to basic telephone.[153] Thus, insofaras Ethiopia's regime outlaws anti-competitive practices it sits well with WTO's requirement under Article 1.1 of the Reference Paper. But what the Reference Paper under Article 1.2(a) wishes to proscribe, i.e., anti-competitive cross-subsidization,[154] may not be acceptable to Ethiopia. Whether Ethiopia's competition law currently prohibits cross-subsidization itself is not clear; at least the law does not expressly prohibit cross-subsidization as an anti-competitive practice. Cross-subsidization has been Ethiopia's policy and practice to achieve its social objective of universal access in the telecom service. This has also been the industry norm both in developed and developing nations. Thus, at the time of her accession negotiation Ethiopia will certainly make a reservation with respect to binding herself to the prohibition of cross-subsidization.

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[152] A.Buckingham and M.Williams, Cited above at note, 83, p.835.

[153] Ibid.

[154] Other anti-competitive practices under Article 1.2 of the Reference Paper are anti-competitive use of information obtained from competitors, and failure to make available to competitors on timely basis technical information about essential services and commercially relevant information which they need to provide services.

F. Rules on Universal Access/Service Obligation

The cost factor associated with rural, remote and low-income areas makes them commercially unattractive to telecom operators often accused of cream skimming.Thus, it takes regulatory intervention to extend telecom services to citizens in and around these areas where telecom operators will not be able to provide services on commercial terms. The twin concepts of universal service and universal access have been at the heart of governments'approaches in this regard.Universal service means every household in the country has telephone service (traditionally a fixed-line phone); it focuses on connecting households and more practical in developed nations.[155]Universal access, more practicable in developing countries, means everyone in a community can gain access to a publicly available telephone; its focus is connecting individuals through shared facilities although the growing mobile penetration rate delivered on the back of leapfrog technology can be invoked to question the continued relevance of this approach to universal access.[156] Despite differences, these two concepts are used interchangeably or combined as universal access/service because of their shared overriding goal of expanding and maintaining affordable telecom services to the public especially in rural, remote and low-income areas.[157]

Governments have used a wide range of instruments to finance universal access/service goals.Guermazi outlines the following instruments:[158] Cross-subsidization is a typical tool in a monopolistic market in which incumbent operator is required to subsidize local lines from the profits of long distance and international calls.With the introduction of liberalization new market entrants have been made part of the funding mechanism in more ways than one. For example, universal access/service obligation has become a market entry requirement i.e., a condition to obtain a license.This takes the form of a mandatory service obligation imposed on the licensee in which it is required to fulfill certain roll-out targets defined in its license document.The second

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[155]ITU, Trends in Telecommunications Reform 2003: Promoting Universal Service to ICTs: Practical Tools for Regulators (http://www.itu.int/pub/D-REG-TTR.6-2003) last visited on August 24,2013

[156]Shared facilities include payphones, telecenters and community centers. Ibid.

[157]Ibid.

[158]B.Guermazi, Cited above at note72

funding method that involves private operators is allowing the incumbent operator to collect access deficit charges from other private operators to subsidize the deficit it incurs in the course of provision of universal access. This payment is collected in the form of interconnection charges.The third funding tool is establishing universal access/service fund, an account to which all operators contribute, administered independently and supports service in a specified area.

Ethiopia's universal access goal as defined in the Growth and Transformation Plan (GTP) is the provision of basic telephone services within 5km radius of service for all rural areas. There is no comparable goal for low-income urban areas in the GTP although public and private payphones and telecentres are common in urban areas. Financing universal access in Ethiopia has been on the back of the incumbent operator which uses cross-subsidization, rural communications projects and rolling out of service stations in underserved areas.[159]

Ethiopia also contemplates to involve private telecom operators in the provision of universal access if and when she opens the market for private operators. Article 11(2(a) of Telecom Proc.No.49 states that a licensee may be required to provide telecom services to rural or other 'specified' areas (to be determined by the licensing body) as a condition of license. There is no doubt rural areas in Ethiopia are prime candidates for universal access. The licensing body can also designate low-income urban areas for similar purpose.Moreover, Article 7(1) of Telecom Reg.No.47 imposes on licensees the duty to fulfill roll-out targets as defined by the licensing body and specified in the license document. Roll-out target under Article2(2) (i) of the same Regulations means telecom service expansion target set by the regulator and includes public payphone target, underserved line target, priority customers target, and public call office target.

Ethiopia does not have universal access fund. But if she establishes one in the future, the telecom regulator can easily force telecom operators to contribute to such fund without even requiring the House of Peoples Representatives and the

[159]Lishan Abay, cited above at note 32

Council of Ministers to formally amend the existing legal regime. Contribution to universal access fund can be made a market entry condition without even amending Article 11 of the Telecom Proc. No.49. This is so because Article 11(3) of the same law expressly empowers the licensing body (MCIT) to modify any conditions of a license in the interest of the public which can also include universal access. Likewise MCIT can easily extend the obligation to contribute to universal access fund to telecom operators already in the market. This is because Article 8(2) of Telecom Reg.No. 47 authorizes the licensing body to modify the original terms of existing licenses for the sake of public interest (which includes promoting universal access) provided that the amount operators are required to contribute to the fund does not substantially affect the operational and financial viability of the operators (see above). The possibility of collecting access deficit charges from operators to finance universal access is not also out of option in Ethiopia. This is because access charges are included in interconnection charges. The fees and costs of interconnection are matters yet to be determined by future directive of the telecom regulator per Article 56(4) (c) of the Regulations. So it is still possible for the regulator to include such charges in interconnection fees and costs which other operators have to pay to the incumbent.

Article 3 of WTO's Reference Paper recognizes the right of a member to define any kind of universal service obligation it thinks fit to pursue its national policy objective. It also declares that maintaining any kind of universal service obligation is not an anti-competitive practice *per se.* What is prohibited under the Reference Paper is the trade-distorting effect of administration of universal service obligation. Thus, it requires the administration to be transparent, non-discriminatory, and competitively neutral and not more burdensome than necessary to achieve the particular kind of universal service already defined by the member. Testing Reference Paper-compatibility of Ethiopia's regime on the intended manner of administering universal access obligation is difficult because the regime lacks in details on the subject. One may be tempted to argue that Ethiopia's regime satisfies at least the transparency requirement of the Reference Paper because it is a matter of published law (which is also publicly available) for private operators to assume universal service obligation.

But this alone is far less than sufficient to make an informed decision to invest or not to invest in Ethiopia's telecom market.

On the other hand, the Reference Paper's discipline on universal service may have implication for Ethiopia's ability to pursue her universal access policy. Markus observes that telecom regulatory obligations which WTO members assume may affect the ability of governments to impose universal service obligation or to introduce a system that generates funds to finance universal service. [160] Normally the transparency obligation under Article 3 of the Reference Paper may not constrain Ethiopia's ability to pursue her universal access policy; nor does the prohibition against measures which are more burdensome than necessary to achieve a defined universal access goal. But the 'non-discriminatory' and 'competitively neutral' elements in Article 3 of the Reference Paper may constrain Ethiopia's ability to purse her universal access policy if, for example, the incumbent operator is subject to universal access obligation. Ethiopia may have to discriminate in favour of the operator that bears universal access obligation and/or allow cross-subsidization which is not necessarily competitively neutral.

One of the reasons why Ethiopia has been resisting liberalization of the telecom service and stubbornly defending her monopoly against all odds is her conviction that liberalization does not help her achieve universal access goal. She argues that private operators shay away from high-risk and low-return investments while competition eats away the revenue base of the incumbent to finance universal access through cross-subsidization.Thus in her accession bid to the WTO, she has the right to wholesale rejection of Article 3 of the Reference Paper on universal access.Alternatively, Ethiopia can still adopt the Reference Paper's discipline on universal access selectively by avoiding those elements of the discipline which constrain her choice of instrument(s) she thinks effective to pursue her universal access policy.This should also be her approach towards other disciplines of the Reference Paper that restrict her choice of universal access instruments. This may not be an easy task, though. The novelty of telecom liberalization is said to have made it difficult to

[160]M.Krajewski, National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy(2003),p.178.

determine exactly how GATS commitments restrict governments' choice of instruments.[161]

Conclusion

While national monopoly operators have been dismantled and liberalization has become the norm elsewhere in the world, Ethiopia is still allowing an age-old monopoly to reign over her. Regrettably, the monopoly has taken the nation hostage of its poor services. Whereas poor monopoly performance failing to meet unrequited demands was one of the driving factors behind telecom liberalization, the Ethiopian government is still in defense of its monopoly. It argues that the monopoly is more efficient and effective to achieve its economic and social objectives in the sector. This may be explained more by political ideology than conventional economic theories.Nevertheless, we may have to resist the temptation of making a sweeping conclusion that the Ethiopian government is ideologically opposed to telecom liberalization.It does not reject liberalization in absolute terms.

Available evidence indicates that the government seeks to subscribe to a gradual and cautious approach to telecom liberalization. But still there are two major uncertainties about telecom liberalization in Ethiopia. Firstly, there is no official timetable for liberalization in the sense of introducing competition to the incumbent operator. Secondly, we are not sure whether the liberalization is going to be autonomous/unilateral and/or through WTO's multilateral track. However, if Ethiopia 'loses' to the neo-liberals at WTO's negotiation table and agrees to open her telecom sector to foreign competition, Ethiopia needs to make a delicate balancing exercise in framing her schedule of commitments.

In view of her domestic policy of gradual and cautious approach to telecom liberalization, Ethiopia needs to avoid commitments that hobble her immediately upon accession. In this regard a weak promise to future liberalization can do the trick. For example, Ethiopia may accept commitments in value-added services and allow foreign firms to provide such services in phases: first jointly with Ethio-Telecom as of fixed date after accession, second

[161]Ibid.

directly on their own after lapse of the period in the first phase. Ethiopia also needs to adopt the Reference Paper, but must also be careful to avoid those elements of the Reference Paper that constrain her ability to choose instruments that help her pursue and achieve universal access goals. The transition from public monopoly to market competition involves changes in the focus of regulatory objectives from controlling a single operator to overseeing competition between multiple actors. This also requires introducing a new set of regulatory framework. In this regard Ethiopia has put in place rules and institutions that are emulated from global champions of telecom liberalization.They specifically address issues independence of the regulator from market participants, licensing, interconnection, competitive safeguards, the allocation and use of scarce resources and universal access obligations. Some of the rules on these regulatory issues are incomplete, ambiguous and confer wide regulatory discretion to the telecom regulator beyond administrative or judicial scrutiny, but overall they have the potential to comply with WTO's standards as set in the Reference Paper. However, the wide regulatory discretions conferred to the regulator without effective substantive and procedural mechanisms constraining their exercise coupled with the novelty of telecom liberalization could cast doubts on the efficacy of the system to smoothly manage the transition from monopoly to competition.

The Doctrine of *Res Judicata* under Ethiopian Law: Essence and Conditions for its Assertion

*Tewodros Meheret**

1. Introduction

A system of civil justice strives to create symmetry between conflicting interests such as accuracy and cost, truth and efficiency, quality and speed. The rules of procedure aim at creating the steps to be followed to unearth truth and achieve justice. At the same time, because of resource and time constraints, it must be ensured that the process is effective and efficient. The dilemma a legal system encounters in balancing accuracy of judgments and efficiency of process is succinctly presented as follows:

> It is axiomatic that the object of procedure is to render litigants their due; namely, to return judgments which correctly apply the law to the true facts. But this does not mean that the state has an obligation to provide the most accurate civil procedure regardless of cost. It would be absurd to say that we are entitled to the best possible legal procedure, however expensive, when we cannot lay a credible claim to the best possible health service or to the best possible transport system. Yet it would be equally absurd to suggest that procedure need not strive to achieve any level of accuracy to satisfy the demands of justice.[1]

Legal systems grapple with the futile effort to strike the balance between these values a procedural law aspires to cater for. They are, therefore, compelled to tilt towards one of them. It is crucial "to periodically inquire whether the administration of justice reflects an optimal compromise between accuracy and cost and whether it fulfills the needs of the community at the time."[2] The extent to which a system of procedure has to strive to ascertain the truth hinges on procedures which strive to provide a reasonable measure of protection of rights, commensurate with the resources that a country can afford to spend on the

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* Lecturer, Addis Ababa University, School of Law

[1]A.A S Zucjerman, "A Reform of Civil Procedure - Rationing Procedure Rather than Access to Justice", Journal of Law and Society, vol. 22, (1995), P. 160, available at http://www.jstor.org, last accessed on 13/2/2014

[2] *Ibid.,*P 161

administration of justice.[3] Generally, despite the rhetoric that the search for truth is of a goal or in some cases the fundamental aim of the law, countries usually prefer to live with an erroneous or unjust decision, rather than allowing parties to litigate forever. *Res judicata* is a doctrine which reflects the stance a legal system takes in this direction by virtue of which a case is made to rest irrespective of the outcome which may be contrary to truth and the law.

As we will see below, it is not right to conclude that *res judicata* is a universal principle recognized in all nations. If we look at the experience of some countries regarding the determination of the underlying principle of their procedural laws, we witness that they have diversified emphasis. For instance, Jewish law does not accept an approach whereby a judgment is irreversible even when incorrect[4] since discovery of the truth[5] is an element of justice to which all else is subordinated. On the other hand, the majority of jurisdictions across legal traditions recognize an end to litigation in spite of the fact that the decision could be erroneous or has unjust outcome.

The doctrine of *res judicata* is one of the tools employed by the Civil Procedure Code of Ethiopia[6] to end litigation. The Code aims at efficiency with the ultimate

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[3] *Id.*

[4] In the Jewish legal system, a judgment is in principle subject to revision, normally by the court that issued it. Courts revise judgments if new evidence comes to light undermining the facts on which the judgment was based, provided that the party seeking to adduce the new evidence is not debarred from so doing. Judgments are also subject to revision for errors in the application of the law. See Yuval Sinai, "Reconsidering *Res Judicata*: A Comparative Perspective", Duke Journal of Comparative & International Law, Vol 21:353(2011), Page 388

[5] Jurisdictions declare that they are committed to establishing the truth through procedural laws even though this cannot be the overriding principle because of the cost it entails. For instance it is stressed that one of the fundamental tasks of the Law of Civil Procedure of the People's Republic of China (Law of Civil Procedure) is to ensure the courts establish the truth based on facts even if it must also recognize an end to litigation whatever the outcome. See Zhong Jianhua & Yu Guaghu, Establishing Truth on Facts: Has the Chinese Civil Process Achieved this Goal? Chinese Civil Process (Spring, 2004), p. 1, available at http://www.law.fsu.edu/journals/transnational/vol13_2/yozhong.pdf, last accessed on 26/05/2014

[6] The Civil Procedure Code of the Empire of Ethiopia Decree No. 52 of 1965 (herein after "Civil Procedure Code or simply the "the Code"), Article 5. The general principle is that a case decided cannot be re-litigated. But, there are exceptions to the rule, the main one being review of judgment. The law recognizes an exception to the rule under article 6 of the Code by allowing review of judgment.

goal of the discovery of truth that, however, cannot be attained if erroneous decisions are allowed to stand by means of *res judicata*. Hence, the two most important goals, ending litigation and seeking justice, come into conflict. Nevertheless, the Code has made a choice in article 5: unjust or factually and legally wrong decisions are allowed to sustain and produce effect in return for stability and efficiency of the system. This article examines the essence of the doctrine and the law applicable to it with a view to establishing whether the balance between these two conflicting interests i.e., ending litigation vs. discovery of truth, has been struck at the right point.

It is generally accepted that the doctrine of *res judicata* will be operational as a bar to subsequent suit only when a former judgment meets certain conditions. However, not all countries employ similar yardsticks in addition to variation in terminology. This article examines the essence of the doctrine of *res judicata* and explores the requirements that need to be fulfilled under Ethiopian law for the proper application of the doctrine to bar subsequent suit. The article also explores exceptions to the application of the rule on *res judicata*. With this end in mind, this piece is divided into the four parts. The first section introduces the concept while the second part dwells on the purpose and significance of the concept of *res judicata*. The requirements for asserting res *judicata are* the conditions which must be fulfilled so that it can be a defense in a subsequent litigation which conditions are listed and explicated in the third part. Finally, the article draws its conclusion from the discussion presented.

2. Conceptual Framework

2.1. Meaning

"*Res Judicata pro veritate accipitur*" is the full Latin maxim which has, over the years, shrunk to mere "*Res Judicata*". The word '*Res Judicata'* is derived from Latin which literally means, a thing adjudged. It is a rule that says a final judgment on the merits by a court having jurisdiction is conclusive between the parties to a suit as to all matters that were litigated or that could have been litigated in that suit.[7] Ethiopian law doesn't define the term although it can be

[7] Black's Law Dictionary defines it as "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." See also Henry Campbell Black., Black's Law Dictionary 4th ed. (1968); See also C. A. Dhanashree Prabhu, Res Judicata in Tax Matters, http://www.hiregange.com/downloads/April_2013-E-Newsletter.pdf, accessed on 6/13/2013

gathered from the contents of the relevant provisions that it subscribes to this traditional meaning of the term.

Variation in the purview of the doctrine can be observed depending on the legal system one may be examining. In this regard, Sinia[8] has identified three models, namely, broad-scope *res judicata*, narrow-scope *res judicata* and non-finality of judgments. The first approach is adopted mainly in common law legal system which is broader precluding subsequent suit on the ground of identity of cause of action or that the issue is a necessary ingredient of a former suit. The second model is that of continental Europe which does not recognize the concept of *res judicata* in the broad sense as is the case in common law countries. For the continental legal system, the fundamental principle is that a judgment binds the parties with respect to the subject matter of claims actually asserted and decided, but parties are not bound in actual or potential claims not submitted for adjudication.[9] The third approach rejects many of the elements of *res judicata* and emphasizes that discovery of truth is a paramount goal of justice all other concerns being subsidiary. Hence, in principle, a party can usually get a judicial decision reversed after the judgment has been handed down and judgments which otherwise are binding, can be re-opened for reconsideration based on an error in the judgment or on newly discovered evidence.[10]

As far as the Civil Procedure Code of Ethiopia is concerned, it appears to have borrowed the broader approach together with the provisions by which not only matters explicitly raised in the proceeding but also matters which could or should have been raised as a ground of defense or attack are barred by *res judicata*. Another inquiry that should be made is whether both claim and issue preclusion, which are the two main forms of *res judicata* in most countries belonging to the common legal system are incorporated in the Code.

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[8]Yuval Sinai, "Reconsidering Res *Judicata*: A Comparative Perspective", Duke Journal of Comparative & International Law, Vol. 21:353(2011), p. 357 ff

[9]*Ibid*, p.384

[10] Ibid, In the Jewish legal system, a judgment is in principle subject to revision, normally by the court that issued it. Courts revise judgments if new evidence comes to light undermining the facts on which the judgment was based, provided that the party seeking to adduce the new evidence is not debarred from so doing. Judgments are also subject to revision for errors in the application of the law, See Yuval, *Supra* note 8, p. 215

In the common law system, the doctrine of *res judicata* has largely two main forms even though the terminology is not the same throughout.[11] Thus, distinction is made between issue preclusion and claim preclusion although the latter is sometimes simply referred to as *res judicata* as it is *res judicata* proper. The doctrine of issue preclusion or collateral estoppels provides that a court's final decision on an issue actually litigated and necessarily decided in a previous suit is conclusive of that issue in a subsequent suit. Issue preclusion is broader in that it applies to claims for relief different from those litigated in the first action and narrower in that it applies only to issues actually litigated.[12] Issue preclusion may arise where a particular issue forming a necessary ingredient of a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.[13]

Sedler acknowledges that the issue whether *res judicata* bars a re-determination of any issue that was determined in a previous suit is unresolved.[14] He, however, contends that this extended application of the doctrine is not perceived under Article 5 of the Civil Procedure Code of Ethiopia. He maintains that the law does not prohibit re-litigation of an issue between different parties even if one of the parties was a party to the former suit.[15]It is not clearly pronounced in our Code whether the doctrine applies to cases where the other requirements such as identity of subject matter are not met. That aspect of issue preclusion which extends *res judicata* to suits relating to a different subject matter in which the issue is raised is not addressed. The requirements[16] in article 5 are cumulative and the extension of the *res judicata* to suits which deal with a different subject matter does not appear to be tenable.[17]

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[11] In England and Canada the forms are called "issue estoppel" and "cause of action estoppel;" in U.S. terminology, the two forms are referred to as "issue preclusion" (traditionally known as "collateral estoppel") and "claim preclusion", respectively.

[12] Diane Vaksdal Smith, Finality of Judgment: Issue Preclusion, Claim Preclusion, and Law of the Case, http://www.burgsimpson.com/pdf/civlitjulyv01clean.pdf, p. 1-2 accessed on 28/6/2013

[13] *Supra* note 10, P. 358

[14] R. A. Sedler, Ethiopian Civil Procedure, (1968), p. 327

[15] *Ibid*, p. 320

[16] See section 4 below, p. 11

[17]The Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960 (herein after the Civil Code), Art. 1898 reads "Proceedings instituted against one of the debtors shall be no bar to

2.2. Purpose and Significance

The doctrine of *res judicata* is deemed to have universal application forming part of the legal systems of all civilized nations even though there are legal scholars who challenge the foundation of the doctrine and a jurisdiction which does not accept the basic legal tenets of *res judicata*.[18] The motivations for revising decisions, it is argued, are "the hopes of correcting error; of altering outcomes based upon changed circumstances; of imbuing some decisions with more meaning by having them made repeatedly and sometimes by prestigious actors, of giving individuals a sense of having been fully and fairly heard."[19]It is also maintained that accurate application of laws serves the goals of legal rules such as maximization of economic value while judicial mistakes impose social cost and thus the procedural system should strive to reduce those costs. Re-litigation of factual issues can be done economically in the trial court because this court has already examined the main factual aspects of the case and, unlike the appellate court, the trial court does not need to learn all the details of the case to reconsider its initial decision. Proponents insist that some major fairness factors weigh against the rules of *res judicata,* among them "the fair-outcome value of deciding on the merits rather than on technicalities and of refusing to curtail society's search for truth".[20] Hence, procedure, it is contended, should frown on any obstruction to correcting mistakes.[21]

On the other hand, proponents of the doctrine insist that the presence of errors in a prior judgment is irrelevant to *res judicata* and a second round of litigation is unlikely to be more accurate; re-adjudication will not avoid error or costs. Although humans are fallible, the errors committed at the trial level can be corrected at the appeal level as the function of the appeal is primarily to reduce

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similar proceedings being instituted against the other debtors." In other words, the decision given in the case involving one of the defendants does not operate a bar against a suit against other defendants. On the other hand relying on Indian law The decision of a matter which is directly and substantially in issue between the parties to a suit operates as *res judicata* between the same parties or their representatives in interest in a subsequent suit irrespective of the fact whether the subject-matter of the two suits is identical or is different. See note 55 infra, p. 351

[18] *Supra* note 8, p. 354

[19] For a detailed discussion on the arguments for and against *res judicata* see Sinai, *Supra* note 8, p. 378

[20] *Id.*

[21] *Supra* note 8, p. 379

the incidence of such errors.[22] It can be witnessed that, for these and other reasons the concept has been incorporated in almost all procedural laws. But, at the same time *res judicata* could result in prevalence of injustice by allowing erroneous, unjust and blatantly wrong decisions to be enforced curbing any room for rectification. Thus, the choice between justice and stability or efficiency is a riddle legal systems encounter in designing their procedural laws. In fact, as has been elucidated above, legal systems are not at one as to how they address the predicament. For instance, pursuant to the common law approach, the court does not acknowledge the doctrine of *res judicata* on its own initiative whereas the idea that *res judicata* primarily concerns the public interest has prompted many continental countries to adopt an absolute principle of *res judicata*.[23]

It is noted that the basic proposition of *res judicata*, namely, a party should not be allowed to re-litigate a matter that he has already litigated, remains the same even if the concept has undergone changes with the evolution of procedural laws.[24]However, despite the general observation that can be made regarding the rationale for barring re-litigation, no consensus among jurists and legal systems exists as to the justification for the incorporation of the rules of *res judicata*. Basically, there are three principles which underlie the concept giving justification for its incorporation in laws.[25] The first principle is that no man should be vexed twice for the same cause. A dispute between parties should be settled once and for all and none of the parties should be allowed to trouble the other by dragging him/her to court now and again for the settlement of a difference relating to the same subject matter. Accordingly, through the principle of *res judicata* the law avoids inconvenience and harassment of parties.

The second justification is that it is in the interest of the state that there should be an end to litigation. Judicial economy requires that there should be an end to lawsuits. Courts are public fora using scares public resources mobilized to resolve disputes. The state has interest in the conclusion of disputes which

[22] *Id.*
[23]*Ibid*, page 385. It is referred to as absolute because its application is not dependent upon the will of the parties and the court can initiate it by itself.
[24]*Ibid*, P. 353
[25] C.K. Takwani, Civil Procedure,(4th ed. 1997). P. 47; Sinai classifies the justifications for the common law rules of *res judicata* into public policy and individual rights, economic efficiency of courts and consistency and stability. See *Supra* note 8, p. 60-61

cannot be allowed to continue only because one of the parties wishes so consuming scarce public resource.

The third reason is judicial decisions must be accepted as correct. If cases are submitted to different courts so that they can be tried to determine the settlement, then it is possible to have contradictory decisions adversely affecting the credibility of the system. Confining the parties to one litigation averts the possibility of two contradictory decisions. The ultimate reason why the verdict of a court as to the law and facts prevails is that such "pronouncement is *ex officio* and the political sovereign has said through organic law that judicial pronouncements shall prevail."[26]The doctrine thus ensures the conclusiveness of a judgment rendered by a court of law and ensures the integrity of the latter.

The foregoing reveals that the doctrine is dictated by both public policy and private interest which laws readily take into account.[27] In the absence of this doctrine, there will be no end to litigation, parties will be harassed with unceasing suits on the same subject matter and courts will be over burdened with litigation with no end in sight. Hence, the doctrine benefits both public and private interests. The query as to the fundamental justification for preclusion leads us to divergent conclusions contingent upon the legal system on may be surveying. In the common law system, *res judicata* is an affirmative defense available to a party to be raised in proceedings. Courts don't raise it by themselves which in effect denotes that the public has no interest so long as parties are willing to re-litigate by waiving their right to raise it as a defense. It is up to the party, to invoke or to waive the right, then the courts have no room to intervene to enforce the public interest purported to be implied in the concept. The continental system, on the other hand, mainly requires the court to take into account a former judgment on its own initiative.[28] It is only then that we can say there is public interest which is primarily promoted through the application of this doctrine.

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[26]Hazard Geoffrey C. Jr., "Preclusion as to Issues of Law: The Legal System's Interest", Iowa Law Review, Vol. 70 (1984), p.82. Available at http://repository.uchastings.edu/faculty_scholarship/959

[27] *Supra* note 28 , p.47

[28]In several European countries, explicit statutory provisions can be found to this effect. See Yuval, *Supra* note 8, p. 385

Coming to our legal system, just like the law, it appears that we have to borrow the justification for the incorporation of the doctrine and for the scope it is allowed to have in Ethiopia since it is not a home grown concept which evolved through practice and theoretical back up. The source of Ethiopia Civil Procedure Code which contains the precepts governing *res judicata* is its Indian counterpart[29]. It is, therefore, natural to resort to the rationale why the law is designed as it is so as to decipher the justification applicable to Ethiopian law. Accordingly, we may embark on comparing section 11 and article 5 of the Indian and Ethiopian Civil Procedure Codes, respectively. Section 11 of the Indian Code reads:

> "No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."[30]

Article 5 reads:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and has been heard and finally decided."[31]

A mere comparison of the wordings of the two provisions exposes that the only divergence pertains to the mention made about the court which gave the decision on the former suit in the Indian Code. Apart from this distinction, the meaning of which is discussed below, the two provisions can be said to be identical.

In keeping with the legal tradition which is its source, it can be maintained that the Ethiopian Civil Procedure Code limits the application of the doctrine to

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[29]Even if Sedler insists that the borrowing was selective, at least regarding the doctrine of *res judicata* the rules are copied as they are. Supra note 16, p. 3 Ultimately, we can say that those rules are influenced by English Law as "the substance of the rule as enunciated and recognized in England was, however, approved of and acted upon in numerous cases by the Judges, and imported, almost *res integra*, in India. See, Infra 55, p.2

[30] The Code of Civil Procedure of India, 1908 (as amended)

[31]Civil Procedure Code, article 5

situations where parties raise the defense. In other words, it is not purely a public policy consideration even if that can be one of the justifications for the position taken in the law, namely, giving effect to objection to re-opening a suit. Had it been public policy of the state to proscribe re-litigation, in the same manner as is the case in the Continental legal tradition, the court would have been empowered to dismiss suits which re-open cases already decided on its own initiative. In line with this contention, as the law stands now, it is only the will to invoke the defense by a party[32] that can do good to the legal system by bringing about its efficiency and integrity.

Nevertheless, the Federal Supreme Court Cassation Division gave a decision saying that courts are required to reject a suit lodged by a party when they discover in the course of the proceeding that it is submitted again. In the case of Fatuma Jemal v. Ali Bekir[33], the court reversed the decision of the lower courts on the ground that they should have closed the file when they learnt that the suit is *res judicata*, which knowledge, the court said, can be inferred from the decisions that that same case was decided by the Sheria Court. The decision given unearths the issue whether *res judicata* is an objection to be raised by the parties only. Hence, even if this decision is binding[34] it is worth inquiring whether it actually reflects the spirit of the law.

The relevant provisions from which we can gather the intended purpose of *res judicata* are article 5 and 244/1/b of the Code where reference is made to the doctrine. Reading the English version of the Code, it is vivid that a court is prohibited from re-opening a suit. The Amharic version[35] imposes the proscription on the parties who cannot lodge an application to re-litigate a suit barred by *res judicata*. Subscribing to the approach adopted by the authoritative version, it becomes imperative to pose the query as to the outcome of an

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[32] The court is sometimes identified as a third participant in the controversy, in addition to the patties, which has a strong although not unequivocal interest in seeing that things judicially decided-*res judicata*-stay decided.

[33] Federal Supreme Court Cassation Division, civil file No. 58119 decided on 21/2/2004 EC), Federal Supreme Court Cassation Division, Vol. 13, p. 37

[34] This interpretation is binding by virtue of Article 10/4 of Federal Courts Proclamation No. 25/1996 Federal Negarit Gazeta, 2nd year, No. 2 as amended by proclamation No. 454/2005 Federal Negarit Gazeta 11th year,No. 42.

[35] It reads "… በክርክሩ ላይ የነበሩት ወይም ከተከራካሪ ወገኖች መብት ያገኙ ሶስተኛ ወገኖች በዚያው ነገር ሁለተኛ ክስ ለማቅረብ አይችሉም፡፡"

application lodged by a party that may re-open a suit. If an objection is raised by a defendant as per article 244/1/b, the court obviously upholds it and dismisses the suit.[36] It remains to be examined as to what the role of a court will be in the absence of such an objection raised by a party.

The law classifies preliminary objections into those which may and those which may not prevent the court form giving a valid judgment or those which can be waived and those which can never be waived as defenses. Basically, the classification of objections into these categories is a function of the underlying interest protected thereby. Even if the policy consideration of the doctrine cannot be gathered from the relevant provisions of the code, considering the position taken in India which the origin of the law[37], it can be affirmed that the fundamental interest is that of the individual. It is submitted that if a party who secured a decision in his favour is not willing to bring into play the objection of *res judicata*, he is entitled to do so.[38]*Res judicata* is, therefore, one of the objections to be raised by a party which, if not raised, does not prevent the court from rendering a valid decision. Courts should continue to consider the suit and there is no room for them to raise it, if it is waived by the party benefiting therefrom. Following this line of argument, it is to be concluded that decision of the Supreme Court is contrary to the spirit of the law[39] and the essence of the concept[40] as incorporated in Ethiopian law. However, apart from the intricacy to decipher the intention of the legislature, given a clear provision of the law proscribing re-litigation, it will be contrary to the law to look for a meaning

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[36] Civil Procedure Code, Article 245/2

[37]Sedler argues that *res judicata* is not the type of matter which prevents a valid judgment being given and it is not jurisdictional in nature; it is waived if not raised, Supra note 14, p. 320. Having identical provision, Indian law holds that the defense can be waived in which case courts cannot raise it. Explaining Indian Civil procedure law, Takwani states that the doctrine of *res judicata* belongs to the domain of procedure and the party may waive the plea of *res judicata*. See Supra note 25, p. 51. But there is no uniformity in approach on this matter as some give priority to public interest. See See Robert Von Moschzisker, "*Res Judicata"*, The Yale Law Journal, Vol. 38, No. 3, p. 229

[38]*Supra* note 14, p. 175

[39] In fact, it is rational to inquire the rationale behind these provisions in order to discover the intention of the legislature. However, in the absence of such documents, and given the fact that the provision is copied word for word, the intention cannot be different unless it can be unconvincingly argued that it is borrowed separately from the underpinning justification.

[40] This is not a home grown concept and its essence remains the same even if it crosses borders unless the borrower introduces modifications which, unfortunately, are no apparent in this case.

deviating from this clear message. The question remains whether it is the intention of the law to allow courts to raise the defense, departing from the approach adopted by its source, when a party fails or refuses to invoke it.

3. Requirements for Asserting *Res Judicata*

Legal systems introduce different tests that a judgment must stand before it can have preclusive effect. For instance, under French law the prevailing test for whether a judgment will have claim preclusive effect is the triple identity test. This requires that the second action involve (1) the same parties; (2) the same relief; and (3) the same legal grounds.[41]The Federal Rules of Civil Procedure of the USA declares that to engage claim preclusive effects, a judgment must be valid, final and the same claim must be involved in the second action.[42]In the same manner as its source, Ethiopian law has five tests for a former judgment to be accorded *res judicata* effect which are discussed below.

3.1. The Requirement of "Directly and Substantially in Issue"

Concurring with its source, the Ethiopian Civil Procedure Code uses the "directly and substantially in issue" standard. The element that is to be compared is the suit or the issue. Hence, the law offers two elements for comparison, namely issue and suit. The Amharic version focuses on the identity of issues and causes of action in the two suits in contradistinction to the English version which focuses on identity of suit and issue. It is natural to presume that these two terms are used so that they can respond to different situations and one will take effect when the other is not operational. Obviously, if we have a suit, it is likely that we will have an issue. It is central to pose the query whether the term issue points at an issue different from that we find in a suit if an issue is inherent in a suit. Issue is defined as a material proposition of fact or of law which is affirmed by one

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[41]Comparative Table: The Effect of Recognition of Judgments p. 13. Available at http://www.biicl.org/files/3479_comp_table_-_effect_of_judgments_questionnaire_without_scotland.pdf, last accessed on 29/05/2014. It should be noted, however, that the triple identity test has, of late, not been strictly adhered to, and instead, there is a growing trend which focuses on the general concept of the first set of proceedings as a whole. If new factual circumstances arise between the first and second action, a new claim between the same parties will be admissible source.

[42] *Ibid*, p. 77

party and denied by the other.[43] Suit is not defined in the code but it is employed to refer to a case initiated by a person to enforce claim relating to a cause of action. It refers to the proceeding in first instance courts and encompasses both statement of claim and defense. It is maintained that the issue is not necessarily the subject matter.[44] So long as the two terms are used purposefully, they must have their respective divergent purposes to serve.

Obviously, both versions lay down that the law intends to prevent re-litigation of an issue on which the court exercised judicial mind. A decision on an issue becomes *res judicata* between the parties to the previous suit and cannot be re-litigated in collateral proceedings.[45] The focus here is restricted to a given issue which is precluded as it is decided by the court even if a party tries to bring it up in a subsequent proceeding. This rule applies in cases like Ermeas Mulugeta v Bekelcha Transport S.C[46] in which the issue relating to the responsibility of the applicant which was resolved could have been re-litigated. Here, there was no doubt about the suit which was not barred by *res judicata*, but the objection was directed against a particular relevant issue which was submitted for re-determination.

The second component avoids multiple suits when there is mere duplication of issues decided in one of them. The Amharic version appears to prefer the identity

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[43] Civil Procedure Code, Article 247(1)

[44]The Elements of *Res Judicata,* available at http://www.ockadvocates.com/2013/04/the-elements-of-res-judicata/

The following example is offered to explain the assertion: Suppose A files a case against B claiming rent, B files a statement of defense and says that A does not own the house and in fact C owns it. The suit is about rent but the issue becomes ownership. The court has to decide on ownership to know who is owed rent. Therefore, an issue is something that the court has to deliberate upon in order to determine the plaintiff's right. Therefore in such a case you can say that the issue of ownership was directly and substantially in issue.

[45]Indian law recognizes an exception to this rule: Where, however, the question is only purely of law and it relates to the jurisdiction of the court sanctioning something which is illegal, by resort to the rule of *res judicata* a party affected by the decision will not be precluded from challenging the validity of that order under the rule of *res judicata*, for a rule of procedure cannot supersede the law of the land. See, Tawakin, Page 59-60

[46]Ermias Mulugeta and Bekelecha Transport Share Company, (Federal Supreme Court Cassation Division Archives) , civil file No. 39471, decided on Hamle 29, 2001) It is also available at http://chilot.me/ accessed on 11/6/2012. Briefly the issue raised pertains to the effect of decision of a labour court which released the applicant from liability on a subsequent suit to recover the damage allegedly caused by the applicant.

of “cause of action”[47] test, as distinguished from the English version of the Code and its source. A suit is initiated by a statement of claim[48] and refers to proceedings at the court of first instance as distinguished from the proceedings in the appellate court.[49]Every statement of claim must contain a cause of action[50]making the latter more specific. At any rate, not every cause of action or issue will produce *res judicata* effect unless it is a matter directly and substantially in issue in the former suit.

As it is the case in India, direct *res judicata* pertains not to the entire subject matter of a suit but particularly to those matters which have been alleged by one party and denied by the other. But that does not suffice. In addition, it is a requirement that it must have been in issue directly and substantially. A matter cannot be said to be directly and substantially in issue unless and until it is or becomes material, for the decision of the suit.[51]A matter is directly and substantially in issue[52] if a distinct issue has been raised on it and it has been in issue in substance.[53]A suit may also involve matters which are in issue but incidentally or collaterally. A matter does not constitute *res judicata* if it is “incidentally or collaterally” in issue, as distinguished from that which is “directly and substantially” in issue. A matter collaterally or incidentally in issue is one “in respect to which no relief is claimed, but which is put in issue for the purpose of enabling the court to adjudicate on issues with respect to which relief is sought.”[54]

[47] It is difficult to ascribing a meaning to the Amharic equivalent of the term “cause of action” since its usage in the Amharic version is not consistent and strict as can be inferred from articles 29, 217,145/3 and 470(b). The operation of *res judicata* may depend on the definition of the term as it can give rise to small-size or big *res judicata*. See Edward W. Cleary, “Res Judicata Re-Examined”, The Yale Law Journal, Vol. 57 (1948), Page 334

[48] Civil Procedure Code, Article 213

[49] *Supra* note 28, Page 58, See also Civil Procedure Code article 32/2

[50] Civil Procedure Code, Article 222/1/f

[51]T. L .Venkatarama Aiyar, Mulla on the Code of Civil Procedure, (1965). P. 296

[52]Issues are defined in Article 247of Civil Procedure Code and the sources of materials from which issues can emanate are specified in Article 248 of Civil Procedure Code. It is further stressed that for a matter being in issue it is not necessary that it should have been distinctly and specifically put in issue by the pleading. See Karia, *Supra* note 42, P. 304

[53] *Supra* note 51 , p.55

[54] *Ibid*, PP.55-56

It is important to comprehend the meaning of the qualification to the term "issue" as that will determine which issues will produce preclusive effect. Recognizing the difficulty to lay down a general yardstick to distinguish what is substantial, it has been submitted that if the parties by their conduct of the litigation clearly treated a matter as a substantial question and the court followed suit treating it as a substantial question, it would be almost conclusive to show that question was one substantially in issue.[55]The Federal Supreme Court Cassation Division maintained that the issue is the basis for comparison and it extends to any matter which was claimed by one party and denied or directly or indirectly admitted by the other on which decision has been given.[56] However, defying such simplicity, cases before courts become more complex in the endeavor to apply this element of the doctrine to facts of specific cases obscuring the fine line between what is precluded and what is not. The complexity of determining whether two suits are the same or not was manifested in this same case in which the Federal Supreme Court Cassation Division was split on the question whether, under the circumstances, *res judicata* operates or not.

In this case the statement of claim was not clear and a claim was made in connection with two separate plots of land with respect to one of which a final decision had been given. The majority ruled that the second suit is precluded by *res judicata* since the plot to which the claims in the two suits relate is the same and no relief regarding the other plot is made in the pleading. However, this decision does not relate to the subject matter of the judgment against which an application is submitted for cassation. If the woreda court was wrong in line with the analysis of the majority opinion, then the mix-up pertains to rendering decision, on a matter which was not referred to it contrary to article 182(2) of the Code.

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[55] Lata Karia, *"Doctrine of Res-judicata"*, PhD thesis, Saurashtra University (2007), P.304, available at http://etheses.saurashtrauniversity.edu/736/1/karia_l_thesis_law.pdf, last accessed on 29/5/2014

[56]Awetash Abreha v. Gebrekidan Engida , (Federal Supreme Court Cassation Division, civil file No. 36780 decided on Megabit 30, 2001), Federal Supreme Court Cassation Division, Vol. 8, p.50.

The dissenting opinion concedes that the statement of claim lacks clarity but insists that the court can frame an issue from the examination of parties at the first hearing which was rightly done by the woreda court. It is obvious that *res judicata* does not affect the claim of the party regarding the plot on which no decision has been given earlier and it is for the first time that a court exercised it judicial power over a dispute relating to the plot. It was not, therefore, proper to invoke the rules of *res judicata* to bar the litigation because the claimant had the right to a day in court. The issue should have focused on whether the court could have framed an issue from allegations made at first hearing particularly when there was deviation from the facts stated in the statement of claim and on a decision made on a matter not stated in the statement of claim.

This case was resolved by decision of the majority shedding light on the perplexity of the concept. The parameter under consideration determines the substance of the doctrine as it pinpoints the subject matter to be precluded. In India, it has been submitted that it is not necessary for a matter to be directly and substantially in issue that a distinct issue should have been raised upon it; it is enough if "the matter was in issue in substance."[57]In other jurisdictions, too, in order to invoke the bar of *res judicata* more than a mere duplication of issue is required. The examination of the nature of the former suit and the treatment that the issue has received in it are taken to be essential.[58]

In Mulunesh Alemu v. Ketemash Chernet[59], the relief sought was recovery of the house and payment of rent regarding a house the respondent forcefully occupied. The respondent submitted plea of *res judicata* which was upheld by lower courts. The Federal Supreme Court Cassation Division ruled that the two cases are distinct and the suit is not barred by *res judicata*. The suits involve the same

[57]*Supra* note 59, P.55

[58] John J. Cound, J. H. Frindenthal, A. R. Miller & J. E Serton, Civil Procedure, Cases and Materials, (1989) P.1166

[59]Federal Supreme Court Cassation Division, civil file No. 29780 decided on 29/5/2000 E.C), Federal Supreme Court Cassation Division, Vol. 6, p. 103. The facts as succinctly summarized in the judgment (which is the only source of information) do not give the impression that the two suits are different in substance. Both cases relate to possession and nothing points toward any characterization otherwise. In both cases the suit was to recover the house which was alleged to be forcefully taken from the plaintiffs. In fact, the court said that some of the facts stated in the statement of claim indicate that it is a claim for ownership although the judgment did not show those facts.

parties and the same object, i.e., house number 1288. The former suit was filed to request cessation of disturbance to enjoyment of the property. In both suits it is stated that they were prevented from enjoying the property although in the former it appears that the defendant locked it blocking entrance while in the latter it was because it was occupied by the defendant who broke the lock and started to inhabit it. The Court reasoned that the two cases are different since the former is a possessory action while the latter is a petitory action. It is obvious that a judgment on possessory action does not preclude a subsequent petitory action. Even if the judgment does not contain the facts which made the distinction between the two suits, it can be concluded that the two suits are not same as the issues raised and disposed are not the same.

Matters which are directly and substantially in issue are divided into two; those actually in issue and those which are constructively in issue.[60] The former includes situations envisaged under Art. 5(1) of the Code while the latter encompasses the circumstances depicted in sub-art 2 of the same article. Constructive *res judicata* is referred to as artificial form of *res judicata* as it is an amplification of the general principle whereby actual issues raised are covered. Matters precluded by operation of constructive *res judicata* were not in issue; they were not heard and finally decided by the court. But, in order to avoid harassment and hardship to the other party and ensure finality of judgments which otherwise will be materially affected, they are treated as matters which were actually, directly and substantially in issue.[61] Constructive *res judicata* extends to all matters which might and ought to have been made a ground of defense or attack in the former suit.

In Bekele Deboch v. Azalech Desalegn et al [62] the Federal Supreme Court Cassation Division reversed the decision of Oromia Supreme court which

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[60] *Supra* note 55, P.54 In some common law countries, the rule of *res judicata* comprises two doctrines: claim preclusion or true *res judicata* and issue preclusion or collateral estoppels. Under the doctrine of claim preclusion, a claim may be merged or barred by a party's failure to raise the claim in a prior action, Issue prelusion, however, applies only to matters argued and decided in an earlier suit, Supra note 58, PP,1146 ff

[61] *Supra* note 28, p 54-46

[62] (Federal Supreme Court Cassation Division, civil file No. 26996, decided on 18/6/ 2000 E.C), Federal Supreme Court Cassation Division, Vol. 7, p.140.

annulled the decision given by Jima Zonal Court on the ground that the subsequent suit is barred by *res judicata*. The suit was filed for enforcement of the contract of sale of a factory between the parties in which the applicant lodged a counter claim whereby he, among other reliefs, prayed that the contract be cancelled. The plea of *res judicata* was put forward by the respondents. In file number 19/94 (the former suit) the applicant lodged a statement of claim by which he prayed for an order to the transfer title of the factory and reimbursement of damages and costs and payment of debt on the property. In the first suit, Jima Zone High Court decided that the respondents transfer title as per the contract and reimburse the expense amounting to Birr 215, 460.13. In the subsequent suit, the court cancelled the contract because title of the property mortgaged could not be transferred.

The issue whether *res judicata* is operational was finally decided by the Federal Supreme Court Cassation Division which reasoned that

> በመሰረቱ የፍ/ሥ/ሥ/ሕ/ቁ 5 ተፈጻሚነቱ ቀድሞ በተወሰነው ክርክር የስረ ነገር እና የያዘው ጭብጥ አንድ ዓይነት በሆነ ጊዜ ነው፡፡ በዚህ ጉዳይ ምንም እንኳ ቀድሞ በመ/ቁ 19/94 የቀረበው ክርክር በፋብሪካ ሽያጭ ዙሪያ የሚያጠነጥን ቢሆንም በክሱ የተጠየቀው ዳኝነት ይሁን አከራካሪ የነበረው ጭብጥ ከውሉ መፍረስና አለመፍረስ ጋር የተገናኘ ባለመሆኑ አመልካች ውሉ ይፍረስልኝ ሲሉ ያቀረቡት ክስ በድጋሚ የቀረበ ክርክር ነው ሊባል የሚችል ሆኖ አልተገኘም፡፡
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> (Basically, Article 5 is applicable where the subject matter and issue are the same in the former suit. In this case even though the dispute in file no. 19/94 revolves around the sale of the factory, the relief sought or the controversy has no relation to the cancellation of the contract and thus the request for cancellation of the contract is not *res judicata*.) (Translation mine)

In the two cases the subject matter of the dispute is the contract of sale. In the first suit a decision had been given for its enforcement but in the second suit the court ordered its cancellation. It needs no explanation that a legal system cannot afford to allow its courts to enforce and cancel a single contract. In fact, as rightly pointed out by the court, the issue of cancellation of the contract was not submitted and was no decided by the court. But, by enforcing a contract, a court is discounting the other alternative remedies, if at all it was part of the claim. Article 1771of the Civil Code stresses that cancellation and forced performance are alternative reliefs when non-performance is alleged. As alternative remedies, they must be either claimed alternatively or else one rules out the other. Once the

court concludes that the contract is worthy of enforcement, it cannot subsequently reconsider the issue whether the contract should be cancelled.

The Ethiopian civil procedure law seems to aim at the broader scope of *res judicata* as it bars not only matters which are directly and substantially in issue but also those matters which might or ought to have been a ground of defense or attack. Sedler argues that a decision on "an issue operates as *res judicata* with respect to the cause of action involved in the suit in which it was rendered." [63] The concept of *res judicata* is also referred to as "the rule against splitting a single cause of action" extinguishing the entire cause of action or claim, including items of the claim that were not in fact raised in the former action. The plaintiff can no longer sue on the original cause of action or any item of it even if that item was omitted from the original action.[64]

In Commercial Bank of Ethiopia v. Moyale City Administration Office[65] the Federal Supreme Court Cassation Division ruled that article 5 is not applicable as the former suit was instituted to enforce priority right while the latter was to recover the loan from heirs of the deceased. One may wonder whether the bank should have another opportunity to present its case against the borrowers with whom it has a single secured contractual relationship separating the loan from the mortgage. The Court reasoned that

> በተያዘው ጉዳይ ባንክ ቀደም ሲል ክርክር አቅርቦ የነበረው ለፋይናንስ መመሪያው ዕዳ በሐራጅ እንዲሸጥ የተባለው ንብረት በመያዣ የያዘው በመሆኑ በንብረቱ ላይ የቀዳሚነት መብቱን ለማረጋገጥ ነው፡፡ በመሆኑም በክርክሩ የተያዘው ሥረ ነገር እና ጭብጥ በንብረቱ ላይ ቀዳሚነት አለው? የለውም? የሚለው ነው፡፡ በዚህ መዝገብ የቀረበው ክስ የሟች ሀጂ አብዱለዚዝ ካሕሳይ የወሰዱት ብድር የሟቹ ባለቤትና ወራሾቻቸው ሊከፍሉ ይገባል የሚል በመሆኑ የሚያዘው ጭብጥ ተከሳሾቹ የብድሩን ገንዘብ ሊከፍሉ ይገባል? አይገባም? የሚለው ነው፡፡ በመሆኑም የሁለቱም ክርክሮች ሥረ ነገር እና ጭብጥ የተለያየ በመሆኑ ጉዳዩ የመጨረሻ ውሳኔ ያገኘ ነው ለማለት አይቻልም፡፡ ስለዚህ ፍርድ ቤቶቹ የፍ/ሥ/ሥ/ሕ/ቁ 5ን ጠቅሰው የአመልካችን ክስ ውድቅ ማድረጋቸው የሕግ ስህተት ነው፡፡

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[63] *Supra* note 8, 337-338; the aim of the Code to settle the whole of the claim can further be ascertained from the prohibition to split claims, see Civil Procedure Code, Art. 216

[64] *Supra* note 10, page 359-360

[65] File no. Federal Supreme Court Cassation Division, civil file No. 28522 decided on 3/3/2000 E.C), Federal Supreme Court Cassation Division, Vol. 6, p. 87

> (In this case, the applicant filed a suit to ascertain its priority right against the finance department which had floated auction to sell the mortgaged property. The issue then was whether it has priority or not. In this file, the claim is that the wife and heirs of the deceased borrower should repay the loan and the issue is whether the defendants should repay or not. Therefore, the cause of action and the issues in the two cases are distinct; the new suit is not barred by res judicata. Lower courts have committed error of law in rejecting the claim of the applicant on the basis of article 5 of the Civil Procedure Code) (Ttranslation mine)

In both cases the Bank instituted action against the defendants who were wife and heirs of the borrower. The plea of *res judicata* is rejected because of the diversity of issues of the two suits. This is manifest when we focus on the other defendants in the two suits, the Finance Department and the City Administration. But, the relationship between the bank and the borrower was based on a loan agreement which was secured by a mortgage, the latter being an ancillary to the former. In the previous suit, the heirs who substituted the borrower were made parties because presumably there was a claim against them. Otherwise, a priority right against third parties doesn't require the presence of the borrower or his heirs unless they are answerable for the loss ensuing form the invalidity of the purported security in which case the relief should have been sought alternatively. Even if the contents of the judgment and pleadings in the former suit should be examined, from the contents of the decision under consideration it appears that given a single contractual relationship which is secured, it was the duty of the Bank to raise its entire claim against those defendants in the former suit.[66]

It is palpable that similarity between the two suits is to be evaluated based not only on the issues actually litigated but also on those matters which were constructively in issue. Constructive *res judicata* broadens the scope of the

[66]A foreign court which decided on a similar case noted that the doctrine of *res judicata* which preclude re-litigation of the same cause of action is "broader in its application than a mere determination of the question involve in the prior action. Rather, the bar of the judgment in such cases extends not only to matters actually determined but also to other matters which in the exercise of due diligence could have been presented for determination the prior action. Gaither Corp. v. Skinner, 241 N.C. 532,535-36, 85 S.E.2d 909, 911(1955) reported in Affirmative Defenses: *Res Judicata* and Collateral Estoppel, Page 7, available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/200610DavisResi.pdf, accessed on 28/6/2013

concept in such a way that matters which were not actually entertained in the proceeding could be precluded if they ought to have been a ground of attack or defense. It is thus essential to establish as to how a matter which the judgment does not even allude to is precluded. One test suggested in this regard is "to see whether by raising the question, the decree which was passed in the previous suit, should have been defeated, varied or in any way affected."[67] As a general rule it is put forward that every ground of attack with reference to the title sued on must be pleaded if necessary in the alternative for the plaintiff will not be allowed to make a fresh suit afterwards.[68]

As stated above, the Civil Procedure Code of Ethiopia has in built mechanisms of ensuring that a suit encompasses all the claims of the plaintiff and the defendant relating to the subject matter of the dispute. This can be gathered from article 5(2) and 216 of the Code which entail a bar to matters omitted by the parties to a dispute. The doctrine of r*es judicata* bars a litigant from splitting claims into separate actions because once a judgment is entered in an action it extinguishes the plaintiff's claim entirely. It outspreads to all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.[69]*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that was previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.[70]

The law requires every suit to be framed in such a way that any further litigation is prevented on the subject matter. Parties must submit all the grounds of attack or defense relating to the subject matter of the dispute under the pain of relinquishing them. Every suit shall include the whole of the claim which the plaintiff is entitled to make with respect to the cause of action. This prerequisite is enforced by the rules governing *res judicata*.[71]To grasp the extent to which *res*

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[67]*Supra* note 28, p. 57

[68] *Supra* note 51, p. 73

[69]Diane Vaksdal Smith, Finality of Judgment: Issue Preclusion, Claim Preclusion, and Law of the Case, P. 8, available at http://www.burgsimpson.com/pdf/civlitjulyv01clean.pdf, last accessed on 28/6/2013

[70]Res Judicata and Related Doctrines, available at http://ncbj.org/PublicOutreach/Public/Res_Judicata_September_2012.pdf, accessed on 28/62013

[71] Civil Procedure Code, Article 216

judicata could affect subsequent suit it is imperative to read article 5(1) and (2) together with article 216 of the Code. Thus, given a ground for a claim, a decision on such claim precludes any further suit which either could result in litigation of any matter which is directly and substantially in issue or the whole of the claim with respect to the cause of action which might or ought to have been a ground of attack or defense or any relief with respect to any such matter.

3.2. Same Parties

The second requirement denotes the extent to which *res judicata* may affect parties and points toward restriction of its effects to the parties who took part in the proceeding having the opportunity to present their case. Hence, the litigation should be between same parties or privies (persons who claim under them) so that the judgment can be *res judicata*. This requirement hinges on the general principle that judgments bind merely the parties and privies.[72] If the parties are different in a subsequent suit, *res judicata* does not have effect as the former decision does not bind the new parties.

A party is a person who is involved in a case and a person can be involved in a case either by alleging something against another person or because the allegation is against him.[73]The wording of the Amharic version[74] of the Code is broad enough to extend the consequence to persons who take part in the litigation beyond the party who initiated the proceeding and the party who is called upon to respond to it. Thus, the term "same parties" refers to those persons whose names were on record either as a plaintiff, or a defendant or third party defendant or intervenor.[75] A person who is not named in the suit is not a party [76] and *res judicata* does not operate against him as he is not bound by the decision.

In contrast, persons who claim under the parties are bound by *res judicata*. These are persons on whom the right or interest involved in the suit devolves. They

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[72] *Supra* note 28, p. 60
[73] *Supra* note 44.
[74] It uses the term " …በክርክሩ ላይ የነበሩ…" broadening it beyond the parties to those who take part in the dispute.
[75]It should be noted that some contend that recognition should be given to exception such as *pro forma* defendant (a person who is made a defendant only because his presence is necessary for a complete and final resolution of the dispute against whom no relief is sought.) See Supra note 28, p. 61-62
[76] *Supra* note 16, p. 323-324

acquired an interest in the subject matter of the suit by inheritance or purchase subsequent to the former suit or must hold the interest subordinately in the sense that their interests are entirely dependent on the interests of the transferor.[77]A decision against a party will bind interests acquired from him subsequently and all subordinate interests represented by him whenever acquired.[78]

The application of the second element of the principle has become concern of several court cases which tried it out in different scenarios. In Ethiopian Grain Trade Enterprise v. Kedija Sabir,[79] the respondent instituted an action in her own name to recover the remaining payment that her deceased husband failed to include in his statement of claim. The question to be addressed here is whether she can have an independent entitlement regarding those payments which were left out by her late husband. One of the two reasons which the Federal Supreme Court Cassation Division made the basis of its decision is that the two suits are the same. Of the factors to be considered under article 5, the most relevant component here is the similarity of the parties. Even if the action was instituted in the name of the wife, she based her claim on the employment relationship of her late husband with the applicant. Hence, she was claiming under him. Otherwise, it would involve the question of vested interest because the claim would be based on a contract to which she was not a party. In another case[80] the Court ruled that a person who was denied to intervene in a case is entitled to initiate a new suit to seek justice and it cannot be validly contended that such party cannot institute an action on the basis of the judgment given in the case she was denied to intervene.

The case of Dashen Bank S.C v. Amelmal Mekonnen[81] raised this issue in the context of money transfer through the applicant. The question was whether the decision given against the sender bars a subsequent suit filed by the recipient.

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[77]*Supra* note 16, p.324, See also Mullah, *Supra* note 77 p.80

[78]*Supra* note 42, p. 464 -466

[79]Federal Supreme Court Cassation Division, civil file No.38601 decided on 14/4/2001E.C), Federal Supreme Court Cassation Division, Vol. 8, p.30

[80]Bethlehm Tadesse v.HannaTadesse et al, (Federal Supreme Court Cassation Division, civil file No. 62173 decided on 11/11/2003 E.C),Federal Supreme Court Cassation Division, Vol. 12, p.371.

[81]Federal Supreme Court Cassation Division, civil file No. 51223 decided on 24/6/2003 E.C), Federal Supreme Court Cassation Division, Vol. 12, p.332.

The court ruled that the recipient's right is derived from the sender and the suit is precluded. Here it does not seem to be an issue of *res judicata* rather it is a question of who between the two can claim refund from the bank. It is very difficult to say one is claiming under the other. The contractual relationship is between the sender and the bank and the recipient is not a contracting party lacking vested interest to initiate action. It does not appear to be correct to dispose the case based on article 5 as neither the two parties are the same, nor one was claiming under the other.

In Tirunesh Ayele v Wegayehu Solomon,[82] an opposition was filed against a judgment rendered by the Addis Ababa First Instance Court in favor of the respondent which declares that she is heir-at- law. In the opposition to the judgment lodged to the same court, it was stated that the matter had already been decided that the deceased had left a will by which the applicant is intestate successor and thus the suite is barred by *res judicata*. Cassation Division of the Federal Supreme Court ruled that it is contrary to article 5 to give a decision on the dispute as there was a prior decision given by the Federal First Instance Court in file number 3680 which is conclusive on the validity and effect of the will. But, can there be issue of *res judicata* in the two cases? First, they deal with different subject matters. Second, the parties are not the same in the two cases. A will can be considered at the time of liquidation which doesn't prohibit one from requesting the court for issuance of certificate of heir.[83] It is contended that succession certificate is merely an authority to collect debt. It does not adjudicate questions of title.[84]

The issue whether a matter could be *res judicata* between co-plaintiffs and between co-defendants is outstanding. Based on the application of Indian law, it

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[82] Heirs of Tirunesh Ayele v Wegayehu Solomon, (Federal Supreme Court Cassation Division, civil file No. 49713 decided on 3/8/2003 E.C), Federal Supreme Court Cassation Division, Vol. 11, p. 79.

[83] Article 971/3 of the Civil Code considers such persons as interested persons. An heir is permitted to apply to the court to be given a certificate of heir. See article 996, Civil Code. The remedy available for a person who objects the issuance of the certificate is to apply for annulment under article 998of the Civil code. Determination of persons entitled to take the property in the inheritance is part of the liquidation process. See art. 994/a/ of the Code. A succession may be testate, intestate and partly testate and partly intestate. See art 829 of the Code.

[84] *Supra* note 77, p. 112

is submitted that the doctrine may be asserted in such situations if certain conditions are fulfilled.[85] Even though no clear solution can be unraveled based on the provisions of the Code, we can think of such cases arising under the Civil Procedure Code of Ethiopia. Article 43(3) provides that the court will determine the claim between the defendant and the third party who has the position of a defendant[86] and such decision will have *res judicata* effect between the parties. But if the defense of co-defendants is separate and independent, a decision on the defense submitted by one cannot be established against the other. In Fetlework Mengesha v. Belaynesh W/kidan[87]the issue whether a decision given on an objection raised by a defendant would bind a co-defendant was decided and the Cassation Division of the Federal Supreme Court reversed the decision of the Court of Cassation of Tigray Regional State saying that the defense of a defendant was independent of that of a co-defendant and it is personal to the applicant which doesn't fall in article 5.

Exceptionally, the law is stretched out to affect persons who are not actually on the record. Such is the case where, *res judicata* becomes operational against persons who are not actually on the record in suits where persons litigate for themselves and others. When a suit is instituted in good faith in respect of public or private rights claimed in common, *res judicata* operates against all persons interested in such right.[88] Here, the persons to be affected are not necessarily represented through an agent and it may be inquired whether it is fair to broaden the application of the doctrine to those who didn't have the opportunity to present their case. The law assumes that all persons who have the same interest are represented by the plaintiffs[89]dispensing with the justification for allowing

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[85]A matter becomes *res judicata* between co-plaintiffs if there is a conflict of interest between the parties and it is necessary to resolve the same in order to give relief to the defendant. If this matter is decided by the court regarding the matter in dispute between the parties and thus *res judicata* operates. Regarding co-defendants the following conditions should be fulfilled. First, there must be a conflict of interest between the co-defendants such that it is necessary to decide the conflict in order to give relief to the plaintiff. Second, the con-defendants were necessary and proper parties in the former suit and the question between co-defendants must have been finally decided Supra note 28, p.60-61

[86]Civil Procedure code, Art. 43/2

[87](Federal Supreme Court Cassation Division, civil file No49852 decided on 30/10/2002 E.C), Federal Supreme Court Cassation Division, Vol. 9, p361.

[88]Civil procedure code, Article 5/4

[89]Legal systems accept the application of *res judicata* in Class actions and the doctrine of virtual representation in which adequate representation in the prior litigation, it is held, satisfies due

others to make the same claim on which decision has been given. Otherwise, contradictory decision may be given in a suit to be instituted by others.[90]

The assumption under article 5 of the Code is that there are at least two parties and such parties or their privies are the same in the two suits. However, it is not true to assume that all cases involve multiple parties or rivals as some judgments are rendered up on the application of a party without a defendant or a respondent. Applications to obtain certificate of heirs, change of name, and declaration of absence are cases in point. Following words of the law, it can be argued that there should be multiple parties for the application of the doctrine. It is not only a matter of fulfilling the requirements of the law, but also it cannot be imagined as there is no party to invoke plea of *res judicata.* Take for instance change of name. Would *res judicata* impede effort to change one's name more than once? Let us suppose a hypothetical case[91] in which a judge rejects an application lodged by a person who wants to change his first name for the second time. In such a case the requirement that the dispute should be between the same parties is not fulfilled and the objection cannot be raised by a disputing party. Can the judge reject the application on the ground that it is *res judicata*? It can be contended that in such cases, the court cannot bring up its earlier decision to block a subsequent suit as has already been brought to light above, this is a defense courts consider if a party raises it. Yet, given that there is a binding decision of the Federal Supreme Court[92], it appears that courts do have the power to raise it.

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process requirements, where policy factors weigh heavily for preclusion, even though the person to be bound did not personally appear in that litigation. Where there is notice 65 and adequate representation, fair treatment is accorded the person to be bound. If, however, the interests of the nonparty are not adequately represented, he will not be bound. See John K. Morris, "Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered", California Law Review, Vol. 56 (1968), p. 1150

[90] *Supra* note 28, p. 62-63

[91] This is not a hypothetical case per se. A colleague shared the experience of a client who applied to a court to and succeeded to change his name to an Islamic name with the ultimate goal of travelling to one of the Middle East countries. But he was not lucky enough to have his dream come true which rendered his new name inept. He had to apply to the court to change his name again which rejected his application on the ground that the court cannot change its own decision and the power to amend judgments is vested on the appellate court only.

[92] *Supra* note 33.

3.3. Same Title

The third condition is that the parties in the new suit should be litigating under the same title as the former suit. Title is the capacity of a party which determines whether a party sues or is sued in his own interest for himself or representing the interest of another or representing the interest of others along with his own. If a person is suing in different capacities a decision cannot block a subsequent action. This requirement has nothing to do with the particular cause of action or subject matter to which the dispute relates.[93] The identity of title in the two cases is the test that must be fulfilled for asserting *res judicata.*

3.4. Validity

A judgment can have a preclusion effect only if it is valid. Validity is not, however, correlated to correctness or otherwise of the judgment. A question of a judgment's validity is rather taken to be a challenge to the authority of the court to have decided the case.[94]It is thus apparent that if the judgment invoked is rendered by a court having no material jurisdiction, the judgment is not valid and cannot be put forward as a bar to a subsequent suit in a court having jurisdiction despite the fact that the issue in the fresh suit is identical to the previous one.

No explicit pronouncement is available as to the requirement of validity of judgment in our code. A glance at article 5(1) of the Code reveals that without any qualification regarding the court which has given the judgment, the prohibition to re-litigate a suit in the circumstances provided for therein applies to courts across the board as the sweeping phrase "No Court…" indicates. Yet, that does not warrant the conclusion that the requirement of validity is missing since it will be repugnant to the integrity and coherence of the code.[95]

The endeavor to decipher the message in the provision is lessened when we look at the Amharic version of the code. It uses the phrase "በሕግ ሥልጣን የተሰጠው ማንኛውም ፍ/ቤት…" (any court having jurisdiction) implying that a judgment will have preclusion effect if it is entered by a court having jurisdiction. *A contrario,*

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[93]*Supra* note 77, p. 89-90

[94.] J.H. Friendenthal, M.K. Kane, A.R. Miller, Civil Procedure, (1993), P.648

[95] See for instance, Art 9(2) cum Art, 244(3) of the civil procedure code of Ethiopia, Material Jurisdiction is one of the objection which under art 244(3) are considered as those which prevent a valid judgment from being given.

the principle of *res judicata* will not be applicable if the judgment invoked is given by a court having no authority to hear the case since validity is a matter of jurisdiction of the court and the law requires that the judgment be given by a competent court. Therefore, validity, in Ethiopia as well, is one of the requirements that should be there in order to assert *res judicata*.

It is worth noting that the court referred in the Amharic version of the Code is different from that of the English version. In the former, the court is that which has heard and decided the previous suit whose judgment is invoked as a bar to the new one while in the English version refers to the one in which the new suit is lodged. The Amharic version prohibits parties from submitting a case decided again while the English version imposes the duty on the court not to try such a case. The disparity of the two versions in incorporating the validity requirement seems to arise from such equivocation albeit the authoritative version rests the case by its clear terms.

In Merigeta Lisanework Bezabehi v. Ethiopian Orthodox Church General Secretariat Office[96] the case was first lodged with the Labour Board which closed the file on the ground that it does not have jurisdiction. But, it did not stop there: it declared that the suit is barred by period of limitation. Subsequently, the case was submitted to the Federal First Instance Court where the plea of *res judicata* was raised by the defendant because the Board decided that the case is barred by period of limitation. The first instance court ruled that the Board had no jurisdiction and should not have ruled on the issue of period of limitation. The High Court to which the case was referred on appeal concluded that the ruling on the period of limitation is not reversed by the appellate court and with this order remaining intact, the first instance court could not entertain the case. The Cassation Division of the Federal Supreme Court upheld the position taken by the first instance court. The case illustrate that the operation of *res judicata* hinges on a valid judgment rendered by a competent court. Short of fulfillment of this requirement, *res judicata* cannot be asserted.

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[96]Federal Supreme Court Cassation Division, civil file No. 32229, decided on Miazia 30/8/2000 E.C, Federal Supreme Court Cassation Division, Vol. 6, p377.

3.5. Finality of Judgment

In order to invoke the bar of *res judicata*, it is not sufficient that a matter directly and substantially in issue in a suit was directly and substantially in issue in a prior action. It is further required that it must have been heard and finally decided.[97] For purpose of *res judicata* , finality "represents the completion of all the steps in the adjudication of a claim by the court, short of execution.[98] This last requirement to assert *res judicata* as to the quality of judgment is referred in many jurisdictions as finality of judgment. In line with its source, the Ethiopian civil procedure code describes this yardstick as "heard and finally decided." It literally requires that the decision should be final disposing the dispute or an issue after hearing the parties.

The decision that the court reached must be final and the court should have come to the decision on a contested matter after arguments and consideration. The first question to be set forth is whether the requirement that the parties are heard is to be distinguished from the finality requirement. Thus, it is worth inquiring what purpose is served by the word "heard." It is acknowledged that *res judicata* by its very words means a matter upon which the court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly.[99] It is contended that a mere opinion of the Court on a matter not necessary for the decision of the case and not arising out of the issues before it is *obiter dictum* and cannot be said to be a decision on any issue, and is, therefore, *res nova*.[100]

Although an identical wording is used in the Indian civil procedure law, it is missing in the Amharic version of our code, which uses the clause "ክርክሩን ተቀብሎ የመጨረሻ የፍርድ ውሳኔ ከሰጠ በኋላ…"[101]emphasizing on the finality of judgment. Accordingly, Art.5 of the civil procedure code bars re-litigation of an issue or cause of action in respect of which "a formal expression of a preliminary or final

[97] *Supra* note 59.p.96
[98] *Supra* note 45, p215
[99]*Supra* note 42, p. 572
[100]*Ibid*, p. 573
[101] "Hearing"' seems to have been omitted which simply refers to decision on the merit. See, *Supra* note 28, p.70

adjudication which so far as the court expressing it, conclusively determines the rights of the parties concerning all or any of the matters in dispute in the suit."[102]

One may argue that the "heard and finally decided" requirement does not hold well in cases of matters constructively in issue. Such matters are precluded not because a final decision has been given upon them. The party failed to join them in the suit while he might or ought to have made them his ground of defense or attack. They are not at all raised in the proceeding let alone becoming the subject matter of one of the issues or the decision given. It is contended that from the very nature of the case, such a matter could not be heard and decided and "it will be deemed to have been heard and decided against the party omitting to allege it."[103]

Similarly, the question whether a matter which was submitted for consideration of the court could have preclusive effect if it was left out of the decision should be posed. The requirement of final decision demands that the court has disposed the issues of the case. But, article 5(3) of the Code deals with a situation where the court's failure to treat a relief would be *res judicata* on the presumption that it was rejected. In the case of Ethiopian Orthodox Church General Secretariat Office v Yitbarek Sahilu[104] the Cassation Division of the Federal Supreme Court said that the application of article 5(3) is limited to a situation where a court has given decision on some of the reliefs sought and left out one or more. If no decision is given on all the issues, the court concluded that article 5(3) is not applicable. On the other hand in Bahir Dar textile S.C v Ameshe Seid[105], the court affirmed that a relief which is passed over is refused. In this case the appeal submitted by the applicant was completely ignored and the court said that Art. 5(3) is applicable. The question whether this rule applies when the court ignores all or one or some of the reliefs is not answered unless it is arguably presumed that the latest decision is the expression of the intention of the court.

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[102]Civil Procedure Code, Article 3

[103]*Supra* note 59, p. 62

[104] Federal Supreme Court Cassation Division, civil file No. 24574 decided on 11/3/ 2000 E.C), Federal Supreme Court Cassation Division, Vol. 5, p. 79

[105]Federal Supreme Court Cassation Division, civil file No. 29920 decided on 26/2/2000), Federal Supreme Court Cassation Division, Vol. 6, p. 257

A judicial decision is deemed final when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution.[106]The Amharic version of the Code emphasizes the finality of judgment while the English version is concerned with final decision.[107]Decision is not a technical term and it is employed in the code in connection with both final and interlocutory judgments[108]while the word "judgment" is defined as the statement given by a court of the grounds of a decree or order[109]encompassing both the decision and reasoning for the decision. In the absence of any proviso in the law, it is tenable to conclude that any judgment will have preclusive effect.[110]

It is held that the scope of the principle of *res judicata* is of more general application and it is applicable to different stages of the same suit as to findings on issues in different suits.[111] It follows that if in the earlier stage of the same suit a matter in issue has been finally adjudicated upon, the issue cannot be re-litigated at the later stage of the same suit[112]. In Kassaye Yadete v Signor

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[106]*Supra* note 42, p. 576. See also Richard S. Crummins, "Judgment on the Merits Leaving Attorney's Fees Issues Undecided: A Final Judgment?", P. Fordham Law Review, Vol. 56, Issue 3, (1987), p. 490, available at: http://ir.lawnet.fordham.edu/flr/vol56/iss3/8 accessed on 21/5/2013

[107] It should be noted that the Constitution (Article 37) uses the two terms distinctly while article 182/1 renders decision a component of judgment.

[108]Decision on objection is provided for in article 245 of the Civil Procedure Code of Ethiopia

[109]Civil Procedure Code, Article 3

[110]That being the principle, it is indicated, however, that there are conditions which must be fulfilled before it can have preclusive effect. For instance, it is argued that the decision must be a judicial decision implying that decisions on dispute entertained by administrative tribunals will not have preclusive effect. Supra note 41, p. 4

[111] See Appellants: Appellants: Arjun Singh Vs. Respondent: Mohindra Kumar and Ors, In the Supreme Court of India, Decided On: 13.12.1963 it is available at http://indiankanoon.org/doc/1608703/, last accessed on 29/05/2014; see also *Supra* note 55, p. 194; But the issue is not settled as can be gathered from the judgment of, the European Court of Justice delivered on November 15th , 2012 in case C-456/11Gothaer Allgemeine Versicherung and others. It ruled extended the application of *res judicata* to procedural decisions in the ruling that a judgment by which the court of a member state declines jurisdiction on the basis of a jurisdiction clause was a judgment in the meaning of art. 32 of the Brussels Regulation even if it was categorized as a mere procedural judgment under the national law of a member state. The ECJ further ruled that the court before which the recognition of such a judgment is sought is bound by the finding regarding the validity of the jurisdiction clause even if such finding were made in the grounds of the judgment.http://conflictoflaws.net/2012/ecj-rules-on-res-judicata-of-judgments-declining-jurisdiction/ accessed on 7/9/2013.

[112]*Supra* note 42, p.61

Francisco Vencian[113], Cassation Division of the Federal Supreme Court said that an issue which is resolved earlier in the course of the proceeding cannot be re-litigated at a later stage of the proceeding. Thus, final decision can arise from a judgment, a decree, and an order[114] which ends a dispute or settles an issue. Nonetheless, distinction is made between interlocutory decisions which resolve issues of substance and which are a step towards the decision of the dispute between parties by way of a decree or a final order. Orders which do not decide any matter in issue arising in the suit, nor put an end to the litigation, nor impinge upon the legal rights of parties to the litigation are not of *res judicata*. [115]

One may wonder whether *res judicata* may operate when a suit comes to an end in the absence a hearing or a judgment. Such may be the case if a default judgment, withdrawal, compromise, etc… bring an end to a claim. The question is whether in such cases, the requirement "heard and finally decided" is met. A default judgment which is pronounced after availing the opportunity to the other party to present his case is deemed to be a judgment having *res judicata* effect.[116]

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[113]Federal Supreme Court Cassation Division, civil file No. 72189, decided on 18/10/2004 E.C), Federal Supreme Court Cassation Division, Vol. 13, p. 20

[114]Awetash Abreha and Gebrekidan Engida,(Cassation Division, civil file No. 36780 decided on30/7/2001 E.C), Federal Supreme Court Cassation Division, Vol. 8, p.50. The court included provisional orders as having preclusive effect which as discussed below do not necessarily have that effect.

[115]This issue was decided in a case in India and I think it explains how the rule should be interpreted under the circumstances. In this regard, the court noted that: "It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of *res judicata* does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process of court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation." See *Supra* note 111

[116]*Supra* note 41, p. 7-8. Article 70(a) of the Civil Code of Ethiopia lays down that if the defendant does not appear after the summons was duly served, the suit will be heard *ex-parte*. It

Similarly, it may be inquired whether *res judicata* may be asserted if a previous suit was withdrawn without the permission of the Court to bring a fresh suit. Precluding from instituting any fresh suit in respect of such subject-matter or such part of the claim[117], the law gives the same effect even though no reference is made to this under article 5 of the Code.

A compromise decree is not a decision by the court even if it settles the dispute between the parties. It is contended that compromise is merely the acceptance by the court of something to which the parties have agreed. For the court does not decide anything, one may doubt the application of article 5 which presupposes final judgment. However, article 3312(1) of the Civil Code renders a compromise agreement to produce *res judicata* effect even without involvement of the court.[118] On the other hand, article 277 of the Civil Procedure Code denotes that after entering the compromise agreement in the case file, the court may, on the application of the parties, make an order or give judgment in terms of such agreement. So it is the order or judgment of the court which elevates the status of the agreement of the parties to an enforceable decision. Applying this provision to a specific case, the Cassation Division of the Federal Supreme Court stressed that a compromise agreement is equivalent to a judgment and it must be enforced as such.[119]

Another issue that arises is that even if we have a valid judgment, it remains to be examined whether the judgment will have preclusive effect if it is rendered by a court of another jurisdiction. It can be a judgment rendered by the court of a regional state or that of the federal government or a foreign court. The issue whether a judgment given in one regional state will have preclusive effect in the court of another state is outstanding. Considering the latest shift from a unitary to a federal state structure, an attempt to grapple for a solution in the Code is futile. Having a similar state structure, the USA resolved this problem by a

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can be, therefore, said that the suit is heard. Th same issue has beeen treated in Appellants: Arjun Singh Vs. Respondent: Mohindra Kumar and Ors, *Supra* note 111.

[117] Civil Procedure Code, Article 279/1/

[118] Reading article 3307 of Civil Code, it can be understood that the dispute can be one arising in the future.

[119]Kedir LajuaHussien et al v. Amin Ousman, (Federal Supreme Court Cassation Division, civil file No52725,decided on 16/10/2002 E.C) Federal Supreme Court Cassation Division, Vol. 9, p. 340

constitutional provision. Article IV (1) of the US Constitution requires that "Full Faith and Credit" be given in each state to the public acts, records, and judicial proceedings of every other State. It requires each State to honor the judicial proceedings of every other State.[120] Although this goes beyond the purview of civil procedure law, whether the silence of the FDRE Constitution in this regard can result in glitch of the system, remains to be seen.

Having the definition given to the term 'judgment' in the code it is important to question whether foreign judgments will have preclusive effect in Ethiopia. Unlike the Indian Civil Procedure Code[121] which gives preclusive effect to a foreign judgment subject to fulfillment of certain conditions, the Ethiopian Code is silent on this matter. Pendency in a foreign court doesn't bar a suit in Ethiopian courts.[122]Moreover, foreign judgments cannot be executed unless the prerequisites set forth in the Code are met.[123]Sedler contends that the decision of a foreign court has *res judicata* effect as this is in accordance with general principles of law recognized by most nations.[124]Ethiopian courts do not freely give recognition to foreign proceedings or judgments as evidenced in the decision of the Cassation Division of the Federal Supreme Court in the case of Alemnesh Abebe v. Tesfaye Gessesse.[125] It is held that an Ethiopian court cannot give effect to a foreign judgment for the purpose of *res judicata* unless the conditions set forth in Article 456 and the following articles of the Code are fulfilled. So, the effect is that foreign judgments do not have preclusive effect in

[120] Ronan E. Degnant, "Federalized *Res Judicata"*, Yale Law Journal, Volume 85, Number 6,(1976), p. 741

[121] Section 13 reads A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties, or between parties under whom they or any of them claim, litigating under the same title, except (a) where it has not been pronounced by a Court of competent jurisdiction (b) where it has not been given on the merits of the case ;(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of the Union of India in cases in which such law is applicable; (d) where the proceedings in which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud, and (f) where it sustains a claim a breach of any law in force in India.

[122]Civil Procedure code, Article 8/2/

[123] Civil Procedure Code, Article 456/1/

[124]*Supra* note 14, p. 320

[125]Federal Supreme Court Cassation Division, civil file No. file no. 59953, decided on 2/10/2003), Federal Supreme Court Cassation Division, Vol. 12, p. 365.

Ethiopia unless such judgments have been recognized in Ethiopia on account of fulfilling the requirements for recognition under Ethiopian law.

The application of the doctrine to situations where parties resort to mechanisms of settling their dispute out of court particularly by means of arbitration presents a riddle. Such is the case when an attempt is made to make an award fit in article 5. It is obvious that arbitration ousts the courts and the decision is not pronounced by a court of law casting the doubt whether the finality of decision can be achieved through the final award of arbitrators. So, too, the restriction to entertain a case barred by *res judicata* is explicitly imposed on courts and it is proper to inquire whether it can be extended to arbitral tribunals. These issues are not straightaway addressed in the Code and a readymade answer is not on hand.

Other jurisdictions provided an answer by codifying *res judicata* provisions regarding arbitral awards.[126] Accordingly, the laws of several countries explicitly lay down that arbitral award carries the authority of *res judicata* in relation to the dispute which it has determined.[127]It is widely accepted that *res judicata* is also a

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[126]International Law Association Berlin (2004) International Commercial Arbitration, Interim Report: "Res judicata" and Arbitration, P. 16 available at www.ila-hq.org/...cfm/.../446043C4-9770-434D-AD7DD42F7E8E81C6, last accessed on 29/5/2014

[127] See *Ibid*, p. 16-17. The Committee mandated to study report on *lis pendens* and *res judicata* in arbitration summarized the laws of several countries as follows: Article 1476 of the French NCPC states (in translation): "The arbitral award, from the moment that it has been given, shall carry the authority of *res judicata* in relation to the dispute which it has determined" This provision also applies to "awards made abroad or made in international arbitration" (per Article 1500);Article 1703 of the Belgian Judicial Code provides that the arbitral award has *autorité de la chose jugée* if it has been notified to the parties and provided it does not violate public policy and that the subject-matter of the dispute was capable of settlement by means of arbitration. In The Netherlands, only final or partial final awards may constitute *res judicata* and do so from the date of the making of the award (Article 1059(1) of the Code of Civil Procedure).Depositing the award with the District Court is not a requirement for the award to obtain *res judicata* status. A statutory provision regarding *res judicata* was deemed necessary to establish that the award has become binding under the applicable law at the place of arbitration in relation to enforcement proceedings of such an award abroad under the 1958 New York Convention (Article V(1)(e)); Article 1055 of the German Code of Civil Procedure provides that an arbitral award has the same effect between the parties as a final and binding court judgment.See also Article 190 of the Swiss Act on Private International Law, and Article 823(6) of the Italian Code of Civil Procedure. Swiss law also accepts the application of *res judicata* to awards on jurisdiction, and partial final awards on substantive issues; The Italian Code of Civil Procedure also states that an award may be annulled if it is contrary to a preceding court decision entered into force amongst the parties, provided that such objection has been raised in the arbitral proceedings (Article 829(8)).;In Sweden and Denmark, similar principles regarding *res judicata* apply to arbitral awards. It is not

rule of international law. The binding effect of arbitral awards is prescribed by many institutional rules and has been repeatedly recognized in several decisions of international arbitral tribunal and tribunals applying international law.[128]

Limiting oneself to the wordings of article 5, the constraint appears to be on courts barring them from entertaining suits or issues decided. However, arbitration tribunals are required to follow the same procedure as courts to the extent possible.[129]Under article 244(2) (g) of the Code, the fact that the claim is to be settled by arbitration is a preliminary objection excluding courts as opposed to the Amharic version which apparently restricts its application to pendency before arbitrators.[130]An arbitral award has the effect of finally settling a dispute and it may be inquired whether it will have preclusive effect in particular with the specific reference made to courts in article 5. If the law permits execution of an award in the same form as a judgment[131], it is logical to give the same preclusive effect under article 5 even if the law seems to be concerned with judgments pronounced by courts. Further, it is tenable to suggest that the effect of foreign arbitral award should be given the same effect in line with the stance taken by the court in relation to foreign judgments. Accordingly, the fulfillment of the conditions for enforcement[132] should be met so that a foreign award can have preclusive effect.

The preclusive effect of a judgment given by a special division of a court on cases which will be handled by other divisions of the court is debatable. For instance, what is the consequence of a finding of a labor or criminal court on the cases pending before a civil court, or vice versa? This issue was addressed by the

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clear whether their laws are more open than other Civil Law jurisdictions to accept some sort of issue preclusion.

[128]For instance, in the *UN Administrative Tribunal Case*(1954), *Arbitral Award Case*(1960), *South West Africa Case*(1966), *Cameroon and Nigeria*(1998), and in the *Boundary Dispute between Qatar and Bahrain Case*(2001). International Law Association Berlin (2004) International Commercial Arbitration, Interim Report: "Res judicata" and Arbitration, Interim Report: "Res judicata" and Arbitration, p. 18-20; See also the *Pious Fund Arbitration* (1902), and the *Trail Smelter Case* (1935). The distinguished tribunal in *Amco v Indonesia (Resubmission: Jurisdiction* International, Supra note 125, p. 18-20

[129] Civil procedure code, Article 317/1/

[130] The Amharic version lacks clarity as it does not clearly specify whether it refers to pendency or finality. It is rather confusing as it mingles arbitration and compromise.

[131]Civil procedure code, Article 319/2

[132]Civil procedure code, Article 461

Cassation Division of the Federal Supreme Court which ruled that the issues that may be framed by the civil and labour divisions of a court are not the same and a decision given by one cannot have preclusion effect. In Ermiyas Mulugeta and Bekelcha Transport S.C, the court held the fact that a party was relieved from responsibility in a labour court does not have *res judicata* effect on the same matter and the civil court will re-hear to determine whether a party is responsible afresh.[133]

One can understand the position that the findings of a criminal court should not be binding on a civil court because the two courts are guided by dissimilar procedural rules and employ different standards of proof. This position is embraced even by the law in Ethiopia. The Civil Code provides that a civil court before which an action for damage is pending is not bound by a decision of a criminal bench on whether or not an offence was committed.[134]But, civil and labour divisions are the same in every respect except the subject matter they deal with. The same standard of proof and the same procedural law justify that a decision given by one should be recognized by the other. Is it conceivable that one would be held accountable by a labour court and exempted by a civil one based on the same facts or occurrence? The courts are the same and it must be expected that the same outcome is to ensue. Otherwise, courts could give contradictory decision compromising their integrity, one of the goals to be achieved by *res judicata*. A decision on the issue whether a fault has been committed by a worker should be conclusive and it should not be re-litigated.

4. Conclusion

The foregoing discussion uncovered the concept of *res judicata*, the conditions for its operation and its boundaries. It can be observed that the Code tries to balance the tension between correctness and stability, on the one hand and revisionism and truth, on the other. It is beyond the focus of this piece to dwell on the philosophical backdrop and underpinning in determining the purpose of law in general and procedural law in particular. However, an attempt has been made to examine the reason underlying the doctrine of *res judicata* with a view to testing whether the ultimate purpose of the law would be attained. A policy

[133]*Supra* note 61
[134]Civil Code, Article 2149

decision has to be made by which the legal system chooses its focus. It can be said that our legal system should have a civil justice system which enables it to say what is, is and what is not is not. Truth should be the goal of a legal system even if the expense seeking it may cause or the depth it may dig up to unravel it hinges on several determinants.

It can be generally accepted that endless litigation cannot be justified no matter what the consequence. At the same time a legal system cannot afford to completely pay no heed to truth and blatant disregard of justice in return for stability or efficiency. It is tenable to limit litigation but it should not be at the expense of compromising the credibility of the legal system. The cost, be it social, economic, etc., a society is willing and capable to pay determines the degree of indulgence in the pursuit of truth. Nonetheless, it is imperative to make a conscious choice whether truth or efficiency should supersede based on the reality on the ground[135] with a view to balancing these competing interests a legal system cannot afford to utterly ignore.

It is also recommended that a periodic assessment be made in order to ascertain that the law strikes the balance taking into account relevant factors. Further, in addition to addressing the call for making a policy decision as summarized above, the foregoing discussion makes it imperative to re-examine the rules governing the doctrine with a view to clarifying the issues raised in this article. The Code has been in force for several decades with little amendment which in any case does not apply to the doctrine under consideration. It is desirable to make it responsive to the era it is intended to serve. With this end in mind it is needful to revisit the rules governing *res judicata*.

[135] In order to determine the degree of conclusiveness of judgments, an assessment should be made regarding the quality of judgment that the judiciary produces, structural and organizational effectiveness of courts, qualification and competence of the judges, integrity of the personnel in the judiciary and other factors which are directly related to the reliability of judgments

In the Eyes of the Withholder: The PAYE and its Discontents in Ethiopia

Taddese Lencho (PhD)[*]

Let me tell you how it will be
There's one for you, nineteen for me
Cos I'm the taxman, yeah, I'm the taxman

Should five per cent appear too small
Be thankful I don't take it all
Cos I'm the taxman, yeah I'm the taxman

The Beatles, Song, Taxman

1. Introduction

Withholding taxes come in all sorts of varieties and emerge in all kinds of places. In some respects, they are as ubiquitous as taxes themselves. They pop up when we cross borders carrying goods (unless we are in the dangerous and precarious game of smuggling goods). They emerge when we receive payments for goods and services. They appear on many payment receipts and invoices that we do not even normally suspect carry withholding taxes. The most prominent among these withholding taxes is the value-added tax (VAT). Indeed, most of the taxes that go under the generic name of "indirect taxes" are in substance withholding taxes in so long as those who collect these taxes include the taxes in the prices of the goods and services they supply to consumers. In the modern times, there is really no place too sacred not to have been haunted and insinuated by withholding taxation.

While withholding has such a ubiquitous presence in daily transactions, the withholding taxation most of us [by "us" I am referring to employees and

[*] LL.B (Addis Ababa University); LL.M (University of Michigan Law School, Ann Arbor); PhD (University of Alabama Department of Interdisciplinary Studies, Tuscaloosa). I am grateful to the two anonymous assessors of this Article for going through the draft of this article and making constructive comments; I am also grateful to a number of respondents for providing me with information which I have used in this article for analyzing the legislative and practical gaps of withholding taxation in Ethiopia.

employers) remember is the withholding of income taxation from wages and salaries. Withholding of income tax on wages and salaries of employees is said to have "done more to increase the tax collecting power of central governments than any other one tax measure of any time in history."[1] It has spawned many a progeny of its own in many areas of taxation, but it remains the most conspicuous and most reliable form of tax collection throughout the world.

The withholding tax on employee income (sometimes referred to us the Pay-As-You-Earn (PAYE), or Pay-As-You-Go (PAYG) in some tax systems) is also one of the most productive sources of tax revenues for many governments and as result the most popular among governments. In the United States, a 2009 data showed that employers collected about 56 percent of the gross revenue collected by the IRS (1.28 trillion out of the total 2.3 trillion).[2] The PAYE constitutes more than 75% of the total tax revenue in developed countries and more than 90% in some developing countries.[3] In many tax systems, withholding income tax on wages and salaries is "the mainstay of effective personal income taxation."[4]

Lured by the productivity and simplicity of withholding taxes, many income tax systems have instituted withholding taxation schemes for multiple sources of income besides that of income from employment.[5] Many income tax systems require withholding taxation at varying rates for sources of income as diverse as "dividends," "interest," "royalties" and other sundry sources of income.[6] The number of sources of income subject to withholding taxation varies from one

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[1] MacGregor (1956) quoted in John Tiley, Revenue Law (5th edition, 2005), Hart Publishing, p. 226

[2] Daniel J. Pilla, "Ten Principles of Federal Tax Policy," Legislative Principles Series, No. 9, the Heartland Institute, p. 8 available on http://heartland.org/sites/all/modules/customs/heartland_migration/files/pdfs accessed on August 05, 2012

[3] See Victor Thuronyi, Comparative Tax Law (2003), Kluwer Law International, p. 254

[4] Richard M. Bird, Tax Policy and Economic Development (1992), The John Hopkins University Press, p. 103

[5] See Victor Thuronyi, supra note 3, p. 246

[6] See Perla Gyongyi Vegh (ed.), OECD Model Tax Convention on Income and on Capital and Key Tax Features of Member Countries(2005), IBFD Tax Travel Companion, pp. 389-390, 401, 406, 415, 426, 431-432, 447, 456, 460-461

country to another, although there are now substantial similarities in the patterns of withholding tax systems throughout the world.

Withholding taxes in general, and the PAYE in particular, are generally popular with tax administrations throughout the world because they are extremely easy to administer, very productive and less susceptible to controversies with taxpayers. On the whole, withholding tax schemes are less susceptible to controversies than their self-assessment counterparts because they obviate the need for direct contact (and thus confrontation) between the taxpayers and tax administration. The withholding tax schemes have also been so thoroughly formalized through the years reducing the grounds for controversy by a considerable margin.

The trouble with withholding taxes is that they can be so seductive to tax administrations as to proliferate in various places and guises. Sometimes, the multiple withholding schemes are not well-coordinated and harmonized creating conflicts of judgment over which withholding rate applies in a specific situation. The withholding tax rules may also be ill-designed, defective or so riddled with ambiguities and loopholes that they can become a source of controversies as any other method of collection or even worse. The sources of controversies can be many, but the common controversies surrounding withholding taxation arise from multiplicity of withholding tax rates and the discriminatory or privileged treatment of some sources of income over other sources of income.

The Ethiopian withholding tax system (if such a thing can be said to exist) has entertained more than its fair share of controversies. In view of the frequency and regularity with which these controversies arise in a number of institutions, however, it may come as a surprise that few cases directly addressing the issue of withholding taxation on employment income have ever made it to courts. Those who are accustomed to view legal controversies from the narrow chink of court cases might thus be misled to conclude that all is quiet on withholding taxation front. Nothing can be farther from the truth. Controversies on withholding taxation are as common as any tax issues in Ethiopia.

The reason why legal controversies regarding withholding taxation in the context of employment rarely make it to courts is due to the peculiarity of tax dispute settlement schemes in Ethiopia. The tax dispute settlement schemes in

Ethiopian tax laws are designed to entertain only tax cases that have their origin in tax assessments by the tax authorities. Since withholding taxation schemes by definition obviate the need for tax assessment by the tax authorities, those taxpayers whose income is subject to withholding taxation are rarely able to directly challenge the assessments by the tax authorities unless the withholding taxation is itself part of tax assessment at some later time.[7]

The aim of this article is to investigate the nature of these controversies, analyze the relevant laws, highlight some of the major legal and practical problems in this regard, and propose some solutions, if possible, to overcome, or at least appreciate the depth and breadth of the problems of withholding taxation in Ethiopia. Since we know that legal controversies surrounding withholding taxation in the context of employment are abundant in Ethiopian tax practice, we must look beyond court cases to understand the nature of these controversies.

In analyzing the laws, the article goes beyond the usual suspects of what are known as "laws" and examines the various directives, circulars, memos and letters in place to highlight and diagnose the problems of withholding taxation in Ethiopia with particular reference to those subject to withholding taxation in the context of employment. The legal status of these other "subsidiary" rules has been considered moot in the Ethiopian tax system, but there is little question that these "subsidiary" rules and laws are binding sources of tax administration behavior and, aside from the subtleties of what is to be considered "law" in the proper or formal sense of the term, these subsidiary rules have controlled the behavior of all the parties to the dispute: the tax authorities, withholding agents and taxpayers (e.g., employees).

The article also surveys the practice of withholding taxation in selected higher education institutions of Ethiopia to highlight the discrepant practices of withholding taxation in even among similar institutions – in this case institutions of higher education. The selected higher education institutions are

[7] The existing tax dispute settlement schemes in Ethiopia could be creatively deployed to accommodate withholding taxation (by interpreting withholding as a form of tax assessment), but the fact that in practice, those whose income is subject to withholding have rarely done so only confirms that those creative ways of interpreting the laws never materialized in Ethiopia.

not, of course, representative of the practice of withholding taxation throughout the country, but in a way these institutions are a microcosm of the subjective and haphazard ways withholding decisions are made in various institutions of Ethiopia.[8] One discrepancy in withholding taxation is one too many (and not just an anomaly) and is as much a violation of the law (if the law can be known with any certainty) as thousands of discrepancies.[9] The point of the article is not to make some statistically fool-proof argument about discrepant practices in withholding taxation but to draw attention to the legal and institutional gaps that have made such practices possible on the ground.

The article is organized as follows. First, the article will review the various forms and types of withholding taxation in general, including the famous PAYE system in the context of employment. Secondly, the article will analyze one of the fundamental concepts in the application of withholding taxation – that of employment, and will review the various laws of Ethiopian tax system for distinguishing the concept of "employment" from that of related services, such as "self-employment" or "independent contract services."[10] One of the payments that frequently gives rise to controversies in the context of higher education institutions is the payment for the writing of modules and other academic materials by full-time and part-time lecturers in the universities and colleges. The article will review the shifting opinions of withholding agents and the tax authorities on the characterization of these kinds of payments to draw attention to the uncertainties surrounding certain payments for performance of services in the context of employment.

The article will then present the results of preliminary surveys done on three higher education institutions of Ethiopia and will compare the practices with the laws in this regard. The surveys are the result of interviews conducted with decision-makers (finance officers) of the respective higher education institutions, and the results of the surveys have been supplemented by the

[8] See Muuz Abraha, Income Tax Withholding in Higher Education Institution in Mekelle City, Mekelle College of Law and Governance Studies, Graduate Program in Taxation and Investment, 2011, unpublished

[9] Courts make decisions on the basis of the facts of each case and ask questions of whether the facts show violation of the rules of withholding, not whether many other cases of violation exist.

[10] The expressions "independent contract services" and "self-employment," "independent contractor" or simply "contractor" are used interchangeably in this article.

"Letters" on the basis of which the finance officers claim to be making withholding decisions. After reviewing the controversies surrounding withholding taxation both from the vantage point of the laws and the practice, the article will make some "modest" as well as "not-so-modest" proposals to overcome some of the recurrent problems faced in connection with withholding taxation in Ethiopia. The article will end with some concluding remarks.

2. Why Withholding Matters under the Schedular Income Tax System of Ethiopia

The controversies over the proper withholding income tax rate and schedule arise in the Ethiopian context because the tax rates and burdens vary considerably under the different schedules of Ethiopian income tax system. To start from the obvious, the withholding tax rates in cases where an employer decides that it is income from employment are progressive, whose rates rise as the income received in itself or aggregated with other income from employment rises. The withholding tax rates in cases where an employer decides that the income is income from business (by a contractor) are flat: 2% if the contractor is able to furnish a TIN or 30% if the contractor is unable to do so. These are the two frequently warring withholding rates, but as shall be seen below, some employers have characterized certain forms of income in the context of employment as "royalties," which brings to the table another flat tax rate: 5%, which is final.

It is easy to see what is at stake as far as tax burdens are concerned. Some within the tax authorities may argue that the 2% tax is an advance tax (which it is) and therefore by no means indicates the actual tax burden borne by independent contractors at the end of the tax period. Because of structural and administrative weaknesses of the Ethiopian tax system, however, the 2% withholding operates pretty much as a final tax for most of those who provide independent contract services without possessing a professional or occupational license. Even if the independent contractors go on to settle the final tax liability at the end of the tax period, the tax burden is still lower than what it would have been had the income been characterized as income from employment. Those who perform services under independent contractual relationships are therefore allowed to split their total income into one of employment and of independent

contract, in the process considerably reducing their total tax liability. Though some offer palliative arguments like the 2% tax is an advance tax to counter the complaints of employees, most employees understand that real tax burden differences underlie the whole argument of whether to withhold tax under Schedule "A" or Schedule "C" or Schedule "D."[11]

The real differences in tax burdens can be seen in one hypothetical case involving an employee (A). It will be seen in the analyses that follow that certain payments may be treated equally as "income from employment" (Scenario One) or "income from independent contract of services" (Scenario Two) or "income from royalties" (Scenario Three) just to name the three possible characterizations in this regard. Payments for writing of distance modules may be (and have been) characterized as "income from employment" or "income from independent contract of services" or "royalties." If A, whose regular monthly salary is 5000 ETB, has received 10, 000 ETB for writing distance modules, her tax deductions from total income would be as shown in the following table.

Table 1.1: Withholding Taxation under the Different Schedules of Ethiopian Income Tax (A, C and D)

Scenario One	Scenario Two	Scenario Three
4587.2	1287.2	1587.2

As can be seen from the table above, A's tax deduction would triple in cases where the income from the writing of modules is characterized as income from employment. A's tax deduction is notionally the lowest in Scenario Two under which A's income from writing of modules is characterized as income from

[11] Ethiopian income tax system is a typical schedular income tax system in which income is taxed under separate schedules organized around known sources of income: Schedule A (income from employment); Schedule B (income from rental of buildings); Schedule C (income from businesses as well as professional and/or vocational occupations); Schedule D (income from miscellaneous sources, such as royalties, interest and dividends); in addition there are autonomous income tax regimes for mining, petroleum and agricultural activities; see Taddese Lencho, "Towards Legislative History of Modern Taxes in Ethiopia (1941-2008)," Journal of Ethiopian Law, vol. 25, No. 2, 2012

independent contract services, but since this is not a final tax, it may be higher than Scenario Three, but it will never get anywhere near Scenario One. The least favorable position is Scenario One, under which the income is considered to be one of "income from employment."

In any case, since the differences are so stark, it does not take the subtle knowledge of tax law to fume at the prospect of withholding taxation under Schedule "A". The situation is exacerbated under the Ethiopian income tax system because of the segregation of one form of withholding taxation from the other withholding taxes. An employee whose income is subject to the highest tax rates of Schedule "A" cannot obtain a relief at some point of the tax calendar because her annual income deserves to be treated under lower progressive tax rates. There are no rules that allow employees, who overpay income taxes, to obtain some tax relief by way of tax credits at the end of the tax year.

3. Varieties of Withholding Taxation

3.1. The PAYE

Of all the withholding schemes ever devised by governments, the withholding scheme on employees' payments, known as the "Pay-As-You-Earn' (PAYE)," is probably the most famous.[12] Its popularity is attributable to its enormous ease of administration and equally enormous revenue productivity. The PAYE scheme of withholding enables governments to raise huge amounts of revenue at one of the lowest costs of tax administration in existence.[13] The PAYE scheme raises "a lion's share of the personal income tax" and its yield is said to exceed the revenue of general sales tax or value added tax (VAT) in the industrialized countries.[14] The PAYE scheme assumes an even more revenue importance to the poorly equipped tax administration of developing countries,

[12] Konraad van der Heeden, "The Pay-As-You Earn Tax on Wages," in Victor Thuronyi (ed.), Tax Law Design and Drafting (1998), International Monetary Fund, vol. 2, 1998, p. 564

[13] Id, pp. 564-565; it is clearly cost effective for the tax administration if we disregard the costs of tax compliance by withholding agents.

[14] Ibid

although for reasons it is not appropriate to go into in this article, the VAT and other indirect taxes far outstrip the PAYE in revenue performance.[15]

Employment income is subject to PAYE in almost all countries of the world.[16] In many developing countries, withholding tax by employers is considered final, which relieves both employees and the tax administration from the administrative pain of self-assessment at the end of the tax year.[17] Some developed tax systems, notably the USA, make use of the PAYE but consider the tax withheld as advance payments for the final tax to be settled at end of the tax year when all taxpayers, including employees, are in principle required to file self-assessment tax returns.[18]

3.2. Other Withholding Income Taxes

3.2.1. Withholding Taxes on "Income from Capital"

Withholding taxes are commonly used against other sources of income, although not as extensively as income from employment. Many income tax systems employ withholding taxes on the so-called "income from capital," sometimes also known as "investment income" or "passive income."[19] The individual details of "income from capital" vary from country to country, but the common forms of "income from capital" include dividends, royalties and interest. In schedular income tax structures, these types of income are often treated under separate schedules, and in some of the schedular income tax systems, the withholding taxes are treated as final. In global income tax structures, these types of income form part of the repertoire of individual income, but may become the subject matter of withholding taxation at source.[20]

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[15] In developing countries, the VAT and taxes on international trade (customs tariffs) are more productive of revenue than the PAYE. The PAYE is nevertheless the most productive of personal income taxes in developing countries; see id, p. 565

[16] The exceptions that Thuronyi cites are France, Switzerland and Singapore; see Victor Thuronyi, supra note 3, p. 254; see also, Koenraad van der Heeden, supra note 12, p. 564, foot note 2

[17] See Victor Thuronyi, supra note 3, p. 255

[18] See ibid

[19] See Richard Bird, supra note 4, p. 104; see also Victor Thuronyi, supra note 3, p. 255

[20] Federal Tax Course, 2000, CCH Editorial Staff Publication, CCH Incorporated, Chicago, 1243

Withholding taxes may be designed as final tax liabilities, or as advance payments. When withholding taxes are considered as advance payments, the taxes withheld are often credited against the final tax due on the income of the person. In typical global income tax systems, withholding taxes are used as advance payments, and would be credited at the end of the tax year against the final tax liability of the person. In scheduler income tax structures, particularly of the developing world, many withholding taxes are treated as final taxes. This typically means that the incomes subject to withholding taxation are not added to the other income of the person, and the taxes withheld are not creditable against any other income tax liability of the person.

Ethiopia has used withholding taxation schemes against an assortment of income known as "miscellaneous income" or "other income" since 1978.[21] One of the four schedules of the main income tax system of Ethiopia (Schedule "D") appears to be designed primarily for applying final withholding taxes against certain sources of income. The list of "miscellaneous income" subject to final withholding taxation under Schedule "D" is more extensive than most other income tax systems, but some on the list may qualify as "income from capital." The number of specific types of income subject to final withholding taxation in Ethiopia keeps growing from time to time and at the time of writing includes "royalties," "income from technical services rendered from abroad," "income from games of chance," "dividends" and "interest from deposits." All of the withholding taxes under Schedule "D" are considered final taxes. With the exception of tax on "income from technical services rendered from abroad," which is obviously exclusively intended for non-residents, the withholding taxes in Ethiopia apply to both resident and non-resident taxpayers.

3.2.2. Withholding on Payments for Goods and Services

Withholding taxes can also be applied to transactions or on supply chains. These types of taxes are withheld at designated loci of movements of goods and services in the market, such as on imports and exports, and domestic supplies of goods and services. Customs are commonly used as loci for collection of non-

[21] See Proclamation to Amend the Income Tax, 1978, Proc. No. 155, Negarit Gazeta, 38th year, No. 3 (now repealed)' see also Taddese Lencho, Towards Legislative History of Modern Taxes in Ethiopia, supra note 11, pp.121

final withholding income taxes. The very factor that made customs ideal for collection of various indirect taxes (customs duties, excise duties, VAT and others) has also made them convenient spots for collection of advance income taxes. Sometimes, exports are also be used for collection of income taxes.

Apart from imports and exports, organizations may also be used as withholding agents for income taxation of suppliers of goods and services. Just as organizations have been used to withhold income taxes from their employees or collect VAT from supplies of goods and services, they may also be used as withholding agents from payments to third parties for the provision of various goods and/or services. Unlike withholding employment income taxes, however, these schemes of withholding are often treated in many income tax systems as advance payments, to be settled at the end of the tax year by suppliers of goods and/or services from whose payments the income taxes were withheld.[22] The adoption of these schemes of withholding depends on the degree of tax compliance in the self-assessment income tax regime (which occurs at the end of the tax year) and on how much the government needs advance cash flows to carry on governmental responsibilities. These schemes of withholding are effective in collecting at least some tax from hard-to-tax suppliers of goods and/or services. In that regard, they act effectively as final taxes against hard-to-tax suppliers of goods and/or services.

[22] In Botswana, commissions or brokerage fees paid for the procurement of goods are subject to a non-final withholding tax of 10%; rental payments subject to 5% withholding; see Jude Amos, Botswana, Corporate Taxation, Country Surveys, IBFD, updated up to 7 November 2012, section 1.6.2; in Ghana, interest (8%), supply of goods and services (15%), rent (8%), commission for insurance and sales persons (10%), commission for lotto agents (5%),; Kennedy Munyandi, Ghana, Corporate Taxation, Country Surveys, IBFD, Section 1.6.2, updated up to 31 March 2013; Kenya applies non-final withholding taxes on a number of sources, except dividends for which the tax is final; management, professional and training fees (5%), royalties (5%), interest on government bonds (from 10 to 15%), income received from sale of property or shares (10%), insurance commissions (5% for payments to brokers, 10% for payments to other agents), contractual fees (3%); Frederick Omoni, Kenya, Corporate Taxation, Country Surveys, IBFD, updated up to 4 March 2013; in Sudan, all government payments to taxable persons are subject to withholding(1%), as are imports of goods by taxable persons (2%), payments by local companies to resident contractors and sub-contractors (5%), consultancy fees (10%); Abdelgader A. Osman, Sudan, Corporate Taxation, Country Surveys, IBFD, Amsterdam, update up to 1 February 2013

Ethiopia had these forms of withholding taxes in the early days of Ethiopian modern tax period[23] and has revived these taxes since 2001.[24] Back in the 1950s, Ethiopian income tax laws required withholding of income tax on imports at the rate of 4% and on exports at the rate of 1%.[25] Since 2001, Ethiopia has used imports as places of withholding income taxes and various organizations for withholding of income taxes from payments for supplies of goods and services. The current withholding tax rate is 3% on imports (calculated on the basis of cost, insurance and freight (CIF)) and 2% on both supplies of goods and services, which is calculated on the gross payments for these supplies.[26]

4. Forms of PAYE

The PAYE is the most famous form of withholding taxation throughout the world. The PAYE, as it operates in various tax systems, has assumed three basic forms: simple PAYE, cumulative PAYE, and year-end-adjusted PAYE.[27]

4.1. Simple PAYE

The simple PAYE involves, as its name suggests, a simple process of withholding taxes from monthly wages and salaries, without any adjustments for overpayments or underpayments resulting from the differences in the monthly accounting system from the annual accounting system.[28] The simple PAYE scheme disregards the differences in the tax burdens for the sake of the extraordinary simplicity of withholding taxes from monthly employment income payments, treating the amounts withheld as final. The result is that

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[23] See the Personal and Business Tax, 1949, Legal Notice No. 138, *Negarit Gazeta*, 9th year, No. 4 and Legal Notice No. 164/1952, *Negarit Gazeta*, 11th year, No. 9; see also Taddese Lencho, supra note 11, p. 117

[24] See Income Tax (Amendment) Proclamation, 2001, Proc. No. 227, *Federal Negarit Gazeta*, 7th year, No. 9

[25] See the Personal and Business Tax, 1949, Legal Notice No. 138, *Negarit Gazeta,* 9th year, No. 4; See id, Article 2(ii); the withholding tax rate was raised in 1952 by 1% for both imports and exports; see Legal Notice No. 164/1952, *Negarit Gazeta*, 11th year, No. 9

[26] Income Tax Proclamation, 2002, Proc. No. 286, *Federal Negarit Gazeta*, 8th year, No. 34, see Articles 52 and 53; Income Tax Regulations, 2002, Regulations No. 78, *Federal Negarit Gazeta*, 8th year, No. 37, Article 24

[27] Koenraad van der Heeden, supra note 12, p. 567; see also Richard M. Bird, supra note 4, pp. 100-103

[28] Koenraad van der Heeden, supra note 12, 2, p. 567

employees whose monthly income fluctuates during a year (as a result of, for example, of salary raises) might be made to pay more than what they should pay if adjustments were made at the end of the tax year. The following table shows the income tax liability of an employee, A, with and without final tax year adjustment. An employee whose regular salary was 2000 Birr for half of the year and whose salary is raised to 3000 after six months has annual taxable income of 30, 000. This employee's tax liability under the monthly simple PAYE scheme is higher than her annual tax liability if her annual salary were aggregated and taxed on annual basis. The following table shows the difference if the tax computations are done according to the progressive income tax rates of current income tax system of Ethiopia.[29]

Table 1.2: The Effect of Simple PAYE on Employee Income Tax Liability

Total Income	Tax under a simple PAYE	Tax under the annual scheme	Difference
30,000	4785	4680	105

By denying any adjustment at the end of the tax year, the simple PAYE system is even more unfair upon employees who lose their employment in the course of the year and thereafter remain without gainful employment in the course of the year. The simple PAYE scheme assumes that the income of employees remains steady throughout the year. Thus an employee whose monthly income falls in the top marginal tax rate category is required to pay under the highest marginal tax rates although that employee lost her employment in the course of the year. Since the simple PAYE scheme bars any re-computation at the end of the tax year in light of the changing employment status of the person, its presumptuous tax computation based purely on monthly income results in over-taxation of employees who lose their jobs in the course of the year. In contrast, a trader who finds herself in similar situation (e.g., ceases trade) is assessed on the basis of the taxable income obtained up to the cessation of the trade since the cessation

[29] For the rates, see Income Tax Proclamation No. 286/2002, supra note 26, Articles 11 and 19 (b)

of trade is taken into account in the computation of income tax liability at the end of the tax year.[30]

The effect of a Simple PAYE scheme can be illustrated by an example as simple as the scheme itself. An employee whose monthly income is 4000 ETB and who loses her job after six months will pay more taxes under a Simple PAYE scheme than is under an annual income tax system. Under the current rules of Ethiopian income tax system, an employee would pay 4770 ETB in six months under a Simple PAYE scheme and would have only paid 4230 under an annual income tax system (a difference of 540 ETB). These tax burden differentials arise from the operation of simple PAYE in a progressive tax rate structure of the income tax system, under which the monthly income of the employee is taken as a final index for measuring the employee's income throughout the year.

4.2. Cumulative PAYE

The cumulative PAYE, adopted in countries like Russia and the U.K.,[31] involves a re-computation of the PAYE to ensure that the tax withheld in individual months is equivalent to the tax due in a tax year.[32] After a salary raise, "the PAYE of the next pay period is increased by the month's share of the difference between the income tax on total income prospectively to be earned during the tax year, and the tax already withheld in the tax year".[33] In the cumulative PAYE, any raise, or for that matter, any reduction of employment income immediately triggers an adjustment in the computation of the tax to be withheld in anticipation of the differences that might arise for the rest of the tax year. In a way, the cumulative PAYE is an attempt to reconcile the differences in the monthly accounting process of monthly withholding tax on employment income and the computation of income tax in general using the "tax year" as a basic unit of time.

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[30] In this regard, see Income Tax Proclamation No. 286/2002, supra note 26, Article 47(2)

[31] For the UK, see John Tiley, supra note 1, p. 230

[32] Koenraad van der Heeden, supra note 12, p. 568

[33] Ibid

4.3. Hybrid PAYE

And then there is the so-called hybrid PAYE – a hybrid of both simple PAYE and the cumulative PAYE.[34] During the tax year, the hybrid PAYE proceeds as if there were no need for adjustment at the end of the tax year and treats each monthly income as final (which is what gives the scheme the veneer of the simple PAYE).[35] At the end of the tax year, however, the final withholding is recomputed on the basis of the yearly income information received by an employee – on a cumulative basis, and the tax due at the end of the tax year and the tax already withheld throughout the tax year are compared, and appropriate adjustments are made accordingly.[36] If the difference shows a credit in favor of the taxpayer, the government will refund the taxpayer, and if the difference shows that something more is owed to the government, the taxpayer will be required to pay that difference.[37] In the example given in the table above, an employee will be able to obtain a refund of 540 ETB when an adjustment is made at the end of the tax year. The hybrid PAYE or the year-end-adjusted PAYE is followed in many industrialized countries like Germany and Japan.[38]

5. The PAYE in Ethiopia

5.1. Introduction

The Ethiopian income tax system has used the PAYE as a scheme of tax collection from the income of employees for a long time. Ethiopia has followed the simple PAYE scheme in which tax deducted monthly by employers acts as the final tax liability of employees in respect of their employment income. As far as employees are concerned, the disadvantages of the Simple PAYE are not relieved by any adjustments at the end of the tax year. Employees whose monthly income rises in the course of the year are treated as if their incomes had been steady throughout the year. Employees who lose their jobs in the middle of the year and are unable to find jobs are treated as if their monthly incomes were equal to those employees who have maintained their job throughout the year. In

[34] Ibid
[35] Ibid
[36] Id, p. 569
[37] Ibid
[38] Id, p. 568

short, the monthly accounting system of withholding taxation locks the fate of the tax burdens of employees in the monthly income received regardless of what happens throughout the year.

The system of withholding taxation on income from employment appears to be designed for its simplicity of administration. The system ensures that employees will have no contacts with the tax administration as the administration deals only with the withholding employers. The system is so thoroughly and singularly dependent upon the collection by employers that most employees are not even aware that exceptions are made in some situations in which employee self-assessment is required. The first exception is made for employees of embassies and international organizations enjoying diplomatic immunity.[39] These employees are required to declare and pay the tax due themselves (in other words, they are subject to the regime of self-assessment). The second exception is made for employees who work and obtain income from more than one employment. Two distinct obligations are imposed in the second exception. The employers themselves are required to aggregate the income from multiple employments if they have known that an employee works for other employers as well.[40] In addition, the employees are required to declare their total income (from multiple employments) and pay the difference between the tax due on the total income from employments and the tax withheld by individual employers respectively.[41] The obligation of employees to declare and pay the tax is not contingent upon the employers discharging their obligation to aggregate and deduct the tax upon total income, although in practice, it is the employers who (when they discover) shoulder the burden of aggregating and deducting the tax upon the total income of employees. The rationale for the second exception is that the tax due on the aggregate income of employees is different (and higher) than the tax due on the separate income from individual employment due to the operation of the progressive income tax structure.[42]

[39] Income Tax Proclamation No. 286/2002, supra note 26, Article 65(4)
[40] Id, Article 65(5)
[41] Id, Article 65(4)
[42] Note, however, that the exception is made in favor of the government's interest to generate more revenue only. When the system results in employees paying more taxes than they should, there are no rules that enable employees to get a refund for excess taxes paid.

5.2. Prerequisites for PAYE Withholding in Ethiopia

The PAYE is a predominant modality of tax collection under Schedule "A" of the Ethiopian income tax system. The application of the PAYE is contingent upon the scope of application of Schedule "A." The task of employers, as withholding agents, is therefore one of ascertaining whether the income payable to employees is chargeable under Schedule "A" of the Ethiopian income tax system. The Ethiopian income tax laws are not explicit in what employers need to do to ascertain whether the income falls under Schedule "A," but a close reading of the relevant provisions of the Income Tax Proclamation shows that employers (as withholding agents) must at the minimum ascertain the existence of two conditions for the application of Schedule "A" rules. These are:

a. The existence of an employment (or employer-employee) relationship;
b. That the payment has arisen from the employment relationship, and not any other relationship.

These two conditions are cumulative. As shall be seen in the greater part of this article, there are many instances in which the existence of an employment relationship is formally established but the payment made by an employer is not said to have arisen from the employment. In Ethiopian context, the most prominent case was **Shell Eth. Ltd. v. Inland Revenue Administration (IRA)**, [43] in which the then Supreme Court of Ethiopia in 1978 E.C. (1986) held that interest paid by an employer on a provident fund held in the name and for the benefit of employees was not income from employment in spite of the existence of a formal employment relationship between employees and the employer (Shell Eth. Ltd.).

The task of employers today in Ethiopia is complicated by the existence of other withholding taxes, which may apply even after employers have ascertained that the income does not fall under Schedule "A." The non-existence of the two conditions above relieves employers in particular only from the obligation to withhold income tax under Schedule "A" of the Ethiopian income tax laws. It does not necessarily relieve employers from withholding under the other

[43] Shell Ethiopia Ltd. v. Inland Revenue Administration (Civ/App/File No. 763/78, 1978 E.C., Supreme Court), in Amharic, unpublished

schedules of Ethiopian income tax system. Employers may still be required to withhold tax if the payment can be characterized instead as "dividend" or "royalty" or if the payment is considered to be a payment for provision of goods or independent contract services. The desire of the [Ethiopian] Government to use every available outlet of cash flows as notional "withholding booths" has complicated the task of employers in this regard.[44] Under current rules of the Ethiopian income tax system, the existence of layered structures of withholding, each involving fairly complicated legal arguments over the characterization of the payment, has meant that employers and other withholding agents must worry about taxes for most of the payments they disburse to others.

While employers have the difficult task of juggling so many issues in deciding the rate of withholding taxation in Ethiopia, it remains to be the case that the most persistent and most difficult issue is one of distinguishing cases of employment from that of independent contract of services. We shall, therefore, address the more vexing question of "employment" vs. "self-employment" before we move on to the less common issues arising in the context of withholding taxation of income from employment.

5.2.1. Distinguishing Employment from Independent Contract of Services

5.2.1.1. Introduction

In Ethiopia, as in many countries of the world, the PAYE scheme uses employers as withholding agents for collection of employment income tax from the income of employees. Since serious tax penalties attach to default in withholding obligations, most employers take their obligations in this regard seriously, sometimes so seriously as to interpret all cases of doubt in favor of "employment."[45] The reason why many employers take what they regard to be a safe bet on "employment" in all instances of doubt is that the amount of tax

[44] In simpler times, once an employer is satisfied that the payments she is making does not arise from employment, she is thereby relieved from the pain of worrying about withholding taxes.

[45] A withholding agent who fails to withhold tax in accordance with the law is personally liable to pay the tax not withheld and in addition, an agent (the manager and the chief accountant or another senior officer who knew or should have known of the failure is liable for a penalty of 1000 ETB for every instance of failure to withhold the proper amount; see Income Tax Proclamation No. 286/ 2002, supra note 26, Article 90(1), (3) and (4)

collected in cases of employment is far higher than the amount withheld in other cases, which will absolve employers (or so they think) from potential charge of having collected less for the government. Employers are more likely to be challenged by the government for not collecting the "appropriate" withholding tax than by the employees for collecting tax under higher withholding tax rates. This state of affairs has made many an employee unhappy in several places.

Most employers (through their finance officers) rely upon their own interpretations of the Income Tax Proclamation, which has definitions (or sort of) for employment and independent contract services (see below).[46] Employees may protest against this interpretation, but their protests usually fall on deaf ears unless a particular employer is somehow persuaded to think otherwise. Employees have virtually no recourse in the income tax laws against potential abuses and misconstructions of withholding rules. Whether by design or by accident, the dispute settlement schemes in the income tax laws of Ethiopia have excluded these kinds of disputes from going to courts.

In a few instances in which withholding agents relent, they may decide to write a letter to the tax authorities seeking clarification on specific issues, and the tax authorities have at times responded to these letters by providing what they deem to be their own interpretation and guidance on how withholding agents should respond to withholding questions. In practice, these communications with withholding agents are heavily decentralized and individualized. Except in a few situations, the tax authorities have refrained from developing common "test factors" for all withholding agents to follow and instead have opted for providing guidance to employers in response to specific questions as these questions arise. The individual approaches the tax authorities have taken have seen the authorities contradicting themselves from time to time resulting in some of the most flagrant cases of inconsistencies in the treatment of identical payments under different withholding tax rates. The gap between what the Income Tax Proclamation prescribes and the practice of income tax withholding in practice is very wide, as shall be seen below, and this is largely because

[46] Many employers are guided by some vague understanding of the provisions of the Income Tax Proclamation; it is uncertain how many of them seriously consult the Income Tax Proclamation before making decisions about withholding of taxes; encounters with a few of the withholding agents makes it extremely doubtful if the withholding agents ever consult the Proclamation before deciding withholding taxation.

neither the tax authorities nor the withholding agents have seriously followed the wordings of the Proclamation in distinguishing cases of "employment" from that of "independent contract of services."

5.2.1.2. Distinguishing Employment from Self-Employment: Analysis of the Income Tax Proclamation

In its definition section, the Income Tax Proclamation offers general definitions for "employee" and "contractor," with the ostensible aim of defining the scope of employment income tax (Schedule "A") vis-à-vis that of business income tax (Schedule "C").[47] In view of the fact that it is the source of income that is important (i.e. "employment" and "independent contract of services") rather than the person upon whom the economic burden of the income tax falls, (i.e., "employee" and "contractor"), it is strange that the Income Tax Proclamation chose to focus upon the definitions of "employee" and "contractor." We must be content with what we find in the Proclamation, however, as we could have been worse off had the Proclamation offered no definition at all. The meaning and scope of employment and its counterpart – independent contract of services – can be inferred easily from the meanings ascribed to "employee" and its counterpart – contractor – in the Income Tax Proclamation.

Article 2(12) of Income Tax Proclamation of 2002 defines an "employee" as:

> " … any individual, other than a contractor, engaged (whether on a permanent or temporary basis) *to perform services under the direction and control of the employer*"(italics added)

And Article 2(12) contrasts a "contractor" from "employee" as:

> "… an individual who is engaged to perform services under an agreement by which the individual [contractor] *retains substantial authority to direct and control the manner in which the services are to be performed*"(italics added)

[47] Income Tax Proclamation No. 286/2002, supra note 26, see Article 2(12); ostensibly, because nowhere in the whole body of the Income Tax Proclamation is it made apparent why these definitions are proffered; in practice, the Tax Authorities have made repeated references to these provisions for purposes of drawing distinctions between "income from employment" (under Schedule "A") and "income from independent contract of services" (under Schedule "C"); see below for guidance letters written by the Authorities in this regard.

The definition part of the Income Tax Proclamation pins the distinction between "employment" and "independent contract" upon the existence or otherwise of the element of "control and direction" from the side of the "employer" or the "client." [48] In the words of the Proclamation, as quoted above, an employee is one who "*performs services under the direction and control of the employer*," while a contractor is one who "*retains substantial authority to direct and control the manner in which the services [are] to be performed.*" In tagging the meaning of "employment" vis-à-vis that of "independent contract of services" to the existence or otherwise of "direction and control," the Proclamation undoubtedly opted for substantive (as opposed to that of "formal") criteria for distinguishing cases of employment from that of independent contract of services. This is bracing to know, for no one wants an important matter as that of employment vis-à-vis that of independent contract of services to be determined by recourse to the form of relationships. The problem is that the Income Tax Proclamation offers no details about factors constituting "direction and control."

It is not generally expected that the Proclamation would provide details about factors constituting "direction and control." The details of "direction and control" are not provided in the Proclamation because it was perhaps understood that the elements of "direction and control" would be spelt out either in subsidiary tax legislations or in court cases dealing with issues of employment. It might also have been supposed that the elements of "direction and control" had better be left to the discretion of those charged with distinguishing these cases based on the facts and circumstances of each case. Due to the inadequacies or peculiarities of withholding taxation schemes in Ethiopia,

[48] In addition to the definitions cited above, the Income Tax Proclamation makes reference to "employment" – references which may be read as hints as to the scope of the Schedule of the Income tax that applies to employment income – namely, Schedule "A". For example, in Section II of the Income Tax Proclamation of 2002, Article 12 describes "employment income" broadly as "any payments in cash or in kind received from employment," including "income from former or prospective employment." While this provision makes it clear to reach "all payments in cash or in kind" (despite the practical challenges of doing so), it is not at all clear as to how employers can identify "all payments in cash or in kind" unless they simply assume that all payments made by employers to employees is by definition "income from employment."

however, the Proclamation's evident intent to turn the distinction on substantive grounds of "direction and control" has been abandoned in favor of formal or superficial or mechanical standards.

The courts of Ethiopia have not been able to provide any guidance in the context of income tax withholding as a result of the quirks of Ethiopian tax dispute settlement schemes. Although disputes regarding appropriate withholding rates are common, everyday experiences, these kinds of disputes have virtually been kept out of courts due to the narrow strip of dispute settlement schemes in taxation. Tax cases in Ethiopia are normally set in motion after assessment notifications are sent to taxpayers, who are then able to contest the assessment notifications before the tax authorities themselves, the Review Committees, the Tax Appeal Commissions and, finally, on matters of law, before courts. Since withholding disputes do not involve assessment notifications (in the literal sense these expressions are understood in practice), those involved in and most affected by withholding disputes (e.g., employees) have had a difficult time to take their disputes through the regular channels of tax dispute settlement, namely through the Tax Appeal Commission and to courts on appeal.[49]

Determinations of withholding under Schedule "A" or the other schedules of Ethiopian income tax system are thus mostly made in settings away from courts. Most of the disputes are resolved (not necessarily to the satisfaction of the parties involved) by the withholding agents themselves. More specifically, it is mainly the finance employees or managers of companies and other organizations that are decisive in making the calls as they are in charge of payrolls along with which withholding tax decisions are most often associated.

[49] The quirks of the Ethiopian dispute settlement schemes in this regard have been noted in Taddese Lencho, "The Ethiopian Tax System: Excesses and Gaps," Michigan State Journal of International Law, Issue 20, No. 2, 2012, pp. 372-278; The few cases that the courts have entertained in this regard made it to courts after the tax authorities assessed tax against the withholding agents themselves because the authorities felt that the agents "failed to withhold taxes in accordance with the law." The Shell Ethiopia case (see footnote 43 above) made it to courts after the tax authorities took a direct action (assessment) against Shell Ethiopia accusing Shell Ethiopia of "failing to withhold tax on some payments to its employees." If Shell Ethiopia withheld the taxes, but employees thought that was illegal, employees would have no recourse against Shell Ethiopia or would at least have an uphill battle trying to persuade the tax dispute settlement bodies that assessments were made by the tax authorities.

Some employees may attempt to persuade the withholding agents to withhold tax under lower-rated provisions, but the ultimate decision rests with the agents themselves.

A few of the disputes on withholding taxation are “resolved” after “appeals” to the tax authorities are made. These “appeals” take the informal process of seeking written guidance from the authorities on specific questions of withholding taxation. The tax authorities have attempted to regulate the practice of income tax withholding at various times. The tax authorities have issued at least one Directive to determine the types of services for which 2% withholding taxation is to be made. The tax authorities have also provided interpretative guidance on a number of individual and collective cases by responding through private letters to questions of withholding taxation coming from organizations or institutions seeking guidance, and through so-called “circular letters” which are answers to frequently-arising tax questions in the practice of Ethiopian tax administration. We will analyze the relevant directives, circular letters and private letters written in this regard to examine the positions of the tax authorities, and to draw some conclusions as to whether the tax authorities have succeeded in bringing out the key elements for the guidance of withholding agents in Ethiopia.

5.2.1.3. The Income Tax Regulations of 2002 and the Directive of 2003

The Income Tax Proclamation, as we have seen above, does not go into the details of what factors constitute “direction and control.” Due to the peculiarities of tax dispute settlement schemes in Ethiopia, the courts have not been able to play their role of interpreting “direction and control” in the context of income taxation. The task of providing details has therefore been in practice left to subsidiary pieces of legislation. After the promulgation of the Income Tax Proclamation in 2002, one income tax regulation was issued by the Council of Ministers and a number of tax directives have been issued by various tax administration bodies, most notably ERCA itself and the Ministry of Finance and Economic Development (MoFED).

The Income Tax Regulations of 2002, which was issued along with the Income Tax Proclamation of 2002, provides many details left out by the Proclamation, particularly in the area of exemptions, deductions and withholding taxes. The

Income Tax Regulations of 2002 does not, however, furnish details on the elements of “direction and control” as might be expected. Nonetheless, the Income Tax Regulations of 2002 is still useful indirectly because it provides detailed rules on the withholding of tax from payments to independent contractors, with whom employees are often confused.

The Income Tax Regulations lists down more than a dozen different categories of services and/or professionals as qualifying for 2% withholding tax under Schedule “C.” Some of the services that are subject to 2% withholding include: consultancy services, design services, writing services, lectures, dissemination of information services, advertisements and entertainment programs for television and radio broadcasts, and construction services.[50] The professionals who are listed in the Regulations as subject to 2% withholding when providing “professional services” are lawyers, accountants, auditors, sales persons, arts and sports professionals, brokers, and commission agents.[51] The Regulations does not state that the list of services and professionals subject to withholding taxation is indicative or exhaustive, but it is clear from the nature of these services and the frequent use of the phrase “other similar services” in some of the lists that the listing was not meant to be exhaustive.

While the Income Tax Regulations helps many a withholding agent to make decisions based on the lists of services and the types of professionals set down thereunder, the Regulations is not going to help withholding agents in borderline cases. The Regulations lists “lectures,” for example, as one of the services subject to 2% withholding, but we know that “lectures” can be delivered by both employees and independent contractors. How is a withholding agent to decide when a “lecture” is part of employment or independent contractual relationship? In the end, the Income Tax Regulations forces withholding agents to go back to the general element set down in the Income Tax Proclamation: “direction and control;” a withholding agent is not absolved from determining, based on the facts and circumstances of each case, whether “direction and control” exist in a relationship to decide whether to withhold tax under Schedule “A” or Schedule “C.”

[50] Income Tax Regulations No. 78/2002, supra note 26, see Article 53 (2)
[51] Ibid

Shortly after the promulgation of the Income Tax Proclamation and Regulations of 2002, the Ministry of Revenues issued a (draft?) directive on withholding schemes in Yekatit 1995 E.C. (February 2003), which was to come into force from Hamle 1, 1995 E.C (July 2003).[52] The Directive was issued to regulate the withholding of taxes on imports and payments for goods and services. The said Directive repeats most of the lists of services and professionals listed down in the Income Tax Regulations of 2002.[53]

Unlike the Regulations, however, the Directive of 2003 suggests that, at least in one exception, it is possible to be an employee for some kinds of services and an independent contractor for other kinds of services, even if both of these services are provided for one employer. That exception is provided for "lectures." In its relevant paragraph, the Directive states:[54]

> ለዲዛይን ስራዎች፤ ለፅሑፎች (በተለያዩ መፅሔቶች ጋዜጣዎች ለተለያዩ ሚዲያዎች ወይም ደርጅቶች ወዘተ ፅሑፍ በማቅረብ ከሚገኝ ክፍያ)፤ ለትምህርት ገለፃዎች (በሚዲያ፤ በት/ቤቶች እና በተለያዩ መድረኮች ወዘተ ለሚደረግ ትምህርታዊ ገለፃ ከሚከፈል ተቀናሽ የሚደረግ ሆኖ ትምህርት የሚሠጠው ሰው በተከታታይ (በቋሚነት ከሆነ ትምህርታዊ ገለፃ ከመስጠት ከሚያገኘው ክፍያ በደመወዙ ላይ ታክሎ የሰዎች የስራ ግብር እንዲከፍል ይደረጋል)።

Roughly translated, the quoted paragraph reads:

> Payments for design works, writing (for magazines, newspapers, various media or organizations), lectures (through various media, in schools or other platforms, except when the person providing the lecture is engaged continuously or permanently [in which case the payment shall be aggregated with her salary and tax deducted under the personal income tax schedule (A)].

In the case of "lectures," the Directive states that "*where the person providing lectures is engaged continuously or permanently,"* the payments for the lectures shall be aggregated with the monthly salaries of the lecturer and the appropriate

[52] Some within the Tax Authorities doubt whether this Directive was still in force but since Directives are not published and seldom rescinded publicly, it is impossible to know which Directives are really in force and which are abrogated; in any case, the Directive is cited in this Article to illustrate the position of the Tax Authorities on the vexed question of employment vs. self-employment; see የገቢዎች ሚኒስቴር፣ የቅድመ ታክስ ክፍያ ስርዓትን (Withholding Taxation) ለማስተዳደር የተዘጋጀ ረቂቅ የአፈፃፀም መመርያ፣ ሐምሌ 1 1995 ዓ.ም፣ ያልታተመ

[53] የገቢዎች ሚኒስቴር የአፈፃፀም መመሪያ፣ supra note 52, see Article 3.4.1.(2)

[54] Id, Article 3.4.1 (2)

tax shall be deducted under Schedule “A” of Ethiopian income tax law.[55] This phrase in italics suggests that if “lectures are provided for a specific, definite period of time,” it is alright for withholding agents to withhold 2% from payments for the “lectures,” provided, of course, the lecturer is able to furnish the TIN. The *a contrario* reading of the said Directive leads to the conclusion that when employees provide short-term lectures under specific contracts and for specific payments, the income derived therefrom should be subject to 2% withholding if the lecturer has a TIN (or 30% withholding if the trainer does not have one).

The Directive does not directly address the issue of withholding under Schedule “A,” but represents a pattern within the Ethiopian tax administration of relegating substance to the form of relationships and deciding withholding taxes on the basis of the form of agreements. Although the said Directive instructs withholding agents to deduct 2% when the payments are for independent contract services, and to aggregate and withhold the appropriate tax under Schedule “A” when the payments are for employment, it does not mention the critical element of the Proclamation, namely that of “direction and control”.

Setting aside the elements of “direction and control” from the consideration of withholding opens the process of withholding to tax planning by parties that are able to take advantage of the list and structure the form of their relationship to fit in one of the lists enumerated in the Directive. Withholding agents can have an easy task of withholding the 2% tax by simply characterizing the service contracts as one of those listed in the Directives, even though the substance of the service is one of employment. In contrast, those employees who are not in a bargaining position to structure their contracts to fit in one of the “independent contract services” listed down in the Directive will be forced to have their payments withheld under the employment income tax even though the nature of their relationship is one of independent contract of services.

5.2.1.4. The Letter Rulings/Administrative Interpretations

Neither the Income Tax Regulations of 2002 nor the Withholding Tax Directive of 2003 directly addressed the issues employers (withholding agents) confront

[55] See id, Article 3.4.1.(2)

in complying with the PAYE. In response to the frequently arising questions for guidance from the withholding agents, the tax authorities have resorted to writing "letters" either to the various branches of the tax administration (from which some of these questions come) or directly to the withholding agents themselves. The written communications on this and many other issues of tax administration with the various units of the tax administration are known in practice as "circular letters" or sometimes "circulars" while the written replies to the withholding agents are known as "guidance letters" or the Amharic equivalent for the federal tax administration of Ethiopia. The legal status (never mind the legality) of these "letters" is not yet fully understood. The letters may go under a tame name of "circular letters" or "guidance letters," but in status and effect, they occupy the same position as "directives" in Ethiopia.[56] We will review the relevant circular letters and private letters written by the tax authorities in this regard.

5.2.1.4.1. The Circular Letter of 2004

In the Ethiopian tax administration, circular letters are written in response to frequently asked questions raised by the various branches of the tax administration. The legal departments of ERCA and the Ministry of Finance and Economic Development (MoFED) from time to time receive questions and requests for guidance from the various branch offices of ERCA which, based on their day-to-day experience of administering taxation on the ground, confront some questions requiring the attention of the higher authorities. At times, the legal departments respond to individual questions as they arise, and at other times, they respond to frequently asked questions by issuing "circulars," which are so-called because these circular letters are distributed (circulated) to the various branch offices of the tax administration for purposes of implementation. These "circulars" represent the interpretation of the authorities, but they operate pretty much like directives because of the lack of recourse for taxpayers to challenge the "circulars." It is not clear how much these circular letters are diffused throughout the tax administration, but it is obvious that members of the

[56] It is not clear as to why the tax authorities prefer "Circular Letters" to "Directives" or for that matter in what circumstances they issue one as opposed to the other.

tax administration consult these circulars whenever issues of interpretation arise.

The Ministry of Revenues (the predecessor of ERCA) issued one such circular letter in 2004 with a view to resolving some of the most frequently raised issues in the income tax laws of Ethiopia. Perhaps not surprisingly, the scope of "employment" for purposes of Schedule "A" income tax withholding was one of those frequently arising questions in the Ethiopian tax administration.[57] The 2004 Circular Letter sought to determine cases in which a specific income falls under Schedule "A" (as income from employment) and Schedule "C" (as income from independent contract).[58] Basing itself on the meaning given to terms "employee" and "contractor" in Article 2(12) of the Income Tax Proclamation, the Circular Letter notes that income from employment does not include the income of a person who has rendered a service under a specific and definite contract. In excluding certain service contracts from the scope of Schedule "A," the Circular Letter states in its relevant paragraph:

> ለተቀጣሪ የተሰጠው ትርጉም አንድ የተወሰነን አገልግሎት ለመስጠት በውል የሚቀጠርን ሰው አይጨምርም፡፡ በመሆኑም የሌላ መስርያ ቤት ሰራተኞች የሆኑ ሰዎች ራሳቸውን ችለው የተወሰነ አገልግሎት (የምክር አገልግሎት፤ ጥናታዊ ፅሑፍ፤ ወዘተ) በተወሰነ ጊዜ ውስጥ ለመስጠት ከሌላ መስሪያ ቤት ወይም ድርጅት ጋር በሚያደርጉት ውል መሰረት የሚያገኙት ገቢ በመቀጠር የተገኘ ገቢ ነው ሊባል አይችልም፡፡

The rough translation of the Amharic quote reads:

> The meaning given to "employee" does not include a person who undertakes to provide a service under a specific and definite contract. Thus, persons who are employed by other institutions and organizations but who provide specific services (e.g., consultancy services; writing and presentation of research papers, etc.) under specific contracts are not considered to have received income from employment (translation mine).

[57] The other issues that received some "interpretative treatment" in that circular include the scope of foreign tax credit (Article 7), the meaning of "casual rental of property" (Article 35), the scope of withholding tax on "interest bank deposits" (Article 36), the scope of loss-carry forward for income tax purposes (Article 28), in the case of VAT, the meaning of "used dwellings" (Article 8(2)(a), the extent of exemptions from VAT of institutions hiring persons with disabilities (Article 8(2)(o)); see Ministry of Revenues, Federal Democratic Republic of Ethiopia, Circular Letter issued on 16 Megabit 1996 E.C., in Amharic, unpublished.

[58] See Ministry of Revenues, Federal Democratic Republic of Ethiopia, Circular Letter issued on 16 Megabit, 1996 E.C., in Amharic, unpublished

On the surface, the Circular Letter reads as an interpretation of Article 2(12) of the Income Tax Proclamation. When we read the paragraph closely, however, we find that the Letter insinuates and adds some requirements or elements to the distinction between "employee" and "independent contractor," requirements or elements which are not suggested in the Income Tax Proclamation. Indeed in the process of purportedly interpreting the meaning of Article 2(12), the Circular Letter ends up completely disregarding the elements of "direction and control" as signifiers of "employment," and their absence as signifiers of "independent contract of services."

The Circular Letter does so by replacing the elements of "direction and control" by easy-to-apply (albeit arbitrary) requirements, which, as can be readily inferred from the paragraph of the Circular Letter quoted above, depend essentially on two factors, namely whether:

i) the contract for services is specific and is not of a continuous nature; and
ii) the person who provides services is a part-timer, having full-time employment elsewhere.

In the Income Tax Proclamation, none of these factors are even intimated as attributes of either "employees" or "independent contractors." Be that as it may, it is important to analyze the practical implications of the Circular Letter cited above. A withholding agent who wishes to conform strictly to the literal language of the Circular Letter (regardless of what the Proclamation prescribes) will perform her withholding obligations in the following ways, among others:

i) If a person providing specific service is a full-time employee, the withholding agent will have to simply aggregate the income from specific contract regardless of the nature of the specific contract (it is immaterial whether the contract is for provision of consultancy services or the presentation of research papers or connected with her full-time (day-time) commitment).

ii) If a person providing specific service is a part-timer, the withholding agent will have to simply treat the income from specific service as income from "independent contract" and withhold 2% unless the

contract is one of continuous nature (how continuous is a continuous contract, the Circular does not offer a clue!).

For a withholding agent anxious to get easy-to-apply signposts, the Circular Letter is clearly superior in its simplicity over that of the Income Tax Proclamation, but there are serious questions over whether the Circular Letter is faithful to the "spirit" of the Proclamation. Indeed, there is no doubt at all that the language of the Circular Letter is not faithful to the spirit of the Income Tax Proclamation. The Letter disregards the requirement of "direction and control" for purposes of withholding tax under Schedule "A" or under Schedule "C".

Besides, the criteria enshrined by the Circular Letter may lead to arbitrary results in practice. The "Circular" induces and authorizes withholding agents to rely upon factors that are not necessarily relevant to the nature of employment or independent contract of services. The factor that is taken to be determinative of the appropriate withholding rate under the Circular Letter is whether or not the person providing the service is a full-time employee of the organizations for which she provides the service. This factor is mostly irrelevant to the question of whether the relationship is one of employment or independent contract of services. A person may provide a self-employment service or a specific contractual service although that person is already an employee of the organization for which she provides the specific service. A full-time employee may provide a consultancy service, a research service, a translation service, etc., to an organization in which she is a full-time employee. As long as these services do not form part of her regular contract, these services are self-employment services and are performed pretty much as if she were not already employed by the organization.[59] Setting aside the argument about whether one should obtain a license to perform these services, the prior status of the service provider (whether she is already an employee or brought from outside) is completely irrelevant to the question of whether the service provided is one of

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[59] In the UK, a man who was on the regular staff of a newspaper was said to have acted as independent contractor when he made a translation for the newspaper on his spare time; as Judge Denning observed in Stevenson Jordan and Harrison Ltd v Macdonald and Evans, a doctor on the staff of a hospital or a master on the staff of a school may be considered to be independent contractors if they produce a written work under a special contract; cited in Graham Stephenson, Source Book on Torts, (2nd edition,2000), Cavendish Publishing Limited, p. 569

"employment" or "independent contract of services." Nothing in the law prevents full-time employees from performing specific services like translation, research, consultancy and training to the very organizations in which they are employed.

For the Circular Letter, the decisive factor is the prior relationship of the service provider. In its choice of the form of the contract over the substance of the relationship, the Circular Letter shares some common features with the Regulations of 2002 and the Directive 2003. It is important to note, however, the difference between the Circular Letter and the Directive of 2003. The Circular Letter assimilates all kinds of additional and specific services of a full-time employee into that of "employment" regardless of the nature of the specific service provided while the Directive of 2003 at least concedes the possibility of some full-time employees (e.g. university professors) taking up specific contractual projects which are capable of being characterized as "independent contract services" in spite of their full-time employment status (see above). The question is, faced with contradictory signals coming from the tax authorities, how should withholding agents determine the appropriate withholding rates and schedules?

5.2.1.4.2. Guidance Letters Written to Specific Withholding Agents (Private Letter Rulings)

The Circular Letters, as pointed out before, are addressed primarily to the various branches of Ethiopian tax administration and but may end up in the hands of diligent or well-connected withholding agents. Since withholding agents are frequently confronted by the dilemmas of withholding, they have (some of them in any case) have sought written and oral guidance from the various units of the tax administration to either protect themselves from erroneous withholding practices or (in the case of some of them) to find solutions acceptable both to them and the payees from whose income withholding taxes are deducted. As far as one can tell, these practices have developed as a matter of course and the various units of the Ethiopian tax administration (both at the federal and regional level) have resorted to these practices as a matter of administrative courtesy rather than as a matter of

established administrative procedure.[60] We shall examine some of these "private letters" (or "guidance letters," as they are customarily known) addressed to some withholding agents in response to queries from these agents. We confine ourselves to those private letters addressed to higher education institutions, many of which have relayed their queries to the tax authorities.

The following "guidance letter" is written in response to a request for guidance by one public university in 1999 E.C. (2007). [61] In its relevant paragraph, the "guidance letter" instructs:

> ... ከኮሌጁ ጋር በፈፀሙት የቅጥር ውል መሰረት አገልግሎት የሚሰጡትን በተመለከተ እነዚህ ተቀጣሪዎች ከተቀጠሩበት መደበኛ ስራ በተጨማሪ አገልግሎት በማበርከታቸው የሚከፈላቸው የትርፍ ሰዓትና መሰል ክፍያ ከደሞዛቸው ጋር ተደምሮ ግብር ተቀናሽ የሚደረግበት ይሆናል፡፡ እንደዚሁም በሌላ አሰሪ ዘንድ ተቀጣሪ የሆኑ እና በኮሌጁም ተቀጥረው አገልግሎት በመስጠት የሚያገኙት ገቢ በአዋጁ አንቀፅ 65 ንዑስ አንቀፅ 5 መሰረት ገቢው በሌላ ቀጣሪ ያልተጣመረ መሆኑን በማረጋገጥ ገቢው ተጣምሮ ግብሩ መወሰን ያለበት ስለሆነ በዚሁ መሰረት ሊፈፀም ይገባል፡፡
>
> በሌላ በኩል በገቢ ግብር አዋጅ ቁጥር 286/96 አንቀፅ 2(12) ድንጋጌ ለተቀጣሪው የተሰጠው ትርጉም አንድ የተወሰነን አገልግሎት ለመስጠት በውል የሚቀጠርን ሰው የማይጨምር መሆኑ ተመልክታል፡፡
>
> ከዚህ ድንጋጌ አኳያ የሌላ መስሪያ ቤት ሠራተኞች ሆነው የምክር፤ ጥናታዊ ፅሑፍ የማቅረብ ወዘተ... አገልግሎት ለተወሰነ ጊዜ ለመስጠት ከሌላ መስሪያ ቤት ወይም ድርጅት ጋር በሚያደርጉት ውል መሰረት የሚያገኙት ገቢ በመቀጠር የተገኘ ገቢ ተደርጎ ሊቆጠር አይችልም፡፡
>
> በመቀጠር የተገኘ ገቢ ካልሆነ ደግሞ ከሚያገኙት ደመወዝ ጋር ተደምሮ በሠንጠርዥ ሀ መሰረት ግብር እንዲከፈል ማድረግ አይቻልም፡፡ በአንጻሩ ግን በዚህ ዓይነት የተገኘ ገቢ በአዋጁ አንቀፅ 2 ንዑስ አንቀፅ 6 ለንግድ ሥራ በተሰጠው ትርጉም የሚሸፈን በመሆኑ በዚህ አዋጅ አንቀፅ 19 ንዑስ አንቀፅ 2 ድንጋጌ በሠንጠረዥ ሐ መሰረት ግብር የሚከፈልበት ይሆናል፡፡

Roughly translated, this means:

> With respect to those providing services pursuant to contracts of employment, their payments received as a result of providing of additional services shall be aggregated with their salaries and appropriate tax withheld. In addition, income of employees of other organizations who provide part-time services shall be aggregated

[60] The legal status of these written communications, whatever names they bear, remains unclear although in practice, these written communications or private letters have served as binding legal documents almost in an equal footing with provisions in the tax proclamations; see Taddese Lencho, The Ethiopian Tax System, supra note 49, pp. 365-369

[61] See Federal Inland Revenue Authority, Ministry of Revenue, FDRE, letter written to the PuB2, 25/2/1999 E.C., in Amharic, unpublished

> with their full-time income from these organizations pursuant to Article 65 (5) of 2002 Income Tax Proclamation once the College ascertains that their full-time employer has not already aggregated their income.
>
> … the notion of "employee" as defined in Article 12 (sic) of Income Tax Proclamation No. 286/2002 does not cover persons who provide specific services. According to this sub-article, employees of other organizations who provide consultancy services, research papers, etc. under a definite and specific contract with the College may not be regarded as employees and their income may not be treated as income from employment. …
>
> Income derived in this way is income from business pursuant to Article 2(6) of the Income Tax Proclamation of 2002 and shall be subject to tax under Article 19(2) of the same Proclamation.
>
> The obligations of the withholding agents that make payments for these kinds of services is to withhold 2% from the payments pursuant to Article 53(2) of the Income Tax Proclamation No. 286/2002 and Article 24 of the Income Tax Regulations No. 78/2002.

The Letter, cited above, relies upon three signifiers to distinguish cases of "independent contract of services" from cases of "employment." First, the persons who provide the service must be "employees of other organizations" and second the type of services (which are only given as examples) should be in the nature of "consultancy services," "writing research papers," etc. And thirdly, the contract should be for a definite period of time (or specific service). If the person providing a service is a full-time employee, it appears that all income from the part-time work of that employee with the College is to be aggregated with her full-time salary and tax withheld under Schedule "A," regardless of the nature of the specific work. Like the Circular Letter cited previously, the Letter provides a simple test to the withholding agent: is the person providing the service already a full-time employee of the College? If the answer is yes, the Letter instructs the withholding agent to simply aggregate the income from part-time engagement with the employee's full-time salary and withhold tax under the progressive tax rates of Schedule "A". The Letter assimilates all kinds of specific work by full-time employees of the College into one of employment

regardless of the nature of the specific relationship involved. Even if the part-time work is one of consultancy or writing or translation, the Letter instructs the College to aggregate the income from specific service with the full-time salary of the employee involved and withhold the tax under Schedule "A."

Like the Circular Letter cited above, the "guidance letter" substitutes other elements for the element of "direction and control" and departs completely from the spirit and language of the Income Tax Proclamation. If the provider of a service is an employee of another organization (a part-timer), the said Letter instructs the College to distinguish those services that are in the nature of "employment" and those that are in the nature of specific services, such as consultancy work, research work, etc. If the service is for a definite period of time and if it is one of consultancy work, research, etc., the withholding agent is required to withhold tax under Schedule "C" regardless of whether the nature of the work requires "direction and control" from the part-time employer. Since the types of services are given only as examples, the withholding agent has the discretion to characterize almost all forms of "part-time" work as qualifying for withholding tax under Schedule "C."

Another interesting "private letter" is one addressed to another public college in Addis Ababa.[62] Its relevant paragraph is quoted thus:

> ግንኙነቱ በአሰሪና ሰራተኛ ደንብ ተቀጥሮ የሰራ ያለ ከሆነ እና ከመደበኛው ደመወዝ ውጪ በኮንትራት መልክም ይሁን ያለኮንትራት ተጨማሪ ክፍያ የሚያስከፍል ስራ በተቀጠረበት ኮሌጅ ወይም መ/ቤት እየሰራ ያለ ከሆነ በገቢ ግብር አዋጅ 286/96 አንቀፅ 12 መሰረት ከወር ደመወዝ ጋር ተጣምሮ የስራ ግብር እንዲከፍል ይደረጋል፡፡ የኮሌጁ ተቀጣሪ ሆኖ በሌላ አካባቢ በኮንትራት መልክ ሰርቶ የሚያገኘው ገቢ በዚሁ አዋጅ አንቀፅ 53 መሰረት የኮንትራት አገልግሎት በሰጠበት ኮሌጅ ወይም መ/ቤት ወይም ድርጅት 2% የቅድምያ ግብር ክፍያ እንደሚቀነስበት ይደነግጋል፡፡ ይህ 2% ተቀናሽ የሚደረገው አገልግሎት ሰጪው ሰራተኛ የግብር ከፋይ መለያ ቁጥር ሲኖረው ብቻ ይሆናል፡፡ ከሌለው ግን በዚሁ አዋጅ አንቀፅ 91 መሰረት 30% እንዲቀነስበት ይደረጋል፡፡

Roughly, this translates as:

> Where a person performs specific or continuous services to an employer outside his regular employment duties in accordance with a contract regulated by employer-employee relations, the income derived therefrom should be aggregated with his regular salary in

[62] Letter written to Kotebe Teachers' College, ERCA, Arada Sub City Small Taxpayers Branch Office on 22/08/04, in Amharic, unpublished

> accordance with Article 12(sic) of the Income Tax Proclamation No. 286/2002. An employee of the College who performs specific services outside the college shall be subject to 2% advance withholding in accordance with Article 53 of the Income Tax Proclamation No. 286/2002. The law authorizes 2% withholding where the person has a TIN. Otherwise, 30% shall be withheld from the payment for specific services in accordance with Article 91 of the Income Tax Proclamation.

The above letter mentions Article 2(12) of the Income Tax Proclamation for purposes of distinguishing payments subject to aggregation under Schedule "A" and those subject to withholding under Schedule "C" (2% or 30%) but fails to provide in the end any way of distinguishing employment from independent service contracts on substantive grounds. The only guidance the College could take from the Letter is that ultimately the distinction rests on whether the provider of specific services possessed a TIN or not.[63]

Another example is a more recent one, addressed to a faculty of another public university in Addis Ababa, again no doubt in response to the queries from the University Faculty.[64] The relevant paragraph of the said Letter states:

> … ፋኩልቲው/ዩኒቨርስቲው/ በትርፍ ጊዜ የተቀጠረው ባለሙያ ሌላ መ/ቤት የተቀጠረበትን ማስረጃ በመጠየቅ የትርፍ ጊዜ ክፍያውን ከደመወዙ ጋር በማጣመር የስራ ግብር ማስከፈል ያለበት መሆኑን፤ በሌላ በኩል ባለሙያው የንግድ ፈቃድ በማውጣት የንግድ ትርፍ ግብር ከፋይ ከሆነ እና ከዩኒቨርስቲው ጋር የስራ ኮንትራት ውል ካለው የግብር ከፋይ መለያ ቁጥር ሲያቀርብ 2% ዊዝሆልዲንግ የሚቀነስበት ሲሆን የግብር ከፋይ መለያ ቁጥር ካላቀረበ 30% የሚቀነስበት መሆኑን እንገልፃለን፡፡

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[63] Incidentally, the letter purportedly advises the College on the treatment of payments to Kotebe Teachers' College employees who work elsewhere, but this is of little use to the College because it is not the concern of the College as to how their payments elsewhere should be treated; the letter should have addressed the concerns of the College on cases in which the college makes payments to part-time employees or to full-time employees who provide specific services outside their regular employment duties

[64] Letter written to Addis Ababa University, Natural Science Faculty, Addis Ababa, ERCA, Customers Education and Support, 18 Miazia 2004 E.C., in Amharic, unpublished; it is interesting to note in this case that the Natural Science Faculty of Addis Ababa University was able to obtain a separate guidance letter in response to its queries. It is not inconceivable in this context for various faculties and colleges of Addis Ababa University to receive conflicting guidance letters from various units of the tax authorities.

Roughly translated as, the Letter instructs:

> The Faculty/University/ shall aggregate the income of a person from a part-time work with the latter's regular salary from his full-time employer. Where the person who performs part-time work has a business license and can present a TIN to the University, the University shall deduct 2% from the payment. If a person is unable to present a TIN, the University shall deduct 30% from the payment.

The Letter quoted above shares one common feature with most of the letter rulings issued by the tax authorities over the years. This Letter completely disregards the substantive requirement of the Income Tax Proclamation and seeks to resolve the issue on the basis of the presentation or lack of presentation of specific documents: like the business license and the TIN. What sets it apart from similar letters is the fact that it introduces a new requirement to the whole saga of the distinction between employment and self-employment – namely possession of a business license and even an intimation that the withholding agents should ascertain whether the person providing the service pays income tax under Schedule "C." The requirement of a business license is not mentioned in the Income Tax Proclamation, and the letter does not even pretend to have relied upon any specific provision of the Income Tax Proclamation – other than rationalizing somehow that 2% is an advance payment for business profit tax under Schedule "C."

5.3. The Withholding Taxation on Payments for the Writing of Modules and Other Academic Materials: the Vacillation of the Tax Authorities over the Years

Most disputes regarding withholding taxes revolve around whether a withholding agent should aggregate specific income in the context of employment with the regular income from employment (wages and salaries) (Schedule "A") or treat the specific income as "income from independent contract" and deduct 2% (Schedule "C"). The resolution of these disputes hinges, as we have seen above, on whether the relationship is one of employment or independent contract of services.

The practice of many higher education institutions has revealed that in some situations, the characterization may bifurcate into the other sources of income

chargeable with income tax under the various income tax schedules of the Ethiopian income tax system. The issues for withholding agents can bifurcate not only between "employee" vs. "independent contractor" but also between "income from employment" vs. "income from royalties," or "income from employment" vs. "income from dividends" or "income from employment" vs. "income from technical services rendered abroad." Employers or withholding agents are thus no longer worried only about employment vis-a-vis independent contract of services, but also about a whole raft of issues arising in connection with the miscellaneous sources of income chargeable under Schedule "D" of Ethiopian income tax laws: royalties, income from games of chance, income from technical services rendered abroad, and dividends. Since the tax rates diverge quite considerably, employees and sometimes employers have every incentive to characterize specific income under one of the lower taxed miscellaneous sources.

One of the specific contractual commitments which gives rise to possible conflicts of withholding taxation is payments for the writing of various forms of academic materials, particularly that of the writing of distance modules. The controversies over the appropriate withholding tax rates from the payments for the writing of academic materials took different forms depending on the level of understanding of the disputing parties involved. Some employees might argue that these commitments were in the nature of "independent contract of services" while others might characterize these commitments in the context of transfer of intellectual property over the materials. For many employees, the complaint is simply about the high rate of taxation.

The letters to Higher education institutions in Amhara Regional State (particularly that of Bahr Dar University) probably represent the best example of how positions shift over the same set of underlying facts on the ground. After a number of disagreements between university finance employees who tended to regard payments for the writing of modules as "income from employment" (thus falling under Schedule "A") and academic employees who asserted that these payments were not "income from employment," the Universities organized an ad hoc consortium of legal advisors to mount a challenge to the practice of regarding payments for the preparation of modules as "income from employment." The Universities (particularly Bahr Dar) were also concerned

about the negative impact of the withholding tax rates upon the motivation of staff members to write instructional materials. In any case, the Universities relayed their legal opinions to the branch office of ERCA (in Bahr Dar). In their opinions, the Universities argued that these payments were in the nature of payments for transfer of intellectual property rights (copyrights) over the instructional materials and should therefore be treated as "royalties" rather than as "income from employment." This argument of the Universities was able to sway ERCA at least provisionally as the following letter attests: [65]

> … የሞጁል ዝግጅት የሥነ-ፅሁፍ ሥራ ለመሆኑ የዩኒቨርስቲው ሕግ አገልግሎት ባለሙያዎች ከሰጡት ማብራሪያ በላይ አሳማኝ ማብራሪያ ለማቅረብ መሞከር አስፈላጊ ሆኖ አላገኘነውም፡፡ ምክንያቱም አዋጅ ቁጥር 410/96 አንቀፅ 2(3) ጥበቃ የሚያደርግለትን ..ሥራ... ሲተረጉም መፅሐፍና ቡክሌት የመሣሠሉትን የስነ-ፅሁፍ ሥራዎች እንደሚያካትት ገልጿል፡፡ በዚሁ አዋጅ የተጠቀሱት መብቶች ያለአንዳች ቅድመ ሁኔታ ጥበቃ የሚደረግላቸው መብቶች ናቸው፡፡
>
> ስለሆነም ... መምህራኑ ከዩኒቨርስቲው ጋር በሚገቡት ልዩ ውል መሠረት የመደበኛ ስራቸው አካል የሆነውን የርቀት ትምህርት መማርያ ሞጁል አዘጋጅተው የሚያገኙት ገቢ ከማናቸውም የስነ ፅሁፍ ስራ እንደሚገኝ ገቢ ተቆጥሮ በገቢ ግብር አዋጅ ቁጥር 286/94 አንቀፅ 31 መሠረት ግብሩ ሊወሰን እንደሚገባው በመግለፅ ይህን አስተያየት የላክን ሲሆን....

When roughly translated, this reads:

> We did not think it was necessary to add to the written opinions submitted by the legal advisers [of the university] who made a convincing case for why modules constitute "copyrighted materials." As Article 2(3) [sic] of Proclamation No. 410/2010 stipulates, works protected as "copyrighted materials" include books, booklets and other materials. All works listed in the Proclamation are accorded copyright protection without any conditions.
>
> Thus… the income the university lecturers derive from the preparation and writing of modules after signing special contracts with the University should be treated as income from royalties and tax withheld in accordance with Article 31 of the Income Tax Proclamation of 2002 (author's translation).

The opinions of ERCA in the above case did not last for very long as persistent questions from various universities in different parts of Ethiopia finally forced ERCA to seek the helping hand of the Ministry of Finance and Economic

[65] Ethiopian Revenues Customs Authority, Bahr Dar Branch, Customers Services Business Process, 08/10/2001 E.C., in Amharic, unpublished

Development and in that proverbial case of curiosity killing the cat, the Ministry of Finance and Economic Development wrote letters which in effect reversed the initial hunches of ERCA in the above letter and brought payments for the writing of modules back to the fold of "income from employment" in many cases. The following Letter, addressed to Jimma University, is typical of the current opinion regarding payments for the writing of modules and other instructional materials in the Universities:

> …ዩኒቨርስቲው ለቀጠራቸው ባለሙያዎች በመስጠት ላይ ያለው የሞጁሎች ዝግጅት ከገቢ ግብር አዋጅ ቁጥር 286/94 አንቀጽ 13 እና አዋጁን ለማስፈፀም በወጣው ደንብ ቁጥር 78/94 አንቀፅ 3 ሥር ከግብር ነፃ እንዲሆኑ ከተዘረዘሩት ውስጥ የማይካተት ገቢ በመሆኑ ከሠራተኞች ከወር ደሞወዝ ጋር እየተደመረ የሥራ ግብር የሚከፈልበት ገቢ መሆኑን እየገለፅን፡፡ ዩኒቨርስቲው ለሠራተኞቹ የሞጁል ዝግጅት የሚከፍለውን ክፍያ በማስላት ከሠራተኞቹ ደመወዝ ጋር በመደመር ተገቢውን የሥራ ግብር ተቀናሽ በማድረግ ለታክስ ባለስልጣኑ መ/ቤት ገቢ ማድረግ የሚጠበቅበት መሆኑን በመግለፅ አስተያየታችንን እናቀርባለን፡፡[66]

This reads:

> … we have concluded that payments for the writing of modules are not exempted under Article 13 of the Income Tax Proclamation or under Article 3 of the Income Tax Regulations issued pursuant to the Proclamation and are therefore to be aggregated with the monthly salary of the employees. The University is therefore expected to compute the tax due after aggregating the payments for the writing of modules with the monthly salary of employees and deduct and transmit the tax deducted to the Tax Authorities (translation mine).

The opinion of the Ministry in the quoted Letter did not even attempt to address the question of whether the payment for the writing of modules was "income from employment" and took a rather curious position of characterizing the payments from the angle of whether these payments were "exempted" under the income tax laws. Having assured itself that these payments were not exempted under any of the "exemption" provisions of the income tax laws of Ethiopia, the Ministry took an unwarranted leap in reaching the conclusion that the income was therefore subject to tax under Schedule "A" of the Ethiopian income tax laws.

[66] Ethiopian Revenues and Customs Authority, Letter written to Jimma University, 24 Megabit 2001 E.C, in Amharic, unpublished

With all due respect to the Ministry, the "exemption" provisions of Ethiopian income tax laws are a complete *non sequiter* in this case as none of the parties claimed that it should be exempted. Even if the conclusion were that payments for the writing of modules are income from employment, the Ministry should have analyzed the issue from the relevant provisions of the income tax laws of Ethiopia that might place these payments under Schedule "A" rather than under the other schedules of the Ethiopian income tax laws. The Ministry began from a non-starter – the exemption provisions – and on that account alone, its position was unwarranted, no matter what we might think about its conclusion.

In another Letter, written to Madda Walabu University, which was cc-ed to several other universities, the Ministry of Finance and Economic Development gave the following opinion:

> በገቢ ግብር አዋጅ ቁጥር 286/2003 አንቀጽ 2(12) እንደተመለከተው ለተቀጣሪ የተሠጠው ትርጉም እንድ የተወሰነን አገልግሎት ለመስጠት በውል የሚቀጠርን ሰው አይጨምርም፡፡ በመሆኑም የሌላ መስሪያ ቤት ሠራተኞች ራሳቸውን ችለው የተወሰነ አገልግሎት ማለትም የትምህርታዊ ፅሑፎች (ሞጁሎች) ዝግጅት፤ የትርፍ ሠዓት የክረምት መርሃ ግብር፤ ለሕክምና ተማሪዎች የሥራ ላይ ሥልጠና (በተግባር ትምህርት ወቅት)፤ በትርፍ ሠዓት ስራ የሚሰጥ የማማከር አገልግሎት ፤ እንዲሁም ልዩ ልዩ የትርፍ ሰዓት ሥራዎች በተወሰነ ጊዜ ውስጥ ለመስጠት ከዩኒቨርስቲው ጋር በሚያደርጉት ውል መሠረት ከሚያከናውኑት ተግባር የሚያገኙት ገቢ በመቀጠር የተገኘ ገቢ ነው ሊባል አይችልም፡፡ ሆኖም ግን የዩኒቨርስቲው ሠራተኞች በዩኒቨርስቲው ውስጥ ተመሳሳይ አገልግሎቶችን የሚፈፅሙ ሆነው ከተገኙ ከዩኒቨርስቲው ጋር የቅጥር ውል ያላቸው በመሆኑ የሚያገኙት ገቢ በመቀጠር የተገኘ ነው፡፡

Translated, this reads:

> As shown in Article 2(12) of Income Tax Proclamation No. 286/2003 (sic), the meaning given to "employee" does not cover a "contractor." Thus, if employees of other organizations are engaged under a specific contract to provide specific services, such as writing instructional materials (modules), part-time work for summer programs, practicum work for medical students, part-time consultancy work and other types of part-time work, the income of these employees may not be considered as arising from employment. If full-time employees of universities are, however, engaged to provide similar services, their payments for these services shall be considered as arising from employment as they are already engaged as employees of the universities (translation mine).

The letter written to Madda Walabu University repeats the familiar line of the tax authorities in these kinds of arguments. If you are a full-time employee,

every other relationship with your employer is defined by your status as a full-time employee. If you are a part-timer, the nature of the relationship is of no consequence. Your status as a part-timer defines you as a contractor as long as your engagement is one of provision of specific services. Although the Letter to Madda Walabu mentioned Article 2(12) of the Income Tax Proclamation, it, like many of the Letters written over the years, ended up setting aside the element of "direction and control" and turned the question of withholding on the prior relationship and status of the service provider with the employer.

The artificiality of the guidance provided by the Letter can be very cleverly set aside by a strategy in which universities have the modules written by outside staff while their full-time staff prepare modules for other universities. Like all artificial interpretations, this kind of guidance is a recipe for easy avoidance of the punitive tax rates of the Ethiopian income tax system under Schedule "A" in particular. It is also easy to note the difference between the letter written to Jimma University and the letter written to Madda Walabu University. The Letter written to Jimma University does not make any distinction between full-time and part-time module preparers while the one written to Madda Walabu makes the distinction between full-timers and part-timers. Thus, if a part-timer prepares modules for Jimma, her payments are taxed under Schedule "A" whereas a part-timer who prepares modules for Madda Walabu and other universities (to which the letter is copied) will be subject to 2% withholding.

5.4. Income from Employment vs. Income from other sources: the Less Common Cases of Conflict

We have reviewed the most common incidents of conflicts, but as the relationships between employees and employers are complex and intricate, so are some of the forms of income flows from employers to employees. The relationships between employers and employees cannot be reduced to the simple matrix of employment relationships, although that often forms the basis of their relationship. The relationships between employees and employers may at times be found in concurrence with the personal relationships of husbands and wives, of fathers and sons, mothers and daughters, debtors and creditors, shareholders and companies, writers and publishers, donors and donees, and so on.

Sometimes, these other relationships are so closely intertwined with the employment relationships that it is by no means clear whether the benefits flowing therefrom are income from employment or from the other relationships. In a schedular income tax system of Ethiopia, these questions are not cerebral jigsaw puzzles but real life questions that require careful consideration of all the elements surrounding each of these relationships and their bearings upon an employment relationship. They sometimes constitute the difference of paying taxes or not paying taxes or paying taxes at lower tax rates if we succeed in characterizing the income as flowing from other relationships. They also open up tremendous opportunities for tax planning by those sophisticated enough to understand the tax implications and thus to structure their relationships in ways that at times eliminate or at least reduce their tax liabilities.

How much these other relationships are mingled or intermixed with employment relationships in practice requires additional researches, but let's point out some specific cases in which the boundaries might, at least at first sight, be blurred for tax purposes.

One possibility or incident for conflict is between income from "employment" and income from "interest." Many employees are known to have organized credit unions which serve as saving financial institutions for the benefit of employees. As taxes are withheld from salaries and wages of employees, a certain amount is withheld monthly from the salaries of employees, which are then placed under the administration of employers for investment and provision of credit facilities to employee members of the credit unions. Employees are paid interest (at least interest accrues in favor of employees) and dividends every year from the saving funds of the credit unions. Some employers are known to borrow from the saving funds in return for the payment of interest.

One of the rare instances in which this kind of dispute found its way to courts involved the payment of interest by an employer on a provident fund. In **Shell Ethiopia vs. Inland Revenue Administration,** cited above,[67] Shell Ethiopia Ltd (the predecessor of Oil Libya) entered into a collective agreement in which the Trade Union in Shell Ethiopia allowed the Company to use (in effect lent)

[67] See Shell Ethiopia Ltd. v. Inland Revenue Administration, supra note 43

provident funds held in the name and on behalf of workers in return for the payment of interest at the rate of 7%. The then Tax Authority – Inland Revenue Administration (IRA) thought that Shell Ethiopia should have withheld the tax due on the interest paid for the use of the provident funds in the name of employees. Shell Ethiopia protested that it had no obligation to withhold tax on the interest, arguing that the interest was not income from employment but from interest, which was not taxable.

The Tax Appeal Commission at the time decided in favor of the Tax Authority and ruled that Shell Ethiopia Ltd was required to withhold tax on the interest, and this was confirmed by the then High Court. The case finally went on appeal to the Supreme Court, which reversed the decisions of both the Tax Appeal Commission and the High Court. The reasoning of the Supreme Court was that the payment constituted an interest and not an income from employment and therefore did not give rise to the obligation of the employer (Shell Ethiopia Ltd.) to withhold tax under Schedule "A". The Tax Appeal Commission and the High Court at the time considered the coincidence of the employment relationship as determinative of the nature of the income as arising from that of "employment" while the Supreme Court at the time quite sensibly thought the "employment relationship" was not the source of the income; the source of the income being the creditor-debtor relationship established between employees as a group and their employer giving rising to "interest."

The Shell Ethiopia case illustrates that disputes regarding income from employment or payments in the context of employment may raise questions as to whether in specific cases employers have the duty to withhold income taxes, or if they have to withhold income taxes, under which of the schedules, and sometimes if they have any obligation to withhold income taxes at all. Due to innovations in employment and industrial relationships, the situation is even going to get more complicated in the future.

In many parts of the world, and perhaps increasingly so in Ethiopia, many employees obtain benefits which are difficult to characterize as income solely from employment. The famous John Lewis model in England, for example, runs on the philosophy of full employee participation as board directors, managers

and shareholders of a business enterprise.[68] Employees of these types of companies obtain income from two principal streams, both of which are closely related: salaries or wages, and dividends. Employees may also be invited to purchase shares at less than market value or be guaranteed a repurchase of the shares at a certain fixed price even though the price of the shares has fallen in the market.[69]

In Ethiopian context, the conflict over “income from employment” vs. “income from dividends” arises frequently with respect to payments to corporate directors.[70] Some public companies have provisions for the payment of 10% of the profits of a company to corporate directors as an incentive and compensation for the latter’s services.[71] These payments have divided opinions within the tax authorities.[72] Some are of the opinion that these payments should be characterized as “income from employment” and be subject to income tax withholding under Schedule “A” of Ethiopian income tax laws, while others have argued that these payments are in the nature of “dividends” as they are payments from the “net profits of the company.”[73]

It has been reported that many companies and corporate directors are reluctant to pay income tax under Schedule “A” (for obvious reasons of the higher marginal tax rates under Schedule “A”) and have only shown willingness to pay the 10% dividend withholding tax.[74] The tax authorities have blamed the problem on the lack of clarity and of details in the Ethiopian income tax laws.[75]

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[68] See Keith Bradley and Saul Estrin, “Profit Sharing in the British Retail Trade Sectors: The Relative Performance of John Lewis Partnership,” The Journal of Industrial Economics, Vol. XL, September 1992, pp. 291-3004

[69] See Abimbola A. Olowofoyeku, James Kirk Bride and Deborah Butler, Revenue Law: Principles and Practice (3rd edition, 2003), Liverpool Academic Press, pp. 107-108

[70] See ከፋይናንስ ስራ አስኪያጆች ኮሚቴ ለህግ ባለሙያዎች ኮሚቴ ሙያዊ አስተያየት እንዲሰጥበት የቀረበ ሪፖርት፤ ሚያዚያ 2003 ዓ.ም. ያልታተመ፤ see also Revision Proposals of the Large Tax Taxpayers’ Branch Office, ERCA, Addis Ababa, 2004 E.C., in Amharic, unpublished

[71] Companies are allowed under the Commercial Code of Ethiopia (1960) to allocate a fixed annual remuneration and a specified share in the net profits of financial year, which may not in any event exceed 10% of the net profits; see Commercial Code of Ethiopia (1960), Article 353

[72] Revision Proposals of the Large Tax Taxpayers’ Branch Office, supra note 70

[73] Ibid

[74] Ibid

[75] Ibid

Unless the boundaries are defined properly through detailed rules, the incidences for tax planning and abuse can be numerous.

5.5. Withholding Practices: Case Studies of Three Higher Education Institutions

In view of the divergent interpretations sampled above, divergent practices of withholding taxation in various organizations and institutions are to be expected. In any case, three higher education institutions in Addis Ababa have been selected for purposes of comparing how similar payments to employees and part-time employees are treated for tax purposes. Two of them are public institutions while one is a private higher education institution. The names of the three higher education institutions are withheld and represented instead as PuB1, Pub2 and PrV1. Some of the most common forms of payments to employees of higher education institutions are used for purposes of comparing how these institutions withhold taxes upon the various payments to employees and independent contractors. It must be noted at the outset, however, that some of these institutions might have changed their practices in some respects after the interviews were conducted. Some of the institutions have been known to shift from 2% withholding tax under Schedule "C" to withholding under Schedule "A" or vice versa after receiving guidance letters from the authorities.

Table 1.2: Comparison of Withholding Practices on Sample Payments in Three Higher Education Institutions of Addis Ababa (valid up to March, 2012)

No	Services for which Payments are Made	Full time Employee			Part-time Employee		
		PuB1	Pub2	PrV	PuB1	Pub2	PrV
1	Day-time teaching (regular)	Schedule "A"[76]	Schedule "A"	Schedule "A"	Schedule "A"	2% withholding	Schedule "A"

[76] Institutions that treat payments as falling under Schedule "A" often follow the rules of aggregation in the Income Tax Proclamation; if the employee is a full-timer, the institution aggregates the income from special contracts with her full-time salary; if the employee is a part-timer, the institution may require the employee to bring a certificate of employment and salary from her full-time employer for purposes of aggregation; some of the institutions have been known to have insisted on their part-time "employees" producing a certificate of employment or else…

2	Part-time (extension)	Schedule "A"	Schedule "A"	Schedule "A"	Schedule "A"	2% withholding	Schedule "A"
3	Provisions of short term training	Schedule "A"	Honorarium (paid net of tax)[77]	2%	Schedule "A"	Honorarium (tax free)	2% (Schedule "C")
4	Presentation of conference papers	Schedule "A"	Honorarium (tax free)	2%	Schedule "A"	Honorarium (tax free)	2%
5	Advising/invigilation/examination boards	Honorarium (paid net but tax paid by PuB1)	Honorarium (tax free	2%	Honorarium (paid net but tax paid by Pub1)	Honorarium (tax free)	2%
6	Consultancy services	Schedule "A"	2% withholding	2%	Schedule "A"	2% withholding	2%
7	Translation services	Schedule "A"	2% withholding	2%	Schedule "A"	2% withholding	2%
8	Editorial services[78]	Schedule "A"	5% royalties tax	2%	Schedule "A"	5% royalties tax	2%
9	Assessment of research papers/scholarly articles	Schedule "A"	Honorarium (tax free0	2%	Schedule "A"	Honorarium (tax free)	2%
10	Preparation of modules[79]	Schedule "A"	5% royalties tax	2%	Schedule "A"	5% royalties tax	2%
11	Writing Books	Honorariums (paid net but PuB1 reportedly pays tax)	5% royalties tax	5%(royalties)	Honorariums (paid net but PuB1 pays tax)	5% royalties tax	5% (royalties tax)

[77] Merriam Webster's Dictionary describes "honorarium" as "a payment usu. for services on which custom or propriety forbids a price to be set;" see Webster's Ninth New Collegiate Dictionary, 1984

[78] PuB1 finance staff may apply 5% under special advisements

[79] PuB1 finance staff may deduct 5% royalties tax under advisement

Source: this table is a summary of interviews conducted with the finance staff of the respective higher education institutions in Addis Ababa

It can be seen from the table above that PuB1 is the harshest or the most faithful withholder of taxes (depending on who is looking at these practices). The rule in PuB1 is to treat virtually every payments made for provisions of services as a payment to employees – subject to the rules of withholding of income tax under Schedule "A." The only situation in which PuB1 appears to concede a ground is when it pays what it calls "honorariums," which according to PuB1's internal "rules" are to be paid net of tax. But even then, it is only because PuB1 ostensibly agreed to bear the tax on behalf of the recipients that the latter do not see the tax withheld – which means that the gross payment in case of honorariums is far higher than the net payments because the taxes are concealed from the recipients.

On the contrary, PuB2 appears to have the most lenient rules of withholding particularly as against part-time providers of services. Except in the case of day-time and extension teaching duties, PuB2 treats most of the payments for specific services as either services of independent contracts (subject to 2%), or as honorariums (tax free as far as the recipients are concerned) or sometimes as royalties for preparation of modules and books (5% final tax). The rules for honorariums in PuB2 are based on its own internal rules of payments which privileged a number of payments as honorariums (e.g. payments for short term training, conference papers, and advising).

The private higher education institution identified as PrV shares many features of PuB2. But there are some differences. PrV does not seem to have what PuB1 and PuB2 call "honorariums." PrV appears to construe payments for publications more narrowly than PuB2 in that PrV treats payments for publications as "royalties" only when the writing contributions are published. That is why writing contributions in the form of modules, which are not published, are not eligible for "royalties," while contributions in publishable journals or books of PrV are eligible as "royalties" and therefore subject to 5% final withholding tax. PrV treats writing contributions for unpublished manuscripts and monographs as independent contract services and withholds 2% tax from payments made in consideration of these services.

It is quite evident that the three higher education institutions diverge quite significantly even on payments that are virtually identical on factual grounds. The paradoxical situation of it is that part-timers who teach the same courses, the same number of students and of hours are treated as employees in PuB1 and PrV and independent contractors in PuB2. By the same token, individuals who write modules for PuB1, PuB2, and PrV, respectively, are subject to income tax under Schedule "A" (the income is aggregated with their regular employment income), under Schedule "D" (royalties, 5%), and Schedule "C" (2% withholding). If a writer of a module in PuB1 has a regular salary above 5000 (the top marginal income bracket), the writer's salary is already in the 35% marginal tax rate range, which means that a writer of modules in PuB1 will be subject to 35% tax rate for all of the payments received for the writing of modules. Even if we assume that the 2% withholding under Schedule "C" is not a final tax, the differences among the three institutions for identical payments are quite astonishing.

6. What is to be Done? Some Modest and Some Not-so-Modest Proposals

It is clear from the analyses above that none of the laws in this regard (the Proclamation, Directive, Circular Letter and the private letters) have provided clear set of solutions to resolve the disputes arising in connection with the withholding of taxes on employee payments. The Proclamation employs a very subjective and difficult to pin-down criteria: whether employer exercises "direction and control" over an employee. The Proclamation does not provide details on indicators or signposts of "direction and control," virtually leaving it up to the withholding agents to determine whether there is employment based on the facts and circumstances of each case. This state of affairs is largely responsible for all the arbitrary and whimsical decision-makings that characterize withholding taxes in various institutions, most notably in the higher education institutions in Ethiopia.

While one would have expected the subsidiary pieces of tax legislation to provide details on matters of "direction and control," all the subsidiary pieces of legislation have gone on a path that was not anticipated by a more exacting and substantive language of the Proclamation. The subsidiary pieces of legislation –

the Regulations, the Directives and the Circular Letters as well as private letters – essentially sought to resolve the problems by applying "easy" parameters that are not necessarily consistent with the spirit and language of the Income Tax Proclamation. The Directives and Circular Letters have drawn the boundaries based on arbitrary indicators like "whether the person providing the specific service is a full-time employee or a part-timer" or "whether the service involved is a specific service or a continuous one," and "whether a person providing specific services possesses a TIN and sometimes a business license." These indicators or guideposts are easy to apply but, as we have seen in this article, they have led to some arbitrary conclusions regarding tax burdens.[80]

In view of the cacophony of instructions issued by the tax authorities over the years, it is really not surprising that various institutions have followed wildly divergent practices on withholding of taxes. Combined with the subjectivism that dominates the practice of withholding taxation, the conflicting signals coming from the tax authorities have only worsened the situation on the ground, resulting in the violation of both principles of horizontal and vertical equity. If the Ethiopian income tax system is to restore some modicum of fairness to the administration of withholding taxation, those in charge of Ethiopian tax administration must realize that there is a need for fundamental change to the way withholding taxation is conceived and administered on the ground. The discriminatory treatments of similar types of payments in various institutions should provide pause for rethinking about the laws and the practice in this regard. We propose three major solutions, which can be implemented in three phases.

6.1. The First Proposal: Provide Uniform Guidance on Elements of "direction and control"

The simple and obvious solution is of course to clarify the element of "direction and control" through subsidiary pieces of legislation. It is important to provide details about instances in which "direction and control" are said to exist (the facts and circumstances of control and direction), and provide for as many

[80] It will be interesting for economists to study the efficiency cost of taxation in these instances; it does not require much research to state that these discrepant practices discourage undertaking certain kinds of work

examples as can be imagined so that the current disturbing discretionary powers of withholding agents are cut down considerably. The Directives and Circular Letters that have surfaced so far have essentially adopted simple parameters that have ended up practically in setting aside the basic requirement in the Income Tax Proclamation, that is, "direction and control".

The Directives and Circular Letters have continued to be operational not because they are consistent with the language and spirit of the Income Tax Proclamation but because it is not customary to challenge directives and circular letters when they are found to be inconsistent with higher ranked laws and it is even less customary for courts to overturn directives and circular letters on grounds of contravening the mandatory provisions of higher-ranked laws.

It is not snobbish to claim that the solutions in this regard are only a click away. Many other income tax systems have struggled with the same set of issues on the question of what types of income should be characterized as "income from employment" and what types should not. The Courts in the United States have developed a number of tests to distinguish cases of employment from cases of "independent contract of services" and the Internal Revenue Service (IRS, the equivalent of ERCA in Ethiopia) has thoroughly simplified the work of withholding agents by culling what are known as 20-factor tests from a number of relevant court decisions.[81] The courts in the UK have similarly attempted to provide black letter tests for the convenience of withholding agents.[82] The settings in Ethiopia might be much different from the UK and the United States, but the facts and circumstances of employment in Ethiopia are much simpler than that of the UK and the United States.

Apart from individual countries, Model Tax Conventions and Commentaries have also summarized the "essential" facts of "employment" from the experience of a number of countries.[83] The doctrine of "substance over form," as elaborated in these Conventions and Commentaries, can also be an

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[81] IRS Publication 15- A (2012); see also Myra H. Barron, "Who's an Independent Contractor? Who's an Employee?" 14 Labor Lawyer 457 (1999)
[82] Olowofoyeku et al, supra note 69, pp. 81-85; see also John Tiley, supra note 1, pp. 219-220
[83] See United Nations, Department of Economic and Social Affairs, UN Double Taxation Convention between Developed and Developing Countries, United Nations, New York, 2011, p. 246

instructive source of inspiration for Ethiopian tax administration.[84] It is incumbent upon the Ethiopian tax administration to develop however many tests it deems appropriate to help employers distinguish cases of employment from other relationships based on the comparative experience of mature income tax systems.

Uniform standards do not guarantee consistency of the standards with the general standard laid down in the Income Tax Proclamation. The tax authorities are not impartial bodies for developing standards that are fair to all parties involved. It is difficult to tell if the tax authorities were not motivated by considerations of revenue in turning out many of the so-called "guidance letters" to numberless withholding agents in the past.

The process of establishing uniform standards must therefore be supplemented and controlled by the intercession of courts. Employees, just like business persons, should be able to challenge withholding taxes and take both withholding agents and the tax authorities to courts. The threat of court challenge alone has tremendous impact upon the behavior of both withholding agents and tax authorities. Knowing that the person from whose income withholding taxes are deducted can challenge them before courts, withholding agents and tax authorities will no longer take the process as cavalierly as they used to and make all sorts of arbitrary decisions in withholding taxes.

6.2. The Second Proposal: a Flat Withholding Tax on Additional Income of Employees

The root of the controversies on withholding taxes can be traced to the structural defects of the Ethiopian income tax system. The income tax brackets and rates of the Ethiopian income tax system may appear uniform, but these apparent uniformities have not removed some of the structural discriminations inherent in the administration of schedular income taxation in Ethiopia. There are still huge differences in tax burdens between income falling under Schedule "A" and income falling under the other schedules. When employees demand the 2% withholding tax instead of aggregation under Schedule "A," they are not just making scenes to score academic points. Most employees (unaided by subtle

[84] See ibid

knowledge of tax laws) know that there is a huge difference between a 2% withholding tax (which is for many practical reasons almost final) and an aggregation under Schedule "A" (which for many academic employees means a 35% withholding from the payment for specific work due to the low income thresholds). Just as it does not take to be a physician to feel the pain of an ailment, it does not really take any special knowledge of tax law to feel the pinch of withholding under higher rates of taxation.

While the eventual solution to this problem is to be found in the overhaul of the schedular income tax system of Ethiopia, solutions short of the overhaul must be found. Many will agree that employees already pay a lot in income taxes, and certainly compared to other income earners (lessors, traders, shareholders, etc), employees are some of the most productive and effective sources of revenue for the governments of Ethiopia.

Until some parity is established in tax burden distributions among various categories of income earners (employees, lessors, professionals and traders, shareholders, etc), it is important to provide a solution that phases out when the income tax system is thoroughly reformed. One solution is to design a flat tax rate (under Schedule "D") for income from specific and additional services by part-time as well as full-time employees. This solution will cut down the administrative cost of characterizing income as either from employment or self-employment. It will also remove the temptation for characterizing these types of income as income from self-employment, thereby making the work of withholding-agents considerably easier. More importantly, it will remove the main reason why employers as well as employees fight over the characterization of income. Finally, it will restore some modicum of fairness to the existing income tax system as it applies to employees –part-time as well as full-time.

6.3. The Third Proposal: Structural Overhaul of the Schedular Income Tax System of Ethiopia

The third solution is a long term one, which can only be mentioned in passing here: making sources of income irrelevant for income tax purposes in

Ethiopia.[85] The root cause of most controversies regarding the appropriate withholding taxes in Ethiopia is the schedular income tax structure of Ethiopia, which takes the source as the ultimate decider of tax burdens in many instances. There are enormous differences in tax burdens between aggregation under Schedule "A", and withholding taxes under Schedule "C" (the 2% withholding tax) and Schedule "D" (the 5% royalty tax) or Schedule "D" (10% dividend taxation). Many employees are instinctively aware of these enormous differences and naturally try to persuade the withholding agents to deduct the 2% tax or the 5% tax, as the case may be. Those employees who can afford to forego the extra income derived from intermittent services simply swear never to undertake those extra duties. Others may be willing to grind the routine out regardless of the tax burden, but they are probably not showing as much enthusiasm in their extra work.

The structural overhaul of the schedular income tax structure of Ethiopia can take many forms and it will take another research of its own to go into details of that nature. But it can be suggested in passing that Ethiopia either i) revise its income tax laws within the framework of the schedular income tax structure in such a way that the burdens among the various sources of income are at least comparable, if not outright equal; or ii) introduce a flat income tax system like many Eastern European countries so that all sources of income are subject to the same flat tax rate regardless of the source of income.[86]

7. Concluding Remarks

The scope of the various schedules of Ethiopian income tax is a source of controversy in many places. Since Ethiopian income tax bases income tax liability exclusively upon the source (expressed mostly in schedules), this structure of Ethiopian income tax is not only a source of disputes in various places but also of huge tax planning opportunities by those having the resources to detect and manipulate the loopholes of Ethiopia's income tax laws. This article has attempted to highlight the extent of the problems by reference to one

[85] How long this is going to take depends on how quickly tax reforms are pushed through; going by how easily the Value Added Tax was introduced in 2002, that time might be sooner than we think.
[86] For the insights on the flat tax model, see OECD, Fundamental Reform of Personal Income Tax (2006), OECD Tax Policy Studies, No. 13, Paris

of the sources of income subject to withholding taxation in Ethiopia: income from employment under Schedule “A”.

It is easy to see why the taxation of this source and related incomes can become a source of controversy in various working places. Employees wear “many hats” like other members of society. Employees may be lessors, traders, licensed professionals, writers and/or inventors, shareholders, savers/depositors, property owners, etc. The current income tax structure of Ethiopia is such that employees pay multiple but separate individual income taxes when they generate income from their multiple activities. Apart from the withholding income tax under Schedule “A,” an employee who rents her house pays an income tax under Schedule B, who is engaged in business pays tax under Schedule “C,” who publishes a book and derives royalties, under Schedule “D,” obtains dividends from shares in companies under Schedule “D”, earns interest from bank deposits under Schedule “D,” etc. None of these “income” taxes are related with one another although the person who derives these various types of “income” is one.

The various disputes that arise in connection with the appropriate withholding taxes on supplementary forms of income in the context of employment arise from this basic structure of the Ethiopian income tax system. The differences in tax burdens at times are so huge that employees and employers (through their agents) frequently disagree over the characterization of the source of income. The withholding practices have also become a source of outrageous discriminatory treatments of the same forms of payments in various places. Employees who have been subject to less onerous tax rates have been more than pleased to be treated as such while employees who have been subject to heavier burdens of tax on their supplementary income are observed complaining about the impact of the tax upon their work ethic and their desire to assume extra work.

Apart from design issues, which, as seen in this article, are considerable, it is important to appreciate the nature of the problems involved and the professional background and training of those tasked with withholding taxes on a daily (or monthly) basis. The technical language of the Income Tax Proclamation is intelligible (if at all) only to those having adequate training in law, particularly

tax and employment law. The irony of the whole process of withholding taxation in Ethiopia is that actual decisions are made by agents who are least qualified to decide cases where "direction and control" are said to exist and cases where these are said not to exist. Since it is not customary to seek legal opinions until late after disputes reach courts, it is likely that most withholding agents decide these cases without bothering about the legal implications of their decisions. The withholding agents are moved to seek the opinions of the tax authorities largely on the instigations of the persons from whose income tax is withheld, and as many of the queries show, the authorities are drawn into these questions largely because many withholding agents (ill-trained as they are in matters of the law) are completely unaware of the requirements of the Income Tax Proclamation or uncertain about the taxes that should be withheld on so many different types of payments made in the context of employment. The only surprise has been that the authorities have chosen a more difficult path of responding to individual queries as they arise rather than providing guidance in all matters pertaining to withholding on income from employment and other related incomes.

It is quite clear that these questions will be with us for as long as the structure of income taxation lacks neutrality with respect to the sources of income taxation. Until design issues are resolved as to make sources of income irrelevant for tax purposes in Ethiopia, it is important to provide withholding agents with detailed guidelines either through directives or advance rulings so that the agents will have little discretion in making judgments about what withholding tax rates are appropriate in specific situations. It is impossible to anticipate all sorts of payments that are made in various working places, but it is quite possible to cover most of them in the guidelines. It is quite possible to reduce the number of discretionary and arbitrary decisions that are made in this regard, decisions that have been based not on the substance of the services performed or the overall relationships of the parties but on some arbitrary factors like whether the work is full-time or part-time. The tax authorities have avoided the substance of the contractual relationships and opted for the formal aspects of contracts (such as the status of the employee as a part-timer or full-timer). This cavalier approach to the question will not do. Instead of writing letters for withholding agents as the queries pour in, the tax authorities should approach the problem with utmost

seriousness, conduct research and provide guidance that puts many (if not all) of the questions to rest.

In this regard, it is incumbent upon the tax authorities to ensure that their guidelines are consistent with the language and spirit of the Income Tax Proclamation. Simple or easy-to-follow guidelines need not and should not set aside the meaning of "employment" vis-à-vis "independent contract" as set down in the Income Tax Proclamation. If you don't like the law, the right approach is not to breach it, but conduct yourself in accordance with its dictates. If you don't like to conduct yourself in accordance with its dictates, the right approach is not to write the law yourself, but to have it written by those empowered to make laws, in this case, the House of Peoples' Representatives.

50 Years of Legal Education in Ethiopia: A Memoir

Stanley Z. Fisher[*]

In this paper I describe my experience as one of the early members of the Haile Selassie I University (H.S.I.U.), Law Faculty, and share my reflections on developments in the ensuing years.

Shortly after graduating from law school, I accepted a Fellowship to work for the government of Tanzania for one year, starting in September 1963. My law school classmate, Steven Lowenstein,[1] invited me to apply for a teaching post at the newly founded Haile Selassie I University Law School (H.S.I.U.), which was funded by the Ford Foundation.[2] Lowenstein was one of the pioneer faculty. In December, 1963 I flew to Addis Ababa for an interview with Dean Paul and faculty members. When the Dean offered me a teaching job starting in September, 1964, I excitedly agreed to come for one year. That this "one year" would stretch to four, and lead to several return visits over the next half century, I had no inkling.[3]

Founding of the Law School

The Law School was established in 1963, with the primary mission of teaching the new Ethiopian legal codes. On September 23, 1963, Emperor Haile Selassie, as University Chancellor, formally opened the Law School

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[*]Professor of Law, Boston University Law School. The author served as Assistant Professor, Haile Selassie I University Law Faculty from1964-1968. This paper is based on a talk delivered by the author at the University of Addis Ababa Law School on October 10, 2013. The author gratefully acknowledges the contribution of his former Law Faculty colleague, Harrison Dunning, for his helpful comments on a preliminary draft of this paper.

[1]See Steven Lowenstein, Materials for the Study of the Penal Law of Ethiopia (Addis Ababa, 1965).

[2] More precisely, the funding came from a Ford-funded project whose acronym was "SAILER," for "Staffing African Institutions of Legal Education and Research." For a history (and assessment) of the SAILER project see Jayanth K. Krishnan, "Academic SAILERS: The Ford Foundation and the Efforts to Shape Legal Education in Africa, 1957-1977," 52 Am. J. Legal Hist. 262 (2012). Between 1962 and 1967 SAILER helped staff and provided other support for law schools in ten African countries. Id., at 313. For a detailed account of the founding and operation of the Law School in Addis Ababa see id., at 291-300.

[3] I made short return visits to Addis Ababa in 1972, to conduct research, in 1992, as a Visiting Professor at the U.A.A. Law School, and in 2013. See also James C.N. Paul, "Seeking the Rule of Law in Africa," 10 Experience 21, 24 (2000), reporting that he came to Ethiopia expecting to stay "two, possibly three, years" and stayed for nearly seven.

building.[4]A few months later, when I first visited, the School had seven faculty members (mainly American), 23 full time LL.B. students, and 40 evening LL.B. students. Three years later, in 1966, 550 students were enrolled in all of the courses offered by the Law School. Before addressing this rapid growth, I will say a word about the first, intrepid batch of law students.

When, in the summer of 1963, students signed up to study law, there was still no School. The students were told that, by September, the Dean, the teachers, and the library were "on their way" to Addis.[5]From their point of view they were the "guinea pigs" in an experiment: they would be taught mainly[6] by teachers who were teaching Ethiopian law for the first time. Actually, as a graduating pioneer student wrote, they were "learning together" with their teachers.[7]The students in the School's early years were bright, hard-working and enthusiastic. Among those in the early batches I was privileged to teach were a number whose names are widely known because of their prominence in Ethiopian affairs.[8]I shall later say more about our students.

Two Important People

In establishing and building the Law School, we faced an array of challenges, which I shall discuss below. Before doing so, I must say something about two exceptional people, who played especially important roles in the story.

The first is James Paul, the first dean of the School, for whom the law library is now named. Paul was teaching at the University of Pennsylvania Law School in the United States, when he became interested in promoting legal education in Africa.[9] He accepted the Deanship in Addis Ababa in response to the Emperor's personal invitation, conveyed in a long-distance telephone call

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[4] This account of the early years of the Law School draws heavily on Dean James C.N. Paul, "Our Faculty," The Balance and the Sword, (vol. 1 no. 1, May 21, 1966) (unpublished mimeo, on file with the author). pp. 2-5.

[5] Zerabruke Aberra, "The Freshmen – Seniors," The Balance and the Sword, id., p. 7.

[6]The one exception was Professor George Krzeczunowicz, discussed *infra*, who had taught Ethiopian law at the University College in Addis Ababa.

[7] Ibid.

[8] They included, to name only a few, Professor Selamu Bekele, Yacob Haile-Mariam, Bulcha Demeksa, Fasil Nahum, Aberra Jembere, Ababiya Abajobir, Daniel Haile and Abiyu Geleta.

[9] The evolution of Dean Paul's involvement in African legal education is discussed in Krishnan, *supra* n. 3, at 276-78. See also Paul, "Seeking" *supra* n. 4.

made by H.S.I.U. President Kassa Wolde Mariam.[10] Dean Paul secured a Ford Foundation grant to establish the law school in Addis Ababa, and he hired the staff. For the School's first few years he provided leadership as Dean, while teaching Constitutional Law. In 1967 Paul left the Deanship to serve as Vice President for Academic Affairs at H.S.I.U. Upon his return to the United States, he served for several years as Dean of Rutgers School of Law - Newark. Active in the African Law Section of the American Association of Law Schools, he published writings on international human rights law, and developing constitutional orders in sub-Saharan Africa.[11]After the fall of the Derg, Dean Paul served as a consultant to the Ethiopian Constitutional Commission. He was also chosen by Ethiopia to sit on the Eritrea-Ethiopia Claims Commission.

Dean Paul passed away in 2011, but remains loved and respected by many former students and colleagues. As an expression of his devotion to the cause of legal education in Ethiopia and Eritrea, before his death Dean Paul generously established a scholarship fund for support of graduates from law

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[10] Dean Paul described Lij Kassa's message as: "I am standing in the presence of His Imperial Majesty who commands – I mean requests – I mean invites – you to come to Ethiopia to start a law school in His new university as its first dean. Will you come?" Paul, *supra* n. 4, at 23-24. Writing in the year 2000, Dean Paul also related the following anecdote:

> The Emperor took a keen interest in the law school--dropping in for "informal visits" at odd hours. One evening his motorcade drew up just as a late faculty meeting was breaking up, just as [Dean Paul's wife] Peggy also arrived, gorgeously attired for a party we were to attend. As usual, I escorted the emperor about, and fortunately, the library was full of busy students -- making a good impression. The emperor spoke little English, but he was quite fluent in French. My two years of high school training in that language were hardly up to the task. I introduced him to the faculty. "Et qui est elle?" ("Who is she?") he asked, pointing to my lovely wife, and I replied "Oh majestie, c'est mon mari," (literally, "Your majesty, it is my husband"). The emperor looked at Peggy, then at me, registering both disgust and amusement, and muttered "Impossible." He then shook my hand and said slowly in English, "If you wish to please me, you must improve either your Amharic or your French." Id., at 24- 25.

[11]See, e.g., James C.N. Paul, "Some Observations on Constitutionalism, Judicial Review and Rule of Law in Africa", 35 Ohio St. L.J, 851 (1974); James C.N. Paul, "Human Rights and Legal Development: Observations on Some African Experiences", Int'l Human Rts L & Prac., 23-27 (Chicago: American Bar Association 1978); James C.N. Paul, "Developing Human Rights for Development By and For People", Third World Legal Stud., 54 (1984); James C.N. Paul, "Putting Internal Security Forces Under the Rule of Human Rights Law: The Need for a Code of Universal Principles Regulating Their Governance", Third World L. Stud., 233 (1990); James C.N. Paul, "Law and Development into the 1990s: The Need to Use International Law to Impose Accountability to People on International Development Actors", 11 Third World L. Studies 1 (1992).

schools in Ethiopia and Eritrea who are seeking advanced law degrees. Former expatriate law faculty made additional donations to the fund, which is now administered by the Yale Law School. Hopefully, one or more graduates of the U.A.A. Law School will, in future, be able to benefit from Dean Paul's generosity.

The second founding member of the Law School faculty I will mention is Professor George Krzeczunowicz, a Polish scholar who, before establishment of the HSIU Law School in 1963, taught law at the University College from 1952-1962. Professor Krzeczunowicz joined the Law School faculty in 1963, and taught there for many years. An avid scholar, he published more than 20 articles on Ethiopian law. In the early years of the Law School, Professor Krzeczunowicz provided a strong voice for the "civilian" point of view in a faculty led and predominantly staffed by teachers trained in the common law tradition. Thus, when his American colleagues proposed to establish the Journal of Ethiopian Law, which was to include selected High Court and Supreme Imperial Court decisions, Professor Krzeczunowicz dissented. In his view, the act of publishing court decisions might imply that they were to be accorded precedential authority – a status acceptable in a common law system, but not appropriate in Ethiopia's Code-dominated system, where authority resided only in the legislation itself.[12] For better or for worse, Professor Krzeczunowicz's view on this issue did not prevail.

The Main Challenges

Among the many challenges facing Dean Paul and his original group of teachers, five stand out. These were:

1. The need for continued adequate funding;
2. The lack of teaching materials, or background materials on the sources of the codes;
3. The lack of an adequate law library;

[12] Although modern civil law practice has since evolved, civil law systems traditionally did not accord the same precedential value to judicial decisions as did common law systems. See, e.g., Mary Garvey Algero, "The Sources of Law and the Value of Precedent: a Comparative and Empirical Study of a Civil Law State in a Common Law Nation," 65 La. L. Rev. 775 (2004-2005). As I recall, Professor Krzeczunowicz's opposition to publishing court decisions was rooted also in his concern lest decisions which were flawed would, by virtue of publication, come to be regarded as correct.

4. The unfamiliarity of most of the first group of (mainly American) teachers with the civil law system;
5. The unfamiliarity of most faculty members with Ethiopian law, language, culture and legal practices.

An additional challenge arose in the mid-sixties, when student politics became more radical: what was the proper role of faculty members, as foreign guests in Ethiopia, when our students clashed with the government? I will touch on the faculty's responses to all of these challenges, below.

My own situation will illustrate the fourth- and fifth- listed challenges above. Although I had some background in African law, culture and language,[13] I arrived in Addis Ababa knowing little about Ethiopia. As the product of an American legal education, neither was I familiar with the structure or methods of civil law systems. Because the Criminal Procedure Code, which I was assigned to teach, was reputedly based upon common law sources, I was in theory not disadvantaged. However, this comfort proved false,[14] and I was soon at work trying to master continental concepts of penal law and procedure.[15]

One might ask why, seeing as most[16] faculty in the early years arrived ignorant of Ethiopian law, language and conditions, did we not recruit trained Ethiopian lawyers to join the full-time[17] teaching staff? The answer is simple, but might surprise some readers. In 1963 Ethiopia only had a handful of university-trained lawyers, who were needed to fill key positions in the courts and the

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[13] In non-degree study at London's School of Oriental and African Studies, I had been exposed to African customary law, East African culture and the Swahili language.

[14] In fact, some important provisions of the Criminal Procedure Code were drawn from continental sources. See, e.g., Fisher, "Some Aspects of Ethiopian Arrest Law: the Eclectic Approach to Codification," J. Eth. L. , vol. 3, no. 2 (1966) 463.

[15] In my second year on the Faculty I was given responsibility to teach the Ethiopian Penal Code of 1957, which was based on continental sources.

[16] Besides Professor Krzeczunowicz, one must point to faculty members such as Norman Singer, Everett Goldberg, Lawrence Church, and Owen Cylke, who were Peace Corps volunteers, as exceptions. Before taking up duties in Ethiopia, Peace Corps volunteers attended orientation programs that included instruction in Amharic. Most faculty, however, including myself, were not Peace Corps volunteers. Thus, we had less preparation for life in Ethiopia than our Peace Corps colleagues and, unfairly, were compensated more generously!

[17] Some Ethiopian lawyers assisted the School by teaching part-time.

ministries.[18]Therefore, foreign lawyers were required to establish and, for a time, to operate the country's first law school. However, the goal of Dean Paul and his American successors was to "Ethiopianize" the faculty as soon as it was feasible to do so. In the first decade of the School's existence, substantial progress was made toward achieving this goal.[19]

Basic Decisions

Dean Paul and the founding staff members made several basic decisions in 1963 that were to shape the Law School's future growth.[20] These were:

First, "to develop and expand part-time programs to provide basic legal education … to persons [then] engaged in legal administration…."[21] Thus, in the first few years, the School established:

- certificate and diploma classes in law, some of which were offered in our extension law school in Asmara;[22]
- at the request of a group in Parliament, a course in public law given both in English and Amharic;[23] and
- translation of teaching materials from English into Amharic.[24]

Many law school classes, including a section of the LL.B. program, were taught in the evenings.

Second, in view of an almost total absence of teaching texts and code source materials, to expand the faculty so that each teacher would be expected to teach only one subject, and to develop teaching materials for that subject.[25]

Third, to attempt to expand further staff recruitment to include teachers, able to teach in English, who were "trained in continental law and civilian methods."[26]

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[18] I refer to such people as Attorney General Teshome Haile Mariam, Vice-Minister of Justice Belatchew Asrat, and private practitioner Tefari Berhane.
[19] By 1969 three Ethiopian teachers were on the staff, and by 1973, Ethiopians comprised 12 of the 21 teachers on staff. See Krishnan, *supra* n. 3, nn. 183 and 186.
[20] This account is based on Paul, "Our Faculty," *supra* n. 5, at pp. 2-5.
[21] Ibid.
[22] Ibid
[23] Ibid
[24] Ibid
[25] My own initial assignment was criminal procedure, for the teaching of which I had only the Criminal Procedure Code itself. In fact, some articles on the Code existed in foreign law journals, but I did not learn of them until three or four years later.

To accomplish this goal, Dean Paul traveled twice in the first two years to France, Germany, England, Canada and the United States.[27] By the end of the School's third year of existence, the teaching staff had grown to 16 full time and 10 part-time members,[28] many of whom came from "mixed" or civil law systems, including France, Canada, Germany, Scotland, Belgium and Finland.

Fourth, to seek new sources of outside funding to supplement the School's initial grant from the Ford Foundation.[29] Over the next two years Dean Paul's fund-raising efforts bore fruit. For example, he obtained a second generous grant from the Ford Foundation; a British grant to fund a teacher from Edinburgh University, in Scotland; a Belgian government grant to fund a teacher from Belgium, and a gift of books; and funds from other sources in the United States to support library development, and to pay student research assistants. All of these grants helped supplement funding received from the University.

Fifth, Dean Paul established a research and publication program, to serve two goals: 1) "to provide the core of materials needed for instructional purposes, and 2) begin to provide a body of available expository material on modern Ethiopian law."[30] To advance the latter goal, the School in cooperation with the Ministry of Justice published, in 1964, the first issue of the Journal of Ethiopian Law, containing scholarly articles and court opinions. The Law Library collection "grew [between 1963 and 1966] from zero to about 8000 books."[31] This growth was assisted by financial grants and by consultation from an American law librarian. Subsequently, the School was able to staff the Library with a professional librarian.[32] Regarding teaching materials, by the end of our third year five books on Ethiopian law had been published, and more works were in progress.[33]

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[26] Paul, "Our Faculty," *supra* n. 5, at p. 3.
[27] Ibid.
[28]Id., at 5.
[29] This paragraph is based on Paul, "Our Faculty," *supra* n. 5, at p.3.
[30]Id., at 4.
[31] Ibid.
[32] Ibid.
[33]Id., at 5. Among the books on Ethiopian law published in the first three years were Philippe Graven, An Introduction to Ethiopian Penal Law (1965); Steven Lowenstein, Materials for the Study of the Penal Law of Ethiopia (Addis Ababa, 1965); Kenneth Redden, The Law Making Process in Ethiopia (1966) and Ethiopian Legal Formbook (1966); Robert Sedler, The

Looking back, primary credit for the School's substantial growth and scholarly productivity in the early years must go to the extraordinary vision and dedication of Dean Paul. His success in obtaining financial support to fund a low teacher-student ratio made possible the production of research materials by faculty.[34] Of vital importance, also, was the hard work and commitment of staff, students and members of the Ethiopian legal community.

Our 1966 Graduating Class: "The Balance and the Sword."

When I left Ethiopia for home in 1968, among the mementos I took was the first issue of "The Balance and the Sword," a publication of the H.S.I.U. Law Student Association.[35] To give the flavor of our early years, I will quote from three items in that issue. The first, reporting a law suit filed by our students against the University, illustrates the readiness of our students to put their book-learning into practice, by challenging authority. The second, regarding "Law House," reveals our students' commitment to improve the conditions of law study for future generations. The third, written by the only woman student in our first batch, offers a glimpse into a past that differs radically from the current state of affairs in Ethiopia.

1. A lawsuit against the University. The announcement stated:

> THE E.U.S. PROGRAM CHALLENGED IN COURT. The senior, Pioneer Law Students, have instituted a case against the Haile Sellasie [sic] I University. The issue of the dispute is whether the University under the Imperial Charter creating it, has the power of making a program of University service a degree requirement. The case is in the High Court waiting to be disposed of very soon.[36]

Conflict of Laws in Ethiopia (1965). Scholarly works in progress by 1966 included Peter Strauss and Paulos Tzadua, transl., The Fetha Nagast (1968), S.Z. Fisher, Ethiopian Criminal Procedure (1969), and William Ewing, Consolidated Laws of Ethiopia (1972).

[34] A Ford Foundation grant for research and publication supported, *inter alia,* a six month research leave in London for me to investigate the sources of the Criminal Procedure Code.

[35] The Balance and the Sword, (vol. 1, no. 1, May 21, 1966) n.p.

[36] Reportedly, in *Ababiya Abajobir et al vs. Haile Sellassie University*, the High Court ruled against the students' challenge. Email communication to author from Alexandra (Hamawi) Kontos, July 11, 2014.

2. Ground-breaking for a "Law House."[37] The announcement was headed:

> IT IS WITH GREAT PLEASURE THAT THE HOUSING COMMITTEE ANNOUNCES THAT THE GROUND BREAKING FOR THE "LAW HOUSE" IS TO TAKE PLACE TODAY, MAY 21, 1966.

Law House was designed to provide "modest but adequate housing for the present and future law students…which is now notoriously lacking…. It would contain twenty double rooms for sleeping and studying, a modest … lounge and central bathroom facilities." The concern was mainly for students who came from the provinces, most of whom "live in deplorable conditions and must have better housing if they are to profit from law study. There are no university dormitories for every student." Many students "live far from the University in conditions that gravely affect their academic work …. [and that] affect the intellectual development of those who must staff [the] Ethiopian legal profession of tomorrow." This announcement ended with an appeal for financial assistance from the "business, legal, governmental and university leadership of Ethiopia."

In succeeding years the Law School community tried, but apparently failed, to find the funds needed to realize this ambitious goal.[38]

3. Women's Legal Education. Alexandra Hamawi, a member of the first graduating class of LL.B. students, contributed an article titled "The One and Only," from which the following excerpts are drawn:

> Being the only girl in a Faculty of the University is a fascinating but at the same time a rather frustrating experience…. I will never forget my first days in the Law School; the terror that overtook me the first time I went into a class with nothing but men around me…. What made the experience even worse was that law was – and still is – regarded as a field reserved exclusively for men, so that I was looked upon as an intruder. I came to be known everywhere as "the" girl

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[37] This section is drawn from The Balance and the Sword, *supra* n. 35.

[38] In an internal memorandum the following year, Dean Paul announced, regarding Law House: "I have signed a contract with the Building College – on behalf of the Law School. If we don't raise the remaining $10,000 either I may be jailed for my debt or Law House may lack a roof. I know we can do it. Will we?" Memorandum from Dean Paul to "Colleagues at the Faculty of Law – Staff and Students", (unpublished mimeo, June 8, 1967) at 3 (on file with the author).

> who was studying law. On one occasion, I was introduced to a Government official who in reply to statement that I was studying in the Faculty of Law, said: "So you are the one!"
>
> When I completed my first year, I was hoping that my example would urge other girls to join the Law School. But here I am, almost at the end of my third year, and I am still alone….
>
> My only wish is that, in the years to come, ladies will feel less reluctant to join the Law School. I have fought the first phase of this war. Their task is bound to be much easier.

I am certain that Ms. Hamawi would be proud of the fact that her example has been followed by so many women, and that law in Ethiopia is no longer regarded as a field "reserved exclusively for men."

The Contributions of Our Students

Among the many contributions to the Law School's progress made by our students, the greatest I believe was their conduct of research. Although most faculty members could not penetrate the mysteries of Ethiopian language, culture and legal practices, they were able to use our capable and energetic students as their "eyes and ears." A few examples will illustrate the extent to which my own students made important contributions to Ethiopian legal scholarship.

1. In response to my interest in traditional criminal procedure, two students, Seifu Felleke and Nebiyeleul Kifle,[39] started an Amharic language radio program in which they invited listeners to submit accounts of traditional procedures, such as *lebashai* and *affersata.* They also wrote a weekly column on this subject in an Amharic language newspaper, requesting reader comments. In addition, my research assistant, Daniel Haile,[40] translated Italian language traveler commentaries for me. I later incorporated the work of these students in my own writings on traditional Ethiopian criminal procedure.[41]

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[39] Both were enrolled in the evening LL.B. program.
[40] Later Dean of the A.A.U. Law School.
[41] See Stanley Z. Fisher, "Traditional Criminal Procedure in Ethiopia," 19 Am. J. Comp. L. 709 (1971).

2. My book, Ethiopian Criminal Procedure,[42] was greatly improved by incorporating student research on actual practices by police and judges. For example:
   a. A research paper by Bulcha Demeksa on bail practices.[43] His interviews of police officers and judges revealed regular denial of arrestees' right to bail, driven by official presumptions of arrestee guilt, rather than innocence;
   b. A research paper by Abiyu Geleta,[44] revealing regular police disregard of the duty to obtain judicial warrants before carrying out searches and seizures;
   c. A research paper by Worku Tafera[45] on the appointment of counsel by High Court judges in Addis Ababa, showing the absence of uniform criteria governing the provision of appointed defense counsel.

In addition, our students played a vital role in selecting and translating court opinions from Amharic into English, for possible publication in the Journal of Ethiopian Law. Through such efforts did our students help their teachers understand how the law in the courts and police stations compared to the law in the Proclamations and Codes.

Faculty Reactions to Conflict between Our Students and the Government

As a teacher of penal law and procedure, I had to consider how freely I and my students could critically discuss official actions that curtailed individual rights. I was given to understand from the start that one could criticize government practices, so long as one did not directly criticize his Imperial Majesty! However, later events forced faculty – as well as students – to make difficult choices. I shall give examples.

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[42] Stanley Z. Fisher, Ethiopian Criminal Procedure, (Oxford University Press, 1969).

[43] Bulcha Demeksa, "The Law and Practice of Bail in Ethiopia" (unpublished, 1965) quoted id., at 157.

[44] Abiyu Geleta, "The Search and Seizure Exclusionary Rule in the Ethiopian Law," (unpublished, 1965) quoted id., at 137.

[45] Worku Tafara, "Indigent Defendant's Right to Counsel in High Court Trials in Addis Ababa," (unpublished, 1965) quoted id., at 269.

1. **An Incident at the Laboratory School**.[46]

A fight in May, 1967 between Eritrean and Shoan students at the University Laboratory School resulted in serious injuries. After an internal investigation, the University President announced that sixteen 12th grade Lab School students had been confined to Kolfe Police training station for up to six months for "rehabilitation." Twelve members of the Law School faculty responded by sending a letter to the Dean of the University's Faculty of Education, protesting "in the strongest possible way," incarceration of the students without any "legal process either by the University administration or by any other body to legitimate this imprisonment."[47] The University's proper course, proposed the letter, would be to support the students' rights to counsel and release on bail, in accordance with the rule of law.

2. **Student Protests**

My last three years on the Faculty, 1965 to 1968, featured rising student unrest and protest against the Imperial regime.[48] As expressed by a contributor to the student publication, Struggle, "the educated few have the responsibility first to teach the people to be aware of their needs and suffering and … lead them to fight and win over their oppressors." [49] Thus, we witnessed students demonstrating, on and occasionally off campus, waving copies of Mao's Little Red Book, and demanding "Land to the Tiller." Protest crossed a line, and affected us deeply when, in the Spring, 1967, one of our recent graduates was arrested for throwing an explosive device in an occupied movie theater in Addis Ababa. He was prosecuted, convicted and later put to death.

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[46] See "Sixteen Lab School students to have 'Educational Experience' at Kolfe," The University Reporter, vol. 1, no. 22, June 13, 1967 (unpublished mimeo, on file with the author).

[47] This account relies upon an unsigned carbon copy of a typed letter to Dean Mulugeta Wodajo dated June 9, 1967, cc. to President Kassa Wolde Mariam, over the names of 12 Faculty members. The assertion that the letter was signed and sent is based on the author's best, but admittedly fallible, memory.

[48] For something like a decade from 1965 on, the students came out into the streets in almost ritual annual demonstrations, daring to defy a political order that had managed to secure the cowed submission of a large part of the population. As impassioned advocates of change, more than any other sector of the society, they proved to be the grave-diggers of the old regime…. Bahru Zewde, A History of Modern Ethiopia, 220 (1991).

[49] T. Menelik, "The Role of Students in the Development of a Society," Struggle, vol. 1, no. 1 (mimeo, March 23, 1967) 8-9. Struggle was published by the University Students' Union of Addis Ababa.

In reaction to student protests, the government sometimes closed the University, in effect locking our students out. Regretting the interruption in classes, some faculty discussed whether we should offer law students instruction in our homes, and – if we did –how the government might respond. We did not make the attempt. However, in another instance of a lengthy government "lockout" of striking students, I became more involved. Together with a colleague from the Political Science faculty, I met with a few student leaders off campus in hopes of mediating the conflict. Shortly afterwards, University President Kassa summoned my colleague and me to his office. Sternly, he warned us that if we continued our efforts, we would be ejected from the country. This warning persuaded us to abandon our attempt at peacemaking.

What Did We Accomplish? Reflections on the Aftermath of Revolution

Although in 1968 I resigned my teaching position in Addis Ababa to join the Boston University Law School faculty, I was deeply affected by the events between 1974, when the Derg took power, and Mengistu's fall in 1991. These events brought immediate death to some of my former students and imprisonment or exile to others and their families. Most were faced, at least, with hardship and suffering of one sort or another.

In the ensuing years, I was sometimes asked whether I felt that my service in Ethiopia had accomplished something positive. This question, over time, led me to confront other, more disturbing questions about the impact of our contributions in the 1960's: Had our well-meaning efforts to encourage respect for individual rights and the rule of law been both naïve and arrogant?[50]Had we merely been part of a problematic effort to transplant foreign law and values in hostile soil? Had the values we espoused -- in light of the social, political and economic realities of Ethiopian life – resulted mainly in personal loss and tragedy? After I visited Addis Ababa in 1992, and heard the tales of numerous former students who had suffered under the Derg, I found it hard to feel positive about what I and my colleagues had "accomplished" in the 1960's.

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[50] Looking back at his enthusiasm, in the early 1960's, for the contribution that young American lawyers might make to legal education in Africa, Dean Paul admitted to being "somewhat ashamed of the arrogance that infected my enthusiasm." See Paul, "Seeking" *supra* n. 4, p. 23. For an appraisal of recent charges that the SAILER program in Africa was "imperialistic" and "chauvinistic," see Krishnan, *supra* n. 3, at 318 ff.

Over time, however, I have come to a more positive (and, I hope, more realistic) view of our accomplishments in the period 1963-1973. Whatever our faults and errors, we helped to lay a foundation for continued growth and development of Ethiopia's ancient legal system, and for the rule of law. The existence of this foundation is apparent in the increased number of law schools operating throughout the country. The research and publication begun in the early years continues to serve as a foundation upon which successive generations of students, teachers and scholars have built. In my own field of criminal procedure, for example, I note the scholarly contributions of present faculty at the Addis Ababa University Law School, who have been carrying forward the work of their predecessors.[51] More familiar than most of the early teachers were with Ethiopian history, culture and institutions, the current generation of Ethiopian law teachers is better equipped to understand and guide future development of the legal system.

My faith in the value of what the early faculty accomplished is bolstered by recognition of the outstanding contributions to the legal profession of many of our graduates. Consider, for example, two of our early LL.B. graduates, Aberra Jembere and Teame Beyene.

In the Haile Selassie era, Dr. Aberra held important governmental and non-governmental posts. [52]He was also active as a legal scholar. In 1974, the Derg imprisoned him for eight years. While in prison, Dr. Aberra pursued his scholarly interest in Ethiopian legal history by interviewing knowledgeable fellow-prisoners. Following his release, he joined the U.A.A. Law Faculty. He went on to serve in the national Parliament, and resumed his activities with charitable organizations such as the Ethiopian Red Cross Society. At the same time, he continued his scholarly research, for which he received a Ph.D. from Erasmus University Rotterdam in the Netherlands. Although Dr. Aberra passed away in 2004, his excellent book, An Introduction to the Legal History of Ethiopia, 1434-1974, was published in 2012.

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[51]See, e.g., Simeneh Kiros Assefa, Criminal Procedure Law: Principles, Rules and Practices (Xlibris Book Publishers, 2010); Tsehai Wada, "Timely Disposition of Criminal Cases in Ethiopia," 24 J. Eth. L. 50 (2010); Tsehai Wada Wourji, "Coexistence between the Formal and Informal Justice Systems in Ethiopia: Challenges and Prospects," 5 Afr. J. Legal Stud., 269 (2012).

[52] He served, for example, as Administrator of the Haile Selassie I Foundation, and as Head of Legal and Parliamentary Affairs in the Prime Minister's Office.

In my view, Dr. Aberra Jembere's accomplishments as a public servant and legal scholar, in the face of such suffering and loss, realize the hopes and vindicate the efforts of those who served on the Faculty in the early years.

The second early graduate whom I will mention is Chief Justice of Eritrea Teame Beyene. After completing law school he enrolled in an advanced degree program at the University of Wisconsin Law School. He interrupted that study to return to Eritrea, where he joined the Eritrean People's Liberation Front and served in the field for over 20 years. After the war, he was made President of the High Court in Eritrea. At a meeting of the Eritrean Studies Association in Asmara in July, 2001, he presented a paper critical of the transitional government for interfering with the independence of the judicial branch.[53] The Chief Justice charged the executive branch with undermining the judiciary in violation of guarantees of judicial independence in the Eritrean Civil and Criminal Procedure Codes and the Constitution. The undermining actions included allocating the judiciary inadequate resources, entertaining appeals by losing litigants to executive officials, attacking the courts in officially controlled media, and establishing a special military court, with the power to review and set aside judgments of regular courts, with no duty to apply the Penal or Criminal Procedure Codes, and no right of appeal.

A few weeks after presenting his paper, the Chief Justice was removed from office and "frozen," meaning that he would continue receive his salary, but could not serve. Like Dr. Aberra Jembere, the former Chief Justice has spent his time researching a book on the legal history of his country. Also like Dr. Aberra, Teame Beyene is a heroic and inspiring alumnus of the H.S.I.U. Law Faculty.

Conclusion

As the accomplishments of Aberra Jembere, Teame Beyene, and many other Law School graduates show, the "rule of law" is not something which either "exists" or "does not exist." Rather, it is a principle which must be fought for in bad times and defended vigilantly in good times. Society looks to us, members of the legal profession, for leadership in this continuing struggle.

[53] His paper, "The Eritrean Judiciary: Struggling for Independence" can be found at http://africa.widmi.com/index.php/ethiopia/ethiopian-review/opinion/152371-the-eritrean-judiciary-struggling-for-independence-by-eritrean-chief-justice-teame-beyene .

What is more, this struggle is equally as necessary in the United States or Europe as is in Ethiopia, Eritrea, or elsewhere in Africa. It is from this vantage point that I view the sacrifices made by Aberra Jembere, Teame Beyene, and their peers and successors at the Law Faculty. And from the same vantage point I honor their achievements, and take pride in having played a small part in their legal education.

The Judicial and Constitutional Review of the Decisions of Courts of Sharia: A Comment Based on *Kedija Bashir et al. vs. Aysha Ahmed et al.*

Girmachew Alemu[*]

Introduction

This comment is based on the landmark case initially instituted by W/o Aysha Ahmed *et al.* against W/o Kedija Bashir *et al.* at the 3rd Naiba First Instance Court of Sharia (hereinafter *Kedija Bashir et al.* Case*).*[1] The *Kedija Bashir et al.* Case went through all levels of Federal Courts of Sharia and was reviewed by the Federal Supreme Court Cassation Division, the Council of Constitutional Inquiry and the House of Federation. This comment focuses on the legality and effect of the judicial and constitutional review of the decisions of the Courts of Sharia by the Federal Supreme Court and the House of Federation vis-à-vis the status of the Courts of Sharia as part of the non-state religious justice system that function primarily on the basis of Islamic law.

Part one of the comment provides the structure of the *Kedija Bashir et al.* Case focusing on the main issues raised at the Courts of Sharia, the Federal Supreme Court Cassation Division, the Constitutional Inquiry Council and the House of Federation. The second part is a reflection on the legality and effect of the judicial review of the *Kedija Bashir et al.* Case by the Federal Supreme Court Cassation Division while the third part provides comments in connection with the constitutional review of the *Kedija Bashir et al.* Case. Part four offers conclusion.

[*] Ph.D., Assistant Professor, School of Law, Addis Ababa University

[1] The Case came to be known as the Kedija Bashir Case after the applicant who refused to submit to the jurisdiction of the Courts of Sharia and went all the way to the CCI. The Case has been cited by a number of writers on human rights and legal pluralism. See for eg. Getachew Assefa, "Federalism and Legal Pluralism in Ethiopia: Reflections on their Impacts on the Protection of Human Rights", in Girmachew Alemu and Sisay Alemahu (eds), The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects, Human Rights Law Series, volume 1, Addis Ababa University Press, 2008. Nonetheless, there has never been a full and proper presentation of the case by anyone yet. This writer has consulted all court documents of the case from the First Instance Naiba Court up to the CCI to prepare the full summary of the Case under section 1 below.

1. The Anatomy of the *Kedija Bashir et al*. Case

1.1 The Initial Pleading and the Decisions of the Courts of Sharia

A) The Case was initially presented to the 3rd Naiba First Instance Court of Sharia (Naiba Court)[2] in Addis Ababa on Hidar 14, 1992.[3] The plaintiffs were W/o Aysha Ahmed, W/o Fantu Ali, W/o Leila Hussein, and W/o Bedria Issa. The defendants were W/o Kedeja Bashir, Ato Ibrahim Hassen, Ato Ahmed Hassen, and Ato Mohamed Hassen.

B) The plaintiffs claimed that they are heirs to their late grandfather, Ato Aman Shene. The plaintiffs also claimed that Ato Aman's dwelling house located in Addis Ababa, Woreda 2, Kebele 11, House No. 439 was in the hands of the defendants, who are also the grandchildren of the late Ato Aman Shene. According to the plaintiffs, the defendants refused to recognize their right over their grandfather's house. The plaintiffs pleaded the Court to order the defendants to handover their share on the "basis of part 4, chapter 4 of the Sharia law". The plaintiffs presented a tax document and listed three witnesses to verify that Ato Aman Shene was the owner of the abovementioned dwelling house.

C) On Tahsas 14, 1992 the defendants submitted their preliminary objection to the Naiba Court stating in writing that they do not want to be adjudicated by the Court on the basis of their right to refuse its jurisdiction pursuant to Article 34(5) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution). Also, the defendants alleged that the suit is *res judicata* as the issue has been settled in another case between the parties in a regular state court on the basis of the Ethiopian Civil Code.

D) In a written response on Tir 4, 1992 to the Naiba Court the plaintiffs rejected the preliminary objection of the defendants. In its session on Megabit 13, 1992, the Naiba Court passed a decision that overruled the defendants' preliminary objection against its jurisdiction. The reason forwarded by the Court was that the defendants did not appear in the Court when they were summoned to explain their preliminary objection. The Court further found that the case filed by the defendants in the regular

[2]The Naiba Court was operating on the basis of the Kadis and Naibas Councils Establishment Proclamation No.62/1944, which is repealed by the Federal Courts of Sharia Consolidation Proclamation No.188/1999.

[3] All dates in this summary are in Ethiopian Calendar.

state court had nothing to do with the present Case and was closed by the time the applicants filed the present Case.

E) On Hamle 5, 1992 the Naiba Court in Addis Ababa passed a Judgment on the merits of the Case and ordered the defendants to handover the plaintiffs' share of their grandfather's house.

F) The defendants appealed to the Federal High Court of Sharia over the Judgment of the Naiba Court. In their appeal the defendants stated that the Naiba Court has erroneously passed its verdict on the merits of the Case even though they clearly notified the Court that they did not accept its jurisdiction on the basis of Article 34(5) of the FDRE Constitution. In their response to the appeal, the respondents(the initial plaintiffs) agreed that Article 34(5) of the FDRE Constitution requires consent but argued that the consent of one party was enough for the Court to assume jurisdiction.

G) On Megabit 17, 1995, the Federal High Court of Sharia upheld the Judgment of the Naiba Court. In its ruling, the Federal High Court of Sharia stated that Article 34(5) of the FDRE Constitution needed enabling law to be applied by Courts of Sharia. According the Court, the present Case was filed before the promulgation of the Federal Courts of Sharia Consolidation Proclamation No.188/1999, which makes the later inapplicable to the Case.

H) Subsequently the defendants submitted their second appeal to the Federal Supreme Court of Sharia, which rejected the appeal as inadmissible on Ginbot 28, 1995.

1.2 The Ruling of the Federal Supreme Court Cassation Division

On Sene 1, 1995, the defendants filed their memorandum of appeal to the Federal Supreme Court Cassation Division contending that the decisions of the Courts of Sharia contain fundamental error of law because the Courts have ignored their preliminary objection against the jurisdiction of the Naiba Court of Sharia. In its ruling of Hamle 25, 1995, the Federal Supreme Court Cassation Division rejected the submission of the appellants stating that there was no fundamental error of law committed by the Courts of Sharia.[4]

[4] See Annex I of this Comment for the ruling of the Federal Supreme Court.

1.3 The Petition to the Council of Constitutional Inquiry (CCI)

A) On Tikemt 2, 1996 the Ethiopian Women Lawyers Association (EWLA) filed a petition to the Constitutional Inquiry Council (CCI) on behalf of W/o Kedija Bashir, a member of EWLA and one of the initial defendants in the present Case. EWLA based its petition on Articles 17, 20(2) and 23 of Proclamation 250/93, Article 4(1) of Proclamation 251/93 and Articles 9(1), 13 and 83 of the FDRE Constitution.

B) In its petition, EWLA argued that the decisions of the Federal Supreme Court Cassation Division and the Courts of Sharia have violated Article 34(5) the FDRE Constitution, one of the basic provisions under the bill of rights section of the Constitution. EWLA outlined the following main arguments as basis for its petition to the CCI:

1) The decisions of all the Courts contradict Article 9(1), Article 13(2) of the FDRE Constitution.

2) Article 34(5) of the FDRE Constitution shall be interpreted in light of Articles 14 and 18 of the International Covenant on Civil and Political Rights.

3) Under Article 34(5) of the FDRE Constitution religious laws cannot be applied unless there is consent from all parties to a dispute.

4)The requirement of consent under Article 34(5) of the FDRE Constitution should be observed by religious courts without a mandatory reference to subsidiary laws. Moreover, in this particular Case the Federal Courts of Sharia Consolidation Proclamation No.188/1999 had entered into force at the time of the commencement of the Case at the Naiba Court.

1.4 The Recommendation of the CCI

In its Tahsas 1, 1996 deliberation, the CCI found that the decision of the Naiba Court has violated Article 34 (5) of the FDRE Constitution and recommended the nullification of the decision on the basis of Article 9(1) of the FDRE Constitution.[5] The CCI forwarded the following main reasons as a basis for its recommendation:

A) The CCI noted that the Naiba Court, the High Court of Sharia and the Supreme Court of Sharia have all admitted that both the FDRE Constitution and Proclamation

[5] See Annex II of this Comment.

No.188/92 require consent of the parties to adjudicate cases on the basis of religious law.

B) Nonetheless, the Courts of Sharia rejected the defendants' preliminary objection against the jurisdiction of the Naiba Court claiming that the Case has been filed before the entry into force of Proclamation 188/92. However, the CCI noted that Proclamation No.188/92 has entered into force on Hidar 27, 1992, well ahead of the preliminary objection against the jurisdiction of the Naiba Court by the defendants on Tahsas 14, 1992. Thus, the application of Proclamation 188/92 could not be taken as retroactive application of the law.

C) The CCI reasoned that even if the application of Proclamation 188/92 was overlooked, the FDRE Constitution has entered into force when the initial plaintiffs in this Case filed their petition to the Naiba Court. The CCI further pointed out that the mere fact that Article 34(5) of the FDRE Constitution refers to enabling law does not alter the fundamental essence of the principle that affirms in its own right that no one shall be judged on the basis of religious or cultural law without his/her consent.

1.5. The Decision of the House of Federation

The House of Federation heard the legal opinion given by its Standing Committee on Constitutional and Regional Affairs on the recommendation of the CCI on Ginbot 7, 1996. On the same day, the House discussed and approved the recommendation of the CCI with one abstention.[6]

2. The Legal Basis and Effect of the Power of Cassation of the Federal Supreme Court over Courts of Sharia

In the *Kedija Bashir et al.* Case, the Federal Supreme Court Cassation Division has passed a ruling that rejected the appellants' petition stating that there was no fundamental error of law committed by the Federal Courts of Sharia.[7] However, the

[6] See Annex III of this Comment.

[7] The ruling on the absence of fundamental error of law by the Federal Supreme Court Cassation Division contrasts with two recent cases reviewed by the Federal Supreme Court Cassation Division. In W/o Salia Ibrahim et al. vs. Haji Seman Issa (Cassation File No. 31906) and W/o Shamse Yenus vs. W/o Nuria Mame (Cassation File No.38745), the Federal Supreme Court Cassation Division found that the violation of the right of individuals to choose between state courts and Courts of Sharia in getting divorce and the trespass of their jurisdiction by the Courts of Sharia constitute fundamental error of law.

Federal Supreme Court did not provide the basis for its jurisdiction to review the decisions of the Courts of Sharia. The FDRE Constitution proclaims that the 'Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law'. [8] The Federal Courts Proclamation [9], the implementing law on the jurisdiction of the Federal Supreme Court, does not provide a power of cassation review of decisions of Courts of Sharia by the Federal Supreme Court.

Moreover, there is no reference to the possibility of cassation review of the decisions of Courts of Sharia by the Federal Supreme Court under the Federal Courts of Sharia Consolidation Proclamation. To the contrary, the Proclamation provides that Federal Courts of Sharia are given exclusive jurisdiction over a case brought before them. Once a case is brought before a Court of Sharia and consent is clearly given by the parties, such a case cannot be transferred to a regular court. [10] Thus, except the general and controversial phrase 'over any final court decision' under the FDRE Constitution, there is no clear legal basis for the Federal Supreme Court to exercise cassation power over decisions of Courts of Sharia. [11]

Even if one were to establish a power of cassation for the Federal Supreme Court over the decisions of Courts of Sharia, such mandate gives rise to range of issues. The first relates to the fact that the Courts of Sharia are non-state religious justice institutions. The Courts of Sharia are established on the basis of the constitutional recognition of the application of religious laws in personal and family cases. [12] The rationale for such recognition is the accommodation of diversity in establishing justice systems that are different in their jurisdiction and structure from the regular

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[8] Proclamation No.1/ 1995, Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), 21 August 1995, Article 80(3) (a).

[9] See Federal Courts Proclamation 25/1996,as amended by Federal Courts (Amendment) Proclamation 138/1998, Federal Courts (Amendment) Proclamation 254/2001, Federal Courts (Amendment) Proclamation 321/2003, and Federal Courts Proclamation (Re-amendment) Proclamation 454/2005 (Federal Courts Proclamation).

[10] Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 5(4).

[11] For extensive analysis of the debate, see Muradu Abdo , "Review of Decisions of State Courts over State Matter by the Federal Supreme Court", Mizan Law Review, Vol. 1, No.1, June 2007, pp 60-74.

[12] FDRE Constitution, Article 34(5) and Article 78(5). Article 34 (5) of the FDRE Constitution provides the principle: 'This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.' For the Common Jurisdiction of the Federal Courts of Sharia, see the Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 4(1) (a), (b), (c).

state courts. Thus, cassation review of the decisions of Courts of Sharia by the Federal Supreme Court amounts to a review of a separate and parallel non-state justice system by a state justice system. Also, the cassation review of the decisions of Federal Courts of Sharia by the Federal Supreme Court adds to the unwarranted powers of the Federal Supreme Court over the Federal Courts of Sharia.[13]

The second problem relates to the applicable substantive law by the Courts of Sharia. Even though the Courts of Sharia are obliged to apply the civil procedure laws promulgated by the state[14], the substantive law applied by the Courts in the adjudication of cases is Islamic law.[15] The FDRE Constitution recognizes the application of Islamic law by the Courts of Sharia. The Federal Supreme Court does not have the legal mandate and capacity to review the application of Islamic law. The only comparable instance that may justify the review of the application of Islamic law by the Courts of Sharia would be the protection of constitutional rights, which is not the mandate of the Federal Supreme Court.[16]Limiting the scope of the cassation review to the interpretation and application of state procedural laws applied by Courts of Sharia may not be a straightforward solution since such review may end up in providing unintended interpretation of substantive Islamic law.

The third issue relates to the binding interpretation of law that is rendered by Federal Supreme Court Cassation Division. Introducing the doctrine of *stare decisis*, Proclamation 454/2005 provides that decisions of the Federal Supreme Court Cassation Division on the interpretation of laws are binding on federal as well as state courts at all levels when rendered by not less than five judges.[17]Proclamation 454/2005 does not stipulate that Courts of Sharia are to be bound by the interpretation of law rendered by the Federal Supreme Court Cassation Division.

In practice, the Federal Supreme Court Cassation Division has rendered binding interpretation of law at least in two Cases that originated in the Federal Courts of Sharia and the Oromia Courts of Sharia.[18]Nonetheless, the idea of maintaining a

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[13] See Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 17(3), Article 18, Article 20(3) & (4).
[14] Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 6(2).
[15] Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 6(1).
[16] See section 4.2 below on the constitutional review of decisions of Courts of Sharia.
[17] See Federal Courts Proclamation Re-amendment Proclamation 454/2005, Article 2(1).
[18] See W/o Salia Ibrahim et al. vs. Haji Seman Issa (Cassation File No. 31906) and W/o Shamse Yenus vs. W/o Nuria Mame (Cassation File No.38745) in Federal Supreme Court Cassation Division Decisions, Volume 9.

uniform interpretation of law[19] through binding decisions from the Federal Supreme Court Cassation Division is contrary to the recognition of Courts of Sharia as institutions that apply a different set of rules on the basis of their own method of interpretation and reasoning.

In this regard it is worth noting that the Federal Supreme Court of Sharia is not endowed with the power of cassation review, which might have been used to maintain uniform interpretation of substantive and procedural laws within the Courts of Sharia.There is an ad-hoc cassation hearing in the Federal Supreme Court of Sharia when there is basic difference between the divisions of the Federal Supreme Court of Sharia in the interpretation of Islamic law.[20] Such oversight does not extend to the differences of interpretation that may occur in the First Instance and High Courts of Sharia. Moreover, the review mandate does not cover the differences in the interpretation of state procedural laws applied by the Courts of Sharia.[21]

3. The Constitutional Review of the Decision of Courts of Sharia

3.1 The Legal Basis for Constitutional Review

As outlined under section 1.4 above, EWLA's petition to the CCI states that the decisions of the Federal Supreme Court Cassation Division and the Courts of Sharia have violated Article 34(5) the FDRE Constitution. The CCI is an organ established by the FDRE Constitution with the power to examine applications that require constitutional interpretation and submit its recommendation to the House of

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[19] See Muradu Abdo , "Review of Decisions of State Courts over State Matter by the Federal Supreme Court", Mizan Law Review, Vol. 1, No.1, June 2007, p. 70. See also 'Message from the President of the Federal Supreme Court', Federal Supreme Court Cassation Division Decisions, Volume 9.

[20] Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 20 (6) states: 'He [Chief Kadi], on his own initiative, or suggestions made to him by the divisions of the court or upon petitions made by parties to a dispute, direct cases involving a basic difference between divisions of the Federal Supreme Court of Sharia, as regards interpretation of Islamic law, to be heard by ta division composed of not less than five Kadis'.

[21] Strangely enough, the criteria for appointment of *Kadis* of the Federal Courts of Sharia do not include knowledge of state procedural laws even though the Federal Courts of Sharia are obliged to apply state procedural laws.The Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 16 provides the following criteria for the appointment of Kadis: Any Ethiopian who: 1) is trained in Islamic law in Islamic Educational Institutions or has acquired adequate experience and knowledge in Islamic law; 2) is reputed for his diligence and good conduct; 3) consents to assume the position of Kadi; and 4) is more than twenty five years of age.

Federation for final decision.[22] The Council of Constitutional Inquiry Proclamation specifies that the CCI has the power to investigate a petition that alleges that 'any law or decision given by any *government organ* or official' is contrary to the provisions of the FDRE Constitution.[23] Article 2(6) of the English version of the Council of Constitutional Inquiry Proclamation defines 'state organ' rather than 'government organ'. Nonetheless, the Amharic version of Article 2(6) is consistent with Article 17 (2) when it refers to "Yemengist Akal" to mean Federal and State legislative, executive and judicial organs and other organs that are given judicial power. [24]

In *Kedija Bashir et al.* Case, the CCI investigated the petition for constitutional review of the decisions of the Courts of Sharia and the Federal Supreme Court Cassation Division, all judicial organs that are listed under Article 2(6) of the Council of Constitutional Inquiry Proclamation. Thus, *lex lata* it is clear that the CCI and the House of Federation have the power to review the decisions of the Federal Supreme Court Cassation Division and the Courts of Sharia.[25] What is not clear, however, is whether the CCI and the House of Federation can review the final judgment of the Courts of Sharia that was passed on the basis of Islamic law. The next section dwells on the issue.

3.2 The Constitutional Review of the Judgments of Courts of Sharia

We can identify four instances where violation of the FDRE Constitution may occur in the operation of the Courts of Sharia:

(1) Where there is no consent of all the parties to a dispute;
(2) When the subject matter of a case does not fall within the jurisdiction of the Courts of Sharia;
(3) When there is error in the application of the state procedural laws;
(4) When the final judgment of a case contradicts the FDRE Constitution.

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[22] FDRE Constitution, Article 62(1), Article 82(1); Council of Constitutional Inquiry Proclamation 250/2001, Article17 (2), Article 19.
[23] Council of Constitutional Inquiry Proclamation 250/2001, Article17 (2). Emphasis added.
[24] See Council of Constitutional Inquiry Proclamation 250/2001, Article 2(6) English and Amharic versions.
[25] The power of the House of Federation to review the decisions of courts is controversial. See for instance Abebe Mulatu, "Issues of Constitutional Interpretation under the 1995 Federal Democratic Republic of Ethiopia Constitution: the Case of Kedija Beshir et al. vs. Ansha Ahmed et al.", Wonber-Alemayehu Haile Memorial Foundation's Periodical, 8th Half Year , May 2011, pp.46-54.

Constitutional review in the first three instances listed above is not controversial. This is because consent, jurisdiction and procedural laws are all part of the state made laws. The CCI recommendation and the decision of the House of Federation in the *Kedija Bashir et al.* Case is an example of constitutional review in the first instance.

The constitutional review at the fourth instance i.e. the review of the final judgment of the Courts of Sharia is controversial due to the application of Islamic law in dealing with cases before the Courts. For instance, Mohamed Abdo states that "if parties to a dispute voluntarily take their case to a sharia court, the outcome should be exempted from constitutional standards" and further argues that "…subjecting final decision of sharia courts to the supremacy clause and the human rights norms of the constitution goes against the very essence of legal pluralism advocated by the Constitution."[26] Even though it is true that the FDRE Constitution protects legal and judicial pluralism, such protection is not a carte blanche especially vis-à-vis the recognition and protection of human rights under the FDRE Constitution. In fact the FDRE Constitution clearly proclaims that the obligation of the state relates to "the duty to support, on the basis of equality, the growth and enrichment of cultures and traditions *that are compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution*."[27] Moreover, the FDRE Constitution imposes a specific duty on all legislative, executive and judicial organs all over the country to respect and enforce the provisions of the bill of rights under the Constitution.[28]Thus, the legal and judicial plurality recognized under the FDRE Constitution is subject to the supremacy clause of the Constitution and the protection of the rights recognized under the Constitution.[29]

Otherwise those who chose to utilize religious laws and religious justice systems on the basis of their religious belief will be accorded less or no protection of their constitutional rights.[30] Moreover, one should not assume that all judgments of the

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[26] Mohamed Abdo, "Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia", Mizan Law Review Volume 5(1), 2011, p.100.

[27] Article 91 of the FDRE Constitution, emphasis added.

[28] Article 13(1) FDRE Constitution

[29] Article 9(1) of the FDRE Constitution.

[30] It is thus unfortunate and hasty for Moahmed Abdo to make the following statement: "If final decisions rendered by the Sharia courts are reviewed by the House of Federation and finally declared unconstitutional, this may be treated by Muslim communities as an onslaught on their religious values

Courts of Sharia would violate the FDRE Constitution. Also, Islamic jurisprudence should be taken as an evolving set of rules that may benefit from in-depth constitutional review in the context of latest notions and interpretations of rights.[31]In this connection, it is worth noting that the CCI needs to develop a capacity to deal with applications that may involve the review of final judgments of Courts of Sharia.

4. Conclusion

There is no clear legal basis for the review power of the Federal Supreme Court Cassation Division over decisions of Courts of Sharia. Even if one is to assume the existence of such mandate of the Federal Supreme Court, it is contrary to the recognition and existence of the Courts of Sharia as part of a separate and autonomous justice system that has a parallel existence with the regular justice system. As such, the idea of maintaining uniform interpretation of laws through the decisions of the Federal Supreme Court Cassation Division does not apply to Courts of Sharia. In this regard, it is not clear why the Federal Supreme Court of Sharia is not endowed with the power of cassation review over substantive and procedural laws, which may eventually lead to a uniform application of the laws within the Sharia justice system.

Unlike the cassation review, the constitutional review of the *Kedija Bashir et al.* Case has a clear legal basis. Constitutional review of the cases at the Courts of Sharia can happen at four main instances: in relation to consent of parties; in relation to the jurisdiction of the Courts; in relation to the interpretation and application of state procedural laws; and in relation to the judgment of a case. The constitutional review of the first three instances is not controversial since all relate to the obligation of Courts of Sharia set under state laws. The fourth instance of constitutional review of decisions of Courts of Sharia is debatable since the Courts apply Islamic law to pass the judgment. This writer is of the opinion that the supremacy clause of the FDRE Constitution should be observed against judgments of Courts of Sharia that are based on Islamic law. Three main reasons have been forwarded: 1) The recognition of judicial and legal plurality is a qualified recognition that should

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and identity". See Mohamed Abdo, "Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia", Mizan Law Review Volume 5(1), 2011, p.100.

[31] On the evolving nature of Islamic jurisprudence, see Joseph Schacht, An Introduction to Islamic Law, Oxford University Press, pp.69-75; See also Council of Constitutional Inquiry Proclamation 250/2001, Article 20(2) on the principle of interpretation in cases that involve the human rights protected under the FDRE Constitution.

operate within the framework of the rights protected under the FDRE Constitution; 2) Those who agree to the jurisdiction of the Courts of Sharia deserve equal protection of their constitutional rights; and 3) As an evolving system, Islamic jurisprudence benefits from an in-depth constitutional review process in the context of the developing notions and interpretations of the rights protected under the FDRE Constitution.

ANNEX I

የኢትዮጵያ ፌደራላዊ ዴሞክራሲያዊ ሪፐብሊክ

ፌደራል ጠቅላይ ፍ/ቤት

የሰበር መ/ቁ 12400
ሐምሌ 25 ቀን 1995

ዳኞች፡- 1. አቶ ከማል በድሪ

2. አቶ ፍስሐ ወርቅነህ

3. አቶ ዓብዱልቃድር መሐመድ

አመልካች፡- እነ ወ/ሮ ከድጃ በሺር /4 ሰዎች/ ጠበቃቸው ወ/ሮ ማሪያ ሙኒር ቀረበች፡፡

መልስ ሰጭ፡- እነ ወ/ሮ አንሻ አህመድ /4 ሰዎች / አልተጠሩም፡፡

ለዚህ ችሎት ሰኔ 1 ቀን 1995 በተጻፈ አቤቱታ በጠ/ሸሪአ ፍ/ቤት በመ/ቁ 7/95 በግንቦት 28 ቀን 1995 የተሰጠው ውሳኔ መሰረታዊ የሕግ ስሕተት አለበት በማለት ጉዳዩ በሰበር እንዲታይ ማመልከቻ ቀርቧል፡፡ አንድ መዝገብ ለሰበር ችሎት ሊቀርብ የሚችለው ቅሬታ የቀረበበት ውሣኔ መሠረታዊ የሕግ ስሕተት የተገኘበት እንደሆነ ብቻ መሆኑን አዋጅ ቁ. 25/1988 አንቀጽ 22/1/ ይደነግጋል፡፡ በዚህ መሠረት ችሎቱ አቤቱታውን መነሻ በማድረግ የሕግ ስሕተት ተፈጽሞባቸዋል የተባሉትን ውሣኔዎች አግባብ ካለው ሕግ እና በየፍርድ ቤቱ ከተደረጉ ክርክሮች ጋር መርምሯል፡፡

ትእዛዝ

በቀረበው ጉዳይ መሠረታዊ የሕግ ስሕተት ተሠርቷል ለማለት አልተቻለም፡፡ በመሆኑም መዝገቡ ለሰበር ችሎት አይቀርብም ብለናል፡፡ ይጻፍ፡፡

ተጨማሪ ትእዛዝ

በዚህ ችሎት ሐምሌ 2/95 የተሰጠው የእግድ ትእዛዝ ተነስቷል፡፡ ይጻፍ፡፡

የማይነበብ የሦስት ዳኞች ፊርማ አለበት፡፡

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ANNEX 11

በስብሰባው ላይ የተገኙ የሕገ መንግሥት ጉዳዮች

አጣሪ ጉባኤ አባላት ስብሰባ

1/04/1996

	በስብሰባው ላይ የተገኙ አባላት	
1	አቶ ከማል በድሪ	
2	አቶ መንበረፀሐይ ታደሰ	
3	አቶ ጌታሁን ካሳ	
4	አቶ በየነ ቢልቱ	
5	አቶ ሙሉጌታ አያሌው	
6	ዶ/ር ፋሲል ናሆም	
7	አቶ ደግፌ ቡላ	
8	አቶ ሐሰን ኢብራሂም	
9	አቶ አባይ ወልዱ	
10	ዶ/ር ደምሴ ታደሰ	

አቤቱታ አቅራቢ - ስለ ወ/ሮ ከድጃ በሽር የሕግ ባለሙያ ሴቶች ማኅበር

ይህ ጉዳይ ለዚህ ጉባዔ ሊቀርብ የቻለው የሕግ ባለሙያ ሴቶች ማኅበር ጥቅምት 2 ቀን 1996 በተጻፈ ማመልከቻ ባቀረበው ጥያቄ መነሻነት ነው፡፡ ለማመልከቻው ምክንያት የሆነው በናኢባ ፍርድ ቤት በሸሪያ ሕግ መሠረት የቀረበው ክስ ነው፡፡ ክሱ የቀረበው ህዳር 14 ቀን 1992 ነው፡፡ የአሁኗ አመልካችን ጨምሮ በጉዳዩ ላይ ተከሳሽ የነበሩት ሰዎች በክሱ ላይ መልሳቸውን እንዲያቀርቡ ሲጠየቁ ታህሣሥ 14 ቀን 1992 በተጻፈ ማመልከቻቸው የሕገ መንግሥቱን አንቀጽ 34/5/ በመጥቀስ በሸሪዓ ሕግና ፍ/ቤት መዳኘት የማይፈልጉ መሆናቸውን ገለጹ፡፡ ለዚህ ምክንያት በማድረግ የጠቀሱት ጉዳዩ የቀረበው ሕገ መንግሥቱ ከፀደቀ በኋላ መሆኑን በመግለጽ ጭምር ነው፡፡ ጉዳዩን የያዘው የ3ኛ ናዒባ ፍርድ ቤት ከአመልካች የቀረበውን መቃወሚያ ባለመቀበል ጉዳዩን ማየት ቀጥሎ ውሣኔ ሰጠ፡፡ ጉዳዩ በይግባኝና በሰበር ለፌደራል የሸሪዓ ከፍተኛ ፍ/ቤት፣ ለጠቅላይ ሸሪዓ ፍ/ቤት፣ ለፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት የቀረበ ቢሆንም ሁሉም ፍርድ ቤቶች የቀረበላቸውን አቤቱታ ውድቅ በማድረጋቸው የ3ኛ ናዒባ ውሣኔ ፀንቷል፡፡

ለዚህ ጉባዔ አቤቱታ የቀረበው በሁሉም ፍርድ ቤቶች የተሰጠው ውሣኔ በሕገ መንግስቱ ምዕራፍ 3 ሥር ከተዘረዘሩት መብቶች አንዱ የሆነውን የመዳኘት መብት የሚመለከት በመሆኑ፣ ጉዳዩ የቀረበላቸው ፍ/ቤቶች ለሕገ መንግሥቱ አንቀጽ 34/5/ የሰጡት ትርጉምም ሆነ የአተረጓጎም ስልት ከሕገ መንግሥቱ ጋር የሚቃረን

በመሆኑና ከሕገ መንግሥቱ ጋር የሚቃረን የፍ/ቤት ውሣኔ ሊፈጸም ስለማይችል ጉባዔው ጉዳዩን መርምሮ ለፌዴሬሽን ምክር ቤት አስተያየት ያቅርብልን በማለት ነው፡፡

ጉባዔው የሕገ መንግሥት ትርጉም ጥያቄ የተነሣበትን ፍሬነገር፣ ለሁኔታው አግባብነት ያለውን የሕግ ማዕቀፍ በየደረጃው ከተሰጡ ውሣኔዎች ጋር በማያያዝ ተመልክቷል፡፡

በፍሬ ነገር ደረጃ ለናኢባ 3ኛ ፍርድ ቤት የቀረበው ክስ የተመሠረተው ህዳር 14 ቀን 1992 ቢሆንም ተከሣሾች በዚህ ጉዳይ በሸሪዓ ሕግና ፍ/ቤት ለመዳኘት ፈቃደኛ አለመሆናቸውን የገለጹት ታህሳስ 14 ቀን 1992 መሆኑን ተገንዝበናል፡፡ በሌላ በኩል የፌደራል ሸሪዓ ፍርድ ቤቶችን ለማጠናከር የወጣው አዋጅ ቁጥር 188/92 ተፈጻሚ የሆነው ከህዳር 27/92 ጀምሮ እንደሆነም ተገንዝበናል፡፡ ስለዚህ አመልካቿ ፈቃደኛ አለመሆናቸውን በገለጹበት ወቅት ይኸው አዋጅ ተፈጻሚ ነበር፡፡

የሕገ መንግሥቱ አንቀጽ 34/5 ሕገ መንግሥቱ «የግልና የቤተሰብ ሕግን በተመለከተ በተከራካሪዎች ፈቃድ በሃይማኖታቸው ወይም በባህል ሕጎች መሠረት መዳኘትን አይከለክልም» በማለት ይደነግጋል፡፡ ዝርዝሩ በሕግ እንደሚወሰንም ይገልጻል፡፡ ይህ የሕገ መንግሥት ድንጋጌ የሃይማኖትና የባህል ሕጎች ተፈጻሚነት በተከራካሪ ወገኖች ፈቃድ ላይ የተመሠረተ እንዲሆን መሠረታዊውን መርሕ አስቀምጧል፡፡ ዝርዝር ሕግ እንደሚወጣ ቢያመለክትም ዝርዝር ሕጉ የመርሑን አፈጻጸም የሚመለከት ከመሆን አልፎ የመርሑን መሠረታዊ ይዘት ይቀይራል ተብሎ የሚገመት አይደለም፡፡ የዚህ መሠረታዊ ይዘት ደግሞ ማንም ያለፈቃዱ በሃይማኖት ወይም በባህል ሕግ አይዳኝም የሚለው ነው፡፡ በመርሕ ደረጃ የዳኝነት ሥልጣን በፌደራል ወይም በክልል የተቋቋሙ መደበኛ ፍርድ ቤቶች ወይም «በሕግ ዳኝነት የተሰጣቸው ሥልጣን» አካላት ነው፡፡ በሕግ የተቋቋሙት የእነዚህ ተቋማት የዳኝነት ሥልጣን አስገዳጅ /Compulsory jurisdiction/ ነው፡፡ በመሆኑም የሃይማኖት ወይም የባህል ተቋማት የዳኝነት ሥልጣን ከዚህ የተለየ ነው፡፡ ሥልጣኑ በተከራካሪ ወገን ፈቃድ ላይ የተመሠረተ ነው፡፡ ይህ ፈቃድ ከሌለ የዳኝነት ሥልጣን አይኖርም፡፡

ሕገ መንግሥቱን ተከትሎ የወጣው አዋጅ ቁ.188/92 አንቀጽ 4/2/ በተመሣሣይ ሁኔታ «በሕገ መንግሥቱ አንቀጽ 34 ንዑስ አንቀጽ 5 በተገለጸው መሠረት ከፍ ብሎ በተገለጹት ጉዳዮች ላይ ፍ/ቤቶች የዳኝነት ሥልጣን የሚኖራቸው ተከራካሪ ወገኖች በእስልምናው ኃይማኖት ሥርዓት ለመዳኘት ግልጽ በሆነ መንገድ በፈቃዳቸው መርጠው የቀረቡ ከሆነ ብቻ ይሆናል» በማለት ይደነግጋል፡፡ ይህ ድንጋጌ ሕገ መንግሥቱ ያሰፈረውን ግልጽ መርሕ አስፈላጊነት ይበልጥ አስምሮበታል፡፡ የሃይማኖት ፍርድ ቤቶች የዳኝነት ሥልጣን ከመተግበራቸው በፊት ባለጉዳዮች ፈቃደኛ መሆናቸውን ማረጋገጥ እንዳለበት በግልጽ ሰፍሯል፡፡ ፈቃደኛ መሆናቸውን ማረጋገጥ የዳኝነት አካላት ኃላፊነት ነው፡፡

በመግቢያው እንደተገለጸው ውሣኔውን የሰጠው የናዒባ ፍርድ ቤትም ሆነ ጉዳዩን በአቤቱታ ቀርቦላቸው የተመለከቱት ፍርድ ቤቶች የሃይማኖት ተቋማት የዳኝነት ሥልጣን በፈቃድ ላይ መመሥረት እንዳለበት በሕገ መንግሥቱም በአዋጅም የሰፈረ መሆኑን ይቀበላሉ፡፡ የአመልካችን ማመልከቻ ውድቅ ያደረጉት አዋጁ ክሱ ሲጀመር ሥራ ላይ ስላልነበረ በጉዳዩ ላይ ተፈጻሚ ማድረግ አይቻልም በሚል ምክንያት ነው፡፡

ሆኖም እላይ በመግቢያው ላይ እንደተጠቀሰው ለጉዳዩ አግባብነት ያለው አዋጅ ተፈጻሚ የሆነው ከህዳር 27 ቀን 1992 ጀምሮ ሲሆን ተከሳሾች ፈቃደኛ አለመሆናቸውን የገለጹት አዋጁ ተፈጻሚ ከሆነ በኋላ ታህሣሥ 14 ቀን 1992 ነው፡፡ ፍርድ ቤቶች አዋጁ ወደኋላ ተመልሶ መሥራት የለበትም የሚለው መደምደሚያ ላይ የደረሱት ክሱ የተመሠረተበትን ቀን ህዳር 14/1992 መሠረት በማድረግ ነው፡፡

ከላይ እንደተገለፀው ሕገ መንግሥቱም አዋጁም ተከራካሪዎቸ ፈቃደኛ ካልሆኑ በሃይማኖች ተቋማት እንደማይዳኙ ይገልጻሉ፡፡ ተከራካሪዎች ፈቃደኝነታቸውን መግለጽ የሚችሉት እንደነገሩ ሁኔታ ክስ በመሰረቱበት ወይም ለክሱ መልስ እንዲሰጡ በተጠየቁበት ጊዜ ነው፡፡ ከሳሽ የሆነው ወገን በሃይማኖት ተቋማት ክስ በመመሥረቱ ምክንያት ፈቃደኝነቱን እንደገለጸ ሊቆጠር ይችላል፡፡ ከሣሽ ፈቃደኛ መሆኑ ብቻውን በቂ ባለመሆኑ ተከሣሹም ፈቃደኛ መሆኑ መረጋገጥ አለበት፡፡ ይህ ደግሞ ሊሆን የሚችለው በተመሠረተበት ክስ መልስ እንዲሰጥ ቀጠሮ በተያዘበት ቀን ነው፡፡ በመሆኑም የአዋጁ ተፈጻሚነት መታየት የሚገባው ከተከሳሽ /የአሁኑ አመልካች/ መልስ የቀረበበትን ቀን መሠረት በማድረግ እንጂ ክሱ የቀረበበትን ቀን ግምት ውስጥ በማስገባት መሆን አልነበረበትም፡፡ አመልካች መልሱ በሚቀርብበት ቀን ደግሞ ፈቃደኛ መሆንን የግድ የሚል አዋጅ ተፈጻሚ ነበር፡፡ የናዒባ ፍርድ ቤትም ፈቃደኛ አለመሆናቸውን ሲያውቅ ክሱን መዝጋት ነበረበት፡፡ ስለዚህ ይህን ጉዳይ በአዋጁ መሠረት ማስተናገድ የሕጉ ወደኋላ ተመልሶ መስራትን የሚያመለክት አይደለም፡፡

ይህ እንኳን ቢታለፍ ዞሮ ዞሮ ፈቃደኛ መሆን የሕገ መንግሥቱ አንቀጽ 34/5/ አቢይና ሊታለፍ የማይችል መርሕ ነው፡፡ ዝርዝር አዋጁ እንኳን ባይወጣ ሕገ መንግሥቱ መተግበር ይገባዋል፡፡ ክስ ሲመሰረትም አመልካች ፈቃደኛ አለመሆናቸውን ሲገልጹ ደግሞ ሕገ መንግስቱ ሥራ ላይ ውሎ ነበር፡፡ ስለዚህ በዚህ ምክንያት ብቻ እንኳን የናዒባ ፍርድ ቤት የአመልካችን ፈቃደኛ አለመሆን በመገንዘብ ክሱን መዝጋት ይጠበቅበት ነበር፡፡

ናዒባ ፍርድ ቤቱ የተከተለው አካሄድ በሕገ መንግሥቱ የሰፈረውን ግልጽ ድንጋጌ የሚጥስ ነው፡፡ በመሆኑም በሕገ መንግስቱ አንቀጽ 9/1/ መሠረት ተፈጻሚነት ሊኖረው አይገባም ብሎ ውሳኔውን እንዲሽር ይህን የውሣኔ ሃሣብ ለፌዴሬሽን ምክር ቤት አቅርበናል፡፡

(የአሥር ሰዎች ፊርማ አለበት)

ANNEX III

የፌዴሬሽን ምክር ቤት

በአመልካች ወ/ሮ ከድጃ በሽር የሕገ መንግሥታዊ ሙብት መከበር

አቤቱታ ላይ በፌዴሬሽን ም/ቤት የተሰጠ ውሣኔ

የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ 2ኛው የፌዴሬሽን ምክር ቤት 4ኛ ዓመት የሥራ ዘመን ሁለተኛ መደበኛ ስብሰባ ግንቦት 7 ቀን 1996 ቀጥሎ የዋለ ሲሆን ክቡር አፈ ጉባኤው ቀጣዩ አጀንዳ ከሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ በቀረበው የሕገ መንግሥት ትርጉም ጉዳይ ላይ ቤቱ ተመልክቶ ውሳኔ መስጠት ስለሚሆን የውሳኔ ሀሳቡ አስቀድሞ የተሰራጨና የተነበበ መሆኑ ታስቦ የሕገ መንግሥትና ክልል ጉዳይ ቋሚ ኮሚቴ ስለ ጉዳዩ ማብራሪያ እንዲሰጥበት ጠይቀዋል፡፡

በዚህም ክቡር አቶ ዳንኤል ደምሴ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባዔ ያቀረበውን የውሳኔ ሀሳብ የሕገ መንግሥትና ክልል ጉዳይ ቋሚ ኮሚቴ የተመለከታቸውን ፍሬ ሃሳቦች የወ/ሮ ከድጃ በሽር ጉዳይን በሚመለከት ከሦስት ተከሳሾች ጋር ለኢትዮጵያ የሕግ ባለሙያ ሴቶች ማኅበር ውክልና በሰጡት መሠረት የባለ ጉዳይዋን ክስ ለሕገ መንግሥት ጉዳዮች አጣሪ ጉባዔ አቅርበው መከራከራቸውን ጠቁመው የምክር ቤቱ ዋና ፍሬ ሀሳብ የሚሆነው በሕገ መንግሥት ትርጉም ጉዳይ እንጂ በአቤቱታ አቅራቢና በሌሎች ጉዳዮች ላይ ትኩረት ማድረግ ተገቢ ባለመሆኑ ሕገ መንግሥቱን መሠረት በማድረግ ጉዳያቸው በሸሪያ ፍርድ ቤት በሚታይበት ሁኔታ ላይ ተከሳሾች አዋጅ ቁጥር 250/93/ አንቀጽ 17፣20፣23 እና 22 በአዋጅ ቁጥር 251/93 አንቀጽ 4/1/ የሕገ መንግሥቱን አንቀጽ 34/5/ በመጥቀስ በሸሪያ ሕግና ፍርድ ቤት መዳኘት እንደማይፈልጉ ጠቁመው የሕገ መንግሥቱን አንቀጽ 34/5/ "…. በተከራካሪዎች ፈቃድ በኃይማኖት ወይም በባህሎች ሕጎች መሠረት መዳኘትን አይከለክልም፡፡" የሚል ስለያዘ ይህንኑ መሠረት በማድረግ አግባብ አለመሆኑን ያቀረቡት መንግሥት በበኩሉ የሸሪያ ፍርድ ቤቶች የዳኝነት ሥልጣን የሚኖራቸው በእስልምናው ሃይማኖት ለመዳኘት በግልጽ በፍቃዳቸው መርጠው የቀረቡ እንደሆኑ ነው በሚል ስለተቀመጠ ጉዳዩ የቀረበለት የሸሪያ ፍርድ ቤት ውሳኔ ሰጥቶበት የጠቅላይ ሸሪያ ፍርድ ቤትም ይግባኝ ቀርቦለት ውሳኔውን ያፀደቀው መሆኑን አስታውሰዋል፡፡

አከለውም ጉዳዩ በሰበር ታይቶ እንዲለወጥ ለፌዴራሉ ጠቅላይ ፍርድ ቤት ቀርቦ አቤቱታው ተቀባይነት ማጣቱንና በሕገ መንግሥቱ አንቀጽ 9/1/ ድንጋጌ መሠረት ከሕገ መንግስቱ ጋር የሚቃረን ውሳኔ የተሰጠበት ሆኖ በመገኘቱ የሕገ መንግስት ጉዳዮች አጣሪ ጉባኤ የሰጠውን የውሳኔ ሀሳብ የሕገ መንግሥትና የክልል ጉዳይ ቋሚ ኮሚቴ የተመለከተውና ክርክሩ በቀረበበት ጊዜ የተጠቀሰው አዋጅ በሥራ ላይ ስለነበር ውሳኔ ሊሰጡ መቻላቸውን በሕገ መንግሥቱ አንቀጽ 34/5/ መሠረት ተከሳሾቹ የጠቀሱትን አንቀጽና መመሪያ በመቀበል መዳኘት ሲገባቸው የሕገ መንግሥቱ አንቀጽ 34/5/ ተፈጻሚነት ዝርዝር ሕግ ከወጣ በኋላ እንደሆነ ወደፊትም የሚወጣው ሕግ በሥራ ላይ ካልዋለ ተከሳሽ ተጠርቶ በሚቀርብበት ጊዜ በሥራ ላይ የዋለ ቢሆንም ለክርክሩ ተፈጻሚነት እንደማይኖረው አድርገው ለሕገ መንግሥቱ የተሳሳተ ትርጉም በመስጠታቸው ከዳኝነት ሥልጣናቸው የዘለለ በመሆኑ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ ከሥር ፍርድ ቤቶች ጀምሮ እስከ ላይኛው ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ድረስ የሄደበትና በጥልቀት የመረመረበት ሁኔታ ስለታየ በአዋጅ

ለፌዴሬሽን ምክር ቤት በተሰጠው ሥልጣን መሠረት ፍርድ ቤቶች የሰጡትን ውሳኔ ሕገ መንግሥቱን የሚቃረን በተለይ አንቀጽ 13 እና አመልካቾች ያቀረቡት የመቃወሚያ አንቀጽ 34/5/ የሚጥስ ሆኖ መገኘቱን የሚዘረዝሩበትን የውሳኔ ሀሳብ ስላቀረቡ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ የውሳኔ ሀሳብ ምክር ቤቱ ሊያፀድቀው ወይም ሊሽረው ስለሚችል ጉዳዩ መቅረቡን ገልጸዋል፡፡

ክቡር አቶ ፀጋዬ ማሞ በበኩላቸው የቀረበው የውሳኔ ሀሳብ አሳማኝና ብዙ የማያከራክር ስለሆነ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ ያቀረበው እውነትነት ያለው በልዩነት ያልቀረበ በጋራ የተወሰነና ከሴቶች መብት አንፃር ሲታይ ትርጉም ያለው ሥራ በመሆኑ በቀረበው መንገድ ቤቱ እንዲቀበለው ጠይቀዋል፡፡

በማስከተል ክቡር ዶ/ር ሰለሞን እንቋይ የሸሪያ ፍርድ ቤት የሰጠው ውሳኔ ሕገ መንግሥቱን የጣሰ ለመሆኑ በማያሻማ ሁኔታ በመቅረቡ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤን የውሳኔ ሀሣብ ተቀብለን ብናሳልፈው የተሻለ ነው ብለዋል፡፡

ክቡር አቶ ደሣለኝ ደመቀ በበኩላቸው ለናኢባ 3ኛ ፍርድ ቤት የቀረበው ክስ የተመሠረተው ህዳር 14 ቀን 1992 ቢሆንም ተከሣሾቹ በሸሪያ ሕግና ፍርድ ቤት ለመዳኘት ፈቃደኛ አለመሆናቸውን የገለጹት ታህሣሥ 14 ቀን 1992 መሆኑን ግንዛቤ ስላለ ተከሳሾቹ መጀመሪያ ወደ ክርክር ገብተው ወይም ክርክሩ ሳይጀመር ቆይቶ አንስማማም ብለው ጉዳዩን ያነሱ ከሆነ በአንድ ወር ጊዜ እንዴት ሊሆን እንደቻለ ተጨማሪ ማብራሪያ እንዲሰጥበት ጠይቀዋል፡፡

ከዚያም ክቡር አቶ ዳንኤል ደምሴ ለቀረበው ጥያቄ መልስ ሲሰጡ በክርክር ደረጃ በፍርድ ቤቶች ጉዳዩ የተጀመረው ህዳር 14 ቀን 1992 ሆኖ መቃወሚያና ክሱ በተመሳሳይ ጊዜ በሸሪያ ፍርድ ቤት ለመዳኘት ፈቃደኛ አለመሆናቸውንና በመደበኛ ፍርድ ቤት ቀደም ብሎ ፋይል በመከፈቱ የተከራከሩበት በታህሣሥ 14 ቀን 1992 መቃወሚያ መጻፋቸውን ገልጸው ህዳር 14 ቀን 1992 ደግሞ የሸሪያ ፍርድ ቤትን ለማጠናከር የወጣው አዋጅ ቀድሞ ሥራ ላይ የዋለና የተደነገገ ስለሆነ በሁለቱ ፍቃድ ካልተቀመጠ በስተቀር ፍቃዳቸውን ካልገለጹ ለመዳኘት አይገደዱም ብሎ ደንብ ወጥቶ የነበረው አዋጅ ወደፊት አሳልፈው ወደ ኋላ ተመልሶ አይሠራም በሚል ስሕተት መፈጸሙን ገልጸዋል፡፡

በመቀጠል ክቡር አቶ አታክልቲ ግደይ ከቀረበው ሀሣብና ጥያቄ እውነታ አንጻር ልዩነት ያላቸው ሆኖ ክሱ እንደመጣ መነሻ የሆነው ከናዒባ ፍርድ ቤት ጀምሮ እስከ ጠቅላይ ፍርድ ቤት ሰበር ድረስ እንዲታይ አቤቱታ ቀርቦበት የመጀመሪያው ውሳኔ እንዲጸድቅ የተገደዱበት ሁኔታን አውስተው ከሣሽ ሆነው የቀረቡት ሰዎች ህዳር 14 ቀን 1992 ማመልከቻቸውን ፍርድ ቤት ያቀረቡ ሲሆን ለፌዴሬሽን ምክር ቤት ሕገ መንግሥታዊ መብቴ ተጥሷል ብለው አቤቱታ ያቀረቡት ወ/ሮ ከድጃ በሸሪያ ፍርድ ቤት ተከሰው መጥሪያ ተሰጥቷቸው መልስ እንዲሰጡ የቀረቡት ታህሳሥ 14 ቀን 1992 ሲሆን የሸሪያ ፍርድ ቤት አዋጅ ደግሞ ህዳር 27 ቀን 1992 ወደ ተግባር ተለውጧል፡፡ የናዒባ ፍርድ ቤት ለቀረበው አቤቱታ ውሳኔ የሰጡበት ምክንያት የፌዴራል ሸሪያ ፍርድ ቤቶችን አቋም ለማጠናከር በወጣው አዋጅ ቁጥር 188/92 አንቀጽ 4 ንዑስ ቁጥር 2 ላይ "...ተከራካሪ ወገኖች በእስልምናው ሃይማኖት ሥርዓት ለመዳኘት ግልጽ በሆነ መንገድ በፈቃዳቸው መርጠው የቀረቡ ከሆነ ብቻ

ይሆናል" ስለሚል የሕገ መንግሥቱን ደንብ ያካተተ ነው፡፡ የሸሪያ ፍርድ ቤት ማጠናከሪያ አዋጅ ከሕገ መንግሥቱ ጋር የሚሄድ አንቀጽ ቢኖረውም ባይኖረውም በሕግ ተዋረድ ሕገ መንግሥቱ የበላይ ሆኖ በሕገ መንግሥቱ መገዛት ሲገባው ሕገ መንግሥቱን ማጣቀስ ተስኖት ከሕገ መንግሥቱ በመነጨ ሕግ የሚውለውን ብቻ ይዞ መሄድ ግጭት ያመጣል ብለዋል፡፡ አያይዘውም የሕገ መንግሥት ጉዳዩች አጣሪ ጉባኤም ተከሳሾች በሃይማኖታቸው ለመዳኘት ፈቃደኛ መሆናቸውን መግለጽ የሚችሉት በተጠሩበት ታህሣሥ 14 ቀን 1992 ሆኖ በቀረቡበት ጊዜ ደግሞ በሃይማኖቱ ለመዳኘት ፍቃደኛ አለመሆናቸውን ገልጸው እያለ ይህን ችላ ብሎ በሸሪያ ፍርድ ቤት ለመዳኘት ፈቃደኛነታውን ገልጸው ሳይሆን መጨረሻ ላይ የሚያመቻቸው ሆኖ ሲያገኙት ከመጀመሪው ሕገ መንግሥቱ ሁለት ዕድል ሰጥቶ ሲፈልግ በመደበኛው ፍርድ ቤት ካልሆነ በሃይማኖት በልማዳዊ አሠራር መሄድ እችላለሁ ብለው እያለ ማለትም ሕገ መንግሥቱ በአንቀጽ 34 ንዑስ ቁጥር 5 መሠረት ማንኛውም ሰው ሕገ መንግሥቱን በማይጻረር መልኩ በመደበኛ ፍርድ ቤት ወይም በሃይማኖታዊ ልማድ ፈቃዱን ገልጾ እዳኛለሁ ብሎ ከገባ አይከለከልም የሚለውን ፈቃዳቸውን በገለጹበት ጊዜ ለማስኬድና ችሎቱን ለማስቻል የተሞከረ ስለሆነ የሕገመንግሥት አጣሪ ጉባኤን መሠረት በማድረግ በሕገመንግሥቱ አንቀጽ 13/1/ የፍትሕ አካላት ሕገ መንግሥቱን መሠረታዊ መርሖዎች የማስፈጸም ግዴታ ያለባቸውና ሕገ መንግሥቱ የሚጻረር ልማዳዊ አሠራር በሚኖርበት ጊዜ በሕገ መንግስቱ አንቀጽ 9/1/ ''.... ማንኛውም ሕግ ልማዳዊ አሠራር፣ እንዲሁም የመንግሥት አካል ወይም ባለሥልጣን ውሣኔ ከዚህ ሕገመንግሥት ጋር የሚቃረን ከሆነ ተፈጻሚነት አይኖረውም'' በሚል መንገድ ተከትሎ ሕገ መንግሥቱ ያስቀመጠላቸውን ፈቃዳቸውን ገልጸው ለመዳኘት የሚችሉበትን ሁኔታ ማመቻቸት ሲገባው አስገድዶ ውሳኔውን እንዲቀበሉ ማድረግ ሕገ መንግሥቱን የሚጻረር ስለሆነ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ ያቀረበውን የውሳኔ ሃሳብ የሕገ መንግሥትና ክልል ጉዳይ ቋሚ ኮሚቴም አሳማኝ ሆኖ ስላገኘው የውሳኔ ሀሳቡ በምክር ቤት ተቀባይነት እንዲያገኝ ጠይቀዋል፡፡

በመቀጠል ክቡር ዶ/ር ሙላቱ ተሾመ ሕገ መንግሥቱ ለዜጎች የሰጠውን መብት መሠረት ተደርጎ የተሰጠው የውሳኔ ሀሣብና በሕግ አተናተኑ ብስለት ያለው ትንተና የቀረበበት በመሆኑ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ ያቀረበውን የውሳኔ ሃሳብ ቤቱ እንዲቀበለው ለድምፅ አቅርበዋል፡፡ በዚህም የውሳኔ ሀሳብ ከአንድ ድምፅ በስተቀር ቤቱ በሙሉ ድምፅ ተቀብሎ አፅድቆታል፡፡

የሰነድ ትርጉም እና አስተርጓሚን በተመለከተ ስለሚታዩ ችግሮች አንዳንድ ምልከታዎች

*አበበ አሳመረ**

መግቢያ

የፌደራል ፍ/ቤቶች እና የአንዳንድ የክልል ፍ/ቤቶች የሥራ ቋንቋ አማርኛ ቢሆንም ለሥራ፣ ለኢንቨስትመንት፣ለጉብኝት ወዘተ የሚመጡ ለተወሰነ ጊዜ ወይም በቋሚነት ኢትየጵያ ውስጥ የሚኖሩ የውጭ አገር ዜግነት ያላቸው[1] የውጭ ቋንቋ[2] ተናጋሪዎች ቁጥር በየጊዜው እየጨመረ ስለመጣ የውጭ ቋንቋ ተናጋሪ ግለሰቦች የፍ/ቤት ባለጉዳይ[3] እየሆኑ ነው፡፡ አማርኛ መረዳት የማይችሉ የአገር ውስጥ ቋንቋ[4]ተናጋሪዎችም የፍ/ቤት ባለጉዳይ እየሆኑ ይቀርባሉ፡፡ ይህ ሁኔታና የኢትዮጵያ የፌደራል ሥርዓት በቋንቋ ላይ የተመሰረተ[5] የግዛት ክልል አወቃቀር ከሰነድ ትርጉምና ከአስተርጓሚ ጋር በተያያዘ አልፎ አልፎ በፍ/ቤት አከራካሪ ሁኔታ ሲያስነሳ ይታያል፡፡

ከዚህ በተጨማሪ የኢትዮጵያ ኢኮኖሚ እያደገ እንደመጣ ጥናቶች ይጠቁማሉ፡፡ በዚህ የተነሳም ከውጭ አገር የሚመጡና የውጭ ቋንቋ ተናጋሪዎች ቁጥር የበለጠ እንደሚጨምር የሚጠበቅ ሲሆን በአገር ውስጥም ወደ አዲስ አበባ የሚመጣውና ለተለያየ ሥራና ጉዳይ ከአዲስ አበባ ወደ ክልሎች የሚሄደው ሰው ቁጥር ይጨምራል ተብሎ ይታመናል፡፡ በዚህ መሠረት በአጠቃላይ ወደፊት ሊኖር ከሚችለው የሕዝብ ቁጥር ዕድገት እና የሰዎች ከቦታ ቦታ ዝውውር ዕድገት አንፃር የአማርኛ ቋንቋን መረዳት የማይችሉና ወደ ክልል ሄደው የፍ/ቤቶቹን የሥራ ቋንቋ መረዳት የማይችሉ የፍ/ቤት ባለጉዳዮች ቁጥር ሊጨምር እንደሚችል ይገመታል፡፡

እነዚህ ሁኔታዎች ከሰነድ ትርጉምና ከአስተርጓሚ ጋር የተያያዙ ክርክሮችን እያስነሱ እንደሆነ በተግባር ከሚያጋጥሙ በርካታ ጉዳዮች መረዳት ይቻላል፡፡ ከዚሁ ጋር ተያይዞ ፍ/ቤቶችም አስተርጓሚ ለመመደብ ያለባቸውን ግዴታ የሚወጡበት አሰራርና ተያያዥ ችግሮቹ ትኩረት የሚፈልጉ ጉዳዮች ናቸው፡፡ ስለሆነም በዚህ

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*የሕግ አማካሪና ጠበቃ። የጽሑፉን አብዛኛውን ድርሻ የሚይዘው የፀሐፊው የራሱ ልምድና ገጠመኝ ነው፡፡ ፀሐፊው ለሶስት አመት ገደማ ለትርጉም ሥራ ቅርብ ስለነበር በጽሑፉ ላይ ያንፀባረቃቸው ሐሳቦች በጠበቃነት በተከራከረባቸው ጉዳዮች ያጋጠሙትና በችሎት ውስጥ ተቀምጦ ያዳመጣቸው እንዲሁም በተግባርም በተደጋጋሚ ያጋጠሙት ጉዳዩች ስለሆኑ ዋናው የመረጃው ምንጭ ፀሐፊው እራሱ ነው፡፡

[1] አንድ የውጭ አገር ዜጋ በኢትዮጳያ ውስጥ የሚኖርበት ሁኔታ በሕግ የተወሰነ ነው፡፡ በኢትዮጵያ ውስጥ ለመኖር የመኖሪያ ወይም የመኖሪያና የሥራ ፈቃድ ከሌለው ወይም ለአጭር ጊዜ የመኖሪያ ፈቃድ በቱሪስት ቪዛ፣ ለስብሰባ፣ ለስልጠና ወይም ለሌላ ሥራ ወይም ኢትዮጵያ በፈረመችው አለምአቀፍ ስምምነት መሠረት በስደተኝነት የተቀበለችው ወይም በኤንባሲዎችና አለምአቀፍ ድርጅቶች ውስጥ በውጭ ጉዳይ ሚኒስቴር በኩል ተቀባይነት አግኝቶ የተመደበ ሰው መሆን አለበት፣ ወይም በጋብቻ ምክንያት ለመኖር ካልተፈቀደለት ወይም የተቀየረ ዜግነት ከሌለው በስተቀር ኢትዮጵያ ውስጥ መኖር አይችልም/ዝርዝር የሕግ መስፈርቶቹንና ሁኔታዎቹን በተመለከተ የኢሚግሬሽን አዋጅ ቁጥር 354/95 ማንበቡ ይመከራል/፡፡

[2] የውጭ ቋንቋ ማለት ምንጩ ኢትዮጵያ ውስጥ ሆኖ የማይነገር ቋንቋ ነው፡፡

[3] የፍ/ቤት ባለጉዳይ ማለት በማናቸውም የክርክር ተሳትፎ አይነት፣ማለትም በምስክርነት በከሣሽና ተከሣሽነት፣ በአስረጂነት፣ በጣልቃገብነት ወዘተ ፍ/ቤት የሚቀርቡ ግለሰቦችን የሚመለከት ነው፡፡ ሕጋዊ ሰውነት ያላቸው ድርጅቶችም የፍ/ቤት ባለጉዳይ ሊሆኑ ይችላሉ፡፡

[4] በኢትዮጵያ ውስጥ የሚነገሩ ከ70 በላይ ቋንቋዎች እንዳሉ አንዳንድ ጥናቶች ያመለክታሉ፡፡

[5] የኢትዮጵያ ሕዝቦች አብዮታዊ ዴሞክራሲያዊ ግንባር /ኢህአዴግ/ አቋም በቋንቋ ላይ የተመሰረተ ፌዴራሊዝም (language based federalism) ነው የሚል ሲሆን አንዳንድ ምሁራን ደግሞ በዘር ላይ የተመሰረተ ፌደራሊዝም (ethnic federalism) አንዳንዶች በዘርና በቋንቋ ላይ የተመሰረተ ፌደራሊዝም (ethno-linguistic federalism) ነው ይላሉ፡፡ ይሁን እንጂ ለዚህ ጽሑፍ ሲባል መሠረታዊው ጉዳይ የፍ/ቤቶች የሥራ ቋንቋ ስለሆነ የኢትዮጵያ ፌደራሊዝም በዘር ላይ ብቻ የተመሰረተ ነው ወይስ አይደለም የሚለው መከራከሪያ ለዚህ ጽሑፍ አላማ ጠቃሚ ስላልሆነ ታልፏል፡፡

ጽሑፍ የሰነድ ትርጉምንና አስተርጓሚን በሚመለከት ያሉትን የሕግ ማዕቀፎች፣ የተከራካሪዎችን መብትና ግዴታ፣ በወንጀል ተጠርጥረው የተያዙ ሰዎችና ተከሣሾች ስላላቸው መብት፣የትርጉም ግድፈትና የአስተርጓሚ አገልግሎት ግድፈትን ለማረም ፍ/ቤቶች ስላላቸው ስልጣንና ከዚሁ ጋር በተያያዘ ስለሚያጋጥሙ ክርክሮች አንዳንድ ምልከታዎችን ለማድረግ ተሞክሯል፡፡

1. ስለትርጉምና አስተርጓሚ ጽንሰ ሐሣብ

1.1 የትርጉም ጽንሰ ሐሣብ

ትርጉም "translation" ለሚለው የእንግሊዝኛ ቃል የተሰጠ የአማርኛ አቻ ቃል ሲሆን በበርካታ ፀሐፊዎች እንዲሁም መዝገበ ቃላት ለቃሉ የሰጡትን ትርጓሜ እናገኛለን፡፡ ለሕግ ጉዳይ ቅርበት የሌላቸውን ትርጓሜዎች ትተን ለሕግ ጉዳይ ቅርበት ያለውን ትርጓሜ ስንመለከት ብላክስ ሎው ዲክሽነሪ "translation" የሚለውን የእንግሊዝኛ ቃል "The transformation of language from one form to another; especially...the systematic rendering of the language of a book, document, of speech in to another language"[6] የሚል ትርጓሜ ሰጥቶታል፡፡ ወደ አማርኛ ሲመለስ፤ "አንድን ቋንቋ ሌላ ይዘት ወዳለው ቋንቋ መለወጥ፣በተለይም ስርአትን በተከተለ ሁኔታ በመጽሐፍ፣በሰነድ ወይም በንግግር ያለን ቋንቋ በሌላ ቋንቋ መስጠት" የሚለውን ትርጓሜ ይይዛል፡፡

በዚህ ትርጓሜ ላይ መሠረታዊ የሆነው ክፍል "ስርአትን በተከተለ ሁኔታ" የሚለው ነው፡፡ የቃሉ መሠረተ ሐሣብም አንድን ቋንቋ ወደ ሌላ ቋንቋ የመለወጥ ጉዳይ ወይም ሥራ በዘፈቀደ የሚፈፀም ሳይሆን አንድ የተወሰነ የቋንቋ ክህሎት ማረጋገጫን መሠረት ያደረገ መሆን ይኖርበታል ለማለት ነው፡፡ ይህም የትርጉም ሥራ ሊከተለው የሚገባው ሙያዊ ስርአት፣ ደንብ እንዲሁም ስነምግባር መኖሩን የሚያመለክት ነው፡፡ በመሠረታዊ ይዘቱ ግን በትርጉሞቹ መካከል ልዩነት ስለሌለ "ትርጉም" የሚለው ቃል በመደበኛው ቋንቋ ካለው ትርጓሜ የተለየ የሕግ ጽንሰ ሐሣብ ነክ የሆነ ትርጓሜ የለውም፡፡ በዚህ መልክ አገልግሎት የሚሰጥ ሰውም "ተርጓሚ" በመባል ይጠራል፡፡

1.2. የትርጉም አይነቶች

ትርጉም በአብዛኛው የሙያ ትርጉም (literate translation) እና መደበኛ ትርጉም (literal translation) በሚል ይከፈላል። በተለይ ለፍ/ቤት የሚቀርብ ሰነድ ትርጉምን በተመለከተ ተርጓሚው የሚጠበቅበት መደበኛ ትርጉም መተርጐም ሳይሆን በሰነዱ ላይ ያለውን የሙያ ሐሣብ እንደሙያው ባለቤት ሆኖ መተርጐም ነው፡፡ ህእንደዚህ አይነቱ የትርጉም ሥራ ተርጓሚው ሰፊ ልምድ እና ሙያዊ ዕውቀት ያለው እንዲሆን ስለሚጠበቅበት ትርጉሙ የሙያ ትርጉም ይሆናል፡፡

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[6] Black's Law Dictionary, 8th ed., p.1537

በዚህ መሠረት በየሙያ መስኩ ያለውን ትርጉም የሕግ ትርጉም'የሕክምና ትርጉም' የምህንድስና ትርጉም ወዘተ በሚል መከፋፈል የተለመደ ነው፡፡ ይህ አይነት ክፍፍል መሠረት የሚያደርገው የሚተረጐመውን ሰነድ የሙያ ይዘት ሲሆን ይህንኑ ተከትሎም ተርጓሚው የሙያ ሰው ወይም ለሙያው ቅርበት ያለው ሰው መሆን እንዳለበት ያመለክታል፡፡[7]

የትርጉም ክፍፍልን በተመለከተ ተርጓሚው ካለው የተለየ የባለሙያነት አመዳዳብ ወይም የትርጉም ሥራን ከሚገዙት ሕጐች ባህሪ አንፃር የተለየ አመዳደብም አለ፡፡ በዚህ መሠረት በአብዛኛው የተመሰከረለት ትርጉም (certified translation)፣ የባለሙያ ትርጉም (professional translation) እና በተመዘገበ ሰው የሚሰራ ትርጉም (translation by registered person) በሚል የተለያየ አመዳደብ ያጋጥማል፡፡ ተርጓሚዎቹም ባለሙያ ተርጓሚ፣ የተመሰከረለት ተርጓሚ እና የተመዘገበ ተርጓሚ በመባል ይጠራሉ፡፡

ከዚህ አንፃር ለፍ/ቤት መቅረብ ያለበት የሰነድ ትርጉም ምን አይነት መሆን አለበት ወይም ምን አይነት የሙያ መደብ ባለው ሰው የተሰራ መሆን አለበት የሚለውን በተመለከተ በየአገሩ ያለው ልምድ የተለያየ ነው፡፡ ለምሣሌ በአሜሪካን አገር አንዳንድ ፍ/ቤቶች በተርጓሚነት የመዘገቧቸውን ባለሙያዎች ብቻ ሲያሰሩ አንዳንዶቹ ደግሞ የተመሰከረላቸው ተርጓሚዎች በሚል ከፈቃድ ሰጪ አካላት ፈቃድ የተሰጣቸውን ተርጓሚዎች ብቻ እንዲተረጉሙ ይፈቅዱላቸዋል፡፡

ስለሆነም ይህን በተመለከተ በየአገሩ ያለው አሰራር እና ልምድ ሰፊና የተለያየ ነው፡፡[8] በዚህ ረገድ በአገራችን ያለውን ልምድ ስንመለከት የትርጉም አገልግሎት ፈቃድ ያለው ሰው የትርጉም አገልግሎት ሊሰጥ ከሚችልና የሰነድ ትርጉሙም ተቀባይነት እንዳለው ተደርጐ ከሚወሰድ በስተቀር ከላይ በተመለከተው አመዳደብ መሠረት አገልግሎት አይሰጥም፡፡[9]

1.3. ስለ አስተርጓሚ ጽንሰ ሐሣብ

አስተርጓሚ ማለት ሌላ ሰው በቃል የሚናገረውን ወይም የሚያሳየውን ምልክት በቃል ወይም በምልክት ከአንድ ቋንቋ ወደ ሌላ ቋንቋ የሚተረጉም ሰው ነው፡፡ ብላክስ ሎው ዲክሽነሪ "interpreter" የሚለውን ቃል፤ "A person sworn at a trial to interpret the evidence of a foreigner or adeaf and dump person to the court" (በፍ/ቤት ቃለመሐላ በመፈፀም የውጪ አገር ሰው ወይም መስማትና መናገር የማይችልን ሰው ማስረጃ የሚተረጉም ሰው) በማለት ተርጉሞታል፡፡

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[7] በአመዳደብ ወይም በክፍፍል ደረጃም የተለያየ የትርጉም አመዳደብ ወይም ክፍፍል አለ፡፡ ከዚሁ ጋር በተያያዘና በአገራችን ያለውን የትርጉም ሁኔታ በተመለከተ ለበለጠ ግንዛቤ የዶ/ር ዮናስ አድማሱን ጽሑፍ ማንበቡ ይመከራል፡፡ Yonas Admasu, Some Notes on the Problems of Translation, Proceedings of the National Workshops on Language, Culture and Development in Ethiopia, The Ethiopia Chapter of OSSREA, Addis Ababa, July 2008, p. 217

[8] Translation, https://www.onehourtranslation.com/translation/blog/types-translation Accesed on Dec. 4, 2013

[9] ይህ ድምዳሜ ፀሃፊው ካለው ልምድ በመነሳት የደረሰበት ነው፡፡

ከፍ/ቤት ጉዳይ ጋር በተያያዘ አስተርጓሚ በዳኛ ፊት ቃለመሐላ ፈጽሞ የሚያስተረጉም ስለሆነ ከላይ የተጠቀሰው ትርጓሜ ለሕግ ትርጉምነት የቀረበ ወይም የሕግ ትርጉም ነው ለማለት ይቻላል፡፡ በአገራችንም አስተርጓሚዎች የትርጉም አገልግሎት ከመስጠታቸው በፊት ቃለመሐላ እንዲፈጽሙ ማድረግ የማይታለፍ ሥነ ሥርአት እንደሆነ በየችሎቶቹ የሚታይ እውነታ ነው፡፡

1.4. የተርጓሚ እና የአስተርጓሚ አስፈላጊነት

የፍ/ቤቶች የሥራ ቋንቋ በሕግ የተደነገገ ሲሆን ፍ/ቤቶች ሥራቸውን የሚያከናውኑበት፣ ክርክር የሚመሩበት፣ በመዝገብ ላይ የሚያሰፍሯቸውን ውሣኔዎች፣ብይኖችና ትእዛዞች የሚጽፉበት፣ ምስክር የሚሰሙበትና ሰነድ የሚቀበሉበት ቋንቋ ማለት ነው፡፡

በሕግ ተለይቶ ከታወቀው የፍ/ቤቶች የሥራ ቋንቋ ውጭ የሚናገር ተከራካሪ፣ ምስክር ወይም የሰነድ ማስረጃ ሲቀርብ ወደ ፍ/ቤቱ የሥራ ቋንቋ እየተተረጐመ መቅረብ ይኖርበታል፡፡ እስከ 1984 ዓ.ም ድረስ የኢትዮጵያ ፍ/ቤቶችና የመንግስት መ/ቤቶች የሥራ ቋንቋ አማርኛ ብቻ ነበር፡፡ ከ1984 ዓ.ም ወዲህ ግን የፍ/ቤቶች የሥራ ቋንቋ አማርኛ እና ሌሎች የአገር ውስጥ ቋንቋዎችም ጭምር ሆነዋል፡፡ በዚህ መሠረት፣ ለምሣሌ የኦሮሚያ ክልላዊ መንግስትና የትግራይ ክልል ፍ/ቤቶች የየክልላቸውን የሥራ ቋንቋ የፍ/ቤቶቻቸው የሥራ ቋንቋ አድርገው እየተጠቀሙ ነው፡፡ በመሆኑም የፍ/ቤቶቹን የሥራ ቋንቋ መናገር የማይችሉ ተከራካሪዎች በአስተርጓሚ አማካኝነት የሚከራከሩ ሲሆን ሰነዶችም በዚሁ መሠረት ወደ ፍ/ቤቶቹ የሥራ ቋንቋ እየተተረጐሙ ይቀርባሉ፡፡

የፌደራል ፍ/ቤቶች የሥራ ቋንቋ አማርኛ እንደሆነ የፌደራል ፍ/ቤቶች ማቋቋሚያ አዋጅ ቁ. 25/88 አንቀጽ 25 ደንግጓል፡፡ የዚህ አንቀጽ ርዕስ “የፌደራል ፍ/ቤቶች የሥራ ቋንቋ” የሚል ሲሆን በስሩ ያሉት ሁለት ድንጋጌዎች (1) የፌደራል ፍ/ቤቶች የችሎት ቋንቋ አማርኛ ይሆናል (2) የአማርኛ ቋንቋ ለማይችል ባለጉዳይ ፍ/ቤቱ አስተርጓሚ ይመድባል፣ በሚል የደነገጉ ናቸው፡፡ የክልል መንግስታት ፍ/ቤቶች የፌደራል ጉዳዮችን በውክልና ለማየት ስልጣን ተሰጥቷቸዋል፡፡ ስለሆነም የፌደራል ጉዳዮችን በውክልና የሚያዩ የራሳቸውን የሥራ ቋንቋ የሚጠቀሙ የክልል ፍ/ቤቶች የፌደራል ጉዳይ የሆኑ ክርክሮችን መምራት ያለባቸው በአማርኛ ቋንቋ ነው፡፡ ይሁን እንጂ የዚህን ግዴታ አፈፃፀም በተመለከተ በርካታ አስቸጋሪ ሁኔታዎች ሲያጋጥሙ ይስተዋላል፡፡ ለምሳሌ የፌደራል መ/ቤቶችን የሚወክሉ ነገረፈጆችን በአማርኛ አናከራክራችሁም፣በራሳችሁ ከፍላችሁ የራሳችሁን አስተርጓሚ አቅርቡ ወዘተ በሚል ችግር የሚፈጥሩ ዳኞች ያጋጥማሉ፡፡[10]

በዚህ መሠረት ለፍ/ቤት የሚቀርቡ ሰነዶችና አቤቱታዎች ወደ ፍ/ቤቱ የሥራ ቋንቋ ተተርጉመው መቅረብ ስላለባቸው የተርጓሚዎች አስፈላጊነት አጠያያቂ አይደለም፡፡ የፍ/ቤቱን የሥራ ቋንቋ የማይረዳ ባለጉዳይም በፍ/ቤቱ የሥራ ቋንቋ የመስተናገድ መብት ስላለው የአስተርጓሚ አስፈላጊነት የሚያነጋግር አይደለም፡፡

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[10] ከጠበቃ ጉግሳ ከተማ ጋር በጥቅምት ወር 2007 ዓ.ም የተደረገ ውይይት፡፡

ይሁን እንጂ አንዳንድ ጊዜ አስተርጓሚም ሳያስፈልግ ዳኛው እራሱ እያስተረጐመ የሚያስተናግድበት አጋጣሚ አለ፡፡ ለምሣሌ በሐምሌ ወር 2006 ዓ.ም በወላይታ ሶዶ ዞን በቦዲቲ ከተማ ውስጥ ባለ አንድ ፍ/ቤት ውስጥ የተከሣሾቹ ጠበቆችና ዐ/ሕግ የተናገሩትን ዳኛው ለግል ተበዳዩ በወላይትኛ ቋንቋ ካስረዳቸው በኋላ እንደገና የግል ተበዳዩ በወላይትኛ የተናገረው ምን እንደሆነና ዳኛውም በወላይትኛ የተናገሩት ምን እንደሆነ በአማርኛ ለተከሣሾቹ ተናገሩ፡፡ ሁሉም ተከሣሾች ወላይትኛ ቋንቋ የሚናገሩም ሆነ የሚረዱ አልነበሩም፡፡[11] ዳኛው የትርጉም አገልግሎቱን ያከናወኑት አስተርጓሚ ስላልነበር ሳይሆን ስለፈለጉ ብቻ ነው፡፡ በተከታዩ ቀጠሮ ተከሣሾች የተስተናገዱት በአስተርጓሚ አማካኝነት ነበር፡፡

2. ትርጉምንና አስተርጓሚን የሚመለከቱ የሕግ ማዕቀፎች

2.1 ሕገመንግስታዊ ድንጋጌ

የፌደራል መንግስት መ/ቤቶች የሚጠቀሙትን የሥራ ቋንቋ "አማርኛ" እንደሆነና ክልሎችም የራሳቸውን የሥራ ቋንቋ በሕግ መወሰን እንደሚችሉ የኤ.ፌ.ድ.ሪ. ሕገመንግስት ደንግጓል፡፡[12] በዚህ መሠረት የፌደራል ፍ/ቤቶች የሥራ ቋንቋን በተመለከተ አማርኛ ሲሆን የትግራይ ክልል ፍ/ቤት ትግርኛ፣ የኦሮሚያ ክልል ፍ/ቤት ደግሞ ኦሮምኛ ነው፡፡ የደቡብ ክልል ጠቅላይ ፍ/ቤቱ የሥራ ቋንቋ አማርኛ ሲሆን በዞን መስተዳድር ደረጃ ግን አንዳንዶቹ የዞኑን የሥራ ቋንቋ የፍ/ቤቱም የሥራ ቋንቋ አድርገው ይጠቀማሉ፡፡ ለምሣሌ በሲዳማ ዞን ሲዳምኛ የዞን መስተዳድሩ የሥራ ቋንቋ ሲሆን በዞን ፍ/ቤቶች ደረጃም ሲዳምኛ የፍ/ቤቶቹ የሥራ ቋንቋ ነው፡፡

ትርጉምን በተመለከተ ሕገመንግስቱ የተያዙ ሰዎች መብት በሚል ርዕስ "ወንጀል ፈጽመዋል በመባል የተያዙ ሰዎች የቀረበባቸው ክስና ምክንያቶቹ በዝርዝር ወዲያውኑ በሚገባቸው ቋንቋ እንዲነገራቸው መብት አላቸው" በማለት ደነግጓል፡፡ ከዚህ በተጨማሪ የተከሰሱ ሰዎች መብት በሚለው ርዕስ ስር፣ "የፍርዱ ሒደት በሚገባቸው ቋንቋ በሚካሄድበት ሁኔታ በመንግስት ወጪ ክርክሩ እንዲተረጐምላቸው የመጠየቅ መብት አላቸው"[13] በማለት የተከሰሱ ሰዎች ያላቸውን መብት ደንግጓል፡፡ መስማት ወይም መናገር የተሳነው ተከሣሽ በሚቀርብበት ጊዜም የምልክት ቋንቋ ተርጓሚ ሊመደብለት ይገባል፡፡ ይህ ግዴታ በሕገመንግስቱ ላይ በግልጽ የተደነገገ ግዴታ ባይሆንም የሕገመንግስቱ ድንጋጌ ኢትዮጵያ የፈረመቻቸውን የሰብአዊ መብት ድንጋጌዎች መሠረት ያደረገ ስለሆነና አስተርጓሚ የማግኘት መብት የጽንሰሐሣብ ሽፋን የምልክት ቋንቋ አስተርጓሚ መመደብንም ስለሚመለከት ይህንኑ መሠረት ያደረገ ነው።[14]

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[11] ዳኛው በዚህ መልክ ችሎቱን ሲመሩ ፀሐፊው በወቅቱ በችሎት ውስጥ ነበር። በወንጀል ክርክር የግል ተበዳዩ እንደፈለገ ተነስቶ ለዳኛ የሚናገርበት ሥነሥርዓት ባይኖርም ዳኛው የተከሣሾች ጠበቆች እና ያለጠበቃ የቀረበው ተከሣሽ ላይ ከፍተኛ ጫና እያደረጉ የግል ተበዳዩ እንደልቡ እንዲናገር ማድረጋቸው ከአዲስ አበባ እየሄዱ የሚከራከሩትን ሁለት ተከሣሾች ተስፋ ያስቆረጠና ከፍ/ቤቱ ምንም አንጠብቅም የሚል እምነት እንዲያድርባቸው ያደረገ አጋጣሚ ነበር፡፡ በመጨረሻ ግን ሁለቱም ተከሣሾች ከተከሰሱበት ወንጀል በነፃ ተሰናብተዋል፡፡

[12] የሕገመንግስቱን አንቀጽ 5(2) ድንጋጌ ይመለከቷል፡፡

[13] ዝኒ ከማሁ

[14] ሰብአዊ መብቶች፣ ሕጐቹና አፈፃፀማቸው በሚል የፌዴራል ፍትህ ሚኒስቴር ነሐሴ 1999 ዓ.ም ያሳተመው መጽሐፍ ገጽ 74 ላይ የተጠቀሰውን የጽንሰሐሣብ ማብራሪያ ይመለከቷል፡፡ ይህ ማብራሪያ ተቀባይነት ያለውን የጽንሰሐሣብ ማዕቀፍ (conceptual framework) መሠረት በማድረግ የተዘጋጀ ነው፡፡

ከላይ የተመለከተው የሕገመንግስቱ ድንጋጌ የሚመለከተው በወንጀል ተጠርጥረው የተያዙና ክስ የተመሰረተባቸው ተከሣሾችን ብቻ ነው፡፡ እነዚህ ሰዎች ከሌላው የፍ/ቤት ባለጉዳይ የተሻለ ግልጽ የሕግ ጥበቃ የተቀመጠላቸው ይህ አይነት የሕግ ጥበቃ ያስፈልጋቸዋል በሚል አስተሳሰብ ላይ ተመስርቶ በአለም አቀፍ ደረጃ የተደረጉ ስምምነቶችን መሠረት በማድረግ ነው፡፡

መንግስት የፖሊስና የዐ/ሕግ ተቋማት ስላሉት በተጠርጣሪው ላይ ምርመራ የሚያጣሩበትና የወንጀል ክስ የሚመሰርቱበት ተቋማት እነዚህ ተቋማት ስለሆኑ ተከሣሹ ወይም ተጠርጣሪው በተነፃፃሪ ደረጃ እራሱን ለመከላከልና ከተጠረጠረበት ወይም ከተከሰሰበት ወንጀል ነፃ ለመውጣት ያለው እድል በጣም ደካማ ነው ተብሎ ይታመናል፡፡ ስለሆነም መንግስት ግልጽ የሆነ የሕግ ጥበቃ ለተከሣሽ መስጠትና ይህንንም ለማድረግ የሚያስችለውን የገንዘብ ወጪና ተቋማዊ ድጋፍ የማድረግ ኃላፊነት አለበት፡፡ በዚህ መሠረት መንግስት ሊያደርግ ይገባል ተብሎ በግዴታነት ከተጫነበት ኃላፊነቶች መካከል አንዱ በወንጀል ተጠርጥሮ የተያዘ ሰው የተጠረጠረበትን ወንጀል በሚገባው ቋንቋ እንዲያውቀውና በወንጀል የተከሰሰም የተከሰሰበትን ወንጀል በሚገባው ቋንቋ እንዲያውቀው ማድረግ ነው፡፡

2.1.1. በወንጀል ተጠርጥሮ የተያዘ እና የተከሰሰ ሰው ስላለው መብት

በወንጀል ተጠርጥረው የተያዙ ሰዎች ለመርማሪው ፖሊስ ቃላቸውን ሲሰጡ በሚገባቸው ቋንቋ መሆን አለበት፡፡ "መያዝ" የሚለው ቃል የሚያመለክተው ሕጋዊ መያዝን ነው፡፡ ሕጋዊ መያዝ መሠረት የሚያደርገው ወንጀል ፈጽመሐል በሚል ተጠርጥሮ አግባብ ባለው ሕግ መሠረት ስልጣን ባለው አካል የተያዘን ተጠርጣሪ ነው፡፡ አንድ ተጠርጣሪ ቃሌን አልሰጥም ማለት መብቱ ነው፡፡ ነገር ግን ይኸው እንቢታው ተተርጉሞ በምርመራ መዝገቡ ላይ መስፈር አለበት፡፡ ቃሉን እንዲሰጥ በአስተርጓሚ ተጠይቆ ፈቃደኛ ካልሆነ መርማሪው ይህንኑ መዝግቦ ከመተው ውጪ ሌላ አማራጭ የለውም፡፡ ይሁን እንጂ አንዳንድ ጊዜ ተጠርጣሪው አማርኛ የማይረዳ ሆኖ እያለ በምርመራ መዝገቡ ላይ ግን ቃሉን በአስተርጓሚ እንደሰጠ ሳይገለጽ ክስ ከተመሰረተበት በኋላ ወይም በጊዜ ቀጠሮ ላይ እያለ የምርመራ መዝገቡ ለፍ/ቤት የሚቀርብበት አጋጣሚ አለ፡፡ ፍ/ቤቱም ተጠርጣሪውን ሲያናግረው አማርኛ እንደማይረዳ ያረጋግጣል፡፡ ይህ ሁኔታ በተለይ የቪዛቸው ጊዜ አልቆባቸው በኢምግሬሽን መ/ቤት በኩል ተይዘው ምርመራ የሚጣራባቸው የውጭ አገር ዜጐች ላይ የተለመደ ነበር፡፡[15]

በተጨማሪም በዚህ ረገድ የሚያጋጥመውና በተጠርጣሪውም ነፃነት ላይ ከፍተኛ ጫና እያደረገ ያለው የምርመራ አካላት በቂ አስተረጓሚ የሌላቸውና አንዳንድ ጊዜም ለማግኘት ያለመቻላቸው ነው፡፡ በዚህ የተነሳም መርማሪዎች ተጠርጣሪውን በ48 ሰአት ውስጥ ፍ/ቤት ይዘው ይቀርቡና የአማርኛ ቋንቋ ስለማይረዳ በእኛ በኩል ደግሞ ተጠርጣሪው የሚናገረውን ቋንቋ የሚናገር አስተረጓሚ ስለሌለንና ለጊዜውም አፈላልገን ስላላገኘን የተጠርጣሪውን ቃል መቀበል አልቻልንም፣ስለሆነም አንድ ተለዋጭ ቀጠሮ ይሰጠን በሚል ያመለክታሉ፡፡

[15] ከጠበቃ አድማሱ በነበሩ ጋር የተደረገ ቃለመጠይቅ /ግንቦት 2006 ዓ.ም ውስጥ/፡፡ ጠበቃ አድማሱ ይህ ሁኔታ ሊያጋጥመው የቻለው ዳኛ ሆኖ ሲሰራ በተለይ የተጠቀሱት ጉዳዮች ይታዩ የነበሩት እርሱ ተመድቦ በሚያስችልበት ችሎት ስለነበር ነው፡፡

በዚህ ምክንያት የተያዘው ሰው የዋስትና መብቱን በማያስከለክል ተግባር አስተርጓሚ እስከሚገኝ በሚል በእስር ላይ ሊቆይ ይችላል::[16]

አንዳንድ ጊዜ መርማሪዎች ከመነሻው የወንጀል ምርመራውን ለመጀመር የሚቸገሩበት ሁኔታም ያጋጥማል፡፡ ለምሣሌ በብራዚላውያን ላይ በተፈፀመ ወንጀል ተበዳይ የሆነው የብራዚል ዜግነት ያለው ግለሰብ ለፖሊስ ሲያመለክት የሚናገረው ቋንቋ ፖርቹጋልኛ ስለነበር ብቃት በሌለው ደረጃ በሚናገረው የእንግሊዝኛ ቋንቋ ከፖሊስ ጋር መግባባት አልቻሉም፡፡ ከዚያም ዐ/ሕግ የምርመራ መዝገቡን ከመርማሪው ፖሊስ በመረከብ የግል ተበዳዮቹን ቃልና የአስተርጓሚዎቹን ቃል ዐ/ሕግ እራሱ ከተቀበለ በኋላ ምርመራ መዝገቡን መልሶ ለፖሊስ አስረከበ::[17]

በሌላ ጉዳይም ሁለት የላቲቪያ ቋንቋ ተናጋሪዎች ወደ ኢትዮጵያ ሲገቡ አደንዛዥ ዕጽ ተያዘባቸው፡፡ ከዚያም የላቲቪያ የቋንቋ የሚናገር ሰው በውጭ ጉዳይ ሚኒስቴር በኩልም ጭምር ተፈልጐ ሊገኝ ስላልቻለ ወደ ሁለት ወር ገደማ የዋስትና መብታቸው ሳይከበርላቸው በእስር ላይ ሆነው እንዲቆዩ ተደረገ፡፡ ይህ ሁኔታ ተጠርጣሪዎቹ ከዚህ በላይ ታስረው ሊቆዩ ስለማይገባ ይለቀቁ ወይስ ተርጓሚ እስከሚገኝ ታስረው ይቆዩ በሚል ዐ/ሕጐቹን ለሁለት ከፍሎ አከራክሯቸው ነበር፡፡

በመጨረሻ ግን እንደአጋጣሚ አስተርጓሚ ተገኝና በተጠርጣሪዎቹ ላይ ምርመራው እንዲጠናቀቅና ክስ እንዲመሰረትባቸው ከተደረገ በኋላ እያንዳንዳቸው 9 አመት እስራት ተፈረደባቸው፡፡[18] የአስተርጓሚ አለመኖር በተጠርጣሪዎቹ መብት ላይ የሚያስከትለው የመብት መጓደል የመኖሩን ያክል የተጠቀሱት ተከሣሾች የተፈረደባቸው የቅጣት መጠን ሲታይ ደግሞ አስተርጓሚ አልተገኘም ተብሎ ቢለቀቁ ኖሮ ሊከተል የሚችለውን አሉታዊ ውጤት ከቅጣቱ መጠን አንፃር መገመት ይቻላል፡፡

አንዳንድ ጊዜ በምን ምክንያት እንደተከሰሰ በግልጽ ሳይረዳው ክስ የሚመሰረትበት ተከሣሽ ያጋጥማል፡፡ ለምሣሌ አንድ የህንድ ዜጋ በገቢዎችና ጉምሩክ ባለስልጣን ዐ/ሕግ ተከሶ ተርጓሚ ጠፋና የአስተርጓሚ መቅረብን ለመጠባበቅ እየተባለ በተደጋጋሚ ተቀጠረ፡፡ በአንደኛው የቀጠሮ ቀን ዳኛው ለመሆኑ እንዴት ነው ምርመራ የተጣራው? በማለት ዐ/ሕጉን ሲጠይቁት ዐ/ሕጉ ምርመራው እንዴት እንደተጣራ የማውቀው ነገር የለም በማለት መልስ ስለሰጠ ዳኛው ለጥያቄው መልስ ማግኘት አልቻለም ነበር፡፡[19]

እነዚህ አጋጣሚዎች የአስተርጓሚ አለመኖር በተከሣሽ መብት ላይ የሚያሳድረው ጫና ከፍተኛ እንደሆነ በሚገባ ያሳያሉ፡፡ ምክንያቱም ተከሣሹ “ ክርክሩ የተካሄደው” በማልረዳው ቋንቋ ነው ቢልና በፍ/ቤቱ መዝገብ ላይ

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[16] ለምሣሌ አንድ መስማት የተሳነው ተጠርጣሪ በዚህ ምክንያት ለረዥም ጊዜ ታስሮ እንደቆየ ተጠቅሷል/አለማየሁ ሐይሌ መታሰቢያ ድርጅት ፔሮዲካል፣አንደኛ መንፈቅ፣ሰኔ 1999 ገጽ 50 ይመለከቷል፡፡

[17]ከጠበቃ ጫንያለው እሸቱ ጋር በታህሳስ ወር 2005 ዓ.ም ውስጥ የተደረገ ቃለመጠይቅ፣ጠበቃ ጫንያለው ይህ ሁኔታ ያጋጠመው ዐ/ሕግ ሆኖ ሲሰራ በነበረበት ጊዜ ነው፡፡

[18] ከዐ/ሕግ ብርሐኑ ጋር የተደረገ ቃለመጠይቅ፡፡ ዐ/ሕግ ብርሐኑ ሙሉ ስሙ እንዲጠቀስ ስላልፈለገ አልተጠቀሰም፡፡

[19]ዳኛው ምንም እርምጃ ሳይወስዱና አስተያየት ሳይሰጡ ዝም አሉ፡፡ ዳኛው ይህን ሲጠይቁና ዐ/ሕጉም ሲመልሱ ፀሐፊው በችሎት ተቀምጦ ያዳምጥ ነበር፡ አስተርጓሚ ከተገኘ በኋላ ፀሐፊው ከእንግሊዝኛ ወደ አማርኛ በማስተርጐም ሁለት ጊዜ ችሎቱን አግዟል፡፡

“የትርጉም አገልግሎት አልፈልግም” ብሏል በሚል የተመዘገበ ከሌለ ይግባኝ ሰሚው ፍ/ቤት የትርጉም ድጋፍ የማግኘት ሕገመንግስታዊ መብቱ ተጥሷል ወይም አልተከበረለትም የሚል ድምዳሜ ላይ መድረሱ አይቀርም፡፡

ከዚህ ጋር በተያያዘ ሊነሳ የሚገባው ሌላው ነጥብ ተከሣሽ ቋንቋውን እንደማይረዳ ከታወቀና አስተርጓሚም አልፈልግም ቢል ክሱ ተተርጐሞ እንዲሰጠው ሊደረግ ይገባል ወይስ አይገባም የሚለው ነው፡፡ አንዳንድ የሕግ ባለሙያዎች የሕገመንግስቱ አንቀጽ 20/2/ ተከሣሽ ክሱ በበቂ ዝርዝር እንዲነገረውና ክሱን በጽሑፍ የማግኘት መብት አለው ስለሚል ተከሣሽ ፈለገልም አልፈለገም መንግስት ይህንን ግዴታውን ለመፈፀም ክሱ ተተርጉሞ ለተከሣሹ እንዲደርሰው ከተደረገ በኋላ ሊነበብለት ይገባል በማለት ይከራከራሉ፡፡ እነዚህ ባለሙያዎች ተከሣሽ በዚህ መልክ የተተረጐመው ክስ ከተነበበለት በኋላ መልስ ካልሰጠ ጥፋተኛ አይደለሁም እንዳለ ተቆጥሮና በዚሁ መሠረት መዝገቡ ክርክሩን መቀጠል ይገባል የሚል አቋም አላቸው፡፡

ከዚህ በኋላ ያለው መብት የመከላከል መብት ነው፡፡ ለዚህ መብት አፈፃፀም የመንግስት ኃላፊነት አስተርጓሚ ማቅረብ ሲሆን ተከሣሽ አስተርጓሚ አልፈልግም ካለ ግን መብቱን መጠቀም እንዳልፈለገ ወይም በራሱ እንዳጣበበ ተቆጥሮ ክርክሩ ሊቀጥል ይገባል የሚል መከራከሪያ የሚያቀርቡ ባለሙያዎች አሉ፡፡ ይሁን እንጂ አንዳንድ የሕግ ባለሙያዎች ተከሣሽ አስተርጓሚ አልፈልግም ቢልም መንግስት አስተረጓሚ የመመደብ ግዴታውን ሊወጣ ይገባል በሚል ይከራከራሉ፡፡ ነገር ግን ይህ መከራከሪያ አስተርጓሚ ቢመደብስ የሚያስከትለው ለውጥ አለወይ? የሚለውን መሠረታዊ ጥያቄ የሚመልስ አይደለም፡፡ አስተርጓሚ የሚመደብበት መሠረታዊ አላማ ተከሣሹ የመከላከል መብቱን በሚገባ እንዲጠቀም ለማስቻል ነው፡፡ አስተርጓሚ አልፈልግም ማለት ደግሞ ይህን መብት መጠቀም እንዳልፈለገ የሚያስቆጥር ስለሚሆን አስተርጓሚ በግዴታ መመደቡ ለተከሣሽ የሚያስገኝለት ጥቅም የለም፡፡ ይልቁንም ተከሣሹ በነፃነት ስሜት ፍ/ቤት እየቀረበ ጉዳዩን እንዳይከታተል የስነልቦና ጫና ስለሚያሳድርበት የበለጠ ይጐዳዋል፡፡

አንዳንድ ጊዜ ተከሣሹ በጠበቃ የሚከራከር ከሆነ አስተርጓሚ ላይፈልግ ይችላል፡፡ ይህ ሁኔታ ፍ/ቤቱ አስተረጓሚ ለማቅረብ ያለበትን ግዴታ ቢያስቀርለትም ስለክርክራቸው ሁኔታ እና ተከሣሹ ስለክርክሩ ሊረዳ ስለሚችልበት ሁኔታ ጠበቃውና ተከሣሽ በመስማማት ተከሣሽ ሊወስን ይችላል፡፡ ለምሣሌ በአንድ የጉምሩክ ወንጀል ክርክር ተከሣሽ በመጠኑ የእንግሊዝኛ ቋንቋ የሚረዳ ሲሆን እናት ቋንቋው ደግሞ ፈረንሳይኛ ነው፡፡ የዐ/ሕግ ምስክሮች እንዲሰሙ ፍ/ቤቱ ትእዛዝ ከሰጠ በኋላ ምስክሮቹ ሲቀርቡ ፍ/ቤቱ አስተረጓሚ ትፈልጋላችሁ? በማለት ተከሣሽንና ጠበቃውን ጠየቀ፡፡ ተከሣሽም በጠበቃው አማካኝነት አያስፈልገኝም በማለት መለሰ፡፡ ፍ/ቤቱም የተከሣሽን ጠበቃ የምስክሮቹን ቃል በእንግሊዝኛ እያሳጠሩ ለተከሣሹ ይንገሯቸው በማለት ትእዛዝ ሰጠና በዚሁ መሠረት ጠበቃው የምስክሮቹን ቃል ወደ እንግሊዝኛ እያሳጠረ በመተርጐም ለተከሣሹ ከተናገረ በኋላ ምስክር መስማቱ ተጠናቀቀ፡፡[20] በበርካታ ክርክሮች ላይ ጠበቆች በዚህ መልክ ለደንበኞቻቸው የትርጉም አገልግሎት በመስጠት ደንበኞቻቸውንና ፍ/ቤቱን ያግዛሉ፡፡

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[20]በዚህ ክርክር ፀሐፊው የተከሣሹ ጠበቃ ነበር፡፡

2.2 በዐ/ሕግ በኩል ስለሚኖር አስተርጓሚ

በወንጀል ክስ የግል ተበዳይ የሆነ ወገን የፍ/ቤቱን የሥራ ቋንቋ የሆነውን አማርኛ ለመረዳት የማይችል ከሆነ ምስክርነቱ ከመስማቱ በፊት ከዐ/ሐግ ጋር ተነጋግሮና ስለጉዳዩ ተረድቶ ምስክር ሆኖ ለመቅረብ ሊቸገር ይችላል፡፡ በወንጀል ክርክር የግል ተበዳዩ በአብዛኛው የዐ/ሕግ ምስክር ሆኖ ይቀርባል፡፡ በተለይ የተወሰኑ እንደ አስገድዶ መድፈር፣ በቼክ ማታለል፣ የአካል ጉዳት ወዘተ የመሳሰሉ ወንጀሎች ላይ የግል ተበዳዩ ምስክርነት ቁልፍ ማስረጃ፣ ወይም ወሳኝ ማስረጃ ተደርጎ የሚወሰድ ነው፡፡

ዐ/ሕግ ተበዳዩን ምስክሩ አድርጎ ለማቅረብ ምን እንደሚመሰክር፣ምን እንደሚያስታውስ፣ወዘተ አስቀድሞ ማነጋገር ሊያስፈልገው ይችላል፡፡ በተግባርም ይኸው ሁኔታ ያጋጥማል፡፡ በዚሁ ሁኔታ ለመነጋገር የግድ በቋንቋ መግባባት ያስፈልጋል፡፡ ሌሎች ምስክሮችንም በተመለከተ ተመሳሳይ ነው፡፡ ዐ/ሕግ የሚያናግረው ምስክር የፍ/ቤቱን ቋንቋ መናገር የማይችል ከሆነ ከዐ/ሕጉ ጋር መግባባት አይቻልም፡፡ በዚህ ሁኔታም የሚያጋጥሙ ችግሮች እንዳሉ ይታወቃል፡፡ በአንድ የወንጀል ክርክር ላይ ምስክሩ በዶርዝኛ ሲመሰክር ዐ/ሕግ ምስክሩን አልፈልገውም፣ ምስክርነቱ ይቋረጥልኝ በማለት አመለከተ፡፡ ፍ/ቤቱም መጀመሪያውኑ ምን እንደሚመሰክር ሳታረጋግጡ ነወይ ስለተፈፀመው ወንጀል ያውቃል በማለት ጭብጥ ያስያዛችሁት ሲል ጠየቀ፡፡ ዐ/ሕግም ቋንቋውን ስለማልችል ላናግራቸውና ምን እንደሚያውቁ ላረጋግጥ ስላልቻልኩ ነው በማለት መለሰ፡፡[21]

ዐ/ሕጎች አስተርጓሚ የሚያገኙት በአብዛኛው ጉዳዩን በያዘው ፍ/ቤት ትእዛዝ አማካኝነት ነው፡፡ይህ የሆነው ዐ/ሕግ ወይም ፍ/ሚኒስቴር እና የተከላካይ ጠበቆች ጽ/ቤት የራሳቸው አስተርጓሚዎች ስለሌላቸው ነው፡፡[22] ለምሣሌ በደቡብ አፍሪካ የፍትሕ ጽ/ቤቱ የተለየ ቋንቋ የሚናገሩ አስተርጓሚዎች አሉት፡፡ በፍ/ቤቱ ቅጥር ግቢ ውስጥም ስማቸው የተለጠፈበት ቢሮ አላቸው፡፡ በዚህ መሠረትም በፍትሕ ጽ/ቤቱ በሙሉ ጊዜ የተቀጠረ ለበርካታ አመታት ከእንግሊዝኛ ወደ አማርኛ እና ከአማርኛ ወደ እንግሊዝኛ በማስተርጐም የሚሠራ ኢትዮጵያዊ እንዳለ ፀሐፊው እራሱ አረጋግጧል፡፡[23]

2.3 በተከላካይ ጠበቃ በኩል ስለሚኖር አስተርጓሚ

በፌደራል ጠቅላይ ፍርድ ቤት ሥር የሚገኘው የተከላካይ ጠበቆች ጽ/ቤት ቁጥራቸው በጣም በርካታ ለሆኑ በከባድ ወንጀል ለተከሰሱ ተከሣሾች ተከላካይ ጠበቃ መድበላቸው ጉዳያቸውን እየተከታተለ ይገኛል፡፡ ይሁን እንጂ ተከላካይ ጠበቆች ከተከሣሽ ጋር በቋንቋ ምክንያት መግባባት የማይችሉበት በርካታ አጋጣሚዎች ስላሉ

[21]ፀሐፊው ይህን ክርክር በመጋቢት ወር 2006ዓ. ም. በፌደራል የመ/ደ/ፍ/ቤት 7ኛ ወ/ችሎት ውስጥ ተቀምጦ አዳምጧል፡፡

[22]ከአንድ የፌደራል ዐ/ሕግ ጋር የተደረገ ውይይት፡፡ ዐ/ሕጉ ስሙ እንዲጠቀስ ስላልፈለገ አልተጠቀሰም፡፡ ፀሐፊው ዐ/ሕግ ሆኖ ይሰራ በነበረበት ጊዜ መ/ቤቱ የአስተርጓሚነት አገልግሎት እንዲሰጥ በሚል የተቀጠረ አስተርጓሚ አልነበረውም፡፡

[23]ፀሐፊው ይህን ያወቀው በ2005 ዓ.ም ደቡብ አፍሪካ በነበረበት ጊዜ ሐውቴን ዲስትሪክት ፍ/ቤት ቀርቦ አንድ የሚያውቀው ኢትዮጵያዊ በወንጀል የተጠረጠረበትን የጊዜ ቀጠሮ ክርክር ሲከታተል በነበረበት ጊዜ ነው፡፡ ኢትዮጵያዊ አስተርጓሚውንም ተዋውቆት ከትርጉም አገልግሎት አሰጣጥ ጋር የተያያዙ ዝርዝር የፍ/ቤቱንና የፍትህ ጽ/ቤቱን አሰራሮችን አጫውቶታል፡፡ በአጠቃላይ በወንጀል ለተጠረጠሩ እና ለተከሰሱ ሰዎች አስተርጓሚ የሚያቀርበው ፍ/ቤቱ ሣይሆን ፍትሕ ጽ/ቤቱ (department of justice) እንደሆነ ፀሐፊው እዚያው በነበረበት አጋጣሚ ለመረዳት ችሏል፡፡አላማውም ፍትህ ጽ/ቤቱ ተከሣሹ ፍትህ እንዲያገኝ የሚያስችለውን ተግባር ሁሉ እንዲፈጽምለት ሕግ ስለሚያስገድደው ነው፡፡

አስተርጓሚ ማግኘት የሚቸገሩበት ጊዜ አለ፡፡ ስለክሱ ዝርዝር ጉዳዮችን ከተከሣሹ ጋር ለመነጋገር፣ የዐ/ሕግ ምስክሮችን በቂ ዝግጅት አድርጐ ለመጠየቅ፣ የመከላከያ ማስረጃዎችን ለማሰባሰብ ለማዘጋጀትና ለማደራጀት ከተከሣሽ ጋር በቋንቋ መግባባት በጣም አስፈላጊ ነው፡፡ ለምሳሌ በቅርቡ በነበረ አንድ የወንጀል ክርክር ላይ ዳኞቹ ተከሣሹን አነጋገሩት ወይ? በማለት ለተከሣሹ የተመደበውን ተከላካይ ጠበቃ ሲያናግሩት ተከላካይ ጠበቃው በቋንቋ መግባባት ስላልቻልንና አስተርጓሚም ለማግኘት ስላልቻልኩ አላናገርኩትም በማለት መለሰና አንድ ተለዋጭ ቀጠሮ ጠየቀ፡፡

ተከሣሹና ተከላካይ ጠበቃው በሚገባ መግባባት ካልቻሉ ለተከሣሽ የተሰጠው መብት ዋጋ ቢስ የሆናል፡፡ የተከላካይ ጠበቆች ጽ/ቤት የራሱ አስተረጓሚ ስለሌለው ተከላካይ ጠበቆቹ የትርጉም ችግር ሲያጋጥማቸው ችግሩን የሚቀርፉበት መንገድ የተለየ ነው፡፡ የአማርኛ ቋንቋን መረዳት ለማይችሉ ተከሣሾች ተከላካይ ጠበቃ ሆነው በሚከራከሩበት ወቅት በዋነኛነት በፍ/ቤት ትእዛዝ አስተርጓሚ ይመደብላቸዋል፡፡ በማረሚያ ቤት ተከሣሾችን በሚያናግሩበት ጊዜ ደግሞ ማረሚያ ቤቱ ሌሎች የቋንቋው ተናጋሪ የሆኑ የማረሚያ ቤቱ ሠራተኞችን በአስተርጓሚነት ይመድቡላቸዋል፡፡ በማረሚያ ቤቱ አስተርጓሚ ከጠፉ ፍ/ቤቱ ይመድብላቸዋል፡፡ አንዳንድ ጊዜ ደግሞ ቋንቋውን የሚናገሩ ሌሎች ተከላካይ ጠበቆች ያስተረጉማሉ፡፡

ተከላካይ ጠበቆቹ በራሳቸው አነሳሽነት አስተርጓሚዎችን የሚያፈላልጉበት ጊዜም አለ፡፡ የዋስትና መብት ተከልክለው በማረሚያ ቤት ያሉ ተከሣሾችን ሲያናግሩ የማረሚያ ቤት ፖሊሶችን ትብብር በመጠየቅ ፖሊሶቹን ጭምር የትርጉም አገልግሎት እንዲሰጧቸው ይጠይቃሉ፡፡ ከእነዚህ ችግሮች የተነሳ አንዳንድ ተከላካይ ጠበቆች ጽ/ቤቱ የአስተረጓሚን ችግር ለመቅረፍ የተሻለ አሰራር መዘርጋት ይገባዋል የሚል እምነት አላቸው፡፡[24]

2.4. ስለፍትሐብሔር ተከራካሪዎች

የፍ/ብሔር ተከራካሪዎች የአስተርጓሚ አገልግሎት የማግኘት መብታቸው በተመለከተ ሕገ-መንግስቱ በግልጽ ያስቀመጠው ድንጋጌ የለም፡፡ ተከራካሪዎቹ ጉዳያቸው በፍ/ቤት እንዲታይ የማድረግ መብታቸው የሚመነጨው ከሕገመንግስቱ ፍትሕ የማግኘት መብት ድንጋጌ ነው፡፡ ፍትሕ የማግኘት መብት የሚመነጨው "ከሕግ የበላይነት መርህ ነው" ፡፡ ይህ መርህ ደግሞ አለምአቀፍ የሰብአዊ መብት መመዘኛን መሠረት ያደረገ ነው፡፡ የሥነሥርአት ሕጐችም ሆኑ ሌሎች ሕጐች ይህን መመዘኛ ያሟሉ መሆን እንዳለባቸው ይታመናል፡፡ የኢ.ፌ.ዲ.ሪ. ሕገመንግስት እነዚህን መሠረታዊ የሰብአዊ መብቶች የተቀበለና የሕጐቻችንም አካል ያደረጉ ስለሆነ መንግስት አለምአቀፍ ደረጃዎቹን ባሟላ ሁኔታ መብቶቹን እንዲያስፈጽም ይጠበቅበታል፡፡ በዚህም መሠረት የሥነ-ሥርአት ሕጐቻችንም ይህን መመዘኛ ባሟላ መልክ እንዲፈጽሙ የሚጠበቅ ሲሆን ግልጽነት የሚጐድላቸው ከሆነም ፍ/ቤቶች የሕገመንግስቱን ድንጋጌ ከዚህ አንፃር እየተረጐሙ የተከራካሪዎቹን መብት ማስጠበቅ ይጠበቅባቸዋል፡፡

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[24]ፀሐፊው ይህን የተረዳው ከአንዳንድ ተከላካይ ጠበቆች ጋር በተደጋጋሚ በጉዳዩ ላይ በተወያየው መሠረት እና በችሎት ውስጥም ተቀምጦ የተከላካይ ጠበቆችን ልምድ ለማየት በቻለው መሠረት ነው፡፡

ፍትህ የማግኘት መብት ሰፊና በጣም ብዙ የመብት አይነቶችን የሚመለከት ነው፡፡ በዚህ መብት ከሚሸፈኑት መብቶች መካከል አንዱ የትርጉም አገልግሎት የማግኘት መብት ነው፡፡ ከሣሽ በፍ/ቤቱ የሥራ ቋንቋ ክሱን ከመሰረተ በኋላ ተከሣሽም በፍ/ቤቱ የሥራ ቋንቋ መልሱንና ማስረጃውን አዘጋጅቶ ለፍ/ቤቱ ያቀርባል፡፡

ከዚህ በኋላ የአስተርጓሚ ጉዳይ እንደመብት የሚነሳው በክርክሩ ሂደት ተከራካሪዎቹ የፍ/ቤቱን የሥራ ቋንቋ የማይረዱ ከሆነ ፍ/ቤቱ አስተርጓሚ አቅርቦ ሊያስተረጉምላቸው ይገባል የሚለው ላይ ነው፡፡ ተከራካሪዎች በፍ/ቤቱ የሥራ ቋንቋ ክስና መልስ መቀባበላቸው ብቻ ፍትህ እንዲያገኙ አያስችላቸውም ወይም ፍትሕ እንዳገኙ ተደርጎ አይቆጠርም፡፡ ከፍ/ቤቱ ጋር የሚያደርጉት ማንኛውም ንግግርና ክርክር በሚገባቸው ቋንቋ ተደርጎላቸው ጉዳያቸውን ካልተረዱት ፍትህ አገኙ ሊባል አይችልም፡፡

ከዚህ መሠረታዊ ሕገመንግስታዊ መብት በመነሳት የመብቱን ዝርዝር አፈፃፀም በተመለከተ በሕግ ሊደነገግ ይችላል፡፡ በአዋጅ ቁ. 25/88 አንቀጽ 25/2/ ላይ “የአማርኛ ቋንቋ ለማይችል ባለጉዳይ ፍ/ቤቱ አስተርጓሚ ይመድባል” በሚል የተደነገገውም ለዚህ ነው፡፡ በዚህ መሠረት የፍ/ብ/ሥ/ሥ/ሕጉ አንቀጽ 262 የምስክርን ቃል መተርጎምን አስመልክቶ ምስክሩ ቃል የሰጠው በአማርኛ ሳይሆን በሌላ ቋንቋ የሆነ እንደሆነ የምስክሩ ቃል ወደአማርኛ የሚተረጎመው በፍ/ቤቱ አስተርጓሚ እንደሆነና አስተርጓሚውም የመተርጎም ስራውን ከመጀመሩ በፊት ቃሉን በትክክለኛ የሚያስተረጉም ለመሆኑ የመሐላ ቃል መስጠት እንዳለበት ይደነግጋል፡፡

ስለሆነም የፍ/ሥ/ሥ/ሕጉ ፍ/ቤቱ አስተርጓሚ እንዲመድብ የሚጠበቀው ለምስክርነት የቀረበው ምስክር ቃሉን የሚሰጠው ከአማርኛ ውጪ ከሆነ ብቻ ነው፡፡ "አማርኛ" በሚል የተጠቀሰው ሕጉ በወጣበት ጊዜ የነበረው የፍ/ቤቶች የሥራ ቋንቋ አማርኛ ስለነበር ነው፡፡ አሁን ግን የክልል ፍ/ቤቶች የሥራ ቋንቋ በርካታ ሌሎች ቋንቋዎችንም ስለሚመለከት «ምስክሩ ቃል የሰጠው ከፍ/ቤቱ የሥራ ቋንቋ ውጪ በሌላ ቋንቋ ከሆነ» በሚል ተፈፃሚ የሚሆን ነው፡፡ ስለሆነም ምስክር መስማትም ሆነ ክስ መስማትና የመሳሰለው ክርክር የሚደረገው ባለጉዳዩ በማይገባው ቋንቋ ከሆነ ፍ/ቤቱ አስተርጓሚ የመመደብ ግዴታ አለበት፡፡ ይሁን እንጂ ከዚህ አንፃር በሕጉ አፈፃፀም ላይ የሚታዩ በርካታ ችግሮች አሉ፡፡

2.5 ፍ/ቤቶች አስተርጓሚ ስለሚመድቡበት አሰራር

የፌደራል ፍ/ቤቶች አማርኛ ለማይረዳ ባለጉዳይ አስተርጓሚ መመደብ አለባቸው፡፡ የፌደራል ፍ/ቤቶች መዋቅር የአስተዳደር ክፍሉንና ችሎቶችን የያዘ ነው፡፡ ችሎቶች የፍ/ቤት ባለጉዳይ የሚባለው ተከራካሪ ወገን እየቀረበ ክርክሩን የሚመራ ዳኛ ወይም ዳኞች ተመድበው የዳኝነት ሥራ የሚከናወንባቸው ክፍሎች ሲሆኑ የአስተዳደር ክፍሉ ደግሞ ለዚህ ችሎቶቹ ለሚያከናውኑት የዳኝነት ሥራ ውጤታማነት ተገቢውን ድጋፍ የሚያደርግ የድጋፍ ሰጪ ክፍል ነው፡፡

ባለጉዳዩ አማርኛ መናገር መቻል አለመቻሉን በመጀመሪያ የሚያረጋግጠው ዳኛው ነው፡፡ ዳኛው ይህን የሚያረጋግጥበት የክርክር ደረጃ ግን የተለያየ ሊሆን ይችላል፡፡ ለምሣሌ በምስክርነት የተቆጠረው ምስክር አማርኛ እንደማይረዳ አስቀድሞ በክሱ ወይም በመልሱ ላይ የተጠቀሰ ከሆነ ፍ/ቤቱ መጥሪያ እንዲሰጥ ትእዛዝ

ሲሰጥ ምስክሩ በሚሰማበት እለት አስተርጓሚም እንዲያቀርብ ለፍ/ቤቱ ሬጂስትራር ትእዛዝ ሊሰጥ ይችላል፡፡ አልፎ አልፎ እንደዚህ አይነት ትእዛዞች ሲሰጡም ይታያል፡፡ በአብዛኛው የተለመደው ግን በክርክር ሂደት እንደየሁኔታው አስተርጓሚ እንዲቀርብ እየተደረገ ማከራከር ነው፡፡ ዳኛው በዚህ ሁኔታ አስተርጓሚ እንደሚያስፈልግ ካረጋገጠ በኋላ በተለያዩ ሁኔታዎች የባለጉዳዩን መብት ለማስከበር ጥረት ያደረጋል፡፡ ጥረቱ ካልተሳካ የፍ/ቤት አስተዳደር ድጋፍ ይጠየቃል፡፡ ስለሆነም አስተዳደሩና ዳኞቹ ወይም ችሎቶቹ የባለጉዳዩን አስተርጓሚ የማግኘት መብት በማስከበር ረገድ ያላቸው ኃላፊነት ተደጋጋፊ ነው፡፡

አስተርጓሚ የሚመደብበትን አሰራር በተመለከተ ሬጂስትራር በመጀመሪያ እንዲተረጐም የተጠየቀው ቋንቋ የአገር ውስጥ ቋንቋ ከሆነ ይህንኑ የሚችል ሰው ከፍ/ቤቱ ሠራተኞች መካከል አፈላልጐ ይመድባል፡፡ ለዚሁ ተግባር የተሰበሰበ የሰራተኞችን ስም እና የሚናገሩትን ቋንቋ የሚገልፅ ዝርዝር ተዘጋጅቶ ተቀምጧል፡፡ እነዚህ ሠራተኞች በመደበኛነት የአስተርጓሚነት ሥራን እንዲሰሩ የተቀጠሩ አይደሉም፡፡ የአስተርጓሚነት ሥራውን የሚሰሩት ከመደበኛው ሥራቸው ጋር በተደራቢነት ሲሆን ለተደራቢው የአስተረጓሚነት ሥራ ግን አበል ይከፈላቸዋል፡፡ አንዳንድ ጊዜ የእንግሊዝኛ ቋንቋን ለማስተርጐም ፍ/ቤቱ የሕግ ረዳቶችን ይጠቀማል፡፡

የፌ/መ/ደ/ፍ/ቤት ልምድን በተመለከተ በአዲስ አበባ በኦሮምኛ ቋንቋ በቋሚ የሥራ መደብ የተቀጠረ አስተረጓሚ አለ፡፡ በድሬዳዋ በሚገኘው የመጀመሪያ ደረጃ ፍ/ቤት በቋሚ የሥራ መደብ ሱማሌኛ እና አደሬኛ ቋንቋዎችን እንዲተረጉሙ የተቀጠሩ አስተርጓሚዎች አሉ፡፡ ለእነዚህ ሰራተኞች ፍ/ቤቱ ሰብስቦ መብትና ግዴታቸውምን እንደሆነ እንዲሁም ሆነ ብለው ትርጉም ቢያዛቡ የሚያስከትለውን ኃላፊነት በሚመለከት ገለፃ አድርጐላቸዋል፡፡

የፌደራል ከፍተኛው ፍ/ቤት በኦሮምኛ ቋንቋ በቋሚ የሥራ መደብ ተቀጣሪ ያለው ሲሆን በሌሎችም ቋንቋዎች አልፎ አልፎ አስተርጓሚ ሲያስፈልግ ፍ/ቤቱ አድራሻቸውን የሚያውቀውን እና የስም ዝርዝራቸው በፍ/ቤቱ ሰነድ ላይ የሚገኝ አስተርጓሚዎች ሬጂስትራሩ ይጠራል፡፡ ችሎቶች ወዲያው አስተርጓሚ እንዲቀርብላቸው ሲጠይቁ ከፍ/ቤቱ ሰራተኞች መካከል የአስተርጓሚነት ሥራ ሊሰራ የሚችል ሰው ከተገኘ ይኸው ሰው ለትርጉም ሥራው ይመደባል፡፡ ሆኖም ለአንዳንድ ቋንቋዎች አስተርጓሚ በቀላሉ ስለማይገኝ የሬጂስትራር ሠራተኞች በግልም ጭምር የማፈላለግ ጥረት ያደርጋሉ ወይም ባለጉዳዮቹ ፈልገው እንዲያመጡ ይደረጋል፡፡ ሬጂስትራር በእነዚህ ሁኔታዎች አስተርጓሚ አፈላልጐ ካላገኘ ይህንኑ ለፍ/ቤቱ በደብዳቤ ያሳውቃል፡፡ አስተርጓሚ የተፈለገበት ቋንቋ የውጭ ቋንቋ ከሆነና ቋንቋውን የሚናገር ኤምባሲ በኢትዮጵያ ውስጥ ካለ ፍ/ቤቱ በውጭ ጉዳይ ሚኒስቴር በኩል አስተርጓሚ ከኤምባሲ እንዲላክለት ደብዳቤ በመፃፍ ትብብር ይጠይቃል፡፡

በየደረጃው ያሉ የሁሉም ፍ/ቤቶች ሬጂስትራሮች አስተርጓሚ በማፈላለግ ረገድ የተዋረድ ግንኙነት የላቸውም፡፡ የፌደራል የመጀመሪያ ደረጃ ፍ/ቤት አስተርጓሚ ካጣ፣ የከፍተኛውን ፍ/ቤት፣ የከፍተኛው ፍ/ቤት አስተርጓሚ ካጣ የጠቅላይ ፍ/ቤትን ሬጂስትራር እየጠየቀ አስተርጓሚ እንዲቀርብ የሚደረግበት አሰራር የለም፡፡ አንዳንድ

ጊዜ ግን የሚታወቅ አስተርጓሚ ካለ አድራሻውን ስጡን በሚል የትብብር ጥያቄ ሊቀረብ ይችላል፡፡[25] ይሁን እንጂ ሁኔታው በዚህ መልክ የሚቀጥል መሆን የለበትም፡፡ በተለይ ጠቅላይ ፍ/ቤቱ የሁለቱ ፍ/ቤቶች የበላይ ስተዳዳሪ ስለሆነ የአስተረጓሚዎችን አመራረጥ፣አበል አከፋፈል፣ዝርዝር መረጃ አያያዝ ወዘተ በተመለከተ ወጥና ጠንካራ አሰራር መዘርጋት ይጠበቅበታል፡፡

2.5.1 አስተርጓሚ የሚመደብበት መመዘኛ፣ አበል አከፋፈል እና በአስተርጓሚዎች የሚነሱ ቅሬታዎች

የአገር ውስጥ ቋንቋዎችን በተመለከተ አስተርጓሚ የሚመደብበት የተለየ መስፈር የለም፡፡ መስፈርቱ ተርጓሚዉ ቋንቋውን መናገር መቻሉ ነው፡፡ ይህም የሚረጋገጠው ተርጓሚው ቋንቋውን መናገር እችላለሁ በማለቱ ብቻ ነው፡፡ የአበል ክፍያን በተመለከተ አንዳንድ የማስተርጐም ሥራ የሚሰሩ ሰዎች ፍ/ቤቱ ለአስተረጓሚዎች የመደበው አበል ትንሽ መሆኑና ይህም የተመደበው አበል ለአስተርጓሚዎች ወዲያውኑ የሚከፈል ሳይሆን የፋይናንስ ክፍል ካፀደቀው በኋላ የሚከፈል በመሆኑ ይህም መጉላላትን[26] ስለሚያስከትል ከፍ/ቤቱ ጋር ለመሥራት ፈቃደኛ እንዳልሆኑ ይገልፃሉ፡፡[27] ፍ/ቤት የባለበጀት መሥሪያ ቤት ስለሆነ እና ለተለያዩ አገልግሎቶች በመደብ ወጪ 6656 በሚል ፍ/ቤቱ ክፍያ እንደሚፈጽም እና ከእነዚህ የአገልግሎት ክፍያዎች አንዱ የማስተርጐም አገልግሎት ነው፡፡ አበል የሚከፈለውም ለአገር ውስጥ ቋንቋዎች አስተርጓሚ ብር 35፣ ለውጭ አገር ቋንቋዎች አስተርጓሚ ደግሞ ብር 50 የመነሻ ክፍያ ሲሆን ዳኞች የነገሩን ሁኔታ እያዩ ከመነሻው ክፍያ በላይ ሊያዙ ይችላሉ፡፡[28]

አስተርጓሚዎች የሚያነሷቸው የአበል ማነስ፣ የአበሉ ክፍያ የተንዛዛ መሆኑን፣ እና ዳኞቹ በሰዓቱ የማያስተናግዷቸው መሆን ይኸውም ብዙውን ጊዜ አስተርጓሚዎች ሌላ ወይም መደበኛ ሥራቸውን ጥለው የሚመጡ በመሆኑ አስተርጓሚ ያስፈለገበት የችሎት ሰዓት ከተራዘመ እንደሚጉላሉ በችግርነት ይገለፃሉ፡፡

ስለሆነም አስተርጓሚዎች የማስተርጐም ሥራቸውን እንደጨረሱ ወዲያውኑ አበላቸው የሚከፈልበትን አሰራር ማመቻቸት እና ለሒሣብ ክፍል ክፍያ ከተፈፀመ በኋላ ማሳወቅ የሚቻልበትን መንገድ መዘርጋት፣የአበሉን መጠን ማሻሻል[29] እና አስተርጓሚ የታዘዘባቸውን መዝገቦች ችሎቶች በቅድሚያ አይተው አስተረጓሚዎች በጊዜ ሥራቸውን ጨርሰው የሚሰናበቱበት ሁኔታ እንዲፈጠር ቢደረግ ችግሩን ያቃልላል፡፡[30]

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[25]ፀሐፊው ከላይ በርዕስ 2.5 ላይ የተመለከተውን መረጃ ያገኘው ስማቸው እንዲጠቀስ "ካልፈለጉ አሁን በሥራ ላይ ካሉ ሬጂስትራሮች እና ከቀድሞ ሬጂስትራሮች ሲሆን፣ በአስተርጓሚነት አበል የተከፈላቸው ረዳቶችም ስለአሰራሩ መረጃ ሰጥተውታል፡፡

[26]ለምሣሌ ፀሐፊው ሲከራከርበት በነበረ አንደ የወንጀል ጉዳይ እንግሊዝኛ ሲያስተረጉሙ ለነበሩ ግለሰብ ፍ/ቤቱ 100 ብር ይከፈላቸው በማለት ትእዛዝ ሲሰጥ ፀሐፊው ሰምቷል፡፡ ይህ አይነቱ ትእዛዝ አስተርጓሚዎች በአበል ማነስ ምክንያት ከሥራው እንዳይሸሹ ስለሚያደርግ ተገቢ የሆነ ትእዛዝ ነው፡፡ይሁን እንጂ በአንዳንድ መዝገቦች ላይ ፍ/ቤቶች በደፈናው በደንቡ መሠረት ለአስተርጓሚው አበል እንዲከፈል አዘናል"ከሚባል በስተቀር የተሻለ አበል እንዲከፈል ስለማይታዘዝ በአስተርጓሚዎች በኩል ከላይ የተመለከተውን ቅሬታ ማስከተሉ አይቀርም፡፡

[27]አንዳንድ አስተርጓሚዎች በችሎት መስተንግዶም ይማረራሉ፡፡

[28] የግርጌ ማስታወሻ ቁ. 24 ይመለከቷል፡፡

[29] ከአንድ የፌደራል የመጀመሪያ ደረጃ ፍ/ቤት ሒሣብ ክፍል ሠራተኛ ጋር በ2005 ዓ.ም ውስጥ የተደረገ ውይይት፡፡

[30] ዝኒ ከማሁ

3. የሰነድ ትርጉምና የአስተርጓሚነት አገልግሎት አሰጣጥ

በአገራችን የትርጉም ጽ/ቤቶች የሚሰጡት መሠረታዊ አገልግሎት ሰነዶችን የመተርጐም አገልግሎት ነው፡፡ አሁን በሚታየው የሥራው ባህሪ የሰነድ ትርጉም አገልግሎት በሶስት መልክ የሚሰጥ ነው፡፡ አንደኛው የትርጉም ጽ/ቤቱ በተተረጐመው ሰነድ ላይ ማህተም አድርጐ ለባለጉዳዩ የሚሰጥበት አገልግሎት ነው፡፡ ባለጉዳዩ ማህተም የተደረገበትን ሰነድ ለፈለገው አገልግሎት ያውለዋል፡፡ ለፍ/ቤቱም በማስረጃነት የሚያቀርበውም ይህንኑ ሰነድ ነው፡፡ ምክንያቱም ለፍ/ቤት የሚቀርብ የሰነድ ትርጉም ትርጉም ማኅተምና ቲተር ወይም ማኅተም[31]ያለው እንዲሆን ስለሚጠበቅ ነው፡፡[32] ሰነዱ በሬጂስትራር በኩል የሚያልፍ ከሆነ[33] ሬጂስትራር የትርጉም ጽ/ቤት ማኅተም መኖሩን የሚያረጋግጥ ሲሆን በቀጥታ ለፍ/ቤቱ የሚቀርብ ከሆነ[34] ደግሞ ዳኛው ይህንኑ በማረጋገጥ ተገቢውን ያዛል፡፡

ሁለተኛው አይነት አገልግሎት ማኅተም የማያስፈልገው የሰነድ ትርጉም አገልግሎት ሲሆን በሶስተኛ ደረጃ የሚሰጡት አገልግሎት በቃለመሐላ ተደግፎ የሚሰጠው የሰነድ ትርጉም አገልግሎት ነው፡፡ ይህ አይነት የትርጉም አገልግሎት ስለትርጉሙ ትክክለኛነት የትርጉም ጽ/ቤቱ በቃለመሐላ አረጋግጦ የሚሰጠው አገልግሎት ሲሆን በቃለመሐላ የተረጋገጠው ሰነድ የሚሰጠውም ለውጭ ጉዳይ ሚ/ር እና ለሰነዶች ማረጋገጫና ምዝገባ ጽ/ቤት ነው፡፡ በዚህ መልክ የሚላከው ሰነድ በተደጋጋሚ የትርጉም ግድፈት ከተገኘበት "ከእናንተ ትርጉም ጽ/ቤት የሚመጣ ሰነድን አንቀበልም" በማለት የሰነዶች ምዝገባና ማረጋገጫ ጽ/ቤት ቃለመሐላውን የሚመልስበት አጋጣሚ አለ፡፡[35]

ከዚህ ውጪ በብዛት የሚያግጥም ባይሆንም ትርጉም ጽ/ቤቶች አስተርጓሚ ካላቸው እንዲመድቡ ከፍ/ቤቶች የሚጠየቁበት አጋጣሚ አለ፡፡ ይሁን እንጂ በአብዛኛው አስተርጓሚ ለመመደብ ፈቃደኛ አይሆኑም፡፡[36] አንዳንድ የትርጉም ጽ/ቤቶች በዚህ መልክ አገልግሎት መስጠት የማይፈልጉት ከፍ/ቤት ጋር መነካካቱ ጣጣ ያመጣብናል ብለው ስለሚፈሩ ነው፡፡ ይሁን እንጂ በሌሎች አገሮች እንደሚደረገው የትርጉም ጽ/ቤቶች ከፍ/ቤቶች ጋር ተዋውለው አገልግሎቱን ሊሰጡ የማይችሉበት ምክንያት የለም፡፡ በዚህ ረገድ የትርጉም ጽ/ቤቶች አሰራር በሚገባ ሊዘምን እንደሚገባው የሚያከራክር አይደለም፡፡

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[31]አንዳንድ ተርጓሚዎች ማኅተማቸውን ይዘው ከባለጉዳዩ ሲደወልላቸው ብቻ ሰነዱን ይቀበሉና ተርጉመውና በራሳቸው አጽፈው በሰነዱ ላይ ማኅተማቸውን በማድረግ ለባለጉዳዩ ይሰጣሉ፡ እነዚህ ተርጓሚዎች ምንም እንኳን ፈቃዱን ሲያወጡ አድራሻ ያስመዘገቡ ቢሆኑም በአድራሻቸው በሙሉ ጊዜ ተቀምጠው አገልግሎት የሚሰጡ ግን አይደሉም፡፡

[32]የማኅተምና ቲተር አጠቃቀምን በተመለከተ የሚታየው ሁኔታ የተዘበራረቀ ነው፡፡ ብዙዎቹ ክብ ማኅተምና የትርጉም ጽ/ቤቱን ባለቤት ማኅተም ሲጠቀሙ አንዳንዶች ደግሞ ማኅተም ብቻ ወይም ቲተር ብቻ ይጠቀማሉ፡፡ ይሁን እንጂ ይህን በተመለከተ ሕግን መሠረት ያደረገ አስገዳጅ አሰራር ስለሌለ የተርጓሚውን ማንነትና ይህንኑ ሊያረጋግጥ የሚችል መለያ በሰነዱ ላይ ካረፈበት ፍ/ቤቶች በቂ ነው በሚል ይቀበሉታል፡፡

[33] ለምሣሌ አዲስ የፍትሐብሔርና የወንጀል ክስ ሲሆን ወይም ሬጂስትራር ጋር ቀርቦ ቃለመሐላ የሚፈፀምበት ሰነድ ወዘተ ሲሆን የሰነድ ትርጉሙ ለዳኞች የሚቀርበው ሬጅስትራር ካየው በኋላ ነው፡፡

[34]ለምሣሌ በወንጀል ጉዳይ ተከሣሽ የመከላከያ ማስረጃ ሲያቀርብ፣ በፍ/ብሔር ክርክር ደግሞ በቃለመሐላ መረጋገጥ የማያስፈልገው አቤቱታ ሲያቀርብ ሰነዱ በሬጂስትራር በኩል አይታይም፡፡

[35]ፀሐፊው ለትርጉም ሥራ ቅርብ በነበረበት ጊዜ በዚህ መልክ የተከለከሉ ትርጉም ጽ/ቤቶች እንደነበሩ ያውቃል፡፡

[36] ፀሐፊው ይህን ሊያውቅ የቻለው ለትርጉም ስራ ቅርብ ስለነበር ነው፡፡

3.1. የትርጉም ግድፈት

የትርጉም ግድፈት ማለት በትርጉም ሰነድ ላይ ከሚያጋጥሙ ተራ የቃላት ግድፈት አንስቶ በተተረጐመው ሰነድ ላይ ያለው ሐሣብ የተለያየ መሆንና ሌሎች ተያያዥ ችግሮችን የሚመለከት ነው፡፡ በትርጉም ሰነድ ላይ የሚታይ ግድፈት የተሳሳተ ትርጉም (mistranslation) ወይም የትርጉም ግድፈት (defect in translation) በሚል ይጠቀሳል፡፡ ልብ ብሎ ለተመለከተ ሰው በአዋጆችና ደንቦችም ላይ ሳይቀር በእንግሊዝኛና በአማርኛ ትርጉሙ መካከል የትርጉም ግድፈት እንዳለ ለመገንዘብ ይችላል፡፡

“የተሳሳተ” ትርጉምና “የትርጉም ግድፈት” ተተካኪ ቃላት ተደርገው የሚወሰዱ አይደሉም፡፡ የትርጉም ስህተት መሠረታዊ የይዘት ስህተትን የሚመለከት ነው፡፡ ለምሣሌ የፊደላት ስህተት፣ተራ የሰዋሰው ስህተት ወዘተ በትርጉም ሰነድ ይዘት ላይ መሠረታዊ ለውጥ ላያስከትል ይችላል፡፡ መጠንን፣ ምክንያትን፣ ውጤትን፣ ልኬትን፣ ጊዜንና የሙያ ቃላት በስህተት መተርጐምን የሚመለከት ስህተት ግን መሠረታዊ ስህተት ተደርጐ የሚቆጠር ነው፡፡ በተለያዩ ጉዳዮች ላይ የክርክር መንስኤ እየሆነ ያለው ግድፈትም በአብዛኛው የትርጉም ስህተት ነው፡፡

ሰነዱም በራሱ ለትርጉም ስራው ከፍተኛ ችግር የሚሆንበት አጋጣሚ አለ፡፡ ለምሣሌ በፍ/ቤት ክርክር በአንደኛው ተከራካሪ ወገን የሚቀርበው ወይም ፍ/ቤቱ በራሱ ትእዛዝ የሚያስቀርበው ሰነድ የማይነበብ ሊሆን ይችላል፡፡ ለምሣሌ በአንድ የወንጀል ክርክር የግል ተበዳይዋ የሕክምና መከታተያ ካርድ[37] (patient card) በመከላከያ ማስረጃነት ከሆስፒታሉ እንዲቀርብለት ተከሣሽ በጠበቃው[38] አማካኝነት ጠይቆ ሰነዱ እንዲቀርብ ከተደረገ በኋላ ተከሣሽ ሰነዱን ኮፒ አድርጐ ወሰደ፡፡ ከዚያም ሰነዱ እንዲተረጐም ለትርጉም ጽ/ቤት ሲሰጥ ሰነዱ በግልጽ ስለማይነበብ መተርጐም አልቻልንም በማለት ትርጉም ጽ/ቤቱ ሰነዱን መለሰው፡፡

ተከሣሽም ሰነዱን የሰጠው ሆስፒታል ተርጉሞ እንዲያቀርብ ይታዘዝልኝ በማለት ባለመለከተው መሠረት ሆስፒታሉ በሕክምና ካርዱ ላይ የተፃፈው የሐኪሙ አስተያየት በባለሙያ እንዲተረጐም አስደርጐ በሆስፒታሉ ማኅተም የተተረጐመውን ሰነድ አረጋግጦ ለፍ/ቤቱ ላከ፡፡ በዚህ መልክ የማይነበቡ ሰነዶች ለትርጉም ጽ/ቤቶች የሚቀርቡበትና ሳይተረጐሙ የሚመለሱበት በርካታ አጋጣሚ ይከሰታል፡፡[39]

በአንድ የፍትሐብሔር ክርክርም ከሣሽ በፍ/ቤቱ ትእዛዝ እንዲመጣለት ያስደረገው ሰነድ ለተረጓሚዎች ስላልተነበበ ዋናው ሰነድ እንዲመጣለት አመለከተ፡፡ ሰነዱን የሚልከው መ/ቤት ደግሞ ምስጢራዊ ሰነድ ስለሆነ “ለመላክ እቸገራለሁ” በማለት መለሰ፡፡ ፍ/ቤቱም ትእዛዝ እንሰጥበታለን በማለት በአዳሪ ቀጠረው፡፡[40] ከዚህ በተጨማሪ ሰነዱ በከፊል የመነበብ ችግር ያለበት ወይም በከፊል ሲነበብ ግልጽ የሚሆንና አንዳንዱ ደግሞ

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[37]የሕክምና መከታተያ ካርድ ማለት አንድ ታካሚ ሆስፒታል ወይም በማንኛውም የሕክምና አገልግሎት ተቋም ውስጥ ለሕክምና ከገባበት ጊዜ ጀምሮ ሕክምናውን እስከጨረሰበት ጊዜ ድረስ የተደረገለት የሕክምና ክትትል፣ያከመው ሐኪም፣የተደረገለትን ምርመራ፣የታዘዘለትን መድሃኒት ወዘተ በተመለከተ የሚመዘገብበት ካርድ ነው፡፡

[38] ተከሣሹ የሕክምና ባለሙያ የነበረ ሲሆን ፀሐፊው ጠበቃው ነበር፡፡

[39] ፀሐፊው ለሥራው ቅርብ በነበረበት ጊዜ አይነበብም በሚል የተመለሱ ሰነዶች እንደነበሩ ያውቃል፡፡

[40] ፀሐፊው ክርክሩ ሲደረግ በችሎት ተቀምጦ ሲያዳምጥ ነበር፡፡በተከታዩ ቀጠሮ የፍ/ቤቱ ትእዛዝ ምን እንደሆነ ግን ለማወቅ አልቻለም፡፡ይህ ሁኔታ ምስጢራዊ ሰነድ ማለት ምን ማለት ነው? ሊደረግለት የሚገባው ጥበቃስ እስከምን ድረስ ነው የሚሉ ጥያቄዎችን ያስነሳል፡፡

በከፊል የተነበበው ግልጽ ሆኖ ከሌላው ካልተነበበው ክፍል ጋር አብሮ መነበብ ካልቻለ ግን የሰነዱን ሙሉ ሐሣብ መረዳት የማይቻል ሊሆን ይችላል፡፡ በበርካታ ክርክሮችም ላይ ይህ አይነት የትርጉም ግድፈት ያጋጥማል፡፡ አንዳንድ ሰነዶች ላይ ደግሞ ሊተረጐም ከሚገባው ሰነድ ላይ በከፊል ሳይተረጐም የሚቀርበት አጋጣሚ አለ፡፡ ይህ አይነት ችግር ሆነ ተብሎ ወይም በስህተት ወይም በቸልተኝነት ተዘሎ ሊሆን ቢችልም በተለያዩ ምክንያቶች ሳይተረጐም የሚቀር የሰነድ ክፍል ያጋጥማል፡፡

በአጠቃላይ የሰነድ ትርጉም ግድፈት ሲያጋጥም ፍ/ቤት የሚሰጠው ትእዛዝ እንደሰነዱ አቀራረብ ይለያያል፡፡ በፍትሐብሔር ክርክር ከሣሽና ተከሣሽ በማስረጃነት ሲያቀርቡ ሰነዱ ተተርጉሞ ስለሚቀርብ ብዙ አከራካሪ ጉዳይ ላያጋጥም ይችላል፡፡ ነገር ግን የሚተረጐመው ሰነድ በፍ/ቤቱ ትእዛዝ ቢቀርብና ሰነዱ የማይነበብ ወይም በከፊል የማይነበብ ከሆነ ሰነዱ እንዲቀርብለት የጠየቀው ወገን አስተርጉሞ እንዲያቀርብ ሊታዘዝ ይችላል፡፡ ሰነዱን ያቀረበው ወይም የላኪው ወገን ሊተረጉመው ካልቻለ ተከራካሪዎች ሊስማሙና ፍ/ቤቱም ሊቀበለው በሚችል አማራጭ ሰነዱ እንዲተረጐም ሊታዘዝ ይችላል፡፡ ይህ ሁሉ ተደርጐ ሰነዱ ሊተረጐም ካልቻለ ግን የማስረጃነት ዋጋውን ያጣል፡፡ ከላይ እንደተመለከተው ዋናው ሰነድ ሊላክ አይችልም ከተባለና ፍ/ቤቱ ይህንኑ ካመነበት ባለጉዳዮቹ በተገኙበት ትርጉሙ ያስፈልገኛል ያለው ወገን ተርጓሚውን ይዞ ቀርቦ ሰነዱን ባለበት ቦታ ቀርቦ በመመልከት እንዲተረጉም ወይም ሰነዱ በዳኛው እጅ እያለ ተተርጉሞ እንዲመለስ ለማድረግ የሚያስችል ትእዛዝ ፍ/ቤቱ የማይሰጥበት የሕግ ምክንያት የለም፡፡ ይህን ማድረግ ፍ/ቤቱ ባለጉዳዩ ፍትሕ እንዲያገኝ ለማድረግ ያለበትን ግዴታ እንደተወጣ የሚያስቆጥረው ነው፡፡

የቁልፍ ቃላት አለመተርጐም ሌላው በትርጉም ሰነዶች ላይ የሚያጋጥም ግድፈት ነው፡፡ ቁልፍ ቃላት ወይም ጽንሰሐሣብ ማለት የሰነድን መሠረታዊ የትርጉም ይዘት በመወሰን ረገድ መሠረታዊ የሆኑ ቃላት ወይም ቃላቶች ናቸው፡፡ በበርካታ የሰነድ ትርጉሞች ላይ በዚህ መልክ የሚሰራ ግድፈት ያጋጥማል፡፡ እነዚህና ተመሳሳይ የትርጉም ስህተቶች እራሳቸውን የቻሉ አከራካሪ ችግሮች የሆኑባቸው መዝገቦች በርካታ ናቸው፡፡[41]

3.2. የትርጉም ሰነድ ግድፈት መንስኤዎች

የትርጉም ሰነድ ግድፈት መንስኤዎችን ከትርጉም መርሆዎችና ከተርጓሚዎች የስነምግባር ግዴታ አንፃር በመመልከት መተቸት በተለይ በስነጽሑፍ ትርጉሞች ላይ የተለመደ ነው፡፡ በዚህ መሠረት በአገራችንም በአማርኛ ቋንቋ ተጽፈው ወደ ውጭ አገር ቋንቋ የተተረጐሙ እንደ ፍቅር እስከ መቃብር (Love unto Crypt) የመሳሰሉት የትርጉም ሥራዎች ላይ የተፈፀመውን የትርጉም ግድፈት በተመለከተ በርካታ የስነጽሑፍ ተማሪዎች መመረቂያ ጽሑፋቸውን ሰርተዋል፡፡[42] ከሕግ ጉዳይ ጋር የተያያዘ የትርጉም ሰነድ ግድፈቶችን በተመለከተ የተሰራ ጥናት ስለመኖሩ ለማረጋገጥ ፀሐፊው ብዙ ጥረት ያደረገ ቢሆንም ማግኘት አልቻለም።

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[41] ለምሣሌ ጠበቃ ሰለሞን ተፈራ እና ጠበቃ ፍቅሩ በላይ በዚህ መልክ የተፈጠረ የትርጉም ግድፈት አጋጥሟቸዋል፡፡

[42]ለምሣሌ Fikir Mesfin, The cultural discrepancy between "Fikir Eske Mekabir" and " Love unto Crypt", Addis Ababa University, unpublished, July 2011 ይመለከቷል፡፡

ለፍ/ቤት የሚቀርቡ ሰነዶች ላይ የሚታየው የትርጉም ግድፈት ከስነጽሑፍ ትርጉም ግድፈት ጋር በባህሪው ተመሳሳይነትና ልዩነት አለው፡፡ ለምሣሌ "ሳይተረጐም መቅረት" (Omission) በሁለቱም አይነት ትርጉሞች ላይ የሚያጋጥም ሲሆን በሚተረጐመው ቋንቋ (source language) የተገለፀውን አነጋገር፣ ዘይቤ፣ አባባል ወዘተ ወደሚተረጐመው ቋንቋ በሚገባ መመለስ አለመቻል ግን የበለጠ የስነጽሑፍ ትርጉም የተለየ ባህሪ እንደሆነ ጥናቶች ይጠቁማሉ፡፡ ይሁን እንጂ ቋንቋ በአጠቃላይ ሐሣብና ባህልን መግባቢያ ብቻ ሳይሆን ቋንቋ በራሱ ባህልና ሐሣብን የያዘ ስለሆነ ይህ የሁለት ወገን ባህሪው የትርጉም ሥራን አስቸጋሪና ውስብስብ ያደርገዋል የሚል አስተሳሰብ በዘርፉ ምሁራን ይንፀባረቃል፡፡[43] ይህ አስተሳሰብ እንደተጠበቀ ሆኖ በተግባር እንደሚታየው በርካታ ችግሮች፣ በተለይ ደግሞ የተርጓሚዎች ችሎታና የባህሪ ችግር ዋነኛ የሰነድ ትርጉም ግድፈት መንስኤዎች ሆነው ይታያሉ፡፡

አንዳንድ ጊዜ እንደሚያጋጥመው አንዳንድ ተርጓሚዎች የቋንቋ ችሎታቸው ጥሩ ቢሆንም በባህሪያቸው ተረጋግተው የማይቀመጡ፣ማጣቀሻ መጽሐፍትን ለመመልከት ትእግስት የሌላቸው፣እጃቸው ላይ ያለውን የትርጉም ሥራ በዘፈቀደ ጨርሰው ለመገላገል የሚጣደፉ ናቸው፡፡ አንዳንዶች ደግሞ የዚህ ተቃራኒ አሉ፡፡

የባህሪ ችግር ባይኖርባቸውም በቋንቋ ችሎታቸው ደካማ የሆኑና በንባብም ሊካካስ የማይችል ግልጽ የችሎታ ማነስ ያለባቸው አሉ፡፡ማንኛውንም የሙያ ሰነድ በመሰላቸው መንገድ ተርጉመው ሲሰጡ ምንም የማይመስላቸዉ ተርጓሚዎች በብዛት ያጋጥማሉ፡፡[44] ለምሣሌ በአንድ የፍትሐብሔር ክርክር ጉዳይ "የእንጨት ማሽን" ተብሎ መተርጐም የነበረበት ቃል "የፀጉር ማሽን" በሚል ተተርጉሞ ክርክሩ ካለቀ በኋላ በአፈፃፀም ክርክር ጊዜ የፍርድ ባለመብቱ ይህንኑ ያወቀበት አጋጣሚ አለ፡፡[45]

ለትርጉም ግድፈት ከሚዳርጉ ምክንያቶች መካከል ሌላው ባለጉዳዩ "ሱሪ በአንገት" በሚመስል ጥድፊያ እንዲሰራለት መጠየቅ ነው፡፡ ነገ ለፍ/ቤት በማስረጃነት እንዲቀርብ የሚፈለግ ሰነድን ዛሬ ከሰአት በኋላ ወደ ትርጉም ጽ/ቤት አምጥቶ ካልተተረጐመልኝ በሚል የሚወተውተው ባለጉዳይ እጅግ በጣም በርካታ ነው፡፡ በዚህ የተነሳ "ደክሞኛል፣ ዛሬ አልችልም" ወዘተ ያለን ተርጓሚ ለምኖ፣ ተለማምጦና ተጨማሪ ክፍያ ከፍሎም ቢሆን እንዲተረጉም ይደረግና ሰነዱ ከነግድፈቱ ለባለጉዳዩ ይሰጣል፡፡ ከዚያ በኋላ በዚህ መልክ የተተረጐመው ሰነድ እራሱን የቻለ የክርክር ምክንያት ይሆናል፡፡

በትርጉም ሥራ ውስጥ አንዱ በጣም አስቸጋሪ ሁኔታ የፀሐፊዎች ብቃት ነው፡፡ የተርጓሚዎች የእጅ ጽሑፍ የማይነበብ መሆን አንዱ ምክንያት ሊሆን ቢችልም እጃቸው እንዳመጣላቸውና እነሱ በተረዱት መልክ ብቻ መፃፍ፣ስሜት የማይሰጥ አረፍተነገርን መፃፍ፣የሰነዱን ይዘት በመረዳትና ግልጽ ያልሆነ ወይም ግድፈት ያለበት

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[43] Yonas Admasu የግርጌ ማስታወሻ ቁጥር 7፣ ገጽ 217

[44] ፀሐፊው ይህን ችግር በሚገባ ያውቀዋል፡፡

[45] ከጠበቃ ደበበ ኃ/ገብርኤል ጋር የተደረገ ቃለመጠይቅ (ታህሳስ 2005ዓ.ም.)፡፡ ጠበቃ ደበበ ይህንን ያወቀው የትርጉም ግድፈቱ ተጐጂ የሆነው ባለጉዳይ ስለነገረውነው፡፡

ከመሰላቸው ከተርጓሚው ጠይቆና ስለሚጽፉት ነገር በሚገባ ተረድቶ ከመፃፍ ይልቅ በግብር ይውጣ ጽፎ መገላገል በከፍተኛ ሁኔታ የሚያጋጥም ችግር ነው፡፡

መሠረታዊ የእንግሊዝኛ ቋንቋ ችሎታ ማነስም ሌላው ችግር ነው፡፡ አንዳንድ ፀሐፊዎች እንግሊዝኛን አንበቦ የመረዳት ችሎታቸው፣መሠረታዊ ግራመርን አለማወቃቸው፣ የሚያውቁት ቃላት አነስተኛ መሆን' የሚጠራጠሩትን ቃል ትክክለኛ ፊደል በማረጋገጥ ለመፃፍ አለመሞከር ለታይፒንግ ግድፈት ሲያጋልጣቸው ያጋጥማል፡፡ በዚህ መልክ የሚፈፀሙ ግድፈቶችም ለትርጉም ግድፈት ያላቸው አስተዋጽኦ ከፍተኛ ነው፡፡

የትርጉም ሥራ በስፋት ከሚሰራበት የሙያ ሰነድ መካከል አንዱ የሕግ ሰነድ ነው፡፡ የሕግ ሰነዶች እና የሕግ ይዘት ያላቸው ሰነዶችን በመተርጎም ሥራ ላይ ብቻ ያተኮሩ የሕግ ባለሙያዎች ነበሩ፣ አሁንም አልፎ አልፎ አሉ፡፡ እነዚህ የህግ ባለሙያዎች ሥራውን የሚሰሩት የትርጉም ፈቃድ በማውጣት ከጥብቅና ሥራ ጋር ደርበውና አንዳንዶቹም የትርጉም ፈቃድ በማውጣት ብቻ ሲሆን አንዳንዶቹ ደግሞ ለሌላ ሰው የትርጉም ሥራ አገልግሎት ሳይሰጡ እራሳቸው የሚከራከሩበትን ሰነድ ብቻ የሚተረጉሙ ናቸው፡፡[46] በርግጥ ይህ አይነት አሰራር ከጥቅም ግጭት ጋር በተያያዘ የሚያስነሳው የራሱ አከራካሪ ሁኔታ ቢኖርም በዚህ መልክ የሚሰሩ ጠበቆች ግን ነበሩ፡፡ እራሱ ለሚከራከርበት ጉዳይ ያቀረበውን ሰነድ እራሱን በሚጠቅም ሁኔታ ተርጉሟል በሚል ፍ/ቤት የቀጣው ጠበቃ እንደነበር ፀሐፊው ያስታውሳል፡፡

የትርጉም ሥራቸውን ያቆሙ የህግ ባለሙያዎች የሚሰጧቸው ምክንያቶች ከሥራው አድካሚነትና አሰልቺነት አንፃር ባለጉዳዩ ለመክፈል ፈቃደኛ የሚሆነው ክፍያ አነስተኛ ስለሆነ አላዋጣንም የሚል ነው፡፡[47] ለእነዚህ የሙያ ተርጓሚዎች ከመደበኛው የተለመደ የገበያ ዋጋ[48] የተሻለ የሚከፈላቸው ቢሆንም ተርጓሚዎቹ የሕግ ባለሙያዎች ስለሆኑ ለእነሱ ከሚከፈለው ከፍ ያለ ክፍያ አንፃር ሥራው አያዋጣም የሚል ነው፡፡[49] በዚህ የተነሳ ፈቃዳቸውን የመለሱና ወይም የተሻለ ክፍያ ለመክፈል ፈቃደኛ ለሆኑ ባለጉዳዮች ብቻ[50] የትርጉም አገልግሎት የሚሰጡ ሆነዋል፡፡

ከትርጉም ጽ/ቤቶች አሰራር ስርአት ጋር በተያያዘ የሚታዩ ችግሮችም የሰነድ ትርጉም ግድፈት መንስኤ ሲሁኑ ያጋጥማል፡፡ ሰነድ ከተተረጐመ በኋላ ማን እንደተረጐመው ለማወቅ የሚያስችል ማስታወሻ አለመያዝ፣ አስቀድሞ የተተረጐመ ሰነድ ስለመሆኑ የሚታወቅበት አሰራር አለመኖር፣ በተተረጐመው ሰነድ ላይ በጀርባው

[46]በ1994 ዓ.ም ላይ በአንድ ክርክር አማካኝነት ጠበቃው እራሱ ተርጉሞና ማኅተም አድርጐ ሰነዱን በማስረጃነት አቅርቦ ነበር፡፡ ፀሐፊው የሌላው ተከራካሪ ወገን ጠበቃ ስለነበር ስለሆኔታው ሲጠይቀው የትርጉም ፈቃዱን የሚጠቀምበት እራሱ ለሚከራከርበት ጉዳይ ብቻ እንደሆነ አረጋገጠለት፡፡

[47]ለምሣሌ ፀሐፊው ከጓደኛው ጋር የትርጉም ጽ/ቤት አቋቁሞ የነበረ ሲሆን የሕግ ሰነዶችን በተሻለ የሕግ ባለሙያ በተሻለ ዋጋ ለማሰራት ጥረት ማድረግ ጀምሮ ነበር፡፡ ይሁን እንጂ ክፍያው ለባለሙያዎቹ የማያዋጣ በመሆኑና ከገበያው ባህሪ አንፃርም ከደንበኛው የሚጠየቀው ክፍያ በዛ በሚል ለመክፈል ፈቃደኛ የሆነ ሰው በመቀነሱ ፀሐፊው ሙሉ በሙሉ ከሥራው ወጥቷል፡፡

[48] በትርጉም ሥራ የተለመደ የገበያ ዋጋ በሚል ለማነፃፀሪያነት የሚወሰደው በአዲስ አበባ ከተማ በትርጉም ሥራ መናኸሪያነቱ በሚታወቀው ስታዲዩም ዙሪያ አካባቢ ባለ ትርጉም ጽ/ቤቶች ያለው አማካይ ዋጋ ነው፡፡

[49]ለረዥም ጊዜ የሕግ ሰነዶችን ሲተረጉሙ ከነበሩት የሕግ ባለሙያዎች አንዱ ጠበቃ በላይ ከተማ ነው፡፡ አቶ በላይም ከሥራው አድካሚነት አንፃር የሚከፈለው ክፍያ አነስተኛ ስለሆነ የትርጉም ሥራ ሙሉ በሙሉ እንዳቆመ ለፀሐፊው ገልጾለታል፡፡

[50] ዝኒ ከማሁ፡፡

ስለትክክለኛነቱና የትርጉም ግድፈት ቢፈፀም ኃላፊነት ሊወሰድ የሚገባው ስለመሆኑና የትርጉም ሰነዱን ትክክለኛነት አረጋጋጭ ሊኖር የሚችልበትን አሰራሮች መዘርጋት ያስፈልጋል፡፡ ለምሣሌ በውጭ አገር የሚገኙ የትርጉም ድርጅቶች ባለሙያው ተርጉሞ ከጨረሰ በኋላ የተተረጐመውን ሰነድ እንደገና የሚመለከትና ምንም አይነት ግድፈት አመፈፀሙን የሚያረጋግጥ ተጨማሪ ባለሙያ አላቸው፡፡

አንዳንድ ጊዜ ሰነዱን ማን እንደተረጐመው ማሰታወሻ ወይም መረጃ አለመያዝም ሌላው ችግር ነው፡፡ አንድ የትርጉም ግድፈት የተፈፀመበትን ሰነድ በተመለከተ የትርጉም ጽ/ቤቱ ባለቤት ፍ/ቤት ተጠራና ማነው የተረጐመው? ተብሎ ሲጠየቅ "አላስታውስም" አለ፡፡ ፍ/ቤቱም የተተረጐመውን ሰነድ ማን እንደተረጐመው ማስታወሻ እየያዝክ መስራት ይገባሐል፣ በድጋሚ ተመሳሳይ ስህተት ቢፈፀም እርምጃ እንወስድብሐለን በማለት በማስጠንቀቂያ እንደታለፈ ፀሐፊው ያስተውሳል፡፡ በተጨማሪም አንድ የአካል ጉዳት መጠንን የሚመለከት የሕክምና ሰነድ አንድ ትርጉም ጽ/ቤት ውስጥ ሁለት ጊዜ መጥቶ ተተረጐመ፡፡ ተርጓሚዎቹ የተለያዩ ስለነበሩ መጠነኛ ልዩነት ያለው የትርጉም ይዘት ተከሰተ፡፡ የትርጉም ጽ/ቤቱ ባለቤት በፍ/ቤቱ በመጥሪያ ሲጠራ፣ ሆስፒታል ስለነበርኩ መከታተል አልቻልኩም ነበር በማለት መልስ ሰጠ፡፡ ስለሆነም ክትትልና የተሻለ የአሰራር ሰርአት መዘርጋት አለመቻል አንድ ችግር ሆኖ ይታያል፡፡

4. አስተርጓሚን በተመለከተ የተከራካሪዎች መብትና ግዴታ

አስተርጓሚን በተመለከተ የተከራካሪዎች መብትና ግዴታ አከራካሪ የሚሆንበት እና ፍ/ቤትም የሚሰጠው ትእዛዝ በራሱ አከራካሪ የሚሆንበት ሁኔታ ያጋጥማል፡፡ በተግባር እንደሚታየው አከራካሪው ሁኔታ የሚፈጠረው፡ አስተርጓሚው በአንደኛው ተከራካሪ ወገን የመጣ ሲሆን፣ ፍ/ቤቱ አስተርጓሚ መመደብ ካልቻለ፣ አስተርጓሚው ግድፈት ከፈፀመ፣ አስተረጓሚው እራሱ በጉዳዩ ውስጥ በምስክርነት የተቆጠረ ሲሆን ነው፡፡ ስለሆነም እነዚህን ሁኔታዎች እንደሚከተለው እንመለከታለን፡፡

4.1. አስተርጓሚው በአንደኛው ተከራካሪ ወገን የመጣ ከሆነ

በወንጀልም ሆነ በፍትሐብሔር ክርክር አንደኛው ተከራካሪ ወገን ፍ/ቤቱ አስተርጓሚ ላይኖረው ይችላል በሚል የራሱን አስተርጓሚ እየያዘ ሊቀርብ ይችላል፡፡[51] ለምሣሌ የኮርያ ቋንቋ ተናጋሪ የሆነ ምስክር ባለበት አንድ ጉዳይ ከሣሽ የራሱን አስተርጓሚ እየያዘ ይቀርብ ነበር፡፡[52] በአንድ የወንጀል ጉዳይ ደግሞ ተከሣሽ ቻይናዊ ስለነበር የዐቃቤ ሕግ ክስ ለተከሣሽ ከደረሰበት ቀን አንስቶ ተከሣሽ የራሱን አስተርጓሚ ይዞ ይቀርብ ነበር፡፡[53]

በአንድ የፍ/ብሔር ጉዳይ ሬጂስትራር ከቻይንኛ ወደ አማርኛ የሚተረጉም አስተርጓሚ እንዲመደብ ፍ/ቤቱ ትእዛዝ ሰጥቶ የነበረ ቢሆንም በቀጠሮው አለት አስተርጓሚ ሳይመጣ ቀረ፡፡ በዚህን ጊዜ 1ኛ ተከሣሽ እኛ እናቅርብ በማለት ለችሎቱ ሲያመለክት ከሣሽና ሌሎች ተከሣሾች የራሳቸውን ምስክር በራሳቸው አስተርጓሚ

[51]በወንጀል ክርክር አንደኛው ተከራካሪ ወግነ ዐ/ሕግ ነው፡፡ይሁን እንጂ ከአስተርጓሚ ጋር በተያያዘ ዐ/ሕግ አስተርጓሚ ይዞ ሲቀርብ ፀሐፊው አላጋጠመውም፡፡ በጉዳዩ ላይ ዐ/ሕግ ከነበሩ ባለሙያዎች ጋር ሲወያይም ይህ ሁኔታ እንዳላጋጠማቸው ፀሐፊው ተረድቷል፡፡
[52] በፌ/መ/ደ/ፍ/ቤት ፀሐፊው የከሳሹ ጠበቃ ነበር፡፡
[53] ፌ/መ/ደ/ፍ/ቤት 2005 ዓ.ም፡፡ ፀሐፊው የተከሳሹ ጠበቃ ነበር፡፡

ሊያስተረጉሙ አይገባም በሚል ስለተቃወሙ አስተርጓሚው እንዳይቀረብ ተደረገ፡፡ ይሁን እንጂ በተከታዩም ቀጠሮ ሬጂስትራር አስተርጓሚ መመደብ ስላልቻለ የእናንተን አስተርጓሚ ይዛችሁ ቅረቡ ተባለ፡፡[54]

በሌላ በኩል በአንድ የወንጀል ጉዳይ ተከሣሽ የራሱን አስተርጓሚ ይዞ እየቀረበና ተርጓሚውም እየተመዘገበ ቆይቶ የተከሣሽ ምስክሮች ሊሰሙ ሲሉ ግን ፍ/ቤቱ በሬጂስትራር በኩል አስተርጓሚ እንዲመደብ፣ለመጠባበቂያም ተከሣሽ የራሱን አስተርጓሚ ይዞ በተከታዩ ቀጠሮ እንዲቀርብ በሚል ትእዛዝ ሰጠ፡፡[55]

አስተርጓሚ ምንግዜም ቢሆን ከጉዳዩ ነፃ ሆኖ የግል እምነቱን፣ስሜቱንና በራሱ የተገነዘበውን ወይም የሚያውቀውን መሠረት አድርጐ አንዱን ወገን ለመጥቀምና ወይም ለመጉዳት ሳያስብ ሥራውን መስራት የሚጠበቅበት ሲሆን ቸልተኛ በሆነ አሰራር ሥራውን መፈፀምም የለበትም፡፡[56] አስተርጓሚው ይህን እንዳያደርግ አንዱ መቆጣጠሪያ መንገድ አስተርጓሚው በተከራካሪ ወገኖች የማይታወቅ ወይም ከተከራካሪዎቹ ጋር ግንኙነት የሌለው እንዲሆን ማድረግ ነው፡፡ ለዚህ የተሻለ አማራጭ የሚሆነው ደግሞ አስተርጓሚው ከተከራካሪዎቹ ውጪ በሆነ አካል እንዲመደብ ማድረግ ነው፡፡ ስለሆነም ከላይ በተቀመጠው ሁኔታ አስተርጓሚው በፍ/ቤቱ በኩል እንዲመደብ የቀረበው ጥያቄና ፍ/ቤቱም የሰጠው ትእዛዝ ተገቢ ነው፡፡ በፍ/ቤቱ በኩል ሊመደብ አለመቻሉ ከተረጋገጠ በኋላ ተከሣሽ የራሱን አስተርጓሚ እንዲያቀረብ የታዘዘውም ተገቢ ነው፡፡

ምስክሩ ፍርድ ቤቱ ይህንን ያደረገው ሌላ አማራጭ ስላጣ ነው፡፡ ፍርድ ቤቱ ይህንን አማራጭ ባይጠቀም ኖሮ ምስክሮቹ አይሰሙም ነበር፡፡ ምስክሮቹ አይሰሙ ማለት ደግሞ ምስክሮቹን በቆጠረው ወገን ላይ የሚያደርሰው የሙብት መጓደልና ጉዳት ከፍተኛ ስለሚሆን "ፍትሕ የማግኘት ሕገ-መንግስታዊና ሰብአዊ ሙብቱን" ዋጋ ያሳጣዋል፡፡ ምስክሮቹ ይሰሙ ብሎ ብይን መስጠትም ከላይ የተመለከተውን የገለልተኝነት መርህ ይቃረናል፡፡ ይሁን እንጂ ሁለቱ ሲነፃፀሩ ምስክሩ ቃለመሐላ ፈጽሞ ወይም በእውነት ለመመስከር ማረጋገጫ ሰጥቶ ስለሚያስተረጉም[57] ገለልተኛ በመሆን ያስተረጉማል ተብሎ ስለሚታመን፣ተከራካሪዎችም መስቀለኛ ጥያቄ ስለሚጠይቁ፣ፍ/ቤቱም የምስክርነት አሰማሙን ስለሚመራና የራሱን የሕሊና ሚዛን ስለሚወስድና በዚህ የተነሳም የአስተርጓሚውን ገለልተኝነት ለመቆጣጠር ይቻላል ተብሎ ስለሚታመን ነው በተከሣሹ አስተርጓሚ አማካኝነት ምስክርነቱ መሰማቱ ተገቢ ነው ብለን ለመደምደም የምንችለው፡፡

ይሁን እንጂ ከላይ የተመለከተው ተከሣሽ ከመጀመሪያው የራሱን አስተርጓሚ ይዞ ይቀርብበት የነበረውን ጉዳይ በተመለከተ ዐ/ሕግ ተከሣሽ የራሱን አስተርጓሚ ይዞ ሲቀርብ ያልተቃወመው፣ተከሣሽ የተከሰሰው የአንድ ኩባንያ ሥራ አስኪያጅ ሆኖ ሲሰራ ከሽያጭ መመዝገቢያ ማሽን የወጣ ደረሰኝ አልሰጠም በሚል ሲሆን አስተናጋጁና

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[54] ፌ/መ/ደ/ፍ/ቤት ፀሐፊው የተከሳሽ ጠበቃ ነበር፡፡

[55] በዚህም ጉዳይ ፀሀፊው የተከሳሽ ጠበቃ ነበር፡፡

[56] ብዙ ጊዜ ምስክሮች በዚህ ጉዳይ ማሳሰቢያ ይሰጣቸዋል፡፡

[57] በአጠቃላይ ከምስክር የቃለመሐላ አፈፃፀም ስነስርአተና በዚህ መልክ የሚደረግ ቃለመሐላ በምስክሩ ህሊና ላይ የሚያሳድረው እና እንዲሁም ሐይማኖት የሌላቸው ምስክሮችን በተመለከተ ሊኖር ስለሚገባው ስነስርአትና የማስረጃ ምዘና ስነሰርአት ያለው የሕግና የስነልቦና አስተሳሰብ ሰፊ ስለሆነ በዚህ ርዕስ ተዳሶ የሚያልቅ አይደለም፡፡ በአጠቃላይ ግን በዚህ ረገድ ያለው ተግባራዊ ልምድና ሳይንሳዊ አመለካከት ሰፊና ጥልቅ መሆኑን መገንዘብ ያስፈልጋል፡፡

ገንዘብ ተቀባይዋ ጥፋታቸውን አምነው ስለተፈረደባቸው[58] ተከሣሽም የሚፈረድበት መሆኑ አይቀርም በሚል እምነት ነው፡፡[59] ስለሆነም ፍ/ቤቱ ዐ/ሕግ ካልተቃወመ አስተርጓሚን በሚመለከት አከራካሪ ጉዳይ እንደሌለ አድርጐ በመቁጠር ተከሣሹ ያመጣው አስተርጓሚ የማስተርጐም አገልግሎቱን እንዲሰጥ ማድረግ ነበረበት፡፡

4.2 አስተርጓሚው ራሱ በምስክርነት የተቆጠረ ሲሆን

በአንዳንድ ጉዳዮች አስተርጓሚው እራሱ በምስክርነት የተቆጠረ የሚሆንበት አጋጣሚ አለ፡፡ ለምሣሌ በአንድ የፍ/ብሔር ክርክር ምስክሩ የኮርያ ቋንቋ ተናጋሪ ስለነበር ይህን ቋንቋ ወደ እንግሊዝኛ ወይም ወደ አማርኛ የሚተረጉም እንዲመደብ ተጠይቆ ሊገኝ ስላልተቻለ ከሣሽ እኔ አቀርባለሁ አለና ፍ/ቤቱ ከሣሽን አስተርጓሚ እንዲያቀርብ አዘዘ፡፡ ይሁን እንጂ በከሣሽ በኩል የቀረበው አስተርጓሚ እራሱ የከሣሽ አንድ ምስክር ሆኖ የተቆጠረ ስለነበር ተከሣሽ "አስተርጓሚው ምስክርም ጭምር መሆኑ ስለሚጐዳን የማይመሰክር ከሆነ ያስተርጉም፣ የሚያስተረጐም ከሆነ ደግሞ ሊመሰክር አይገባም" በማለት ስለተቃወመ ፍ/ቤቱ የከሣሽን መቃወሚያ ተቀብሎ ከሣሽን ከሁለቱ አንዱን ምረጥ በሚል ትእዛዝ ሰጠ፡፡ ከሣሽም ምስክሩ ትንሽ ትንሽ እንግሊዝኛ ስለሚሞክር ምስክርነቱ ከሚቀርብን በእንግሊዝኛ ይመስክርልን በማለት አመልክቶ በእንግሊዝኛ እንዲመሰክር ሆነ፡፡ ይህ ክልከላ ሕጉን[60] መሠረት ያደረገ ነው፡፡

4.3 አስተርጓሚው ግድፈት ሲፈጽም

ምስክሩ ያልተናገረውን መናገር፣ ምስክሩ የተናገረውን ቃል በራሱ አገላለጽ መግለጽ፣ ምስክሩ የተናገረውን ለማብራራት መሞከር፣ምስክሩ የተናገረውን አለመናገር ወይም ጠቃሚ እና በጣም አስፈላጊ የሆኑ ዝርዝር ጉዳዮችን መተው ወዘተ አስተርጓሚዎች የሚፈጽሙት ግድፈት ሆኖ ያጋጥማል፡፡ ይሁን እንጂ ግድፈቱ በግልጽ የሚታወቀው ዳኛውና ጠበቃው ሁለቱንም ቋንቋዎች የሚረዱ ከሆነ ወይም አንደኛው ወገን በሚገባ የሚረዳና ትርጉሙ ትክክል አይደለም በማለት አጠንክሮ ከተቃወመ ነው፡፡

ለምሣሌ በአንድ የወንጀል ክርክር ተከሣሽ እምነት ክህደት ሲጠየቅ ከኦሮምኛ ወደ አማርኛ የሚያስተረጉመው አስተርጓሚ "ጥፋተኛ ነኝ" ብሏል አለ፡፡ ተከሣሽ የተናገረው ግን "ድርጊቱን ፈጽሜአለሁ" በማለት ነው፡፡ ከዚያም ኦሮምኛ የሚችሉ ጠበቃ ተነሱና "የተከበረው ፍ/ቤት እኔ ሁለቱንም ቋንቋዎች መናገር እችላለሁ፣ትርጉሙ ስህተት አለው" በማለት ይህንኑ ግድፈት ለፍ/ቤቱ ተናገሩ፡፡

ዳኛውም አስተርጓሚውን "ለምን በሰው ህይወት ይቀልዳሉ?፣ የማይችሉ ከሆነ አልችልም ይበሉ፣ ፍ/ቤቱ በእርስዎ ትርጉም ተማምኖ የጥፋተኝነት ውሣኔ ሊሰጥ ነበር" በማለት ተቆጡ፡፡ ከዚያም ዳኛው ስለዝርዝር የድርጊቱ አፈፃፀም ተከሣሹ ሲያስረዳ ጠበቃውን እባክዎትን እርስዎ ይተርጉሙ፣ጉዳዩ የሕግ ጉዳይ ስለሆነ

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[58] ከተጠቀሰው ወንጀል ጋር በተያያዘ ድርጊቱ በተፈፀመበት እለት የኩባንያው ሥራ አስኪያጅ በድርጅቱ የፈፀመውን ጥፋት እንደፈፀመ ተቆጥሮ በአዋጅ የተጣለው ቅጣት ተፈፃሚ ይሆንበታል ይላል/ የኢትዮጵያ ፌደራላዊ ዴሞክራሲያዊ ሪፐብሊክ ተጨማሪ እሴት ታክስ አዋጅ ቁጥር 285/94 አንቀጽ 56/1/ ይመለከቷል፡፡

[59] በወቅቱ ዐ/ሕግ ከነበሩት ግለሰብ ጋር በ2005 ዓ.ም. ስለዚህ ጉዳይ ስንወያይ ይህንኑ እምነታቸውን ገልፀውልኛል፡፡

[60] የወንጀለኛ መቅጫ ስነ ስርዓት ሕግ፣ አንቀጽ 126/2/ በምስክርነት የተጠራን ግለሰብ ከአስተርጓሚነት ያግላል፡፡

አንዳንድ ቃላትን አስተርጓሚዎቹ ባይረዱና በተራ ቋንቋ ቢናገሩ አይፈረድባቸውም በማለት ጠበቃው እንዲተረጉሙ ተደረገ፡፡[61]

ከዚህ በተጨማሪ በአንድ ጉዳይም ምስክሩ በእንግሊዝኛ እየተናገረ አስተርጓሚው ወደአማርኛ ሲተረጉም በርካታ ግድፈቶች ስለነበሩበት ጠበቆችና ዳኛው ትርጉሙ ትክክል አይደለም በሚል በተደጋጋሚ ይቃወሙ ነበር፡፡ እንዲያውም ዳኛው "እኛምኮ እንግሊዝኛ እንረዳለን፣ ምስክሩ እየተናገሩ ያሉትን እንረዳለን፣ ዝም ብለን እያዳመጥን ያለነው እርስዎ ባለሙያ አስተርጓሚ ነዎት ብለን ነው፣ ስለሆነም አስተካክለው ሊተረጉሙ፣ ካልቻሉ ደግሞ አልችልም ይበሉ" በማለት ተናደው ግሳጼ ሰነዘሩ፡፡ በአጠቃላይ ምስክርነቱ በጭቅጭቅ ተሞልቶ ተጠናቀቀ፡፡ አስተርጓሚው ሊቀየሩ ይገባል የሚል መቃወሚያም ተነስቶ ፍ/ቤቱ አስተርጓሚው ባለሙያ ተብለው የተመደቡ ስለሆነ አስተርጓሚውን መመለስ አስቸጋሪ ነው በማለት ጥያቄውን ሳይቀበለው ቀረ፡፡[62] ይሁን እንጂ ይህ አስተርጓሚ ባለሙያ ነው ተብሎ ቢመደብም በማስተርጐም ሥራው ላይ ግልጽ ግድፈት ከታየ ሌላ አስተርጓሚ እንዲመደብ ትእዛዝ ሊሰጥ የማይችልበት ምክንያት አልነበረም፡፡ በዚህ መልክ አስተርጓሚ እንዲቀየር ትእዛዝ የተሰጠባቸው ክርክሮች እንደነበሩም ፀሐፊው ያስታውሳል፡፡ ለምሣሌ በአንድ ጉዳይ ከኦሮምኛ ወደ አማርኛ የሚተረጉም አስተርጓሚ ግልጽ ግድፈት ስለፈፀመ ሬጂስትራር ሌላ አስተርጓሚ እንዲመድብ ፍ/ቤቱ ትእዛዝ ሰጥቶ ነበር፡፡

አንዳንድ የአስተርጓሚ ግድፈት ፍ/ቤቱ ውስጥ በተቀመጠ ሰው የሚለይበት አጋጣሚ አለ፡፡ ለምሣሌ በአንድ የአስገድዶ መድፈር ወንጀል ጉዳይ ተበዳይዋ በኦሮምኛ የተናገረችው "ቀሚሴን ዝቅ አደረገው" የሚል ሲሆን ተርጓሚው ግን "ቀሚሴን አወለቀው" በሚል ሲተረጉም ችሎቱ ውስጥ የተቀመጠው ፖሊስ ሳያስበው ጭንቅላቱን ሲያወዛውዝ ዳኛው ተመለከቱትና፣ ምነው? ትርጉሙ ችግር አለው? በማለት ሲጠይቁ አዎ አለና የትርጉም ግድፈቱን ተናገረ፡፡ ከዚያም ዳኛው አስተርጓሚውን ለምን ያልሆነ ነገር ተናገራለህ ሲሉት ይቅርታ "ልብ ስላላልኩት" ነው በማለት መለሰ፡፡[63] ለማንኛውም እንዲህ አይነት ሁኔታ ሲያጋጥም ፍ/ቤቱ ራሱ አስተርጓሚውን ማስቆምና ሌላ አስተርጓሚ እንዲመደብ ማድረግ አለበት፡፡ ለዚህም ዳኛው የአስተርጓሚነቱን ሂደት በንቃትና በሚገባ የሚከታተል መሆን አለበት፡፡ አንዳንድ ጊዜ እንደሚታየው ምስክርነት እየተሰማ ዳኛው ሌላ ሥራ የሚሰራ ከሆነ ግን ግድፈቱን ለመከታተል ስለማይችል ውጤቱ መጥፎ ይሆናል፡፡

ቋንቋውንም የማያውቅ ሰው አተርጓሚው ከሚናገረው አማርኛ የትርጉም ግድፈት እንዳለ ሊረዳ ይችላል፡፡ ለምሣሌ የቀን፣ የሰአት፣ የድርጊት አገላለጽ መምታታት ወዘተ በግልጽ ሊታወቅ ይችላል፡፡ የአስተርጓሚው የቋንቋ ችሎታ፣ ንግግርን ቶሎ የመረዳትና የማስታወስ የተፈጥሮ ችሎታ፣ ፍ/ቤት ሲቆም ያለው ስነልቦናዊ ሁኔታ የአስተርጓሚውን ብቃት በመወሰን ረገድ ከፍተኛ አስተዋጽኦ አላቸው፡፡ በርግጥ አንዳንድ ጊዜ የአስተርጓሚዎች ግድፈት የሚመስለው ችግር ከምስክሩ ጋር የተያያዘ ችግር ሊሆን ይችላል፡፡ ድርጊቱ ከተፈፀመ ከረዥም ጊዜ በኋላ የሚመሰክሩ ምስክሮች ዝርዝር ጉዳዮችን ሊረሱ ስለሚችሉ ምስክርነታቸው የተምታታ የመሆን እድሉ ሰፊ

[61] ይህ ጉዳይ በፌ/የመ/ደ/ፍ/ቤት 7ኛ ወንጀል ችሎት ውስጥ ሲታይ ፀሐፊው በችሎት ውስጥ ተቀምጦ እየተከታተለ ነበር፡፡
[62] በዚህ ጉዳይ ፀሐፊው የከሣሽ ጠበቃ ነበር፡፡
[63] እነዚህ ጉዳዮች ፀሐፊው በችሎት ተቀምጦ የሰማቸው ናቸው፡፡

ነው፡፡ በዚህን ጊዜ አስተርጓሚው ሲያስተረጉምም የእሱ ችግር መስሎ ሊታይ ይችላል፡፡ ለማንኛውም እንዲህ አይነት ሁኔታ ሲያጋጥም ፍ/ቤቱ አስተርጓሚውን ቢያስቆምና ሌላ እንዲመደብ ቢያደርግ የተሻለ ነው፡፡

ዳኛውና ተከራካሪዎቹ የአስተርጓሚን ግድፈት በሚገባ ለመከታተልና ለመለየት የማይችሉት የሚተረጐመውን ቋንቋ የማይረዱት ሲሆንና አስተርጓሚው ከሚናገረው ቋንቋም አጠራጣሪ ግድፈትን መገንዘብ ካልቻሉ ነው፡፡ እነዚህ ችግሮች ብዙ ሰው በማይናገራቸው ከእንግሊዝኛ እና ፈረንሳይኛ ቋንቋዎች ውጪ በሆኑ የኮርያ፣የቻይንኛ፣ስፓኒሽና መሰለ ቋንቋዎች ትርጉም ላይ ያጋጥማሉ፡፡ ይሁን እንጂ እንደተለመደው አስተርጓሚው ቃለመሐላ ፈጽሞ ስለሚያስተረጉም በትክክለ አስተርጉሟል የሚል የቅን ልቦና እምነት ወስዶ ከማለፍ ውጪ ሌላ አማራጭ የለም፡፡ ምስክርነቱ በጽሑፍ ከሰፈረ በኋላ ከሌሎች ማስረጃዎችና የምስከርነት ቃል ጋር አብሮ ሲመረመርና ሲመዘን ግን ተገቢውን ጥንቃቄና ምዘና ማድረግ ግን ያስፈልጋል፡፡ በቂ የሰው ሐይል የመኖርና ያለመኖር ጉዳይ ካልሆነ በስተቀር ዋናውንና የተተረጐመውን ቋንቋ በባለሙያ አነዲመሳከር በማድረግ የትርጉሙን ትክክለኛነትም ማረጋገጥ ይቻላል፡፡

4.4 አስተርጓሚ ካልተገኘ

ፍ/ቤቱ መዝገቡን የቀጠረው ውሣኔ፣ ብይን ወይም ትእዛዝ ለመንገር ወይም አንዳንድ የችሎቱን የክርክር ሂደት ለመንገር ከሆነ የአስተርጓሚው መገኘት አስፈላጊ ላይሆን ይችላል፡፡[64] ምስክር ክርክርን ለማስረዳት በጣም ወሳኝ ማስረጃ ስለሆነ በአስተርጓሚ አለመገኘት የተነሳ ካልተሰማ ምስክሩን በሚያሰማው ወገን ላይ የሚደርሰው ጉዳት ከፍተኛ ነው፡፡ በዚህ ምክንያት የፍርድ ባለዕዳ የመሆን እድሉ ወይም በወንጀል ክርክር ደግሞ ጥፋተኛ የመባል እድሉ በጣም ከፍተኛ ይሆናል፡፡ ይህም የፍትሕ መዛባትን ሊያስከትል እንደሚችል ፈጽሞ የሚያከራክር አይደለም፡፡

አስተርጓሚ መመደብ ሙሉ በሙሉ የፍ/ቤቱ ኃላፊነት ነው፡፡ በተለይ በወንጀል ክርክር አስተርጓሚ ማግኘት የተከሣሽ ከፍተኛ መብት ነው፡፡ እስከአሁን በሚታዩ አንዳንድ ክርክሮች ተከራካሪዎች የራሳቸውን አስተርጓሚ ይዘው የሚቀርቡት የተለየ የሕግ ግዴታ ስላለባቸው ሳይሆን ፍ/ቤቱን ለማገዝና ራሳቸውም በቀጠሮ መለወጥ የተነሳ ላለመጉላላትና በአጠቃላይ አስተርጓሚ አልተገኘም መባሉ መብትና ጥቅማቸውን ስለሚጐዳው ነው፡፡

ይሁን እንጂ አንድ ተከራካሪ ወገን በራሱ በኩል ተገቢውን ጥረት አድርጐ አስተርጓሚ ማግኘት ባይቻል ፍ/ቤቱ በራሱ ሊያደርግ የሚገባው ጥረት እስከምን ድረሰ ነው የሚለው ነጥብ አከራካሪ ነው፡፡ ለምሣሌ አስተርጓሚ ተገኝቶ አበሌ ግን በሰአት 200 ብር መሆን አለበት ቢል ውጤቱ ምን ይሆናል? አስተርጓሚውን በግል ያመጣው ተከራካሪ ወገን ላመጣሁት አስተርጓሚ አበል እንዲከፈለው ፍ/ቤቱ ትእዛዝ ይሰጥልኝ በማለት ቢያመለክት ውጤቱ ምን ይሆናል?፡፡ ፍ/ቤቱ አስተርጓሚውን በፈለገው የአበል መጠን እንዲያስተረጉም ማስገደድ

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[64] እንዲህ ሲሆን ዳኞችም የሚተረጉመውን ቋንቋ የሚያውቁት ከሆነ አስተርጓሚ ሳያስፈልግ ከባለጉዳዩ ጋር የሚግባቡበት አጋጣሚ ይታያል፡፡ለምሣሌ በአንድ ጉዳይ ዳኛው በእንግሊዝኛ እየተነጋገሩ አማርኛ መረዳት ለማይችል የውጪ አገር ዜጋ ቀጠሮ ሲሰጡ ፀሐፊው በችሎት ውስጥ ተቀምጦ ተመልክቷል፡፡

ይችላል ወይ? አስተርጓሚ በመፈለግ ረገድ የሬጂስትራር ጥረት እስከምን ድረስ ነው? ለምሣሌ ማስታወቂያ በማውጣት፣ትርጉም ጽ/ቤቶችን በመጠየቅ ወዘተ ሊያደርግ የሚገባው ማፈላለግ አለ ወይ? ወዘተ የሚሉት ጥያቄዎች መሠረታዊ ጥያቄዎች ናቸው፡፡

በእርግጥ ፍ/ቤት አንድን ግለሰብ በአስተርጓሚነት እንዲቀርብ ትእዛዝ መስጠት ይችላል፡፡ ለዚህ ትእዛዝ መነሻ የሚሆነውን ማመልከቻ ሬጂስትራር ወይም ባለጉዳዩ ሊያቀርብ ይችላል፡፡ በዚህ መሠረት ትእዛዝ ከተሰጠ በኋላ ትእዛዙን አክብሮ ለመቅረብ ፈቃደኛ ያልሆነ ሰው ወይም ቀርቦ እንደታዘዘው ለመፈፀም ፈቃደኛ ካልሆነ በወ/ሕ/ቁ. 448[65] መሠረት ሊቀጣ ይችላል፡፡ ይህ የሚያሳየው አስተርጓሚ ለፍትሕ እርዳታ ለመስጠት ግዴታ እንዳለበት ነው፡፡ ስለሆነም አበልን መሠረት አድርጐ አስተርጓሚው ለመደራደርና አገልግሎቱን ላለመስጠት የሚችልበት ሙብት የለም ለማለት ይቻላል፡፡ ይሁን እንጂ አሁን ባለው ሁኔታ እነዚህን ጥያቄዎች ለመመለስ የሚያስችል አሰራርና ልምድ አለ ለማለት አያስደፍርም፡፡

የውጪ ቋንቋዎችን በተመለከተ ፍ/ቤቱ እያደረገ ያለው በውጭ ጉዳይ ሚኒስቴር በኩል አዲስ አበባ ውስጥ ያሉ ኤንባሲዎችን አስተርጓሚ እንዲሰጡት መጠየቅ ሲሆን ኤንባሲዎች ለመተባበር ፈቃደኛ ካልሆኑ ግን ሌላ አማራጭ ለመውሰድ ይቸገራል፡፡ ለምሣሌ አንድ ህንድኛ የሚናገር ተከሣሽ በወንጀል ተከሶ የህንድ ኤንባሲ አስተርጓሚ ካለው እንዲልክ በውጭ ጉዳይ ሚኒስቴር በኩል ከተጠየቀ በኋላ ኤንባሲው ህንድኛና እንግሊዝኛ የሚናገር ሰው በመመደብ ተባበረ፡፡ ከዚያም ከእንግሊዝኛ ወደ አማርኛ የሚተረጉም ሌላ አስተርጓሚ አብሮ ተመደበና ተከሣሽ እንዲረዳ ተደረገ ፡፡ ኤንባሲው ባይተባበር ግን ውጤቱ ምን ሊሆን እንደሚችል ግራ ያጋባል፡፡ ምክንያቱም ኤንባሲዎች ለትብብር ያክል አስተርጓሚ ይመድባሉ እንጂ ፈቃደኛ ባይሆኑ ግን ፍ/ቤቱ አስተርጓሚ እንዳላቸው ቢያረጋግጥ እንኳን አስገዳጅ ትእዛዝ ለመስጠት አለምአቀፍ ሕግ ገደብ ያደርግበታል፡፡

ማጠቃለያ እና የመፍትሔ ሐሳቦች

የዩኒቨርስቲዎቻችን የሕግ ፋኩሊቲዎች የመማሪያ ቋንቋ እንግሊዝኛ ነው፡፡ መሠረታዊ የሚባሉት የተጠቃለሉ የሕግ መጽሐፍትም በአማርኛና በእንግሊዝኛ ብቻ የተዘጋጁ ናቸው፡፡ በየጊዜው በብዛት እየወጡ ያሉት የፌደራል ሕጐችም የሚታተሙት በአማርኛ እና በእንግሊዝኛ ነው፡፡ እስከአሁን የተዘጋጁት የሕግ ማብራሪያ መፃህፍትና የሕግ ምርምር ጽሑፎች የተዘጋጁት በአብዛኛው በእንግሊዝኛ ሲሆን የተወሰኑት ደግሞ በአማርኛ ነው፡፡ የሰበር ውሣኔዎችም የተዘጋጁት በአማርኛ ስለሆነ ከዚህ አንፃር የክልል ፍ/ቤቶች የሚጠቀሙት የተለየ የሥራ ቋንቋ እራሱን የቻለ ከፍተኛ ትኩረት እንደሚፈልግ አያከራክርም፡፡

በዚህ መሠረትም ለአማርኛና ለእንግሊዝኛ ቃላት አቻ የክልሉን ቋንቋ ትርጉም ማዘጋጀት፣ የትርጉም ሥራ ድርጅቶችን አቅም መፈተሽን ፣የዳኞችን የቋንቋ ክህሎት ማዳበርና በሥራ ቋንቋው አፈፃፀም ላይ የሚታዩ

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[65] የኢትዮጵያ ፌደራላዊ ዴሞክራሲያዊ ሪፐብሊክ የወንጀለኛ መቅጫ ሕግ አዋጅ ቁጥር 414/1996፣ቁ 448 "ፍ/ቤት በያዘው ጉዳይ ላይ በአስተርጓሚነት እንዲረዳ በሕግ መሰረት የተጠራ ማንም ሰው በቂ ምክንያት ሳይኖረው ሳይቀርብ የቀረ ወይም ለመቅረብ እምቢተኛ እንደሆነ ከሁለት ወር በማይበልጥ ቀላል እስራት ወይም ከአንድ ሺህ ብር በማይበልጥ መቀጮ ይቀጣል" በሚል ደንግጓል፡፡

ግድፈቶችን ለማረም ያለማቋረጥ ተከታታይ የጥናትና ምርምር ሥራዎችን መስራት ያስፈልጋል፡፡ ይህ ሁኔታ ለቋንቋዎቹ ማደግና መዳበርም እንደጥሩ አጋጣሚ ሊቆጠር የሚችልም ነው፡፡

አሁን እየታየ ካለው የውጭ አገር ዜጐች መብዛት ጋር ተያይዞ፣ እንግሊዝኛ፣ቱርከኛ፣ህንድኛ፣ ቻይንኛና ኮርያኛ ተናጋሪ የፍ/ቤት ባለጉዳዩች በብዛት እያጋጠሙ ነው፡፡ ይህ ሁኔታም የውጭ ቋንቋዎች የሰነድ ማስረጃ ትርጉምና አስተርጓሚ ፍላጐት በከፍተኛ ሁኔታ መጨመሩን ያሳያል፡፡ በመሆኑም ለትርጉም እና ለአስተርጓሚ ጉዳይ የሚሰጠው ትኩረት ሊጨምር እንደሚገባ የሚያከራክር ስላልሆነ በዚህ ረገድ የሚታዩ ችግሮችን ለመቅረፍ በርካታ ሥራዎች ሊሰሩ ይገባል፡፡

ከዚህ በተጨማሪ የፌደራል ጉዳዮችን የሚያዩ የክልል ፍ/ቤቶች በሕጉ መሰረት በአማርኛ ሊያከራክሩ ይገባል፡፡ የአስተርጓሚዎችን አበል ማሻሻል፣ የአስተርጓሚ አገልግሎትን የበለጠ የተደራጀና የተሻለ እንዲሆን ማድረግ ያስፈልጋል፡፡ ስልጠና እና የሙያ ክህሎት ማሻሻያ እንዲያገኙ ጥረት ማድረግ ያስፈልጋል፡፡ ከአስተርጓሚ አገልግሎት አሰጣጥ ጋር በተያያዘ ያለውን አሰራርም ወጥነትና ምቹነት ያለው እንዲሆን ማድረግ ያስፈልጋል፡፡