Exclusion of Managerial Employees from Ethiopian Labor Law in Light of Some ILO Standards

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Introduction

Ethiopian labor law applies to employment relations emanating from contract of employment concluded between a worker and an employer as defined by the law in question. However, it is not all employment relations that are governed by the law. For some policy considerations certain category of workers are excluded from its ambit. These include, among others, domestic workers, public servants and management personnel.

This essay centers on the exclusion of the managerial employees of private sector that comprises workers vested with powers such as to lay down and execute management policies, to hire, transfer, suspend, layoff, to take disciplinary measures against employees or to recommend measures on managerial issues.

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For the purpose of Ethiopian labor law individuals entrusted with one or more of the above activities are managerial employees and hence denied labor law protection of basic work rights as enshrined under the law in question. Thus, there are no legal protections *inter alia*, to their right to organize, collectively bargain and the right to strike. Consequently, they are viewed as employees –at- will, who can be disciplined or dismissed with out good cause. Such a problem is not unique to least developed states like Ethiopia. In advanced nations alike, particularly in USA and Canada concerns pertaining to exclusion of management staff are being voiced. In the US, for instance, from 33% of the private work force excluded from the coverage of National Labor Relations Act, managers and supervisors account half[1]

The purpose of the essay is, therefore, to explore the main reasons underlying such exclusions and critically assess whether it is justifiable when seen in light of the

[1] Paula B. Voos, Expanding voice for Professional and Managerial Employees, Paper for Labor and Employment Relations Association Annual Meeting, Dec 2005, p 2

relevant ILO Conventions which are binding on Ethiopia, and see whether such exclusion constitutes violation under the aforementioned instruments. In assessing the compatibility of the exclusions with relevant international norms, we will confine ourselves on the most fundamental rights of workers –the right to organize and collectively bargain, in recognition of which they form part of ILO Declaration on Fundamental principles and Rights at work which is binding on any ILO member states regardless of ratification of specific conventions on freedom of Association and collective bargaining. The paper contains 3 sections. The first section deals with major arguments for exclusion. Here, we will briefly and critically evaluate major arguments forwarded in support of exclusion of the managerial employees from the ambit of labor law.

The second section is devoted to the discussion of the issue whether the exclusion constitutes breach of international obligation assumed by Ethiopia. In particular, attention will be paid to the conformity of such exclusions with the Right to Organize and Collectively

Bargain as recognized under ILO Conventions NO.87and NO.98.

Finally, the last section windups the paper with conclusions and recommendations.

Section One: Justifications for the exclusion of Management Employees from Ethiopian Labor Law

1.1 Who are managerial employees?

Under part one of the Ethiopian labor proclamation No.377/2003 the term employee' is understood in such a way that some workers are granted the protection of the proclamation while others are either out rightly or conditionally excluded from scope of the law under consideration. Managerial employees are among those who are out rightly excluded. Before directly embarking on the exclusion of managers under Ethiopian labor law, it is imperative to define managerial employees- which employees are considered as managerial employees under Ethiopian labor law?

In order to establish who qualifies as managerial employee under Ethiopian labor law at least two approaches, which have long been employed by Ethiopian parliament while excluding same, can be identified-namely the structural approach and the functional approach. The structural approach, as the name indicates defines managerial staff by focusing on the structure of a given enterprise. Here the center of attention is on the post, as opposed to the functions (job descriptions) attached to it. This approach was typical of previous Ethiopian labor proclamations and particularly the one during the dergue regime.[2]

The functional approach, on the other hand attaches importance to the activities one is entrusted with, irrespective of his position in the structure of an enterprise. Thus, a person exercising any or many those activities listed by law as managerial functions will be deemed as managerial employee.

[2] See Article 2, Proclamation 64/75.

The current Ethiopian labor law, proclamation No.377/2003 and its amendment proclamation No 494/2006 adopt the functional approach. Consequently, the law lists those activities the engagement of which qualifies one as managerial employee.

Article 2(1) of the labor amendment proclamation provides that:[3]

This proclamation shall not be applicable to the following employment relations arising out of a contract of employment:.....c) managerial employee who is vested with powers to lay down and execute management policies by law or by the delegation of the employer depending on the type of activities of the undertaking with or without the aforementioned powers an individual who is vested with the power to hire, transfer , suspend, layoff, assign or take disciplinary measures against employees and include legal service head who recommend measures to be taken by the employer regarding managerial issues by using his independent judgment in the interest of the employer.

According to this provision, any worker who engages in one or more of the enumerated activities is a managerial

[3]Article 3 (2), Proclamation No 337/2003, cum Article 2(1) of the Labour Amendment proclamation No 494/2006.

employee and will no longer receive the protection of the proclamation. Nonetheless, determining the elements of the above provision so as to draw a line as to who is and/or is not a managerial employee may not be a simple task. This is not only because the way the provision drafted is extremely vague but also because of lack of jurisprudence. Consequently, we will try to show possible interpretations. From the close reading of the above provision three categories of workers may qualify as managerial employees and hence excluded from the coverage of the law These are:

1) Individuals entrusted with the power to lay down and execute management policies short of those described here in under category two. Under this group is any worker who is responsible for not only the formulation of management policies but also execution of same. In other words, the power to formulate management policies alone is not conclusive to establish who managerial employee is. Thus, mere set up of management policies may not qualify one as a managerial employee provided however that this is not related to recommendations communicated to the

employer on managerial issues (see category three below)

In doing so, one may say the law seems to limit the scope of this provision so that workers who are vested with the responsibility to set up managerial policies without the power to execute them would not be regarded as managerial employees and hence remain protected. Yet, when one stresses on the meaning of `management policies , it is easy to imagine that quite a lot of workers can be excluded. The law does not define what constitutes management policy' thereby opening a room for broader interpretation that may eventually leave more workers unprotected. In other jurisdictions such as the US while excluding managers (supervisors) the relevant law , instead of using catchall phrases like 'management policies' appropriately opts for enumeration of specific activities. Thus, US National Labor Relations Act (NLRA) lists ten supervisory

(managerial) activities the engagement of which qualifies exclusion from the NLRA.[4]

2) Individuals with authority to hire, transfer, suspend, layoff, assign or take disciplinary measures against employees. Here the law provides six activities the engagement of which denies a person the benefits of the labor proclamation. Under this category it suffices that a person is vested with either of these activities. Thus, if an individual is entrusted with one of the aforementioned tasks, he is no more the subject of Ethiopian labor law.

Nonetheless, the question who exactly is covered under such exclusion is compounded with several problems. Among these are: should independent judgment be a requirement while exercising the aforementioned tasks?

[4] The Taft-Hartley Amendments to NLRA defines a supervisory as: any individual having authority ,in the interest of the employer ,to hire ,transfer, suspend ,lay off, recall ,promote ,discharge, assign, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action ,if in connection with the forgoing the exercise of such authority is not of merely routine or clerical nature but use of independent judgment.

If so, what degree of independent judgment be exercised for one to qualify as managerial employee? Is the list exhaustive particularly when seen against the phrase `....with or with out the aforementioned power....`in the above quoted provision?

Though the purpose here is not to comprehensively discuss what constitutes managerial employee, it would be appropriate to say few words on the preceding questions. To begin with, the labor proclamation seems, unlike legal service heads whose discussion is the subject of category three below, to attach no qualification as to the exercise of listed activities. The proclamation with respect to legal service heads requires that the later, to qualify exclusion should, among others, exercise independent judgment.

Under Ethiopian labor proclamation individuals who exercise one of the listed activities even with detailed management guidelines limiting the exercise of managerial authority can still be considered as managerial employees. Consequently, it can be seen

that broad range of workers can be excluded as managerial employees and therefore denied the benefits of the proclamation.

3) Legal service heads who with independent judgment and in the interest of the employer recommend measures regarding managerial issues. The exclusion under this category pertains to legal service heads as opposed to managers proper. Managerial status here depends on whether an individual possess authority to recommend in matters and in manner provided by the labor proclamation. In particular, to determine managerial status at this point, four basic questions can be posed. First, does a worker head the legal service of the undertaking?, second , does he have the power to recommend on managerial issues? Third, does he exercise such power in his independent judgment? Fourth, does he hold it in the interest of the employer? Should the answer to the preceding questions be all in the affirmative, such an employee is a managerial employee and there fore is not entitled to receive any protection under the proclamation. Thus, those who use

independent judgment in effectively recommending discipline qualify under this category[5]

Despite the above guidelines (questions), determining whether a worker exercises the power to recommend in his independent judgment and in the interest of the employer seems open to varied interpretations and should be seen on case-by-case basis. In the US for instance, while the Labor Relations Board ruled that employees did not use independent judgment when they exercise ordinary professional and technical judgment in directing less skilled employees to deliver service in accordance with employer's specified standards; the Supreme Court rejected such interpretation of the Board by saying that the nature of judgment whether professional or technical or experimental doesn't determine whether a judgment is independent [6]

[5] Statutory exclusions, outline of law and procedure 2005, p.11 available at www.nlrb.gov/nlrb/legal/manuals/, visited on 12/07/06

[6] NLRB v. Kentucky River community care, Inc,532u.s 706(2001)

In a nutshell, workers that fall in either of the above discussed categories, i.e. those who have the authority to exercise those managerial activities in a manner defined by the proclamation may not claim labor law protection. However, since such statutory definition or guidelines may not be adequate to establish the question who qualifies managerial employee secondary indicia that can serve as complimentary evidence in determining the question of managerial status have been developed. These include the ratio of managers to employees, differences in terms and conditions of employment, attendance at managerial meetings.[7]Thus, the fact that an employee has better terms and conditions of employment ,that he /she attends managerial meetings though not conclusive ,indicate some thing as to the managerial status of such worker.

[7] Supra at note 3,p.211-212

1.2 Why exclusion?

Freedom to form and join a union has been recognized as a basic human right by UN and its member states since the adoption of UDHR. The international significance of freedom of association and the right to collectively bargain which was recognized by ILO, has been reaffirmed as one of the four work place rights so universal and fundamental that they must be honored by all states irrespective of ratification of relevant ILO Conventions.[8]

Yet, it is not uncommon to observe sizable number of workers being denied protection of their right to organize and collectively bargain. Most often, excluded from labor law coverage and consequently denied the guarantees provided under same law are public servants, domestic workers, managerial personnel, agricultural workers.

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[8] Block, Richard, and others, *Justice on the Job: Perspectives on the erosion of Collective bargaining in the United States*, W.E Upjohn Institute for Employment Research,Kalamazoo,Michigan,2006, p.1

In Ethiopia, all of the above exclusions but agricultural workers apply. Here one may wonder why these categories of workers are excluded from receiving labor law protections. Advocates of exclusion by advancing several arguments try to justify such exclusions. Under this contribution, however we will first briefly deal with arguments propounded in support of exclusion of one of such categories of workers-the management personnel. Then we shall evaluate the plausibility of such arguments.

To begin with, several arguments have been forwarded in support of exclusion of managerial employees from the scope of labor law. Nonetheless, we will focus on the glaring and frequently advanced ones.

1. Dual loyalty impossible

The argument that relates to the duty of loyalty of managers can be viewed from two angles-from perspective of the employer and the union (workers). From the employer perspective, supporters of exclusion vehemently argue that managers, 'as part of their job

owe undivided loyalty to the employer [9] Extending managerial employees same labor protection as an ordinary worker implies, among others, that they can join trade unions which eventually `may take away or divide that loyalty` in the event where the union and the management have different interests.[10] The whole argument here boils down to the idea that since it is not practicable for the manager to put on` two hats` at the same time-one for the employer and the other for the union, it would be both logical and a matter of necessity to exclude managers from labor law and joining trade unions. This argument, which seems the main justification for Ethiopian parliament to deny the guarantees of labor law to managers, is mainly advanced by employers.

From the union angle, it has been maintained that managers lack homogenous interest with other workers.

[9] Voos,Paula, Expanding Voice for Professional and Managerial Employees, Paper for Labour and Employment Relations Associations Annual meeting, Rutgers University, Dec .2005,p.3

[10] Ibid

They, as representatives of the employer, the argument goes, are closer to the employer than to the workers. As a result, providing those labor law protections and letting them join trade unions would adversely affect the interest of the union. Advocates of this argument claim, affording labor protection to managerial employees not only runs counter to the autonomy of the union but also would render the union a `toothless dog`

2. Managerial employees have strong bargaining power

It has been said that unlike ordinary workers, Managerial employees posses strong bargaining power. They are not only well paid but also allowed to enjoy wider autonomy and discretion as regards to their work. Historically, the advocates of the argument say, labor law has been there to protect the weak. For them labor law is an affirmative action to the weak-(i.e. the ordinary workers). From this it follows that, Managerial employees who indeed possess strong bargaining power should not be afforded the same protection with ordinary workers and hence their exclusion is justifiable. This argument assumes that individual Managerial employees can

effectively bargain with the employer concerning terms and conditions of employment thereby rendering the need to collective bargaining insignificant. Related to this is the argument that says since Managerial employees can avail themselves of general protections by law, there is no need to establish special labor law guarantees.

Such was the position of the Canadian government when Managerial employees challenged their exclusion from the labor code before the Committee on Freedom of Association: the Government states: [11] the legal provisions and the procedures applicable to the complainant associations are in conformity with Conventions Nos. 87 and 98; that, although managers are excluded from the general system in place established by the Labour Code, they are nevertheless covered by a structured system allowing them to exercise their freedom of association, i.e. the recognition of the right to associate and to establish their employment conditions; that they enjoy adequate

[11] Committee on Freedom of Association Report, Report No.335,Vol.LXXXVII,2004,SeriesB,No.3 para.458

protection against acts of domination and interference by employers; and that it is not necessary to establish a special disputes settlement procedure for the managers concerned.

So far, we have discussed major arguments advanced in support of exclusion of managerial employees from the scope of labor law. At this juncture, the central question that warrants close scrutiny pertains to the plausibility of such arguments. To what extent are the above arguments tenable? As has been discussed in the preceding section, one of the justifications for exclusion of Managerial employees relates to the duty of loyalty. It has been said that Managerial employees if allowed to benefit from labor law and join trade unions it would be impossible for them to deal with two conflicting interests –the interest of the employer, on the one hand and the interest of the union ,on the other hand. Such argument is, however, open to several criticisms:

First, the argument seems to ignore the realty in that no manager is entirely loyal to the company and the

company alone[12] In this regard, it has been said that: ` [managers] are also loyal to themselves, to their families and often to a variety of others like their workgroups, or department, community, religion, and so forth. All of us juggle multiple commitments in complex lives`[13]

Second, it fails short of recognizing the fact that decisions in trade unions are made by majority and are not left for Managerial employees which in turn renders managers` perceived pressure on workers less likely. After all, managers share so much with workers than with the employer.

Third, practice in developed nations particularly in Western Europe shows that managers not only enjoy labor law protections but also are allowed to join same trade unions with other workers. According to one study, almost in all Western Europe, managers enjoy the right to organize and collectively bargain. In Scandinavian countries such as Sweden managers are covered by

[12] Supra at note 8,pp. 3
[13] Ibid

collective bargaining agreements and it is only top executives that are not eligible for union representation.[14]

Fourth, research disapproves the allegation that managers are not capable of discharging` dual loyalty` As has been shown by Angle & Perry managerial employees are capable of `dual loyalty` and often they are committed to the union and the company[15].Represented managers, `in strike situations crossed picket lines with the blessing of the union when their labor was essential [and] they continued to discipline subordinates when it was necessary, even up to the point of participating in grievance arbitrations...`[16]

From this it follows that the assertion that managers are not able to perform their `double loyalty` ,which often advanced as a major justification to exclude them from Ethiopian labor law doesn't hold water. Here one may

[14] Ibid
[15]Harold, Angel and James, Perry,Dual Commitement and Labor–Management Relation ships Climates,Acadamy of Management Journal,Vol.29,No1,1986,pp31-50
[16] Ibid

argue that the experience in Western Europe will not work for countries like Ethiopia with different economic, political, social contexts. However, such assertion would not be compatible with the underlying concept of universality of human rights. Work rights such as the right to organize and collectively bargain are among those basic human rights so universal that all states irrespective of differences in level of development must observe. More over, the experience is not just limited western Europe; in Africa alike such as in South Africa and Namibia managers get protections of labor law.[17]

Finally yet importantly, even if one admits the assertion that managers may not discharge double loyalty, this may in no way justify their total exclusion from the benefits of labor law. Rather it may lead one to apply what I call `purposive exclusion`-exclusions made in the event where the perceived conflict of interest is likely to arise -more specifically exclusion for union /collective bargaining purposes.

[17] Readers are advised to refer the respective Labor laws with their amendments.

The second justification for exclusion of managers from the scope of Ethiopian labor law has to do with the bargaining power of managers. As has already been noted, advocates of exclusion maintain that managers, since they possess strong bargaining power based on which they can assert their rights, should not benefit from the protection of labor law. This, however, does not seem plausible. In the first place, the fact that Managerial employees can help themselves without the protection of labor law appears to be highly theoretical. In practice, it is not uncommon to see managerial employees at the mercy of the employer; being subjected to arbitrary dismissal and discipline. Here there seems to exist misconceptions and generalizations as regards to manager's powers.

Secondly, contractual arrangements, in particular individual bargaining, as it entirely depends on the will of the employer cannot be relied upon. The effectiveness of individual bargaining depends not only upon the willingness of the employer but also on the bargaining

power of the individual manager. Consequently, without protection of the rights of the manager by law, it would be hardly possible to enforce basic work rights of managers such as the right to organize and collectively bargain.

The Committee on Freedom of Association in handling complaints of managerial employees of Canada enunciates that:[18]

As regards the recognition of the associations and of their right to bargain collectively, the Committee notes that, under the current system, the complainant associations do enjoy a real form of recognition by their respective employers and participate in the elaboration of their members' employment conditions. These contractual arrangements, therefore, constitute an embryonic form of legal recognition, but one which is not enshrined in a legislative text. The examples given by the complainant associations demonstrate that this recognition is precarious, that it varies among different employers and workplaces, and that working conditions are not codified in real collective agreements accompanied by the relevant rights and guarantees. The precariousness of this

[18] Committee on Freedom of Association ,Supra note 10, Para.465

situation and the uncertainty which it creates in labour relations result from the absence of real legal recognition, within the meaning of the Labour Code, of managerial personnel as "employees" and of their associations with all the rights that would accompany such recognition.

Most important of all, leaving basic human rights such as the right to organize and collectively bargain exclusively to contractual arrangements would be at odd with the notion of universality of human rights. In criticizing, US labor relations one writer says:[19]

The concept of human rights has never been an important influence in making US labor law or policy. Workers are considered to have only those rights set forth in specific statutes or collective bargaining contracts, [which] are subject to shifting political and bargaining power. That contrasts sharply with the understanding that human rights are a species of moral rights, which all persons have equally simply because they are human, not because these rights are earned or acquired by special enactments or contractual agreements.

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[19]www.american**rights**atwork.org/docUploads/grosspaper, A Logical extreme: proposing human rights as the Foundation for Workers rights in the U.S,pp.3,visited on 12/7/06

From the forgoing discussions it follows that none of reasons forwarded to exclude managerial employees from the scope of Ethiopian labor law seem adequate to justify denial of labor law protection.

Of course, on the other side of the story, it may be claimed that managers are not left unprotected for their case is being entertained as per the provisions of the 1960 Civil Code of Ethiopia. For lack of any up-to-date law governing Managerial employees, Ethiopian courts often have recourse to the provisions of the Civil Code. For instance, in one case[20] the Cassation Bench of the Federal Supreme Court whose decisions are made to bind the lower courts[21], handed down a judgment that entirely denies managers reinstatement or reengagement where their contract of employment is terminated unlawfully- with out good cause. The Cassation Bench grounded its decision on the obsolete provisions of the Civil Code (Articles 2573 and 2574),

[20] *Arsi Agricultural Enterprise vs Solomon Abebe*, File *No. 15815, Tahsas 10 ,1998.*

[21] Article 2(4) of the Federal Courts Proclamation Reamendment Proclamation No.454/2005.

which in effect authorize the employer to dismiss workers without good cause just by paying a maximum of 6 months wage. Here, the court endorses the position of this law even at a reduced protection (it fixes the amount due to managerial employees at three months wage) and binds lower courts to do the same. From the forgoing, it can be seen that managerial employees made at-will employees who can be dismissed with out any good cause. As such, the provisions of the Civil Code under discussion, which are far behind the developments of labor law, not only fail short of alleviating problems managerial employees are facing but also put employment security of such workers at the employer's whim, which ultimately encourages the employer to dismiss managers arbitrarily and unlawfully.

Section 2: Compatibility of Exclusion with some ILO Standards

2.1 General remarks

Before directly embarking on the compatibility of exclusion of managerial employees from Ethiopian labor law with some international standards it is believed that spending few words on the domestic legal order would give proper insight into the problem of exclusion. At this juncture, it seems quite appropriate to see whether the exclusion of managers from Ethiopian labor law has some constitutional basis.

The Constitution of Ethiopia not only guarantees every one freedom of association[22]but also makes specific mention of the right to form trade unions and collectively bargain including the right to strike[23] Under the constitution, every worker has the right to organize and collectively bargain, including the right to strike. The only qualification one can find under the constitution as

[22] Constitution of the Federal Democratic Republic of Ethiopia, Fed-Nega gazette, No.1, 1995, Article 31.
[23] Id., Article 42(1)

regards to the right to organize and collectively bargain is with respect to workers `whose work compatibility doesn't allow the exercise of the right and who are [beyond] a certain level of responsibility`[24].What does this qualification refer to? Would managers fall under such exception? , are central questions that deserve attention. The qualification though fluid seems to recognize the exclusion of certain categories of workers from enjoying the right to organize and collectively bargain. In particular the phrase ` [beyond, *a contrario* reading of the term `below`] certain level of responsibility `has much to do with managers. Obviously, managers are workers whose level of responsibility forms among the top in an enterprise. Accordingly, it can be said that managers are among those workers whose right to organize and collectively bargain has been curtailed by the constitution. It seems based on this construction that the Ethiopian parliament enacted labor law that out rightly excludes managers from its ambit. Indeed the

[24] Ibid

constitution further authorizes law be enacted so as to implement the right as recognized under it.

Accordingly, part eight of the labor proclamation lays down procedures for the implementation of the rights under consideration. The proclamation under Article 113 guarantees the right to establish and form associations for both the employer(s) and the worker(s). More importantly, Article115 defines the functions of trade unions and thus trade unions are entrusted with functions ranging from collective bargaining to initiation of law and regulations regarding labor issues[25]

On this account, one may hope that affording such broad functions to workers organizations would play a pivotal role in insuring broader participation of workers in all matters affecting their interests so that workers interests would be adequately protected. Unfortunately, however, such hope diminishes when one comes to learn the fact that several categories of workers including managers

[25] Ethiopian Labour Proclamation, Labour Proclamation No.377/2003,Art.115

are precluded from enjoying the benefits of Ethiopian labor law. In our previous discussion, we tried to show the underlying justifications advanced in support of exclusions of managers and their sustainability thereto. Now let attention be turned to the compatibility of such exclusions with some international standards. The exclusion of managers from the ambit of Ethiopian labor law denies them two highly essential rights: the right to organize and the right to collectively bargain. Under this section, attention will be paid to discussion of the compatibility of exclusion of managers with the right to organize and collectively bargain as recognized by relevant ILO Conventions- Convention No.98 and No.87

2.2 ILO Convention No.87

The major source of Ethiopia's international obligation with respect to labor law lies on ILO Conventions. Ethiopia by ratifying ILO Convention concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No.87) assumed the obligation to ensure that every worker enjoys the right to form and join trade unions. Article 11 of ILO Convention

requires Ethiopia as a ratifying state to give effect to the convention by taking all appropriate and necessary measures to ensure the free exercise of the right to organize by every worker. The obligation arising from the convention is two fold:[26]

Firstly ,the obligation established by international law, according to which the addressee of the convention ,the ratifying state, is obliged to make the provisions effective within its territory. This obligation calls for national legislations, where necessary, to make the provision effective. Secondly, the contents of this convention calls for legislation again where necessary, concerning restrictions on the activities of the state it self; [which] ...aims at the creation of a state-free sphere, a reserved attitude of the state in matters concerning industrial relations.

The obligation here relates both to negative and positive obligations of a state. The state not only should refrain from interfering in the exercise of the right to organize but also should take positive measures such as enactment of legislations that guarantee and ensure the right fully

[26] ILO Principles ,p.71

Yet the option of employing the appropriate method of implementation is at the disposal of every state. With respect to this the Chairman of the Committee on Freedom of Association and Industrial Relations noted that ``the convention was not intended to be `code of regulation` for the right to organize but a concise statement of certain fundamental principles-the member states are free to decide on the method according to which the content of its provisions are guaranteed, either by means of legislation or by non intervention, as long as provisions are guaranteed ``

Though the method of implementation is left for states to choose, it does not mean that such choices are mutually exclusive. Thus, a state may be required to take both negative and positive obligations. One of the regular reports of committee of independent experts on European social charter is instructive regarding the obligation of states concerning the right to organize. The committee explained the obligation of states in this

regard to constitute two separate forms, one negative and one positive:[27]

The implementation of the first obligation requires the absence, in the municipal law of contracting state, of any legislation, regulation or any administrative practice such as to impair the freedom of employers or workers to form or join their respective organizations. By virtue of the second obligation the contracting state is obliged to take adequate legislative or other measures to guarantee the exercise of the right to organize, and in particular to protect workers' organizations from any interference on the part of employers.

Even though the above report was addressed to parties to the European social charter the nature of obligations of states indicated there remains valid for all, the difference lies on the sources such obligations. The source of such obligations for Ethiopia is the ILO convention, in particular Convention No.87 Ethiopia, as a state party to this convention assumes both positive and negative obligations discussed above. Thus, it must

[27] Prondzynski, Ferdinand, *Freedom of Association and Industrial Relations: comparative Study*, Mansell Publishing Limited,London,1987, p.21

ensure that her laws (including the constitution), regulations or administrative practices, among others, are compatible with the convention. Nonetheless, the question whether Ethiopia complies with such obligations remains questionable as one encounters the exclusion of certain categories of workers, including managers from the protections of labor law.

As has been discussed in Section one, for various alleged policy reasons, management staff are not entitled to receive Ethiopian labor law protections. Article 2 of the Convention under consideration provides that `workers and employers without distinction whatsoever, shall have the right to establish.....to join organization of their own choosing without previous authorization.` And, the only possible limitation on the right to organize can be found in Article 9 which stipulates that `the extent to which the guarantees provided for in this convention shall apply to the armed forces and the police shall be determined by national law or regulations`

Although the convention guarantees the right to organize /freedom of association for both workers and employers `without distinction whatsoever` ,it at the same time does allow exclusion of the armed forces and the police which has been justified on the ground that `most countries would not ratify a convention which require absolute freedom of association and organization (with possibly the right to strike) to be granted to those workers ,regarding the responsibility of governments defending the law and assuring the maintenance of public order`[28]

The Committee on Freedom of Association in handling allegations of violations of the right to organize and collective bargaining of managerial employees in Canada observes that: [29]

with regard to the exclusion of managerial personnel from the scope of the Labour Code, the Committee notes that the restrictive definition of the term "employee" effectively prevents managerial staff from forming trade unions in the sense of the Code, with all the strict rights that flow from it, in

[28] ILO Principles . p 65

[29] Committee on Freedom of Association, supra note 10,para.459

particular the right to negotiate collective agreements within the framework of the Labour Code. While noting that managerial personnel can form associations, which enjoy significant prerogatives..., the Committee recalls that the only exceptions permitted by Convention No. 87 concern the armed forces and the police, and emphasizes that this exclusion must be defined restrictively.

Here one can see that the exclusion of workers other than members of armed forces and the police from enjoying the right to organize has no recognition under the convention. Accordingly, the exclusion of managers from Ethiopian labor law particularly in the absence of any similar legal protection to their right to organize and collectively bargain denies them the right to organize and collectively bargain, and is by no means compatible with ILO conventionNo.87 (On the contrary, it can be maintained that in the presence of Article 31 of the Ethiopian constitution that guarantees everybody the right to freedom of association, managers remain protected. Nonetheless, as we have shown earlier, Article 42 of the constitution, the pertinent provision that guarantees labor rights seems to exclude managers from

benefiting core labor rights such as the right to organize, collectively bargain and the right to strike.) Yet, the Committee on freedom of association seems to hold the view that the exclusion of managers from the scope of labor law, which denies them the right to belong the same trade union as other workers, does not necessarily offend the provisions of convention No.87

The Committee in handling complaints of managerial employees of Canada enunciates that:[30]

....noting that the national case law has provided an extensive interpretation of the concept of managerial personnel, the Committee recalls that it is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to form their own associations to defend their interests and, second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a

[30] Id,para.460

substantial proportion of their present or potential membership.

The Committee seems to emphasize on the end in that in so long as managers can form their own associations that enjoy same rights and privileges as other workers' union, exclusion of managers from labor is allowable. However, this construction is open to criticisms.

First, it has little practical significance for the protection of mangers interests. Since the very purpose of exclusion is to limit the right of managers, states may not accord managers` association same rights and privileges as other workers organizations do. Even if, accorded with similar protections as other workers organizations, managers being minorities in an enterprise would not be as effective as they would otherwise be by joining workers organizations (trade unions). Thus, managers union would turn out to be mere associations with no effective right to collectively bargain, strike etc. In particular, such would be the case under Ethiopia law where it recognizes and attaches legal personality only for a trade union with 50% +1 majority of workers.

Obviously, as minorities, managers associations will not receive such recognition and hence have no right to collectively bargain with the employer, among others.

Second, the construction is not consistent with article 9 of Convention No.87, which allows exclusion only to armed forces and the police. Insofar as managers from public sector are concerned, the relevant ILO Convention seems to take different approach. The ILO convention concerning the right to organize and procedures determining conditions of employment in the public service, while generally strengthening the association rights of public service employees, does permit the exclusion of high- level policy making or managerial employees or those whose duties are of a highly confidential nature.[31] Here the fact that while the ILO explicitly authorizes the exclusion of managers of the public sector, refrains from making such authorization as regards managers of the private sector strengthens the

[31] Labor Relations(Public service)Convention, No.151 , 1978 ,Art.1(2)

assertion that the exclusion of the latter is not compatible with the ILO norms.

2.3 ILO Convention No.98

ILO Convention No.98 was intended to supplement and complete the guarantees accorded under Convention No.87 by dealing with two different aspects of freedom of association[32] `` First, it seeks to protect workers` exercise of their right to organize vis-à-vis employees and to protect workers` and employers` organizations against interference by each other. Second, it seeks to ensure the promotion of collective bargaining. The convention, by providing guarantees and procedures protects the right to collective bargaining.

The Convention further requires states parties to take appropriate measures so as to ensure the right to organize and collectively bargain.[33] Ethiopia, a ratifying state to the convention undertakes to ensure that

[32]ILO Principles supra at note ,pp.73

[33] Right to Organise and Collective Bargaining Convention,No.98,Article 3

workers and employers enjoy their right to freedom of association as guaranteed under the convention.

Yet, Ethiopia by denying managers such guarantees as the right to organize and collectively bargain fails to live up to the requirements of the convention. Such failure is detrimental to not only managers but also to employers and the industrial relations in general. With this regard, the committee on freedom of association while expressing its concerns over Canada's interference in collective agreements notes that ` repeated recourse to statutory restrictions on collective bargaining can in the long run only prove harmful and destabilize labor relations ,as it deprives workers of a fundamental right and means of defending and promoting their economic and social interests`[34] Denial of workers' rights such as the right to organize and collectively bargain can have its repercussions on productivity. Productivity is greatly affected by social relations of production. Naturally, workers will endeavor to productivity only where they feel

[34]Philip, supra at note 27, p.67

that their interests are fully protected. In connection to this, it has been noted that:

Work rights embodied in an industrial relations system that promotes collective bargaining and employment and income security encourage more cooperative labor management relations in which workers participate both in decisions about how to improve their firms economic performance and in the rewards in doing so.[35]

The problem would obviously be intensified as regards to the curtailment of the rights of managers who have a leading role in the overall performance of an enterprise.

Section 3: Conclusion and recommendations

The scope of labor law depends on how a particular jurisdiction defines the term 'employee' The way a legal system defines such concept generally determines who does or does not receive the protection of the labor law. The Ethiopian labor law defines the term in such a way

[35]Buchele,Robertand Christiansen Jens "Labor Relations and productivity Growth in Advanced Capitalist Economies", *Review of Radical political Economies*,Vol.31 No.1,,1999, p.2

that certain categories of workers, including managers are precluded from its coverage. This Article sought to address the exclusion of management staff from the scope of Ethiopian labor law. Discussed are the underlying justifications for exclusion and their plausibility thereto, and compatibility of such exclusion with ILO Conventions No.87and No.98, with particular reference to the right to organize and collectively bargain.

The importance of freedom of association of workers in particular the right to organize and collectively bargain as human rights can be evidenced from not only the work of UN Treaty bodies and ILO committees but also from the 1998 ILO Declarations on fundamental principles and rights at work which is binding on any ILO member states. The rights out lined under the Declaration which encompass the right to organize and collectively bargaining are not workers rights *per se* but rights at work ,meaning that they are rights that all persons

possess by virtue of being human and they are rights with particular applicability at work[36]

Similarly, UN treaty bodies particularly Human Rights Committee (HRC) and Committee on Economic, Social and Cultural Rights (CESCR) stressed on several occasions the importance of the right to organize and collectively bargain. For instance, the HRC in its 1999 concluding comment on Chile's periodic report on compliance with ICCPR expressed its serious concern over a Chilean law that imposed a general prohibition on the right of civil servants to organize trade unions and collectively bargain, as well as the right to strike.[37]

More over, the CESCR in its concluding comment on Korea reminded the later that the provisions of article 8 guarantees for all persons the right to freely form and join trade unions for the protection and promotion of their

[36]Devinatz, Supra at note 7
[37]Philip, Supra at note 27, p.68

economic and social interests, as well as the right to strike.[38]

The right to organize and collectively bargain, including the right to strike are central facets of the right to freedom of association and should be honored by states so that workers can defend their interests. Hence, the right should be enjoyed by all, except those limitations permitted under relevant conventions.

Yet, in Ethiopia, manager's freedom to form trade union and collectively bargain has been curtailed by excluding them from benefiting labor law protections and thereby denying them legal protections.

As has already been indicated in section two, the exclusion of managers from Ethiopian labor law and restriction of their right to organize and collectively bargain thereto, cannot be justified by any of the limitation clauses recognized under relevant ILO

[38] Id,p.71

conventions. Consequently, the total exclusion of managerial employees from Ethiopian labor law, in the absence of full protections of their freedom to association – in particular right to organize and collectively bargain runs counter to norms of freedom of association guaranteed under relevant international instruments (ICESCR, ILO Conventions No.87&98). Such exclusion, which prohibits managers from participating in collective bargaining, infringes not only the rights of managers but also the unions' freedom to decide who might be a member. The exclusion, beyond infringing the rights of managers and the freedom of the unions may have its repercussions on productivity of an enterprise. This is precisely because industrial peace, bedrock for productivity, cannot be achieved unless workers' rights are fully respected.

Mindful of the problems of exclusion of various categories workers across the world ILO commissioned a series of country studies on the need of labor law protections and concluded that there has been a world wide decrease in workers' protection. As a result, it

proposed the adoption of promotional instrument, which requires states to clarify which workers are covered by labor law and adjust these definitions in response to changes in employment relations.[39]

Such measure of ILO is blossoming in terms of ensuring the rights of unprotected workers such as managers and Ethiopia needs to welcome such gesture so that those forgotten workers including managers enjoy the benefits of labor law and endeavor for productivity. In particular, it needs to revisit her labor policies. The primarily purpose of labor policy should not be just to increase labor productivity and employer competitiveness; rather` finding a moral basis for human dignity, solidarity and justice for all at work place`, which at the same time guarantee development, must dictate it.[40]

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[39] Benjamin,paul,`Who needs labor law? Defining the scope of labor law protection` ;in :Conaghan,Joanne(eds),Labor law in an Era of Globalization Transformative Practices and Possibilities, Oxford University Press, United states,2002,p.81

[40] www.american**rights**atwork.org/docUploads/grosspaper, A logical Extreme: Proposing human Rights as a foundation for workers Rights in the U.S ,p11,visited on 12/07 /06

Accordingly, to alleviate such problems associated with exclusion of managerial employees under Ethiopian labor law, four options with varying degrees of importance, in order of their importance in terms of guarantying managers' rights, can be identified:

1. To amend Ethiopian labor law so that managerial staff receive the full protections of the labor proclamation as other workers. Thus, managers by joining same trade union as other workers would enjoy all the benefits of labor law as any worker, including the right to collectively bargain and the right to strike. The perceived conflict of interest between employer's interest on the one hand and union's interest on the other , which allegedly may result following managers joining of same trade union with workers is ,as shown in section one ,less likely to happen for managers are capable of effectively discharging `dual loyalty `, among others.

2. As a second option comes the` partial exclusion` of managers from labor law whereby managers maintain

their right to join trade unions and enjoy the benefits thereto, but banned from joining `workers` council` which is entrusted with defined functions that complement but not replace the role of trade unions. This approach typical of many countries such as Germany, South Africa and Namibia has been proved successful. So, recourse can be had to such an arrangement.

3. Related to the second option is the recognition of `purposive exclusion` Managers will remain protected by labor law and could only be excluded for union purposes. They will not be represented in the workers union and yet remain beneficiary of the minimum protections of labor law.

4. The fourth option pertains to maintaining the exclusion but allowing managers to form their own organization that enjoys same rights and prerogatives as organizations of other workers so that they may freely associate, collectively bargain on terms and conditions of employment etc. This option seems consonant with Article 31 of the Ethiopian constitution, which guarantees

every one freedom of association for any lawful cause. Yet, in the absence of implementing law, and most importantly, in the presence of Article 42 of the constitution as it is now (which doesn't guarantee managers rights to organize and collectively bargain, among others), this guarantee (option) will remain less important. Moreover, such an option, given the fact that exclusion of managers under Ethiopian labor law aims at limiting their labor rights in particular- the right to organize and collectively bargain has less practical significance compared to the first option. (See our discussions on section 2.1). Above all, managers` associations even if accorded similar protections as other workers` organizations, would be less feasible for two reasons:

First, even if accorded with similar protections as other workers` organizations, managers being minorities in an enterprise would not be as effective as they would otherwise be by joining workers organizations (trade unions). In particular, under Ethiopia law where it recognizes and attaches legal personality only for a trade

union with 50%+1 majority of workers, managers associations will have less practical significance. Obviously, as minorities, managers associations will not receive such recognition and hence have no right to collectively bargain with the employer, among others. Therefore, managers union would turn out to be mere associations with no effective right to collectively bargain, strike etc.

Secondly, even if one can imagine the situation where managers associations (being minority) got recognition to collectively bargain, this may not work since they constitute insignificant minorities (compared with the task force of an enterprise) whose collective pressure may remain less important and ineffective.

University Teachers' Classroom Speeches: How Far Can It Go? A Reflection from the Perspective of Academic Freedom

Birhanu Beyene Birhanu*

1) Introduction

We have witnessed quite many violent incidents sparked by teacher's classroom speeches in several campuses of government universities. Students taking offenses in the speeches reacted violently and disrupted the learning-teaching process in many occasions. These incidents put university teachers in uncertainty as to their class room speeches. On the one hand, they do want to enjoy the maximum freedom to critically examine issues and express their opinion freely .On the other hand, it is so painful for them to see violence sparked by their classroom speech. Beyond, the emotional pain, they even fear that they could be subjected to any disciplinary measures or any other punishment for their speech. Therefore, it is needed to formulate, to the extent possible, which classroom speeches of university teachers are protected by their academic freedom of speech and which are not.

The issue of classroom speeches also arises in different scenario where students complain against their teachers for making speeches in the classroom not related to the course they deal with[41] Most teachers out-rightly turn-down these complaints as against their academic freedom of speech while some hold these complaints as well-founded.

Therefore, in this writing, I will show where a line which delineates those speeches guaranteed by academic freedom of speech from those ones not guaranteed should be drawn. However, before embarking on that business, I will briefly explain the need for academic freedom of speech and its recognition in our laws.

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[41] The writer personally knows one incident where students accused their civics teacher of going astray by raising such concepts in the classroom not falling with in the ambit of the course syllabus as "the existence of God"

2) The Need for Academic Freedom of Speech and Its Recognition in the Law

Universities are places where existing knowledge should be not only transmitted but also examined, evaluated and then expanded to ultimately find out the truth. To this end, they must be a free market place of ideas where there is active interplay of clashing views. As Justice Holmes put it, "[t]he best test of truth is the power of thought to get itself accepted in the competition of the market."[42]Therefore, it escapes nobody's cognition that university teachers must have an academic freedom which, among many other things, guarantees them to freely express their views. Unsurprisingly, our laws extend recognition and protection to the academic freedoms.

Academic freedom is recognized in the *Constitution of the Federal Democratic Republic of Ethiopia.* Of course,

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[42] Craig R. Ducat, Constitutional *Interpretation* (6th ed., 1996), 922.

one may not find a provision in the constitution which literally refers to academic freedom. However, Art. *41(4) (indirectly)*[43] and 90(1) of the constitution recognize the right to education and this right must be considered to include academic freedom. The first reason is that the right to education cannot be complete with out academic freedom.

The right to education is one of the rights recognized by the *International Convention on Economic, Social and Cultural Rights.*[44]This right is understood to be inclusive of academic freedom. The comment by The *United Nations Committee on Economic, Social and Cultural*

[43] Here note that Art.41 (1) of the Constitution states that "*the state has the obligation to allocate ever increasing resources to provide to the public health, education and other services*" The flip side of this provision is that Ethiopians can enjoy access to education by holding the government to live up to its obligation.

[44] Ethiopia has ratified this convention and thus this convention is the integral part of the Ethiopian legal system(see,Art.9(4) of the FDRE Constitution)

Rights clearly states so.[45] Therefore, we have also an extra ground to interpret the part of the constitution dealing with the right to education to include academic freedom as its provision on human rights must be interpreted in harmony with international standards.[46]In addition to the constitution, academic freedom is recognized by other legislations like *Higher Education Proclamation No. 351/2003.*

When it comes to *who* are to enjoy academic freedom and its constituent elements, it is a freedom enjoyed by learning institutions, teachers and students. It guarantees these bodies, among other things, their liberty to express their opinion freely. Therefore, it is out of question that university teachers have legally well protected academic freedom which guarantees them to express their opinion freely, without fear of repression by any body else, including the state.

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[45] Committee on Economic, Social and Cultural Rights, General Comment13(1999)

[46] See,Art.13 of the FDRE Constitution

In general, as universities must be a free market place of ideas and as university teachers have an academic freedom of free speech, and as classrooms are among the most important places where a university teachers shall enjoy their academic freedom of speech, I subsequently deal with university teachers' classroom speeches in light of their academic freedom of speech.

4) **Classroom Speeches Not Related to the Subject**

Academic freedom is a role related freedom. University teachers are guaranteed with this freedom to make them feel free in playing their role of transmitting, examining and expanding knowledge. Teachers making classroom speeches which have no relation to their subject can not claim that their speeches are protected by their academic freedom of speech. Teachers talking about the matter not related in any way to the topic assigned for class discussion are drifting away from the role they are supposed to play. In a context of classrooms, they must be considered as playing their role if and only if their

speech is limited to the subject which is assigned for them.

Classroom speeches unrelated to the subject can even be held as a violation of the academic freedom of universities and students. Universities have an institutional academic freedom to determine for themselves on academic grounds what may be taught, among other things.[47] Teachers making unrelated speech are thus undermining universities' academic freedom of determining what may be taught. One more argument can also be developed along the line universities and teachers stand in their relationship. Teachers are employees to universities to teach subjects assigned to them. They are failing to discharge their employment obligations if they engage themselves in classrooms in speeches not related to the subject they are supposed to deal with.

[47] Other academic freedoms of universities include the freedom to determine who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Teachers making unrelated speech in classrooms to their subject are giving a big blow to students' academic freedom to learn. Students make themselves available in classrooms to learn and get knowledge on the subject they are registered for, not to hear any other agenda of teachers. Therefore, university teachers making unrelated classroom speeches are violating students' right to learn by hijacking classrooms for their own personal agenda.

In general as teachers' classroom speeches not related to their subject does not have any place in their role of teaching the subject assigned to them, and as it conflicts with both universities institutional academic freedom and students right to learn, they can not invoke the protection of academic freedom to such speeches[48]

[48] Some of my colleagues ask me whether I mean that a teacher should not even crack jokes to put students in a receptive mood. If the joke is too brief and have a pedagogical value of putting students in a receptive mood, we can at least say that such jokes must be prohibited if not protected by academic freedom. However, if the jokes are offensive to some students of a certain ethnic group, sex, religion, the joke cannot have a pedagogical value (as it is

5) Classroom Speeches Related to the Subject

Classrooms must be open to all sorts of speeches as long as the speeches are in germane to subject matters teachers deal with. If classrooms are perceived as places where only popular ideas or ideas validated by political, social or cultural life of a society are entertained, then universities' role of critically questioning popular ideas to broaden the knowledge database and to introduce the society with new perspectives and knowledge will come to cease. And the final result will be "stagnation and death of civilization." Therefore, university teachers have an academic freedom of making any kind of speeches related to the subject matter they are handling.

Here one may wonder whether teachers have an academic freedom of making, for e.g., offensive speeches, just because the speeches are in germane to the subject. Generally speaking, teachers have academic freedom in the classrooms to express any idea of

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creating hostile classroom environment for those students), we may thus be held liable and can't invoke the protection of academics freedom.

whatsoever nature as long as it is in germane with the subject. There are, however, some necessary cautions they need to take. In ensuing sections, I will argue for that teachers need to be guaranteed a freedom in classrooms to make even offensive speeches and show the cautions they must take in making such speeches. In addition, I will show cautions that must be taken in making speeches on controversial issues. I am limiting my discussions to these points with a belief that the discussions on these points recap many of the issues arising in relation to classroom speeches.

5.1) Offensive Speeches

It may be argued that teachers must not make offensive speeches (based on ethnical origin, sex, physical appearance, etc) in classrooms as it may harass students belonging to the class the offensive speech is directed at. And exposing students to hostile educational environment by itself amounts to denial of equal educational opportunities. However, this argument is not

sound when examined in light of the unique nature of class rooms.

Classrooms are unique in that they provide a space in which marginalized and silenced voices can respond and be heard and thus critical analysis of offensive expressions are made possible. It may not be reasonable to allow offensive speeches in the streets or supermarkets since in such places the environment does not allow the targets of the speech to respond and be heard, but very reasonable to allow it in classrooms. Even it may be good to encourage a voicing of hostilities in classrooms to have the voice of class members against whom the speech is directed heard and to make speakers reflect and become critical about their expression. Therefore, university teachers have an academic freedom to make offensive speeches in classrooms as long as it is in germane to their subject. The most important caution the teacher must take here is that they must allow students to not only freely react to the matter, but also they must present their speech in a way suitable for scientific investigation. If a teacher of, for

e.g., '*comedy writing*', say in the class that "women can never be funny" and he refrains from giving his reasons how he arrives at the conclusion, he cannot claim the protection of academic freedom. He is not helping the search for truth (academic freedom is there to facilitate the search for truth).He is simply making the classroom environment hostile for female students. He has to show in his speech his premise, his analysis, his sources etc. Thus, students offended by the assertion can point out what leads to the wrong conclusion.

Once, an American professor of *Tort Law* made an expression in a classroom that "Marxism, feminism, homosexual and blacks contribute nothing to tort law" Defending himself he said that he made the assertion based on a science called *Critical Race Theory*. The position held by many members of the community of academics on this issue is that the professor has an academic freedom to make such a speech though it could be offensive to black, homosexual, feminist and

Marxist students.[49] Here one may wonder what arguments could be invoked in favor of such a position. Primarily, universities are places where unpopular ideas must be tolerated than any other places. There offensive speeches must be confronted by rebuttal, not by suppression. In universities, one important matter that must be developed is academic civility and one of the behaviors academic civility admonishes is intolerance. Therefore, offensive speeches must be dealt with tolerance by invoking refuting arguments, not by censoring them. Censoring offensive speeches simply fosters intolerance.

The other argument is that prohibiting offensive speeches is trying to address the symptom but not the

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[49] Donna R. Euben, *Academic Freedom of Professors and Institutions* (2002), available at http://www.aaup.org/AAUP/protect/legal/topics/AF-profs-inst.htm visited 15 January 2009

real problem. Expressions of offensive speeches in classrooms encourage critical analysis of them and that speakers may finally find themselves unreasonable to use such expressions any more. Prohibiting them is, however, simply restraining speakers from doing what they think right without showing them what they think right is really wrong. One more argument that could be raised for allowing offensive speeches in classrooms is that targets of offensive speeches must be presumed as critical persons. If they are allowed to respond and be heard, they will be able to show how the speech has root in ignorance or prejudice. The discovery of this fact that the expression has root in ignorance makes them less vulnerable to be offended by the expression than they could be otherwise.

In general university teachers must be considered as having academic freedom of making offensive speech in germane to their subject. Holding otherwise goes against the ultimate goals of universities to find out the truth. However, teachers must give targets of the offensive speech a chance to respond and be heard. Also, they

must present the speech in a way appropriate for scientific critical analysis. Teachers making offensive speeches in dogmatic manner (not in a proper way for critical analysis) can not expect academic civility of tolerance. They may be held liable for making classrooms hostile and thus denying equal opportunity of education to targets of the speech.

5.2) Speeches on Controversial Issues

One of the main tasks of universities is to introduce the society with a new knowledge to help it tackle its social, political and economical problems. This task of universities is clearly indicative of the fact that university teachers must be guaranteed to deal with controversial issues. It may not be that much a point of controversy that university teachers are guaranteed with academic freedom which warrants them to express their opinion in classroom over controversial matters in relation to their subject, but it is not without controversy the way they should handle controversial matters. The next discussions are devoted to address the latter issue.

a) Education versus Indoctrination

Knowledge must be open to challenge. The knowledge base can be expanded if individuals feel free to express their challenge. Unsurprisingly, academic freedom is there, among other things, to encourage academician to freely express a view over the existing knowledge, however dissenting. University teachers who show in classrooms only one line of argument either against or for a controversial matter are, therefore, setting aside these underlying principles of academic freedom.

Students have an academic freedom to learn. University teachers who speak only one side of a story in classrooms are denying students their right to know about the other side of the story. They are, therefore, not educating rather indoctrinating students. To educate their students, university teachers must balance their speech on controversial matters by raising and discussing different opinions. Teachers whose subject requires them to talk, for example, about globalization must not raise arguments that show only the good or bad side of these matters. They must balance their speech by raising all

possible arguments that can be invoked against or for this issue.

The very purpose of universities is making students ready for challenges of the real world by exposing them to different ideas, by making them think critically and by putting them in a position to choose the side they think right by themselves. University teachers who offer unbalanced speeches over controversial matter are simply indoctrinating their students to take their stand and denying student the right to exercise their free thinking to or not to endorse an idea as a right one on their own.. Therefore it is reasonable to conclude that university teachers' academic freedom guaranteeing them to speak on controversial matter comes together with an obligation of maintaining the balance of their speech by airing opposing ideas.

Here it must be noted that the above conclusion is premised on the general principle that knowledge is open for challenge. Besides, it is based on the important belief upheld by many philosophers and justices at a high

position for many centuries that silencing opposing views, considering them as false, being intolerant and holding views of certitude to our own idea_ lead to the failure of democracies and the shift to authoritarianism. However, it does not mean that all knowledge is open for challenges and no settled issue. To hold a position that all knowledge is subject to challenges under any circumstance amounts to reducing knowledge to mere opinion. Therefore university teachers, with a view to maintain balance, must not waste time over the search of frivolous opposing idea with regard to an issue which is widely considered as settled by academics.

In general, university teachers must not use their position to exploit students' unawareness to the existence of different or opposing views. Keeping students in the dark about opposing views amount to indoctrination of students with their belief. Equally teachers must not introduce every trivial opposing idea to every issue in the name of balance as students must first grasp the general framework. Therefore, university teachers must consider the sophistication of students in balancing their speech

both to avoid an accusation of indoctrinating students with their belief and to avoid confusion on the part of students(by reducing knowledge to an opinion) as they must first be equipped with the necessary framework of knowledge. Don't forget that universities have the goal to produce a productive individuals who can contribute something to society, not confused individuals who are over skeptical on everything.

6) Conclusions

Universities are places where knowledge is not only transmitted but also examined and expanded to ultimately find out the truth Truth can be found out if a free market place of ideas is created in universities. As classrooms are one of important places of universities where academics are engaged to find out the truth, they must be free from any pall preventing free flow of ideas. One important device to ensure a classroom of such environment is to guarantee teachers that they will not be held liable for statements they make in playing their role of teaching. That is the reason why teachers are

guaranteed with academic freedom which, among other things, warrants free speech in classrooms.

However, as teachers' classroom speeches not related to their subject does not have any place in their role of teaching the subject assigned to them, and as it conflicts with either universities institutional academic freedom or students right to learn or their employment obligation, they cannot invoke the protection of academic freedom to such speeches.

When it comes to teachers' classroom speeches related to their subject, they are free to make any kind of speeches including such speeches as offensive ones. But teachers making such speeches must take necessary cautions. They must give targets of the offensive speech a chance to respond and be heard and must present their speech in a way subject to scientific critical analysis. Offensive speech not well handled has the risk of making classrooms hostile and thus denying equal opportunity of education to targets of the speech.

In making speeches on controversial matters, since the very purpose of universities is to make students ready for challenges of the real world by exposing them to different ideas, by making them think critically and by putting them in a position to choose the side they think right by themselves, university teachers who offer unbalanced speeches over controversial matter are simply indoctrinating their students to take their stand and denying students the right to exercise their free thinking. Thus, university teachers must try to balance their classroom speeches, to the extent possible and reasonable, considering the sophistication of their students.

Tell Me Why I Need to Go to Court: A Devastating Move by the Federal Cassation Division

Dejene Girma Janka[79]

Introduction

In the current Ethiopian legal system, the concept *cassation* has its roots in the FDRE Constitution (See article 80) and Proclamation 25/1996 (see article 10). According to these laws, the *cassation Division* (CD) of the Federal Supreme Court (FSC) may entertain the cases which involve fundamental or basic error of law.[80] Such introduction is relevant particularly in lieu of the proper administration of justice and uniform application of law. Consequently, the CD has so far entertained considerable number of cases involving fundamental

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[79] Currently, Dean, Lecturer, Faculty of Law, Jimma University, Jimma, Ethiopia, LL.B (Addis Ababa University, Ethiopia), LL.M ((University of Pretoria, South Africa), PhD Candidate (University of Alabama, USA). I am grateful to those members of the Faculty of Law of JU who read and commented on this piece of writing.

[80] The FDRE Constitution uses the term *fundamental error* while Proclamation 25/1996 uses the term *basic error*. Thus, we can use these terms interchangeably.

error of law and decided thereon as appropriate. In this regard, the FSC has been publishing and distributing the decisions of the CD with the view to making it reach all relevant persons/bodies. Such publication and distribution has become indispensable since the enactment of Proclamation 454/2005, which makes the decision of the CD on interpretation of laws binding on all courts at all levels (Federal and Regional).[81] Upon its enactment, Proclamation 454/2005 attracted challenges from some of us as we thought (and still think) it would erode the independence of judges. This is particularly so when the judges in the CD err; that is, when they themselves commit (fundamental) error of law in an attempt to rectify others 'alleged' fundamental error of law.[82]

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[81] See article 2(1) of the Proclamation. The Proclamation makes the publication and distribution of the decision of the CD compulsory.

[82] Fundamental error of law committed by the CD may be rectified by the Hose of the Federation (HOF), as I will be discussing later on, if such error has constitutional pertinence. In a sense, the HOF exercises cassation over the CD in constitutional matters. (See article 83 of the FDRE Constitution.)

In this writing, I will be commenting on one case[83] decided by the CD in 2007 and which is, in my opinion, worthy of consideration. Some writers have already commented on the case both in favour and against the decision of the CD on the case.[84] Thus, I will focus only on the aspects that are not touched upon by these writers and those points which are touched by these writers either inadequately or only as passing remarks. Further, I will do some survey to show where the

[83] *Shewaye Tessema V Sara Lengana and Others*, Federal Cassation Bench, File No. 20938, April 19, 2007 Actually, the case between *W/o Abebech Yeshewleul v W/o Etagegnehu Admasu and Others* is also similar to the present case on which similar decision was given by the same organ and in the same yerar. See Filipos Aynalem, *dÃó- (Ç= ó¡„) õ*; p 131-132, Mizan Law review, V 2, No. 1, 2008

[84] Mehari Radae, Assistant Professor of Law, AAU, has commented on the case primarily from the perspective of family law and has shown how defective the decision is and the possible danger it poses to the institution of marriage. See Journal of Ethiopian Law, Volume XXII, No.2, December 2008, p 37-45. On the other hand, Philipos Aynalem, who is a judge in Federal High Court and also a lecturer in St. Mary University College, commented on the case in support of the CD's decision. He cited and discussed in length many instances where similar cases appeared before courts both at Federal and Regional levels yet obtaining different decisions. See Filipos Aynalem, supra note 83, p 124-136,

decision of the CD on the case at hand might lead us. Finally I will conclude my comments and forward some recommendations on how to deal with the aftermath of this decision.

The Case

The whole text of the case as included in the FSC CD case reports, volume IV, is attched at the end of this writing. The gist of the matter is; the case arose between W/O Shewaye Tessema (the applicant) and W/o Sara Lengana and Others (the respondents) on dissolution of marriage. W/o Sara claimed that although she ceased to live with Ato Yilma W/Hana in 1985 E.C. (whom she wedded in 1966 E.C.) and started leading her own life by wedding another man, her marriage with Ato Yilma was not dissolved on legally recognized grounds. Thus, she argued that she should be declared the widow of Ato Yilma who died in 1989 E.C. This argument was accepted by lower court and the applicant then brought the case to the CD. The CD after considering the case admitted that the marriage was not dissolved based on the grounds recognized by law. Yet, it declared that the

non-use of marriage for long period would result in the dissolution of marriage. Thus, the CD has introduced the notion of *de facto divorce.*[85]

Comment

In our legal system, the grounds for the dissolution of marriage are death (and absence) of a spouse, invalidity of marriage, and divorce.[86] Save for death, the dissolution of marriage becomes valid in the eyes of the law only if it is approved by the court. Thus, there are only two exits from marital relationship-one created by

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Therefore, the CD erred by attempting to interpret the law when interpretation is not necessary. Such error is fatal because it made the CD to encroach upon someone's power thereby breaching the principle of *separation of powers*. That is to say, the CD has *injected* one ground the law-maker(s) has/have not recognized for the dissolution of marriage. This is undeniably law-making, not law interpreting. Such encroachment upon others' power is utterly unconstitutional. The FDRE Constitution has given legislative powers to legislatures (federal and regional) and as its decision is binding on courts at all levels, the powers of both the federal and regional legislative organs have been affected by this decision. At this juncture, it is important to consider article 9(3) of the FDRE Constitution. It states: "It is prohibited to assume state power in any manner than that provided under the Constitution" Has not the CD assumed state power (of making law)? Its power as provided and envisaged under the Constitution is construing laws when there are fundamental errors.[96]

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Yet, by failing to applying the existing clear law, the direct application of which would not have led to ludicrous conclusion, it widened the scope of the existing laws thereby modifying them. This is contrary, not only to the principles of separation of powers, but also to article 9(3) of the Constitution.

Conclusion and recommendations

As this brief discussion has outlined, the CD held that 'long disuse' of marriage dissolves marriage. This injection of one ground into the legislatively recognized grounds of marriage is not sustainable in light of the provisions of the FDRE Constitution as it, firstly, affects the protection the Constitution envisions for marriage and family. This is easily discernable from the little survey I conducted. Secondly, the injection runs contrary to the principle of separation of powers the Constitution in one way or another recognizes and protects such as under article 9(3).

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[99] At this juncture, one may argue that the courts cannot do so until the HOF declares that such decisions are unconstitutional. But I think this power can be exercised by courts even before HOF declares something is unconstitutional. Otherwise, they will be furthering the violation of the Constitution thereby violating their own duty to obey the Constitution as stipulated under article 9(23).

Tell Me Why I Need to Go to Court: A Devastating Move by the Federal Cassation Division

Dejene Girma Janka[79]

Introduction

In the current Ethiopian legal system, the concept *cassation* has its roots in the FDRE Constitution (See article 80) and Proclamation 25/1996 (see article 10). According to these laws, the *cassation Division* (CD) of the Federal Supreme Court (FSC) may entertain the cases which involve fundamental or basic error of law.[80] Such introduction is relevant particularly in lieu of the proper administration of justice and uniform application of law. Consequently, the CD has so far entertained considerable number of cases involving fundamental

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[79] Currently, Dean, Lecturer, Faculty of Law, Jimma University, Jimma, Ethiopia, LL.B (Addis Ababa University, Ethiopia), LL.M ((University of Pretoria, South Africa), PhD Candidate (University of Alabama, USA). I am grateful to those members of the Faculty of Law of JU who read and commented on this piece of writing.

[80] The FDRE Constitution uses the term *fundamental error* while Proclamation 25/1996 uses the term *basic error*. Thus, we can use these terms interchangeably.

error of law and decided thereon as appropriate. In this regard, the FSC has been publishing and distributing the decisions of the CD with the view to making it reach all relevant persons/bodies. Such publication and distribution has become indispensable since the enactment of Proclamation 454/2005, which makes the decision of the CD on interpretation of laws binding on all courts at all levels (Federal and Regional).[81] Upon its enactment, Proclamation 454/2005 attracted challenges from some of us as we thought (and still think) it would erode the independence of judges. This is particularly so when the judges in the CD err; that is, when they themselves commit (fundamental) error of law in an attempt to rectify others 'alleged' fundamental error of law.[82]

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[81] See article 2(1) of the Proclamation. The Proclamation makes the publication and distribution of the decision of the CD compulsory.

[82] Fundamental error of law committed by the CD may be rectified by the Hose of the Federation (HOF), as I will be discussing later on, if such error has constitutional pertinence. In a sense, the HOF exercises cassation over the CD in constitutional matters. (See article 83 of the FDRE Constitution.)

In this writing, I will be commenting on one case[83] decided by the CD in 2007 and which is, in my opinion, worthy of consideration. Some writers have already commented on the case both in favour and against the decision of the CD on the case.[84] Thus, I will focus only on the aspects that are not touched upon by these writers and those points which are touched by these writers either inadequately or only as passing remarks. Further, I will do some survey to show where the

[83] *Shewaye Tessema V Sara Lengana and Others*, Federal Cassation Bench, File No. 20938, April 19, 2007 Actually, the case between *W/o Abebech Yeshewleul v W/o Etagegnehu Admasu and Others* is also similar to the present case on which similar decision was given by the same organ and in the same yerar. See Filipos Aynalem, *dÃó- (Ç= ó¡„) õ*; p 131-132, Mizan Law review, V 2, No. 1, 2008

[84] Mehari Radae, Assistant Professor of Law, AAU, has commented on the case primarily from the perspective of family law and has shown how defective the decision is and the possible danger it poses to the institution of marriage. See Journal of Ethiopian Law, Volume XXII, No.2, December 2008, p 37-45. On the other hand, Philipos Aynalem, who is a judge in Federal High Court and also a lecturer in St. Mary University College, commented on the case in support of the CD's decision. He cited and discussed in length many instances where similar cases appeared before courts both at Federal and Regional levels yet obtaining different decisions. See Filipos Aynalem, supra note 83, p 124-136,

decision of the CD on the case at hand might lead us. Finally I will conclude my comments and forward some recommendations on how to deal with the aftermath of this decision.

The Case

The whole text of the case as included in the FSC CD case reports, volume IV, is attched at the end of this writing. The gist of the matter is; the case arose between W/O Shewaye Tessema (the applicant) and W/o Sara Lengana and Others (the respondents) on dissolution of marriage. W/o Sara claimed that although she ceased to live with Ato Yilma W/Hana in 1985 E.C. (whom she wedded in 1966 E.C.) and started leading her own life by wedding another man, her marriage with Ato Yilma was not dissolved on legally recognized grounds. Thus, she argued that she should be declared the widow of Ato Yilma who died in 1989 E.C. This argument was accepted by lower court and the applicant then brought the case to the CD. The CD after considering the case admitted that the marriage was not dissolved based on the grounds recognized by law. Yet, it declared that the

non-use of marriage for long period would result in the dissolution of marriage. Thus, the CD has introduced the notion of *de facto divorce.*[85]

Comment

In our legal system, the grounds for the dissolution of marriage are death (and absence) of a spouse, invalidity of marriage, and divorce.[86] Save for death, the dissolution of marriage becomes valid in the eyes of the law only if it is approved by the court. Thus, there are only two exits from marital relationship-one created by

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