Legality of Circulars as Regulatory Instruments in Ethiopia: the Case of National Bank of Ethiopia (NBE)

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THIS IS TO CERTIFY THAT THE THESIS PREPARED BY ADDIS WOLDE BONGER GSR176611 ENTITLED "LEGALITY OF CIRUCULARS AS REGULATORY INSTRUMENTS IN ETHIOPIA: THE CASE OF NATIONAL BANK OF ETHIOPIA" AND SUBMITTED IN PARTIAL FULFILEMENT OF THE REQUIREMENTS OF THE DEGREE OF MASTERS OF BUSINESS LAW COMPLIES WITH THE REGULATIONS OF THE UNIVERSITY AND MEETS THE ACCEPTED STANDARDS WITH REGARDS TO ORIGINALITY AND QUALITY.

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DECLARATION

I, the undersigned, declare that this thesis is my original work in its entirety and has not been presented for a degree in any other university and that all sources of materials used for the thesis have been dully acknowledged.

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ABSTRACT

The Legality of Circulars as Regulatory Instruments in Ethiopia: the Case of National Bank of Ethiopia (NBE).

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The main objective of this study is to examine the legality of circulars as employed particularly by the National Bank of Ethiopia (NBE). Particular emphasis is made on their consistency with existing regulation in the financial market regulation legislative hierarchy. Apart from a subject matter legislative analysis of circulars in light of existing hierarchies beginning with the constitution and down through proclamations and regulations to directives issued in the sector's regulation. A conceptual framework is provided ahead of analysis to enable examination of the use of circulars as regulatory instruments by NBE against acceptable standards of legality of administrative regulatory tools.

Analysis is provided by taking into consideration, apart from subject matter analysis of laws, also the reflections of the randomly selected actors in the business community with a view to showcase qualitative empirical considerations in the study.

Key words: *Legality of Legislations, Delegated Legislation, Financial Market Regulation, National Bank of Ethiopia, Circulars, Directives*

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ACRONYMS IN THIS STUDY
AND THEIR STANDING IN THIS STUDY

BIB	Buna International Bank S.C.
CD	Compact Disc
CEO	Chief Executive officer
CM	Council of Ministers of F.D.R.E.
CPRD	Constitution, Proclamation, Regulation and Directives
CPTP	Consumer Protection and Trade Practice Authority of F.D.R.E.
CRS	Credit Reference System
EIC	Ethiopian Investment Commission
EIPO	Ethiopian Intellectual Property Office
FAQ	Frequently Asked Questions
FDRE/F.D.R.E.	Federal Democratic Republic of Ethiopia
FFIC	Federal First Instance Court of F.D.R.E.
FHC	Federal High Court of F.D.R.E.
FI	Financial Institution
FSC	Federal Supreme Court of F.D.R.E.
HoF	House of Federation of F.D.R.E.
HoPR	House of Peoples Representatives of F.D.R.E.
KYC	Know Your Customer
LSD	Legal Services Directorate of NBE
ME	Medium Enterprises
MoFED	Ministry of Finance and Economic Development of F.D.R.E.
MoR	Ministry of Revenues of F.D.R.E.
MoTI	Ministry of Trade and Industry of F.D.R.E.
NBE	National Bank of Ethiopia
NGO	Non-Government Organization
OMFI	One Microfinance Institution S.C.
PAP	Proclamation on Administrative Procedure (HoPR Proc. No 1183/20)
PLC/P.L.C.	Private Limited Company
PMO	Project Management Officer

PSSD	Payment Services and Settlement Directorate NBE
SC/S.C.	Share Company
SME	Small and Medium Enterprises
SMFI	Somali Microfinance Institution S.C.
SNNP	Southern Nations Nationalities and Peoples
TSP	Technology Service Provider
UK	The United Kingdom of Great Britain
USA	the United States of America
USD	United States Dollars

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Chapter One

Introduction

1.1. Background of the Study

Financial markets in the revolutionized industrial age persisted as economic spear-headers with importance in global commerce. They attained vitality because they accumulate large proportion of funds to be spent into investments and value generation.[1] Such vitality calls for government intervention through diverse regulatory mechanisms from setting operation standards to forming rules, from supervision to affirmative and punitive actions. Markets do not operate independently without *intrusion* by state's regulatory hand.[2]

Regulations are justified in terms of their latitude and depth because of lessons in recent economic history. These are mainly state inactions that caused global economic crisis affecting hundreds of millions worldwide. Chief among these were the American recession in 2000s and the recession that preceded it three decades ago. These incidents greatly affected our understanding of regulations and deregulations. Whenever such staggeringly shocking economic eventualities occur, politicians and academicians are dictated into model shifts.

Today, regulation is understood as essential in maintaining healthy and safe markets.[3] There is skepticism that governments use regulation to entertain politically preferred engagements, provide firsthand for political decision makers, make government expenditure smooth etc.[4] Others admonish saying market self-directing proved incapable of achieving healthy and safe operation of actors justifying government strong hand.

Ethiopia lived a highly regulated system. Genuineness of regulatory approaches and principles that delivered them, structural framework, regulatory tools and enforcement including

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1 Eden Kebede, *The Impact of National Bank Regulation on Banks Performance: Evidence from the Private Banks of Ethiopia*, Addis Ababa University (June, 2017) pp. 2

2 Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials*, Cambridge University Press (June 2014) pp. 54

3 *Id. Pp 70*

4 Melese Kassahun A., *Financial Regulation and Supervision in Ethiopia*, Journal of Economics and Sustainable Development, Vol. 5 No. 17 (2014) pp. 63

institutionalization and staffing may be questioned.[5] The regulatory approach followed in financial sector specifically proved to be the most draconian rendering the NBE a *predatory* regulator. No sector in Ethiopia is as much regulated as financial market is.[6]

NBE being at the pinnacle of the executive in this sector supervises FIs. It is mandated to plan and execute policies, serve as government's finance advisor, undertake express and implied customary undertakings of central banks.[7] It uses delegated law-making power to operate as government banker and regulator. Subsidiary legislations such as *circulars* are key instruments in exhausting its functions.

In this thesis, I provide exegesis of use of *circulars* in regulatory approach in Ethiopia's financial market today. I provide summary of the hierarchical chain in Ethiopia to attempt providing accurate location of these documents and how they affected business in the sector. I theorize on what amounts to legality of legislations (and administrative actions for that matter – for some insist that circulars shall not be considered legislations.) NBE circulars are introduced to enable better judgment of readership with fair portion. Then I substantiate where risk of *ultra vires* lies and how to approach it. Surely, aptness of systems can be judged from the amount of chance provided for subjects to question legality. This discussion shall be followed by a conclusive summary and recommendations.

1.2. Statement of the Problem

Ethiopia follows a federal arrangement where the Constitution comes at the zenith of the power system laying down principal provisions for legislating, implementing and interpreting tasks. Beneath it come proclamations using sectorial and subject-matter patterns towards institutionalizing and implementing the constitution. Regulations of the CM further interpret proclamations and constitutional terms. Divisions of executive branch issue directives further interpreting everything that came higher in the hierarchical chain. Directives are, as a matter of principle, treated as lying at the bottom of the working hierarchy even by the PAP.

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5 Lelissa TB1 and Kuhil AM, *Are Regulatory Measures Influencing on Bank Performances? The Ethiopian Case*, Arabian Journal of Business and Management Review, 2018, Vol. 8 No. 1 (January, 2017) pp. 2

6 Tony Addison and Alemayehu Geda, *Ethiopia's New Financial Sector and Its Regulation: A Discussion Paper*, United Nations University and World Institute for Development Economics Research (August 2001) pp. 6

7 Article 5/19 of Proclamation 592

Unlike the promises of the outline above, the system poses auxiliary documents under the category of subsidiary (subordinate) legislations which takes determination of obligations a step further. That is problematic in ascertaining compliance comprehensively. Administrative decisions in formalized *circular* shapes or customary letters roam around the system binding subjects. NBE is not a different story in this regard; perhaps it is a model institution for such an experience.

Such documents need to be studied because they affect obligations sometimes in the widest possible margin (entailing criminal liabilities as we might see later on). They also make life difficult in much needed swift references to ascertainable statutory documents. We often labor limiting our search on CPRD without knowing there are other micro-level documents which need to be studied for comprehensive understanding. Most importantly, the ways they employed needs investigation as whether effective in the financial environment.[8]

The statement of the problem in this study therefore, shall be:

- Are *circulars* legislative documents or not in view of their practical applications and their relations with superior laws in the legislative hierarchical chain in Ethiopia?
- Are *circulars* expected to conform to statutory requirements of delegated legislation?
- Are NBE *circulars* in conformity of legality tests of administrative regulatory conceptual prescriptions?

1.3. Significance of the Study

Mekonnen K. and Kassahune M. argue that financial regulation scheme is effective if it, among others, produces and processes information on investment opportunities and challenges in a manner enabling allocation of capital based on such. They also provide important litmus paper i.e. ability to control firms and individuals through corporate governance regulation, managing risks, mobilizing and pooling savings and easing transactions.[9]

[8] Lelissa and Kuhil, pp.2.
[9] Mekonen and Melesse, pp.2

Researchers put NBE regulations as considerably ineffective in many ways.[10] Many cover aspects of its regulation and analyze them against conceptual and theoretical allusions to find where the problem lies. Attempts to use interest rate regulation, limited actors defined into the financial service platform and repressive financial regulation style being at the cord emanating from pre-1991 age showcasing Marxist traits of regulation, ranges of problems are covered.

In this study, we take most of these conclusions for granted. We diagnose the use of legislative authority by NBE to see whether we can say the non-preferable is preferred to end up as such. There are indications that NBE uses legislative power strangely contributing to its regulatory appearance as outwardly escaping from convention. Partly, this relates to rules inconsistency. Failures to cope with latest developments in modern market systems, abuses of power and regulatory uncertainties are widespread. Whether or not the manners and uses of subsidiary legislations have contributed is an interesting topic to be discussed.

1.4. Study Objectives

a) Major Objectives the Study

Ethiopia is a dynamically changing nation in all spheres of change; political, social, economic and importantly legal.[11] Economic and legal dynamisms and active reforms are particularly pivotal in our recent journey. We witnessed multi-rounded transitions over the last 50 years where the country transformed from a feudal monarch into a totalitarian Marxist regime, then to a South-East Asian-breed developmental state. Currently, we are held between centrifugal and centripetal forces of the past enigmatic ideologies and a current forward-seeking zeal into a *seemingly* stylistic liberal nation. Law proved an extremely important instrumentality in these historic transformations, each time serving as a tool of paradigm shifts implementing incumbent ideologies. Changes are made by new legislations of regulations and deregulations beginning by a constitution or a constitution-size major statute and then follows trail down to lower laws.

With these dynamism and reform intervention background, the major objective of this study is examining the financial regulation legislative structure and legality of circulars as they are

[10] id, pp.1. Tony Addison pp.4 AlemayehuGeda, pp.9. Lelissa TB1 and Kuhil AM, pp. 2
[11] Tony Addison, pp.2-4

employed particularly in financial market regulation by looking at their subject-matter in light of enabling laws and look at how legality of such subsidiary legislations affected financial business on the ground.[12]

b) Specific Objectives of the Study

- Examine the nature of *circulars* as whether legislative or otherwise and the consistency of delegated legislation in NBE;
- Identifying impacts of regulatory styles followed by NBE via its circulars on business on the ground;
- Looking at policy implications of delivering a rather uniform, predictable regulatory exercise respecting regulation standards and addressing the demands of growing investment in Ethiopia;
- Investigating NBE in relation to its preparedness and proficiency to dealing with trendy elements and contemporary regulatory issues by setting parameters for effective treatment of these by analysis and conclusion;

1.5. Methods

The need to enlightened understanding of up-to-date treatments of administrative regulation in financial market requires blending significant amount of empirical analysis with a fair magnitude of doctrinal scholarship while determining legality of delegated legislations for example.

To show proper picture of judicial practice in Ethiopian courts, few decisions are analyzed. The cases adjudicated thus far including cassation are of moderate size prior to and after the enactment of PAP posing hindrance in showing full judiciary practice.

Approaches in this regard are revisited frequently to match practicality. In fortunate circumstances, views of stakeholders are analyzed. Most FIs suggested common reflections on the regulatory approaches. Therefore, the preceding instances were taken as common denominations.

[12] Mekonen, pp.13

The objectives of this research are to analyze laws and show practical implications in light of factual considerations. This begs for qualitative presentation and analysis. Whereas, assessment and recommendation regarding legislative intent of NBE justify interpretations and proper mandate lines and opinions of actors on the state of regulation in financial regime showcases levels of qualitative discussion and theoretical analysis. This study has nothing to do with numbers, and no quantitative presentation is deemed important. This researcher is of the opinion that quantitative research is of dignity only where it belongs.

1.6. Scope

The title is tuned to encompass views on usage of *circulars* and their likes in the regulatory practice under which spectrum their usage in financial regulation can more viably be seen. There is not much that makes us consider this as analysis on the entire Ethiopian regulatory apparatus. It focuses on financial market regulation with a small size of comparative look with adjacent sectors. This is because *circulars* are more practiced by NBE than any other institution. The use of circular-type documents elsewhere is analyzed in appropriate depth.

Analysis and recommendation greatly relies particularly on banks and microfinance regulation merely out of mechanical need to limit content and clarity. Analysis in these areas is implicative of regulatory intent and practices duplicating imprints elsewhere needed. Even though, it slides slightly off-ridge, this researcher believes that regulation of banking institutions and insurers by a single regulator is a less justified model than a central bank regulating essentially banks. Analysis of insurers with a blend look poses a danger of non-clarity.

Regulatory apparatus shall be consistent and principled to keep track with growing sophistication and rapid development of markets. Whenever we find Ethiopian regulators out of sync with global market developments and contemporaries we deliberate on them. We do so especially when this has to do with their use of subordinate legislations under delegated legislative power scheme.

Theoretical analysis within the frames of doctrinal scholarship is presented in areas that require understanding of more standardized approaches to delegated legislative power and proper evaluation of the Ethiopian case in that light. It is very important to note that in this study, a

melded approach is utilized more to discuss theory than making such under distinctive headings to limit the scope and detail of theoretical discussions only to a needful boundary.

1.7. Limitations

One difficulty is trying to show judicial practice by way of case analysis. This is because of a protracted access to decisions on cases of legality of executive legislations. Court decisions are kept in registry only to the level that it is possible to access them all. Is it possible to access them easily in convenient research friendly manner? No. In comparison to FSC Cassation decisions, which are published in compartmentalized volumes, the manners of consolidating court decisions elsewhere are begging for systematic organization with different factors of research/inquiry.

This study requires a big deal of empirical data and analysis from courts along with non-ignorable size of theoretical study, the situation above is even worse in cases of appreciation of delegated legislations. Cases prior to PAP are obscured and assimilated within the jungle of cases in court registrars.[13] Courts are wired only to expect spot-lighting using solely one *famous* key – i.e. file number.

Apart from that, the information hunt was a bit obscure because of the COVID-19 (Coronavirus 2019 pandemic.) Government offices were closed for a stretched timeline. In instances where they were partly open, access to information was protracted. Court registrars were virtually inaccessible during the period of this study. FIs were relatively better accessible. Therefore, much information was acquired as a result and was of significant importance in filling gaps. Alternative information sources digital and internet archives are opted to compensate the loss in this regard. I accessed pertinent data with enhanced searching endeavors. In the worst instances, I limited analysis and conclusions within the available cases. It goes without saying that analysis and conclusions are done by being modest in presenting the inferences made, their accuracy and degree of consideration under the circumstances.

[13] FHC Lideta Division for example instituted 2 benches as per PAP on October, 2020 and adjudicated 92 cases to date. Prior to this event, cases were heard under 12th civil bench amid other cases.

Chapter Two

Subsidiary Legislations: Concepts and Trends in Administrative Regulation of Financial Markets

2.1. Subsidiary Legislations: A Melded look at Meanings and Trends

Subsidiary legislations, as referred sometimes to as 'subordinate legislations'[14] are legislations at least beneath one piece of authority often regarded as 'parent legislation/authority'. They are issued pursuant to powers vested by preceding higher authorities.[15] Legislations in Ethiopia starting with proclamations downwards have chances to be called subsidiary. The working principle of delegated authority comes with delegated legislations in that public bodies at all layers are able to pass their own legislations. Such may be a person or a body mandated by law in a non-interrupted sequential chain of hierarchical laws all the way upwards to the law of the land.[16] The law of the land itself being an oath of the people has small chance of treatment as subsidiary to anything but the people who can modify it.

Subsidiary legislation is an expression which covers a crowd of confusions argues P.B.Mukharji.[17] In the section he summarized Indian experience he argues that it is *"an excuse for the legislators, a shield for the administrators and a provocation for the Constitutional purists".* It is easy to understand views that it is laziness on the side of the legislative body to escape from the duty bestowed up on it by the ultimate power holders. He mentions an instance that in England the king lost legislative power at Runnymede and Parliament lost legislative power at the stampede that followed since to provide Government for the country through administration and bureaucracy.[18] He even refuses to consider delegated legislations as 'modern' problems.

Others take a more accommodative stance, though. For Edward L. Rubin, modern legislation in its essence is an institutional practice by which the legislature, as our basic policy-making body,

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[14] P. B. Mukharji, Delegated Legislation, Journal of the Indian Law Institute, Vol. 1, No. 4 (July, 1959), pp. 467

[15] B.C. Sarma, *The Law of Ultra vires*, (Eastern Book Company), 2004, p 1 [Electronic copy available at: http://ssrn.com/abstract=1877247].

[16] Document Available at Electronic copy available at: http://ssrn.comvisited on June 18, 2020 3:17am

[17] Mukharji, pp. 465-492

[18] Id. pp. 465

issues directives to the government mechanisms that implement policy.[19] To begin with, he refuses to view legislation as a subset of some overarching category called *law*.[20] He seems to take a huge part of legislating act to a means or an aspect of its implementation also. In this lens, it seems that the understanding is once the verbal deliberations at a high policy level are made by the legislative body, since implementation is made by the executive organ,[21] the remainder of the itemized legislative activity as we go down the hierarchy belongs to the ambit of the implementation faculty of the government, i.e. the executive organ.

In other words, a big portion of implementing the high standards of the legislature involves further legislative undertaking which takes the law making at parliament as an 'A' cord. This makes us believe that executive organs cannot be thought of without a portion of legislating activity which essentially forms part of their implementation function. Rubin himself does not put it in such a straight forward manner. But, this researcher believes that the logical deductions are as such.

We have some trends outlined in literature by which mandating of legislative authority can be done. One is by simple statutory provisions, which seems to be a household routine in the Ethiopian legal system.[22] Here such a provision is used to delegate power to a government body or a specified officer to carry out specific legislative authority in specified subject-matters. Laws of higher hierarchy are meant to be busy in laying down important premises, setting principal intended policy-like terms and constructing framework of a sector's regulation.

Elaborated deliberations are meant to be made by the special factions of the regulatory institutional hierarchy. These often are with levels of fixated expertise (which is the primary faculty of the executive college that makes it essentially fit to the task *to implement*), resource and other opportunities to come up with more exegetical terms on the area. It may also be justified as such that since the executive body is one that implements law on ground, delegated

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19 Edward L. Rubin, *Law and Legislation in the Administrative State*, Columbia Law Review, Vol. 89 No.3 (April 1989), pp.372.

20 id.

21 This formulation follows as per Rubin's notes Kelsen, who treats the judiciary and the executive as variants of a single governmental function. H. Kelsen, *General Theory*, supra note 5, at 274-78; see also M. Shapiro, Courts: *A Comparative and Political Analysis* 17-37 (1981).

22 Mukharji, pp. 468

authority in law making enables it to determine the manners how to its own convenience.[23] As we can see in Ethiopia, higher laws set the tune for delegated authority at each hierarchical layer down wards. To make the conceptual discussion of this section framed and targeted towards our desired end, we exemplify it with the hierarchy we have in Ethiopia.

A proclamation explicitly deals entirely with delegated authority up to a degree of a directive and what remains shall be the subject-matter of delegation which is provided by a regulation. This means that once a proclamation sets forth a delegated authority to issue regulations and directives, what remains for the regulation is specifically point out to the legislative subject-matters to be covered by directives beneath it in some more details. Sometimes, regulations and directives share regulatory areas between themselves and govern different things as equals. Apart from these, the question of whether a regulation can delegate legislative authority to a directive in the absence of explicit mention of such a possibility in a proclamation is an interesting one. This researcher believes that it can for practical theoretical reasons.

All proclamations in the financial market and tax regulation sector deal with delegated legislative powers in explicit manners with a customary *'can issue'* term. Whether or not we can ascertain subsidiary legislations such as *circulars* goes responded to in the negative except we consider general and crude allusions of *'shall determine'* or *'has a power to'* provisions to mean issuance of any subsidiary law equivalent to or beneath directives. The proclamation on National Payment Systems has allusion to *orders* issued by the NBE.[24]

Elsewhere in the world, delegating statutes prescribed official publication as in the case for example of India's General Clauses Act section 23.[25] In other instances, delegating terms went further and specified how rules are to be drafted, procedures to be followed, what consultations to undertake etc.[26] Some rules required depository or archive of delegated legislations at the registry of delegating authority who remains always with the power to modify the provisions of

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[23] Taddesse Lencho *The Ethiopian Tax System: Excesses and Gaps,* Michigan State International Law Review Vol. 20:2, pp.356-378

[24] Article 4/2(j), 7/1(c), 16, 29/4(a), 34, 37/2 Proclamation to Provide for National Payment System, **Federal Negarit Gazeta,** Proclamation No. 718/2011

[25] *Provisions applicable to making of rules of bye-law after previous publication*

[26] Mukharji, pp. 469

the legislation that came as a result of its prior willed mandate. Mukharji mentions instances from a few Indian legislations.[27]

Delegations to add or exempt subjects from a certain regulation, delegations to add or modify a certain appendix or table in the enabling legislation and delegations to direct the good implementation of enabling statutes can be enlisted among the most famous patterns including in Ethiopia.

2.2. Principle of Legality vs. Subsidiary Legislations

Legality of subsidiary legislations is clearly a distinctive discussion compared to legality of legislations in general. The reason is that the former is a concern of (or has to do a lot with) executive discretion than essentially a legislative one. And the contention is between parliamentary representation which facilitates for popular exercise of power and executive usurpation which fights against the forces that tend to limit executive discretion.[28] This is true particularly when it comes to non-natural exercises where the executive branch, the one that implements, is allowed to come up with designs and merits of the laws themselves.

How should delegated statutes be formulated is often an important question? This is so as to determine whether they can most effectively fulfill their social function.[29] The risks are not only violations of contemporary legal principles laid down ahead of them with higher authority, but also accepted intellectual or theoretical standards at a conceptual level in government treatments of its subjects.

In light of theory of modern legislation, Ethiopia's scheme of rules reside a long way behind in terms of systematizing and substance as well as form. One may possibly argue that massive transplantation activities in the 1950s and 60s poised greater prudence in terms of genuine considerations of ideology and state make-ups compared with current efforts. The transplantation

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[27] Id.

[28] David Dyzenhaus, Murray Hunt & Michael Taggart*The Principle of Legality in Administrative Law: Internationalizatio as Constitutionalization,* (2001) 1 Oxford University Commonwealth Law Journal 5-34 David Dyzenhaus, Murray Hunt & Michael Taggart, pp.3 Gwyer, ; *The Power of Public Departments to Make Rules having the Force of Law,* (1027) 5 J. of Pub.Ad.404, 400.(Electronic copy available at: http://ssrn.com/abstrat accessed on 7/8/2019 at 6:23am)

[29] Edward, pp.372.

in those years was replayed in huge size over the last three decades. The system that we see today is a result of exacerbated levels of transplantations today compared with the 1960s. Proclamations and regulations imitated foreign acts in chunks. Further, most transplantation is done blind-folded without genuine legal and policy considerations. Such lacunae are manifest in the manners of provisions and inconsistencies demonstrated in the specified sector legal systems. The financial sector displays more of these.

Legality of legislations can possibly be viewed from various angles as applying to not only subsidiary legislations but the enablers themselves. It is even thoughtful to view legality of administrative legislations in consideration of administrative banking regulatory spectrum we assumed. That does equal justice to those who seek to understand *circulars* merely as administrative decisions or as legislative actions alike.

This is however a crucial consideration for it determines what troubles us about possible *ultra vires* in *circulars* as whether relating basic human rights which are points of concern in administrative law legality or relating to other substantive ponderings out of mere concern of constraining executive authority. Therefore, we analyze any possible concerns from the two angles.

The prime knotty aspect of Ethiopian law making (at least to the note of this researcher) is that the introduction of new rules in legal subject-matter is not as blessed with justification as the inference of law-making authority is in many instances. When the law maker (CM or Ministries or the sectorial authorities) enacts new laws, it smoothly describes how it happened to get that power to issue with very customary trace-back efforts all the way to Constitution via that household article 55 of the F.D.R.E. Constitution. Once the laws made this inference, which is not that protracted to us for easy note, and made their power known; they come up with some cracked provisions going wildly against the master-pieces of legislations and sometimes also the constitution. In this regard, one may argue that Ethiopian legislators do well in terms of demonstrating their legislative authority and marking their power to issue when they reach-out first to these articles and then enter into a hectic disruption by providing way beyond in terms of subject-matter.

While many give emphasis to due process followed to come up with such circular regulations, others tend to insist mere success in citing legislative authority and following due process shall not bless us with the power to reign over the galaxy afterwards. What other conformities are needed? We search for and present below main requirements, the fulfillment of which reflects as the legality of legislations. Many authorities provided many requirements as amounting theory of modern legislative action. But, let us be less theoretic and emphasize on ones that best apply to the pieces of documents under scrutiny here.

a) Substantive Scope and Authority

We begin by citing legislative 'authority' even though it is the key which is blessed with comparative observance than the others; still it demonstrates crucial elements which are alien to what we understand by hierarchy. For a piece of legislation in order to succeed both in substance and form, it must necessarily be enacted within valid authority. The legislating entity shall demonstrate a proper chain of mandate to enact that piece. This is why we see justifying provisions at the outset of any legislation telling its authority and how it came with that possession.

Citing authority shall not necessarily entitle an entity to come up with *ultra vires* however; there is also the need to show that the delegated authority shall not be exercised *in contravention of the scope of authority of an administrative body*.[30] The forthcoming substance of that legislation shall necessarily conform genuinely with the foundational principles provided under the parent legislation. The principle of rule of law requires us to see to it that government actions at any stage shall be done within the confines of the parent law.

A directive is a directive and one cannot cite any instance where it can be regarded as equals of a regulation or a proclamation (as we observe from treatment in Ethiopia). If a directive is treated as a proclamation, then citizens are subjected to an administrative entity which is acting riotously as equivalents with the HoPR. HoPR may be an entity we created to govern with that wide range of power because we rely on the rituals of democracy that we know and understand and the conceptual underpinnings as well as check-and-balance mechanisms operative in a democracy.

[30] Fasil Abebe, *Notes on Administrative Law: French and English Experience*, Mizan Law Review, Vol. 4 No.1, (March 2010), pp.159.

But if NBE comes up with legislation equally intimidating as the House does, then we have multiple draconian power holders above us which possess sanely hierarchical powers in paper terms, but ludicrously corresponding ones in practical terms. In response, one argues that directives shall remain directives and proclamations shall operate as one. Legislations shall rely on appropriate mandate systems that empower them to enact. And at the same time, they shall keep their substantive details in legally acceptable spheres within the limits of their mandate as are outlined in enabling legislations.

There are others who argue that legality of administrative legislations (or decisions for that matter) shall depend on how much dependable the justifications made to these legislations or decisions are in extenuating the limits of the legislations.[31] The matches and mismatches of legislative authority here do not matter in so far as the outcomes are intended.

Some of these entertain a doctrine called '*the doctrine of legitimate expectation'* to scrutinize such.[32] We may apply a hard-edge approach where strong presumptions of constitutional rights may be used as parameters to check the executive action. For example, in the case of NBE we may look at the its stretched hands on the corporate governance of the FIs, even though done with concerns of protections of victims of self-dealing by related parties among others, it plays little with the constitutional right to do business. The same may be talked of the stipulation of minimum requirements as restricting entry to business defying constitutional entitlement of subjects to engage in a business of their choice.

Whichever the way, subordinate legislations shall necessarily observe substantive scope of authority while promulgating new rules and interpreting laws of higher hierarchy. Otherwise, the mere citation of delegating clause, as we frequently encounter in Ethiopian legislations for example, may end up a shy compliance of procedural piece.

b) Language and Publicity

Normally, one anomaly that can be spoken of delegated legislations is that they are very far apart from public scrutiny in comparison with other laws of higher hierarchy. One basic reason being

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[31] David Dyzenhaus, pp.6

[32] *Id.Pp.10*

their volume, the nature of their expertise and detailed technicality also makes them distant from subjects. The saddening story is not that. In many cases, the legislative authority also once it has delegated the legislative power, remains distant from monitoring these showers of delegated laws not emanating from a poor zeal so to do, but sometimes also the accessibility of these is even obstructed to the enabler not to mention the citizens.[33]

While an aspect of this experience in India is something we discussed above in the legislative powers delegation trend,[34] French system also has room for this. According to Fasil, non-observance of prior publication involves procedural error called *vice de forme.*[35]

Authorities at NBE may suggest that they work with FIs that do not have problem at accessing *circulars* at NBE official website and also are proficient at the use of the English language.[36] But the legislative body that enabled NBE shall not look for merit in such arguments. Legislations shall be enacted, as a matter of rule, in the language that subjects understand. Merits of the *circulars* which are originally intended to institutions may end up affecting obligations of individuals (say for example shareholders or end-user subscribers etc.) in substantial degree. In such cases, limited or no use of English language and access to internet can possibly be alleged a defense. One such case arises before FFIC in relation to an NBE directive as we will see it later.

Legislative materials shall be published if in Ethiopia for example, all federal laws and legislations any documents that subjects are expected to refer to must be prepared in the Amharic and English languages. Absence of one may render the legislation to fall short of legality.

And legislations shall be enacted in a *gazette*. They shall be made available in adequate copies to be known by the public. Some advised that legislations shall roam around the town as drafts for some while to allow popular reflection by their future subjects and interested parties. In a sense, this allows public response to be incorporated in the final promulgation and this pays it a better popular acceptance. Public discussion and opinion are among the important elements of legality under the PAP.

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33 Mukharji, pp. 465-492

34 Id. pp. 467

35 Fasil Abebe, pp.159.

36 LSD director W/ro Kibre Moges argued as such in an interview with this researcher

Consultation is required either where a person or a group may be affected by some administrative action or where they have some expert contribution to make to proposed administrative action. The statutory machinery for consultation tends to be less formal than that relating to the public inquiry and it is in the case that the administrative agency has discretion as to who is consulted.[37]

As things are now, not only the end targets of NBE directives and circular are troubled by these legality questions but also the highest authorities in the executive and legislative branches also find it very difficult to monitor the powers they mandated. In other sectors such as tax for example, the story is even worse that the tax authority finds itself in a jungle of legislations [of its own]. They go unenforced for years for they are inaccessible not only to the rest of the tax community, but also the authority itself that issued them. In such case, noticing irregularities and finding solutions in terms of legislative revision action also cannot be possible unless one knows the totality of laws and materials it has produced over a course of time. There is no doubt that the business community will be left into uncertainty in terms of knowing neither accurate tax burdens nor getting a genuine analysis from tax lawyers and accountants prior to, during and post incorporation.

To make life worse, the Cassation Division of the FSC under Cassation Bench file 53781 prescribed a binding precedence that Directives need not be published in order to be effective. Note that the case relates to criminal liability and the directive is only prepared in the English language as well as unpublished. Which means that the administrative agencies can take legal action as per a directive that is kept in their office close-sets only and not communicated on the pretext that any citizen wishing to ascertain obligations specified therein can get copies by visiting anytime (if one knows of course that there is any new directive in effect). This means that for stronger reasons *circulars* of NBE need not be publicized to be binding. The reader shall bear in mind that the discussion of *circulars* as whether being laws or merely extra-legal documents is an important consideration here. In this research, we will make a presentation on this on forthcoming units.

[37] Keli Vakil, *Procedural Deviances of Delegated Legislation from Parent Act,* (Available on www.answes.com/ topic/ ultravires visited on September 17, 2019.)

Recently, the PAP[38] prescribed publication as a requirement. As we will see it with analysis later, NBE is however, exempted from these requirements in certain instances.[39]

c) Post Publication

Post publication, we emphasize on flexibility of rules to be modified with rooms for public opinion still being open. There are also issues of review systems for anyone who seeks to take recourse against the constitutionality or otherwise validity of a mandated legislation.

Rules shall be flexible in that they shall not be rigid on public response in all cases where amendments can be taken easily. Apart from that, aggrieved citizens whose interests have been adversely affected shall be entitled to approach an independent judicial entity to adjudicate whether or not a particular administrative action or rule is in accordance with the law. As such we create a possibility to examine a particular rule to determine whether it falls within the realms of proper authority or not.

In France, we have a mechanism by which ordinary courts are made available as a resort to relief against such administrative body's legislations. These have a special jurisdiction in the protection of personal liberties such as the ones protected by law. For example, property rights that arise in the context of expropriation fall under the jurisdiction of ordinary courts in which case we have a longstanding availability of relief for individuals and entities grieved by the acts of the central bank.

Fasil, in his note where he summarized French experience, presented grounds for administrative legality.[40] In a system which is a longstanding code based system, he noted that an inherently case law approach is used to allow courts to entertain reviews based on *'any ground'* that they deem is appropriate. Infringement on the right to fair trial amounts to *vice de forme* – a procedural error while the actual content of the administrative legislation is reviewed under a

[38] Art. 8.
[39] Id. Art. 3/3
[40] Fasil Abebe, pp.158.

procedure called *violation de la loi*. Giving interpretation of administrative law in the course of civil litigations is also a type of remedy.[41]

2.3. Conclusions on Conceptual Discussions

Generally, one can note here that a subordinate legislation shall necessarily pass tests of legality chiefly in its relation with its enabling laws. Aside from that, there are also conventional legality tests it needs to pass that facilitate better performance in terms of due process and effective communication of rights with subjects to improve compliance. The experience of other jurisdictions in this respect can potentially fill in the knowledge gap that may be prevalent in Ethiopia.

At a preliminary level, we see very customary legality tests which are rampant in other systems went virtually unpracticed here. There is a considerable care in outlining delegation of legislative power done in the preamble sections of legislations. However, subject-matter wise especially, we see some anomalies require focused study for better presentation, which we will attempt in this study.

[41] Id, pp.159

Chapter Three

Legality of *Circulars* issued by NBE

3.1. The Regulatory Spirit Hovering around NBE Subsidiary Legislations

For long, Ethiopia's financial sector regulatory approach has followed gradualism towards liberalization.[42] At least, this held true for the ages closing to the 2018 politico-legal and socio-economic reform hopes in the country. Looking at the promise, one may argue that we are in want of some patience to judge whether the nation is in the direction of real reform or not. Both as a matter of practicability and also the reform paths chosen as preferred ways, there is still a lingering spirit of the repression school in all areas in general and in financial market regulation in particular. This is to say that the strict regulation approach in place over the layers of time down to 2018 lingers around for a reason or another as stated above.[43]

Ethiopia is still a repressive class regulator in terms of financial market regulation regardless of the fact that liberal wind has been blowing for some time. This school is intact as an influence in most of its legislations, for stronger reasons in its subsidiary legislations (which are expected to co-roll with major national reforms as time lapses). Therefore, sources tell that government intervention rates stand at the highest in comparison with other systems.[44] As a result, the trends and modes of liberalizations demonstrate a limited change in style.

We can refer to recent legislative interventions (such as the payment instrument and agent directives) as litmus of real liberalization intents. The payment instrument directive issued by NBE is instigated by EthioTelecome which sought to get involved as a Fintech in the digital money realm. This shows that NBE sometimes steps into enacting a piece of law inspired by a related state stakeholder's needs.[45]

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[42] Mekonen, pp.1

[43] Id.

[44] Id.

[45] The New Payment Directive and the Future of Fintech in Ethiopia, Bricsa Events, (Available at - https://bricsaevents.com/detailblog/the-New-Payment-Directive-and-the-future-of-fintech-in-ethiopia accessed: 7/6/2020 4:45)

3.2. Brief Historical Introduction

NBE *circulars* are issuances by the Bank in a letter-like correspondence at once and circulated around (disseminated through) financial institutions demanding flat sector-wide obedience. They are usually issued with two type serial numbers, i.e. one a letter reference number and the other a circular reference number as the subject. As such some tend to treat them as mere letter correspondences while others consider them as pieces of legislations beneath hierarchical directives.

In NBE, they have longstanding history and in operation since its commencement. They usually existed as special notices and various orders Mesfin, Chief lawyer in LSD confirmed. From the online archives of active circulars today, we see that the first circulars in banking and microfinance regulation were issued back in 2011.[46] Negede Abebe, currently board director of *OMFI* and formerly president of BIB, recalls when he was serving NBE at various levels up to a director level for decades until late-1980s, he saw when some staggeringly huge administrative letters were issued equivalent to today's circulars.

As we know it, hierarchies of laws are very distinctive in nature in different countries. Ethiopia may use proclamations in the second tier of the hierarchy while another country may call it regulation instead. For example, regulations in U.S.A. are equivalents of directives in Ethiopia.[47] Acts in U.S.A. may be equivalents of our proclamations while they may be just regulations in others.[48] In many Asian countries, we find Acts being used in place of our proclamations. Even when we come to constitutional law for example, the constitutional form of countries (and the meaning of constitution itself) greatly varies from one system to another. Israel for example survives on a one-page constitution which cannot be analyzed using the same tools of constitutional inquiry as ours. Therefore, legal systems vary in their hierarchical form and designations of laws.

One only needs to look at substance than forms and designations of legislations while trying to understand legal systems. The power relationship and delegation approaches followed by

[46] Available at web archive: www.nbebank.com/circular/ [accessed: 19/04/19 at 7:14pm]
[47] Taddesse Lencho, pp.359
[48] Id.

different systems determine the positioning of pieces of legislations. As we said earlier, in the Ethiopian case, Constitution comes first followed by proclamations that give birth to regulations. Directives, as a matter of principle, then come from the ambits of the regulations and many times also from proclamations.

Why discuss the designation dichotomies here? It is because while this claim of looking at substance than form and designation here seems very rudimentary, unfortunately it is what gave birth to what we know today as Circulars in NBE. Circulars in Pakistan somehow correspond directives in our system save for some peculiarities dictated by the constitutional form of that country. Fortunately, the circulars are more explanatory and interpretative than expected of legislations.

We may have three types of subsidiary legislations. Some may be notices and reminders, some interpretative and explanatory some defining obligations making them a whole set of new category of laws. Even our directives here in Ethiopia have all these categories while some manifest hybrid features. Pakistani circulars are of like nature. In like manner as our directives, they present interpretative, informative and definitive deliberations.

Negede remembers passionately the years closing to 1984 where he was a member of special committee drafting the re-establishment proclamation of NBE when it was restructured in those years. He had also served in high profile positions in private banks including as the Operations Vice-president in Wegagen Bank S.C. and as the President of BIB. He is currently Board Director of *OMFI.*

Negede speaks of a trend in NBE that he has observed. He said that normally, department heads serving for years there were accustomed to the regulatory manners and practices until they become considerably familiar with the tasks. This gave them courage and confidence to come up with very acute regulatory deliberations easily. To this effect, he says that there was no any formal or statutory introduction of Circulars in the menu apart from a metamorphosis of ordinary letters into them. However, non-intended use of letters in special considerations led to today's use of Circulars. A head of foreign exchange control department may in a routine exercise issue these letters and disseminate them to banks across the market. He said that these letters, although

ordinary letters in type, were treated extraordinarily in a consideration which somehow lifts them to statutory documents.

While the legality of such decisions is something that should be judged by a legal professional, he thinks that the transactions are such huge ones in light of regulatory undertakings. He remembered one such instance which led to criminal liability of an NBE department head released only recently after serving long-term jail sentence.

3.3. Financial Market Legislative Regulatory Hierarchy

As has been discussed above, Ethiopia is a duplicate system of Continental system to the large portion of its statutes. As such, it relies on periodic accumulation of legislations that through time make up a whole synergy of statutes into a 'system'. While some laws manifest such a civil law system inference to the highest possible degree (such as the civil law, the commercial law and all of the procedural laws which are consolidated transplants in great size from Europe), the Anglo-American style also left traces in the massive enactments of the 1950s, 60s and early 70s predominantly in the tax area which manifests a huge scatter of pieces of legislations.

The developments led to what we know today as a federal system which prizes the F.D.R.E. Constitution of 1995 (the constitution herein forth) at the zenith of the legal system ruling over all sorts of other legislations as subsidiary to it, some of common law types and others with continental styles. Immediately below the Constitution come, the series of proclamations (many of which were enacted prior to the constitution and others came afterwards) all enjoying a secondary bargain to the Constitution.

Proclamations are issued by the HoPR. Then come Regulations of the CM which run chiefly on legislative mandates given by proclamations and are supposed to provide further guides and details than the proclamations. In Ethiopia, both proclamations and regulations have always in mind issuance of the next subsidiary legislations on the pipeline – directives. Directives are issued by Ministries and various branches of sector-specific executive agencies.

The above is the conventional hierarchy of laws in Ethiopia agreeable thus raising little issues. There are some writers who, however, comment on the manners of operation of these. Constitutionality issues are raised whenever new legislations making up the above described

hierarchy come. Apart from that, the way regulations and proclamations mirror each other and provide a comprehensive understanding of the specific areas of laws is always questioned. Most acute of these is the discussion provided by Tadesse Lencho[49] – an Ethiopian tax law intellect who presented a contrast analysis on the intended and the achieved consecutiveness. We also find detailed rules dichotomy presented by the two legislations which are promulgated within no period difference with each-others. These are ingenuity-centric critics. There is no significant skepticism we can run when it comes to the way the hierarchy is organized both in matching and distinctive elements in comparison to other systems elsewhere.

The issue becomes worrisome when it comes to the way other subsidiary documents which promise to remain documents actively roam as proper legislations. Particularly, the tax and financial systems produce documents which are meant to be explanatory and interpretative, however, ended up being binding legislations proper.

The tax system provides additional documents such as administrative rulings (even though recently they acquired recognition by the tax administration law – they were under rigorous use for quite so long without formal admission), tax guides, tax forms and publications which the tax payers (who are formally the ultimate subjects of law here) do not know whether to actually comply with them as a matter of normative rule or just utilize them for better enlightenment as expert documents. And this primarily emanates from the way administrative units (MoR, MoFED, EIC and even NBE who happened to be legislating directives on tax exemptions) employ them.[50]

NBE itself comes up with volumes of directives pursuant to the legislative mandate provided to it by proclamations and regulations.

Explaining the financial sector legislative hierarchy, the Constitution provides the archetypical rules (we can call them policy directions and strategic materials regarding the financial and fiscal policy of the country. Whenever we study an area of law, we surgically single out the relevant sector-constitution from within, and analyze it in light of theories. We may call such a *Special*

[49] Tadesse Lencho (Ph.D), *Ethiopian Tax System: Excesses and Gaps,* Michigan State International Law Review Vol. 20 No. 2 (2016) pp. 356

[50] *Id. Pp. 360*

Constitution over the specific sector. Such may be for example, the land-constitution of Ethiopia or the tax/fiscal-constitution or in our case here, financial constitution).

Sector-constitutions start from a bouncing point of the preambular constitutional terms which work in like manner for varied sectors, and bring puzzle-pieces by grabbing relevant terms in power divisions, assignment of functions etc. then put them together to acquire what we labeled a special constitution.

This *special constitution* in the financial sector here comes at the apex of Ethiopian financial market regulation in light of which proclamations such as the re-establishment of NBE, banking, microfinance, insurance, national payment system, etc. are issued and are ruling currently.

The proclamations mandate CM to issue regulations pursuant to which are issued for example NBE Employees regulation. The proclamations and the regulations dictated the issuance of directives which are definitive rules in the financial market and in fact the most widely implemented terms in the entire rule system of financial market regulation. Below these directives lie circulars issued by NBE divisions to provide rules and guidance in the sector as the most referred to by stakeholders as well as the most cited by NBE. Other pieces of documents such as NBE guidelines, NBE survey reports, NBE publication *Biritu, Forms* may be taken as lying somewhere beneath to compose the entire financial market regulation framework of law.

We find Forms extensively used in tax law system and persist here also in – for example that issued for banks to report loans and advances portfolio on a monthly basis. While these are attached with a *circular,* one may use the same analogy expression to take them as subsidiary legislations beneath. The reason why we label a document as a piece of legislation is with the degree how it interprets legal provisions in statutes of higher hierarchy. In this research, we go with the important assumption that proclamations interpret constitution, and are interpreted by regulations which are interpreted by directives interpreted by others. All laws interpret the entirety of provisions above them with hierarchical chain synergy in a model that comprises the system governing that area. In this regard, NBE report formats comprise the system that requires compliance from the actors.

This researcher aligns with Taddesse's attributes of these all documents. Apart from these, actors take the contents of such publications as authoritative incites and meanings of their compliance requirements. We see businesses regularly subscribing to periodic tax magazines such as *Biritu* to get original intent of regulatory bodies and spend huge amount of budget accordingly in compliance. In such a sense, authorities issuing such publications shall necessarily be taken to their words if stakeholders assumed their explanations on rules and spent budgets in consequence if later on they are found to be non-compliant of their actions.

3.4. Why *Circulars* are Effectively Legislations

I tried to get information including on why NBE issues *circulars* at all. Unfortunately, Gobena Worena, V/director of BSD, NBE rejected a kind request for data with official letter issued by this University's law school. Our analysis refers to information provided by the LSD whenever NBE's opinion is needed.

One may question the legislative nature of *circulars* from their naming as unidentifiable in the known grid in the legal system. Sometimes, we see them being labeled as 'Government decision'. For example, a circular referred another former circular as such.[51] The legislative wisdom that we see in proclamations and regulations is not emphasized in directives and circulars. There are those who do not accept as laws any documents which are below directives. Particularly, circulars are issued as letters by NBE to its subjects and are catalogued in a tricky manner.

The PAP in its Article 2/2 defines Directives as *"legislative document that is issued by an administrative agency based on delegation of Power bestowed up on it by the Legislator which affects people's rights and interests"* and their amendments. Administrative decisions on the other hands are *"decisions issued by an administrative agency on relating to persons rights or interests in its day-to-day function, excluding issuance of Directives".* The distinction is clear. Directives are static documents while decisions are on routine 'day-to-day' matters. Apart from this, we see from the proclamation's use of these terms that administrative decisions are overwhelmingly issued to individual petitioners when they petition the agency or upon initiation by the agency. Directives are on the other hand, issued out of the agency's initiatives or upon a

[51] See Circular BSD/15/2016 calling Circular BSD/13/2016 as such.

petition expecting sector-wide flat compliance.[52] Looking *circulars* from these perspectives, we see that they are overwhelmingly issued upon NBE's own initiative than on individual petition and expecting sector-wide flat compliance.

Some consider any document issued by the administrative entity plainly as directive. Such views assume that the emphasis shall be on the substance than the forms and looks. A document may claim to be a guide or an explanatory piece and in effect require one to comply with it. Sometimes it may even suspend provisions of other legislations – say for example NBE *circular* suspending NBE Directive.[53]

In essence, if a document compels compliance and determines obligations at any degree, it shall be treated as legislation. If a *circular* has a content that tells one of his/her right, what s/he can and cannot do and especially, if it has consequences, it shall with all theoretical and practical considerations be treated as law. It shall not matter how it calls itself or how practitioners label it if it is one that we shall follow and take note of at each step analyzing a legal system and obligations of subjects. What these documents do is interpret rules of higher hierarchies and that is the same thing done by the higher laws as well.

Added to that, even though *circulars* appear to be formal letters (like any other formal correspondences and exchanges of the Bank in day to day affair), they are however additionally referenced with sequential numbers which are distinctive from letter reference numbers as in other letters that the bank uses as CIR-00-0 or BSD-00-0 which are distinctive from other formal exchanges. The preliminary letters connote the department issuing them or their nature as *circulars.* The middle number is a kind of serial unique number while the end number is always the year it is issued in in Gregorian calendar.

It is difficult to recognize between *circulars* and some ordinary directives issued by the bank. We see that the language use and legislative drafting life-force in traditional proclamations, regulations and directives overshadows them when they use the usual WHEREAS, WHEREAS and NOWTHEREFORE clauses[54] which on the ordinary citizen (who is not a lawyer thus

[52] See Art. 20, 21, 22 of PAP along with 4, 6
[53] *Infra Note (ultra vires) 21*
[54] Look at Cirucular No. BSD/10/2015

intimidated by the lexical power of statutory words and expressions) would have the same frightening appearance as the higher laws.

Subjects may be poor ordinary shareholder in banks or microfinance institutions or a member of *edir* who is anticipating corporate membership in holding arrangement in banks, or a poor member of a cooperative society in SNNPR. These would not be interested in our drafting lectures on the peculiarities and features of laws of each hierarchy to understand the power given to Circulars. Forgetting the substance and merits of the documents, and taking into consideration the form and appearance of *circulars* matches proper legislations. In fact, there are directives and regulations which appear less of a law than some *circulars*.

Additionally, NBE uses the same repealing or amendment manners we see in higher laws to come up with a different circular regulation in the area. A circular would be amended by another in like manner as a proclamation may as well be.[55] Such elements are constitutive of the fact that even as a matter of form, there is a big deal that one can infer to label them as legislations whether explanatory and interpretative or informative as formal notices or even dictating on obligations (which are less challenged as whether being laws or not at least in comparative spectrum).

For informational nature, we can cite many regulations which aim at specifying or defining what obligations are stipulated in their enabling proclamations. Traditional legislations are explanatory on the ones enabling them. Proclamations are doing nothing but explaining further the constitution. If not, then they are *ultra vires.* In effect, subsidiary legislations shall necessarily mean complementing legislations in terms of details and specifics. When we talk of subsidiary law, we can anticipate how the already provided obligations are effectuated. Therefore, they are manners of implementing the preceding and more powerful legislation.

In this regard, we have three circular categories in NBE. These are interpretative circulars, circular notices and rights-defining circulars.

[55] Circular No. FISBSD/669/16 (May 30, 2016) repealing BSD/12/16 (Feb. 12/2016)

3.5. Subject-Matter Analysis of NBE *Circulars*

a) Types: Explaining and Analyzing NBE *Circulars*

i. Interpretative Circulars:

Interpretation of obligations in the regulations, proclamations [and constitutions] is what we see here. These provide varied length of exegesis on what we should understand by provisions in higher laws. These are equals of advance rulings issued by the MoFED in tax administration. These are written notices which are issued by the Ministry to tax payers on request to notify them in advance as to effects of tax regulation with regard to a certain intended transaction. They have private and public nature in that public rulings are cited by other entities to enforce matching claims. These are the types matched by NBE interpretative *circulars*.

In as much as the rulings are explanations which define tax implications based on a set of facts manifested in the request of the private entity, these *circulars* also define implications (sometimes even by outlining exemplary facts). In as much as rulings are documents avoiding possible future controversy and encourage voluntary compliances by tax payers,[56] *circulars* are. Different systems including some of the developed nations such as Sweden and the U.S. use advance rulings. And as we said above many Asian nations have *circulars* working in place of directives doing the same thing.

Circular BSD/05/2012 is example in view which provides that exposure limits on one and more related parties stipulated in a Directive No. SBB/53/2012 will not be applicable retroactively.

Another interpretative circular of NBE is BSD/04/2011 which makes direct references to Proclamation No. 592/2008[57] and recalls that such prescribed a maximum of 5 percent shareholding for a single person out of the total holdings of a bank. The proclamation enables NBE to come up with a directive stipulating a period with in which banks shall comply and fortunately NBE came up with a directive[58] that provided 36 months for full compliance.

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[56] F. Vanderlaidenin Victor Thuronyi, (ed.), *Tax Law Design and Drafting* ,Volume 1; International Monetary Fund: 1996; p 55

[57] Proclamation No. 592, **Proclamation to Provide for Banking Business,** F.D.R.E. House of Peoples' Representatives, (2008)

[58] SBB/47/2010.

With the newer *circular*, NBE goes on to argue that any move to acquire exceeding both by those who are compliant and non-compliant is contrary entailing criminal liability as per Article 58/7 of the proclamation. The later stipulates that *"any person who contravenes or obstructs the provisions of this Proclamation or regulations or directives issued to implement this Proclamation shall be punished with a fine up to Birr10, 000 and with an imprisonment up to three years."*

The problem with the *circular* is that in its endeavor to interpret the provisions of the proclamation, it legislates further and does not specify who shall be the subject of the criminal liability in cases of breach, whether shareholders or the bank executing it. This would have been the most important corner of the *circular* had it been specified, because we then know exactly who is being cautioned here. Apparently, the bank is being directly notified by NBE in this instance. The problem occurs, as we will see it below, when we try to address issues of whether what *circulars* do normally is simply notify or they bind people as much as legislations do.

In relation to this *circular*, one need to remember that compliance may not be achieved within 36 months period. If for example a shareholder is in no possible situation to comply, say if they are abroad and without proxy, if they are taken hostages or in like situations, they may not comply. Is the bank to be criminally liable up on the lapse of 36-month period? Note that Article 57 has provisions pertinent to this case that can potentially hold directors and other members of the bank management criminally liable under circumstances. It is not easy to justify a situation where in the shareholder is not diligent enough to appear in person or by proxy and act in compliance. The bank can normally do nothing for a self-directed move would jeopardize its other commitments under property and civil law requirements.

That is only one scenario. The proclamation also precludes a person's share in a bank from being above 5% even after such is accounted by addition with any other shareholder in the bank who is below the age of 18 and is related up to first degree of consanguinity. Let us consider a father and son lost apart for quite some years and never saw each-others even though both are endeavoring to reunite. If NBE finds them before they find each-others, are they to serve a three-year term in jail?

The other crucial question in the case where NBE is ready to attach such a criminal liability on the bank instead of the individual shareholders, how is the bank supposed to know consanguinity and spousal relationships from amid hundreds of thousands of shareholders and their sophisticated chunks of credentials? This is because such relations are not always straight forward. Sometimes they cannot be known even to the shareholders, forget the bank that has to run a KYC of shareholders, if for example Amara Bank S.C. which has over 150,000 shareholders. How are consanguinity and spousal relations to be figured where there can be a situation that a father may virtually have no information that his firstborn has subscribed for a share? For example, this researcher met Addis Getachew – an Addis Ababa resident and Getachew Dagne, his father both subscribing for certain amount of shares probably, the only factor sparing us here being the solid fact that Addis is 32 year old.

ii. Informative Circular:

These *circulars* are those that are meant to inform the subjects of some compliances or rules which remained inactive. NBE may figure that there are certain proclamation or regulation provisions which went unobserved for quite long. Compliance may require a certain time for NBE to regulate. When NBE feels like now is the time to start being the watchdog on the FIs, it first notifies all involved that it will begin to send out *circular* notices.[59] Such relate to the supervising function of the bank and are about detailed and specific issues such as reporting of specified customer lists for example.

Some may be induced by simple eventualities such as interruption of the CRS run by NBE and the manners of recovering access along with the fate of a legal requirement under a directive. While at the same time in the same *circular* we also witness a feature of kind reminder citing specific provisions that banks are [not] allowed to do certain activities. These *circulars* normally have a nature of rulings in taxes that they aim at advance cautions at better compliance both in specific circumstances of eventualities as well as normal circumstances where NBE demands better compliance.[60]

[59] Article 5 of PAP
[60] Look at Circular No. BSD/12/2016

However, the problem that we see in this *circular* for example (as will be discussed elsewhere in this study) is that it suspends a directive, CRB/01/2016. A directive is a hierarchical statutory document identified by the higher enabling laws of this country and by the PAP. As we discussed, *circulars* are not yet formalized in the working hierarchy. When we say there is a problem in a *circular* repealing or suspending an active legal requirement in a directive, we are pointing to a risk of *ultra-vires* by a department head inside NBE playing the governor off.

Kibre Moges, says that she basically does not agree with the use of *circulars* and thinks directives are appropriate. In an interview, she said "Legally speaking, we are allowed to issue directives and our directorate seeks to see our regulation limited with directives." She added "We advise saying that we are allowed to issue Directives. Circulars must be mentioned in the proclamations." It seems that if *circulars* are mentioned by name in the parent legislations that would suffice to say that they are compliant. However, this compliance would be a miniscule of what is required if we consider the rest of procedural and especially substantive train-wreck the use of *circulars* presents. This is because NBE has procedural *intra-vires* considerations and not substantive.

Directives are signed by the governor – the highest ranking NBE officer – and his decisions shall only be reconsidered or suspended by another of his own. His inferior, a department head suspended a statutory prescription for undefined period and then also reinstated them with another of his own circulars.[61] Circular BSD/13/2016 does another suspension in another instance, this time on a directive that prevented loan repayment time rescheduling as will be discussed herein below. As we will see it some *circulars* also amended proclamations.

In certain instances *circulars* may also be requiring of certain information to allow better supervision by NBE of statutory requirements. An instance may be Circular No. BSD/09/15 that required banks to provide information on loans and advances portfolio with a template on a monthly basis to ensure compliance with Directives No. MFA/NBEBILLS/002/2013.

[61] FIS/BSD/669/16

iii. Rights-defining Circulars:

These normally define obligations and impact of their substantive content is higher than the others and these also manifest a higher degree of *ultra vires.*

b) Manners of Work

i. Issuance, Parties and Manners of Work

Circulars are issued by department officials of NBE. They address it by saying "To All Banks – Dear Sir(s)" and the subject bears a unique *circular* number apart from the usual letter reference numbers[62] in a way we can understand specific designation of laws of higher hierarchy. This is uncommon for formal ordinary letter exchanges and correspondences between entities. We see NBE facilitating easy citation of these subsidiary legislations as authority. Look at the following *circular* for example:

FIS/BSD/17/16
February 02, 2016
All Banks
Addis Ababa
Dear Sir;
Subject: - **Circular No. BSD/11/2016**
The NBE has a responsibility to ensure that all advertisements by banks and their technology service providers are fair and free from misleading statements or omissions. To this end, you are expected to submit hard and electronic copies of all your current or live advertisements on television, magazine, newspaper, radio, website, poster, or otherwise to the NBE, by February 8, 2016 at the latest. Likewise, all future advertisements have to be submitted to the NBE for follow-up and comments (if any).
Sincerely yours
Signature
Solomon Desta
Director, Banking Supervision Directorate

Here, NBE first claimed authority to monitor in a manner how we know the CPTP approaches businesses for public interest factors purely distinct from one advocated for by NBE. Whether or not this is a statutory responsibility or one that is inferred from the given mandates under law, one cannot know. The information we have is that NBE feels responsible to monitor this aspect of commerce. And it claims it will make *follow-up* as well as *comment* on newly produced projects of advertisements.

[62] Art. 16/2 of PAP

The enabling laws are places to go to when NBE claims to have certain responsibilities. Under the establishment proclamation's article 5 on powers and duties of the Bank, the closest we get is sub-article 7 dictating it shall license and *supervise* banks. However, one may argue that supervising stands for ordinary banking activity traditionally done by central banks and certainly not competition and consumer protection related regulations which advocate for a public policy motive that is extra-financially alien to central banks.[63]

NBE claimed such responsibility it has extends to those advertisements done by FTPs also. These are points to be carefully looked at because *circulars* are to be followed strictly and complied with by FIs on matters falling within the realms of NBE supervision. When it comes to the TSPs however, there are possibilities for contention. NBE approached TSPs by issuing not a *circular*, but an ordinary formal letter exchange. From the archives of BCTS, we see that it has done so by directly requiring TSPs to submit hard and copies of electronic and print media.

The relation between NBE with non-FI providers cannot be as straightforward as that with the FIs. One may wonder what kind of regulatory measures NBE may take on non-compliant non-FI actors which are not licensed by it. When one looks at the regulation by relevant agencies proper, it is troubling. This is because formal letter exchanges by NBE for example may not possibly be referenced by MoTI (the licensing agency of TSPs) to take measures both as a matter of system and as a matter of Ethiopia's poor regulatory institutionalization.

As such, one wonders how NBE would act (in an unchallenged way by TSPs) if they are non-compliant with this call. Nevertheless, BCTS complied with the request and sent with cover letter all relevant materials.

In the case of FIs, some *circulars* were not as welcomed as some of them are. And we know of some cases that reached the CM for scrutiny and failed to bring the sought relief on behalf of the banks.

[63] See also sub-article 19 of Proclamation No. 592.

Regarding revisions, NBE comes up with revisions of its circulars as we have seen above[64] or providing detailed implementation, clarifications following FAQs either by the FIs or interested parties.[65]

ii. Legality Issue to be pointed out from the Advertising Circular

Here the TSPs believe that NBE has gone off-ridge in regulation and this is a possible *Ultra-vires* case. NBE is a financial regulator and shall remain such. But in fact, it acted as a competition authority. Tracking advertising works and supervising them shall necessarily be the task of CPTP in the areas NBE suddenly dived into.

The Micro-financing Business Proclamation No. 626/2009 is the only proclamation along with Proclamation No. 592/2008 that bears any provision on advertisements. Sub-article 1 of Article 4 dealing with requirements in obtaining license to operate, it prohibits subjects to operate as a microfinance institution without acquiring license from NBE.[66] Then under sub-article 2 it says that if anyone acts in contravention, NBE has power to *"require that all books, minutes, accounts, cash, securities, records, vouchers and other documents which are in the possession or custody of such person be submitted to it and inspect or cause the inspection of the same"*.

We see two problems in the way NBE issued circulars. The activity which is the subject-matter of the circular is not covered by the proclamation. Therefore, the circular went *ultra-vires.* And second, the measure that NBE prescribed by the circular is virtually none existent in the proclamation that enables it in relation to any advertising terms.

We clearly see that mandates of NBE only stretch to *pending micro-financing applicant* subject which are the only subjects we can identify on the ground for this provision of the proclamation. We do not see, TSPs here. We do not see operating micro-financing institutions as well being subjects of this regulation. But what we see in the usage of this circular is that NBE required all banks, all microfinance institutions (this researcher confirmed the same request with SMFI and TSPs such as BCTS and Moss.

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64 Circular No. FISBSD/669/16 (May 30, 2016) repealing BSD/12/16 (Feb. 12/2016)

65 Circular No. BSD/15/2016, Circular No. BSD/13/2016

66 Proclamation No. 626/2009, **Micro Financing Business Proclamation**, F.D.R.E. House of Peoples' Representatives (2009)) *See also* Proclamation No. 592/2008, **Proclamation to Provide for Banking Business,**, F.D.R.E. House of Peoples' Representatives (2008)

Additionally, in cases where NBE is convinced that a person who contravened Article 4/1 of the micro-financing business proclamation, the remedy it can take is request that entity to submit all books, minutes, accounts, cash, securities, records, vouchers etc. for ascertaining the issue. In short, NBE can request the *banking transactions* themselves. In the Banking Business proclamation it further entitles NBE to sue the person in the FHC for the return of money that it might collect in terms of deposits or other related transaction. With all due respect, we see no CDs, promotional print outs and video cassettes here.

iii. The language of Circulars

We said that circulars are normally issued in the English language. This may be easy to overlook if one considers that the prime subjects of NBE are FIs. Kibre said that these are considerably apt in the use of English language and may not be challenged. She mentioned instances such as customs related For-ex circulars that used Amharic. Therefore, NBE somehow uses selective approach when it comes to complying with language requirements under the PAP. However, subjects of NBE regulation are not practically these alone. All Ethiopian residents capable to open a bank account are subjects. So are persons interested in some kind of saving benefits from FIs. Being a subject means possessing some rights and some duties under the regulatory spheres of that institution.

For example, circular BSD/13/2016 suspends sub-articles 7/1 and 7/8 of Directive No. SBB/43/2008 which places restrictions on rescheduling/renegotiating short/medium term loans for more than three iterations and further conditions on second iteration. This circular suspended this limitation for defined period of time. Another circular BSD/15/2016 further clarified on its detailed implementations. The beneficiaries of such a suspension are SNNP Region coffee loan borrowers who failed to repay loans for coffee prices went down internationally.

This noble and relieving provision entitling these poor coffee growers was communicated in English language and posted in the website of NBE. A great majority of these coffee growers are left at the mercy of interpretation by their bankers for the purposes of comprehension of their rights under this. They cannot equally bargain with their service providers with a learned negotiation.

The PAP came up with language requirements for directives under Article 15/1. For circulars we have to succeed in our assumption that they are legislations proper to succeed in this requirement. NBE continued to issue circulars in English to date.

3.6. Analysis of The Risk of *Ultra Vires*: Where it lays

The doctrine of *ultra vires* is opposed to *intra vires* which means 'within the powers'.[67] The later, goes one step further and states that an action of any official beyond the given scope of power is *ultra vires* hence it is considered as *null and void*.[68] It seems that Ethiopian system entertains a broader-ranged tolerant margin interpreting this term, practically speaking. Elsewhere, we see the principle applied (including on private bodies) who shall act strictly within boundaries.[69] In the administrative law setting, we are concerned with the decision-making procedure (how power is exercised), rather than the decision itself or the merits of it. To a wider extent the study of administrative law has been limited to analyzing the manner in which matters move through an agency, rather than the wisdom of the matters themselves.[70]

a) NBE *Circulars* Use of Authority

As discussed above there may be procedural and substantive *ultra vires.* Sometimes *circulars* may even suspend provisions of other legislations. Circular No. BSD/13/2016 provides for a temporary suspension of requirements by a directive No. SBB/43/2008[71] in an instance where a circular [though temporarily] renders a directive of no effect. If a *circular* has the effect of rendering a Directive useless, then for the sake of rationality, we have to call *circulars* with their correct name – i.e. Directives. Otherwise, only directives would be able to repeal, amend, or suspend other directives.[72] Therefore, if the same two documents are coming from the same

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67 David and Muray, *pp. 20*

68 S.P. Sathe, *Administrative Law,* (Nagpur: LexisNexis Butter Worths Wadhwa), 2008, p 387.

69 *The "Doctrine of Ultra Vires" and its subsequent development in the frame work of Company law,* (Electronic copy available at: http://ssrn.com/abstract=1936728 accessed November 23, 2020 at 1:31am)

70 C. Sarma, pp 10.

71 See Circular No. BSD/14/2016

72 Article 15/1 (3) of PAP

administrative authority, then one repealing the other may not be of a problem only looking at how those two documents are called by name.[73]

As slightly referenced above, if one consults to basic principles of legality, NBE Directives are signed by the Governor (which is a statutory position), while *circulars* are issued by persons in a subsidiary [hired] position to them – i.e. Directors of departments. Therefore, if a *circular* tends to repeal, amend or temporarily suspend a Directive – and if we for any reason do not call it a Directive (but a Circular), then there is surely *ultra vires.* Directives are strictly regulated in their substance and procedure by the PAP. For another document to do what it does and successfully reside outside of the application of PAP is a system irregularity. One has to remember that administrative law for example does not care about rights and other concerns subsidiary and incidental to it.[74] It rather looks at procedural regularity to tackle possible defense by NBE saying that Directives are more rigid legislations and issuance of a suspension directive which necessitates a reinstatement directive on the other hand is impractical.

In another instance, NBE *circular*[75] alleged that it found a printing error on an article of Directive.[76] This circular has preamble saying '*Whereas, printing error has been observed in sub-article 13.2 of Directives No. SBB/62/2015, Now, therefore, the sub-article has been corrected to read as follows…'* and then comes the checked spelling. The *circular* does not showcase the old (unintended) term and compare it with a revised one. It simply, types up the new intended term.

It is easy to know where a person would likely search if s/he wonders if there is an amendment or a repeal in certain statutes. If we have a proclamation and wonder if there was a modification made to it, we could search in the list of proclamations. In like manner, we work with regulations to comprehend the totality of compliance consulting regulations to see if there exists a repeal or amendment and certainly not refer to Directives. A person may refer to laws vertically only to understand how principal provisions encompassed in the higher laws are further elucidated and certainly not in expectation of suspension or repeal.

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[73] The Bank issued Circular details.
[74] *David and Murray pp. 73*
[75] Circular No. BSD/10/2015
[76] SBB/62/2016

In NBE, an amendment of a statute may be made by a circular – which is a document of lesser significance in all respects than a directive. Here, the governor may be reversed or corrected to mean anything by his inferior ranking officers.

b) Prohibitions on Foreign Nationals and Entities

Ethiopia is a highly regulated system, and this is a second time we have solidly claimed this in this study. Its tight regulation can be expressed in many ways but can best be so by its prohibitions of foreign nationals for multiple transactions. Engaging in the financial business showcases the most notorious of these prohibitions. Foreigners are not allowed to open banks and bank branches, subsidiaries or even acquire shares in Ethiopian banks. The prohibition includes organizations fully or partially owned by foreigners as per article 9 of the proclamation to provide for banking business.[77] Definitions in Article 2/5 of the proclamation on "Companies" also do a good deal defining foreign persons out.

On the contrary, circular BSD/14/2016 stepping in to repeal this prohibition exempts banks from checking KYC and pay dividends without checking Ethiopian citizenship to companies. We see here HoPR defining out foreigners from the possibility to be shareholders and thus earn dividends. Regardless, a director inside NBE corrected the HoPR with a letter saying that "the National Bank hereby exempted…" banks from enforcing such. It explicitly allowed a body corporate to own shares and thus to earn dividends, regardless of the fact that its CEO positively and certainly confirms that not 100 per cent of its holdings are held by Ethiopians. If this is not *ultra-vires*, then there is no *ultra-vires*.

c) Provisions regarding Use of Financial Brands

NBE regulators interpreted the provisions relating to the use of brands. We see a convoluted approach of reading through terms of Ethiopia's competition and financial regulation laws. NBE rejected applications by institutions among which is OMFI to provide payment issuer service by using a brand and technology called "*HelloCash*" owned and provided by a Dutch-based Ethiopian registered company BCTS.

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[77] Proclamation No. 592/2008, **Proclamation to Provide for Banking Business,** F.D.R.E. House of Peoples' Representatives (2008), Art.9)

The PSSD, NBE stated reasons that the requested mobile money brand, *HelloCash*, is already 'owned by one of the FIs'. Jean-Marrie, PMO of BCTS said that *HelloCash* brand in fact is a trademark belonging to BCTS, the TSP partner which labeled the tech platform it developed with this while offering it to financial providers.

The problem with NBE is not only reading superior laws properly, but also reading factual circumstances properly, Negede speaks. He adds that regulations shall not be on the *nitty-gritty* of the market. Oversight supervision is preferable than stretching hands on virtually all things. The financial actors shall enjoy a little more freedom with a more liberalized approach in the regulations. The problem is a national problem and he sees it in light of the entire regulatory set of mind in Ethiopia. While regulators shall strictly 'go by the law', what we see is the opinions of government institution officers and the ways they understood laws being normative understandings. Negede thinks that these irregularities coupled with unfair competitions in the market can drive actors outside out of discouragement.

Jean-Marie says that this practice is a common problem in Ethiopian regulators and cites as an example EIPO. Particularly with regards to NBE, he suggests that regulators shall strictly go by the law not act beyond their mandate. For him, the brand issue mentioned here is quite a big nightmare.

The problem here is that officers are not familiar with trends of brand use in global market. This is a conventional practice and a common exercise in the field of financial services. Jean-Marie cites Orange, VISA, PayPal and the likes as examples. A third party provider may offer a platform by labeling it appropriately with a unique brand. VISA and MasterCard are even used in Ethiopia for years. More worrisome is the fact that NBE is not enabled in this regard with any law. The Directorate unreasonably exercised influence over an issue which is clearly left to the providers to contract with.

Most NBE decisions are not properly aligned with the development of both the financial services industry in the country and the global market practice. Apart from other adjacent fields of regulations such as competition and protection of consumers is also twisted by most officers.

Taking into consideration the development of brands and intellectual property rights elsewhere in the global market, if the decision of NBE is to be taken for granted, existing providers will be driven away from the market, and in the future also Ethiopia will not attract other providers that have good experiences in developed countries.

The decision further required the contract signed by the FIs seeking license to provide such services with the technology service providers to among others include the time when technology is transferred. This decision has no legal basis and it does not correspond to modern financial technology manners which has a potential to push actors from the market. Continued rehearsal by NBE of such actions will inevitably push Ethiopia's infant industry to its extermination and as a result the entire process will be a futile exercise with no result.

Martha Hailemariam – the director of PSSD thinks otherwise. NBE can determine regulation however fit on the specific *HelloCash* brand. She justified the rejection of the application based on "risks to national payment system that contracts with TSPs fails to address total cost of technology, modality of payment of cost, period to cover cost, time when the technology is transferred to the applicant, detail roles and responsibilities of each party on data management, service provision, pricing and information". Such a comment, as to the judgment of this researcher is inconsiderate of franchising and licensing agreements which are famous in markets abroad and getting contemporary or modern momentum in Ethiopia as well. Apart from failing to make such market-specific technical information, it also overlooked factual data. *HelloCash* is in fact not owned by the 'former registered [financial] institution', but by BCTS who provided it to various financial providers based on a master license agreement arrangement.

The kind of business followed by like providers as BCTS, others such as Moss Technologies that provides the 'M-Birr' service is beneficial for Ethiopia's financial market development. Existing laws at all hierarchies do not have a prohibition in this respect. According to the new directive of NBE on licensing and authorization of the Payment Instrument Issuers ONPS 01/2020 does not denounce trademark and technology related customary undertakings. The other directive issued by NBE on the Use of Agents FIS 02/2020 has a provision on outsourcing of certain activities of the FIs to the third parties without any further condition.

However, the above-mentioned decision of the Directorate overregulated issues to disallow a lawful practice by giving neither sound justification nor legal grounds for doing such. In this regard, one may also point out to a constitutional issue that government organs shall work in a transparent and accountable manner as per the Constitution and the principles of the Proclamation to Provide for Definition of the Powers and Duties of the Executive Organs of F.D.R.E.

d) Transaction Limits on Electronic Payment

Recently, a letter V/G/VIS/003/2021 dated Jan. 08/2021 and addressed to all commercial banks posed a limit on transfers from a deposit accounts to multiple accounts to 5 transactions per week with certain exceptions. This means that a person cannot transfer to more than 5 persons balance from a deposit account. This is in line with the anti-terrorism financing and money laundering laws and at the same time acutely against the financial inclusion policy and the National Payment Services proclamation. This has a potential to drive existing providers out of market.

3.7. Challenging Legality

We not only tackle the interpretation of a rule but the rule itself as per the PAP. The terms in this regard shall stretch to mean *circulars* for practical reasons. Tadesse claims this in the tax system analysis made (which to the great majority of the portion conforms to and can be duplicate note for this financial sector – for the fiscal/financial constitutional policy of the country has a good chance of coming up with both the tax regulation and financial market regulation in the end) by saying the way the dispute system is constructed is to enable applicants to pursue a specified and predetermined relief details – of tax assessment for instance.[78] He argued that since tax assessment is not the only reason why tax payers may possibly be seeking relief, we shall keep legislative language general to encompass for example the ability to challenge legislations.[79]

PAP sets out detailed rules on procedure of issuance of Directives and also the review process in its Section 4. Any interested person can file a petition to review directives and administrative decisions before FHC.

[78] Taddesse, pp.356
[79] Id.

a) Where to Challenge

Reviews for a directive is accordingly to be filed with FHC upon final decision of the agency save for undue delays by the agency to respond to reliefs.[80] These decisions with respect to administrative acts shall be final while those on directives may be appealed to FSC. Institution of the benches took a longer time after the enactment of PAP. Lideta Division for example opened the first file on Tikimt 12, 2013 E.C. The information from the Division's civil benches data section tells that thus far, the two benches entertained 92 files, 9 of which are closed. No cases involving NBE have been entertained thus far.

The PAP provides three grounds for petition; on breach of procedural and substantive *ultra vires* and contradiction with other laws placed higher in hierarchy. Procedure-wise, however, Article 53/1 and 2 jointly pose 90-day limitation on petitions on irregularities of directive enactment. One wonders how the petitioner would be able to meet such deadline in instances where the breach relates to publication for example in which case the later may not be informed. Sub-article 1 here shall not have existed and sub-article 2 shall not have encompassed sub-article references.

Further, under Article 57 it enables the court to invalidate partially or fully the enactment. However, such invalidation shall not retroactively impact decisions based on the invalidated law. This is the rough-bump we have to run in ensuring full rights to citizens to request their rights. As a matter of fact, invalidation shall have a *void ab initio* impact to provide full meaning and justice. Citizens shall not be left victimized by a law that is *ultra vires* or contradictory with lawful legislations or that broke procedural rules. One may delve into some substantive instances where rights could be seriously hampered by such a provision.

These and other features make the newly provided legislative solution with some glitches. But, still, the judicial review provisions are good developments. Within the current framework, one shall be allowed challenge the legality of legislations (not only *circulars*, but even also proclamations) at the HoF – which is instituted sidelining the Constitution. The HoF doing its job means equivalent of the peoples of Ethiopia ensuring the Constitution – an oath they entered with full commitment – continues to be interpreted with their original intent intact.

[80] Article 49, 51 and 52 of PAP

In the opinion of this researcher, we can challenge any legislation of NBE including *circulars* at the entity that mandated NBE. The CM also monitoring it shall be traced back for solution. The HoPR both in its capacity as the creator of NBE and the prime gateway of constitutional legislative mandate system via article 55 (which ultimately resulted in NBE legislative power) is always at our disposal. Whether these applications will be scrutinized properly being a question that begs discussion taking into consideration anomalies of Ethiopia's legislative and relief mechanism, all theories and principles tell us that legislations shall virtually always be challenged somewhere.

b) Scrutiny by Formal Courts

There is a prevalent attitude in scholarship also that the formal function of courts is to determine on obligations of individuals (the state in its individual capacity also) and not certainly on checking whether the government is doing its job properly or not.[81] For these, even the constitutional empowerment of courts being political or conventional rights-centric is a discussion seeking depth in determining whether we can challenge administrative legislations and decisions at formal courts.[82] There was an event where NBE directive was challenged at a Federal Court by an individual party before the enactment of the PAP. This presented to us the possibility of challenging *circulars* for stronger reason by analogy at the time.

NBE and Hibret Bank S.C., Ato Eyesus Work Zafu, and Workshet Bekele litigated at FFIC. Here, NBE was challenged on *ultra vires* in one of its directives overriding a proclamation. When the case led all the way to the FSC, Cassation Division decided that directives can override an earlier proclamation as long as they are issued pursuant to the power given in a Proclamation.[83] A directive only has a procedural requirement at the level of outlining the drives of its power for enactment to avoid *ultra vires* altogether. Once it has done that, it has no further requirement and can surpass substantive entitlements. NBE can act as the parliament if it wishes. This position needed revision.

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81 Muray, pp. 20

82 *Supra Note (David and Muray) pp. 17*

83 FSC Cassation Decisions, File No. 44226, Tahsas 15, 2003 E.C., in Amharic, unpublished

c) How the Administrative Texts could be Scrutinized

i. Technical Familiarity to Scrutinize:

The financial sector is technology specific and many of its function require familiarity. As such, it takes whether a formal court or specialized tribunal, or an executive higher body or even the HoPR itself to apply a technical approach. A legitimacy inquiry resting up on internationally accepted practice is desirable.[84] This is also recommended in other sectors outside of financial market regulation which manifest a parallel magnitude of technicality.

Currently, NBE seems to be the only entity aware of what is going on with the financial market, its residues and spill-overs on adjacent economic sectors such as tax, intelligence etc., and we can present no other entity with the required familiarity to scrutinize its decisions. One manifest instance is the way formal courts (chaining up to the cassation division) approached the legality of the directive in the above discussed instance. We see there that even though the question is more of procedural and due process than technical, the courts reached at an unprecedented outcome.

Even though we are considerate of the justifications of delegated rule making power, such to a more qualified technical expert (such as NBE) shall not justify a vacuum on behalf of the legislative authority of knowledge to follow-up for *ultra-vires.* Even though we can harmonize absence of knowledge, we cannot justify remaining without a little effort to solicit the knowledge required to monitor powers we delegated. What we see is that NBE is as per its establishment proclamation providing as an advisory body to the government over the issues that it issues administrative decision and circulars on. This is a petty.

ii. Conventional Requirements:

The movement to a 'culture of justification' entails more than the creation of a duty to give reasons. The notion of justification, as distinct from explanation, implies that the reasons supporting a decision be 'good' reasons, and this in turn requires rules for determining what counts as a 'good' reason. In other words, a 'culture of justification' entails substantive commitments. These commitments are most fundamentally to a democratic account of legislative

[84] Keli Vakil, *pp.4*

authority. The legislature has the authority to decide on the content – and design the implementation – of public policy. It is because, in a representative democracy, it is the legal institution best placed to serve the interests of the people.

But the interests of the people cannot be served outside the framework of fundamental values of the society, including the values of the rule of law and the constitution. The need for interpretative charity – which is what is done while proclamations translate constitutional terms into formal detailed legislations, regulations do the same by filling technical and detail gaps in proclamations, directives interpret regulations and proclamations alike and other subsidiary documents and administrative decisions are in effect translations of the laws into practical meanings – is at its most basic principle about the justification of legislative authority.

It is because the legislature is presumed, in the absence of explicit statements to the contrary, to be a democratic institution that we should presume the legislature intends its delegates to act in accordance with basic needs of individuals as well. This approach does have substantive effects since it will necessarily limit a range of results open to officials that they can show to be consistent with the values, given the particular context.

In sum, here our concern is not only that relating to having a good reason, but one that does adequate justice in substantiating the reasons why specific measures are taken.

iii. The Constitution as the Cannon

As the constitution is the supreme law of the land, we shall adopt a look which questions the harmony done by the administrative legislation or decision against the basic rights identified in the constitution and the power relationships outlined therein. What differentiates the constitution as the supreme law in Ethiopia is that it is the law of all other laws. While other laws dictate on behaviors of persons, the constitution governs laws, policies and government bodies primarily. And this by all considerations is a stringent exigency that needs to be addressed because by discussing the *legality* of legislations, we are primarily talking about the *constitutionality* of legislations.

Chapter Four

Conclusive Summary and Recommendations

4.1. Conclusive Summary

a) Pointing at the Issues to Address

Ethiopia follows strict regulation policy of financial market to enable healthy functioning of the sector. NBE lies at the top of the financial sector machinery acting also government advisory on financial, fiscal and monetary issues. It runs with a bulk of delegated legislative and executive powers. In fact, it is one of very few regulatory entities in Ethiopia that have best utilized the amount of bullets they are trusted with.

NBE is proactive player in the market. It uses two documents primarily in its regulatory roles i.e. Directives and Circulars. Directives are formally embodied in the Ethiopian legal system as the fourth layers of enactments somehow governed with PAP also. While issues of legality and the risk of *ultra vires* can be discussed in a worthy size about Directives themselves, Circulars present a magnitude of non-compliance in terms of administrative due process and substantive requirements. The fact that they reside outside of the scheme that controls executive legislations presented a car-crash like scenario of their use.

There are problems that made FIs furious at stages. On the one hand, we have constitutional entitlements to do business and engage in any economic activity. On the other, we have public interests in regulating the FIs. Balancing has not always been easy, especially for Ethiopia who is caught midway between individual liberty and public interest motives. Entry and exit in the financial market cannot be said free. The great majority of this comes from the tight regulations and unmonitored extensions of mandates of NBE with its legislations.

HoPR, since it delegates a multitude of powers across the executive divisions, shall be equipped with technical support, expert advice to monitor powers it mandated. CM, as an entity running with a great size of delegated power itself and delegates great portion as well, shall be responsible in organizing its institutions to act without superseding power.

b) Mistakes not to be made

Recently, 18 FIs have applied to NBE for incorporation anew not to mention that many among existing actors applied for providing newer services as payment instrument issuing and agent banking. One may look at this and argue this rate of entry into financial business speaks good things about the regulation. High entry rate and limited turn-out means effective regulation. In competition law, cleansing the system of entry barriers is advocated for by liberal wings so that actor may freely enter and freely exit market.

However, one shall not err thinking that this serves the only parameter of examining NBE success. The first reason is the question of whether multiplicity of subjects by itself is positive. For a system with few strong actors than multiple mini actors may be preferred. NBE regulation, which is intimidated by strong actors and is comfortable by small size multiple actors, such market diagram, is the only possible outcome.

Secondly, the type of actors which are attracted by the existing rules is mostly non-passionate local actors while the thriving foreign market is still left at bay. Foreign actors could have been attracted into providing technologies, integration, marketing and other specifics of the business. This could have helped Ethiopia with technologies and business trends that have matured elsewhere to transform its economy. Worse of all, the kind of legal interpretation we saw in financial brand use by NBE on the HelloCash and M-Birr brands have great perils of discouraging technology not to enter the market. While this instance shows that NBE is not in line with contemporary developments of branding issues, it can also drive existing foreign tech actors out. The financial sector cannot be operated with local knowledge and technology alone.

Third problem with high rate of entry into business is that it is induced by other factors from the country's current state as a nation. For long, ethno-religious factors were keys in the life of the nation and its people generally. Ethnic and religious problems long over-due materialized and taxed the nation severely recently. One language and religious group is in a suspicious self-defense mode with another. Aspects of political, social and economic dominances used to be scattered among different actors in government and the public. Factions are now manifesting interest in assuming their fair-share of such dominance.

The resultant effect in financial market is seen in the type of FIs existing and newly being incorporated. Most of these are founded in ethno-religious frontiers. Prime demonstration can be made from the names of these institutions which pose acute ethno-religious lexical factors. The other manifestation may be the individuals who spear-head the incorporation being dominant in their respective religious institutions and/or ethnic groups.

Finally, to render this valueless, only 3 among the 18 are persistent in application while the rest are driven away when the 500 million birr paid-up capital requirement is posed by NBE.

For these reasons, we can say that the high rate of entry into the financial market business in Ethiopia cannot be taken for granted to conclude that the sector regulation is of full health.

4.2. Recommendations

The state of delegated legislations in Ethiopia is not yet in its matured posture. It is low rated and with severe consequences on business in financial markets. Cries are prevalent in financial sector and vows to leave market and relocate to elsewhere in Africa are frequent companies. The system needs quick maintenance.

Three stages shall be marked as points of improvement; at time of delegating legislative power, continued monitoring of delegated and appropriate review system.

a) NBE shall Stop Issuing Circulars and Keep Using Directives

NBE shall act in a procedural and substantive *intra virus* state. Circulars shall be supplemented by directives signed by the Governor. Administrative due process of PAP on directive issuance needs to be followed. Legislations shall have Amharic correspondents paralleling the English versions.

And this is because; in effect not only FIs are affected by their terms. Illiterate shareholders, workers, members of ‘edir’ and cooperative societies etc. shall have comprehensive understanding comprising provisions in CPRD and circulars, guidelines, reports, forms and NBE publications. But currently, the only documents we can reference in the Amharic language are only the first three layers of legislations.

b) Learned use of Delegated Legislations

Entities delegating legislative powers need to formulate mechanisms of monitoring their use. A system that allows power without control is a lesser proficient and interactive system than ordinary.[85]

Laws promulgated using such delegation need to be seen versus conditions and limits therein. Entities designating powers to agencies shall, detail special procedures, preconditions, subject-matter and formative limits, other legality-oriented prescriptions shall be drafted into these terms simultaneously. In this regard, the PAP does not impose duty on entities giving legislative authority to specify the scope of authority. The impositions focus more on the delegated entity.

c) Continuous Monitoring of Delegated Authority

Further, the delegating entity shall assign representative supervising delegated authority. Authority shall not simply be left unattended. It needs a stagnant person overseeing implementation. At the parliament level for example, standing committees may use their sectoral arrangement to ensure enhanced look into such undertakings.

Registry shall also be opened to archive deposits of legislations by subordinate entities. Currently, the proclamation entitles Attorney General to do this task. The PAP shall incorporate duty to involve delegating entities in the issuance of delegated legislation to reasonable degree. HoPR shall not only keep its own archives, but of entities it delegated to enact. Circulars of NBE shall be monitored against this requirement by the CM. The issuances of the CM themselves shall be monitored by the HoPR.

d) Ensuring Procedural Requirements of the PAP

NBE shall consolidate its binding deliberations by way of Directives making it manageable for actors to comply. This is especially true because circulars as statutes are unidentifiable members in the known hierarchy. If one has very good reasons to believe that they are good introductions by which agencies may formalize implementation of directives and other laws, they shall qualify

[85] David Dyzenhaus, pp.4.

all procedural requirements of administrative legislation. Currently, NBE may challenge by saying the documents are not ruled by the PAP.

First, circulars shall be issued within subject-matter limits. Directives shall not suspend, modify or repeal regulations, proclamations and/or constitution. Circulars shall not do so on directives, regulations and any of the upper laws. The PAP has in mind only directives repealing other directives and not higher laws.[86] However, we see circulars issued by departments of NBE modifying, suspending and repealing Directives issued by the governor and sometimes proclamations also. An inferior authority is ruling on a superior authority.

Then circulars and directives shall be issued in Amharic and English languages. And when there appears version controversy Amharic version shall be authoritative. Currently, NBE is using the English language in its enactment of most directives and all circulars. Account holders (majority of whom do not use English) wary of their obligations cannot make references to such statutes. Stories get worse as one goes further to places such as the list of shareholders in FIs who cannot communicate in the English language, where the need to communicate better is a pre-requisite to make active use of ones rights. Apart from these factual readjustments, the PAP shall also bind circulars, like directives, to be made in Amharic.

Circulars shall be made known to the public in an enhanced and accessible manner. Currently, they are only made available on the official internet website of NBE. Even in some instances, as we have seen above, recourses are made by the regulator to directives which are not made known even in this manner. But the viability of such a publication by itself shall be questioned because of the limited use of such a platform by the majority of users we mentioned above. In this regard, the requirement in the PAP on directives shall be extended to circulars as well.

e) Furnishing Adequate Review Mechanisms beyond the PAP

The move by the PAP to set out for judicial review of directives and administrative decisions is good. So is the formation of special benches for review of administrative decisions. However, some provisions limiting the exercise of these rights shall be modified. An example is Article 53/1 which provides 90-day period of limitation to petition on breach procedural rules in

[86] See Art. 15/1 (e) of PAP

enacting directives. This makes no sense if we see the rules on procedure in Chapter two of the proclamation. Procedural errors may not be detected from their very nature as procedural. If for example, NBE issues and violates the procedural duty to publicize the directive, the petitioner may come to know of the directive only in case of recourse to NBE. Further, the constitutionality of legislations shall also be subject to the review of HoF via Constitutional Inquiry.

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INTERVIEW LOG

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30. Ato Mesfin – Chief Lawyer, Legal Services Directorate – NBE

BelCash:

31. Jean-Marrie – PMO, BelCash Technology Solutions PLC

One Microfinance Institution S.C.

32. Negede Abebe – Board Director

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33. Yetnayet Mengistu – Data Supervisor
34. Sewda Arab – Data Administrator