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A critical analysis of Ethiopian Civil Code: in the light of  
the core features of Continental European Codification

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**LLM in Advanced Legislative Studies (ALS)**

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**DISSERTATION**

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Codification**

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**Abstract:**

**This paper critically analyzes the 1960 Civil Code of Ethiopia. The paper explores the six core features of continental European codification set out by Gunther A. Weiss. Weiss has identified the six core features of continental European Codification as: (1) authority; (2) completeness, in the sense of an (a) exclusive, (b) gapless, and (c) comprehensive code; (3) system; (4) reform; (5) national legal unification; and (6) simplicity. Using these continental European core features as a template, the paper critically analyzes whether the Ethiopian civil code complies with the core features of codification or not. The paper concludes that the Ethiopian civil code does not comply with the core features of continental European codification.**

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## CHAPTER ONE – INTRODUCTION

### 1.1 Introduction

How many countries have ‘Codes’ as a basic legal source in the world? In how many countries legal systems the term ‘Codification’ exist? Are there common features of codification used as a basis for comparison and analysis? Although the exact number of codes is uncertain today, the UNESCO-sponsored survey on the basic sources of various legal systems in 1957 reveals that from 110 countries 73 countries had legal sources called ‘codes’ and the work of ‘codification’.<sup>1</sup> In other words, codification exists in 67 per cent of known legal systems and each system consists of an average of 6 codes.<sup>2</sup> This figure seems to suggest that codification has become prevalent in most existing legal systems.

Despite its wide existence, the meaning and role of codification is different on what period and which country is considered.<sup>3</sup> It may also take different forms since it may be required to fulfill different functions.<sup>4</sup> It could be resorted to as a means of self-expression on nationhood or statehood as in the developing countries. Or it represents a means of assertion of a novel social and political system as in the countries of Eastern Europe.<sup>5</sup> Academics in this field offer a large number of definitions which reflect a common agreement that a code is an enacted, organized statement of law in a particular field. But they offer no consensus as to the drafting style, level of comprehensiveness or exclusivity required to make an instrumental a code.<sup>6</sup> In modern legal systems, legal reforms are introduced through legislation. When the legislative reform is

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<sup>1</sup> Csaba Varga, ‘Codification as a Socio-Historical Phenomenon’ Budapest : Akadémiai Kiadó, 1991 P. 18.

<sup>2</sup> *ibid.*

<sup>3</sup> Attila Harmathy, ‘Codification in a Period of Transition’ (1997-1998) 31 *Davis L Rev* 785, 788.

<sup>4</sup> Denis Tallon, ‘Codification and Consolidation of the law at the present time’ (1979) 14 *Isr L Rev* 1, 3.

<sup>5</sup> A.G. Chloros, ‘Principles, Reasons and Policy in the development of European Law’ (1968) 17 *Intl & comp LQ* 849.

<sup>6</sup> Catherine Skinner, ‘Codification and the Common Law’ (2009) 11 *EurJLReform* 225, 228.

comprehensive and professes to encompass an entire legal field, it is customarily defined as 'codification', and its 'product' as a 'code.'<sup>7</sup>

Originally, codification was part of the history of European Civil Law countries, following the tradition of Roman law and the model of the Codex Justinianus (6<sup>th</sup> century A.D.).<sup>8</sup> Later, however, the idea of codification extended beyond European countries and spread over almost all over the world. The civil law of Rome has spread over Continental Europe, and has retained its authority for many centuries; the French Code has been largely adopted by other countries; and even at this early stage of its history the German Code has been made the basis of the codification of the private law of Japan.<sup>9</sup> The first major wave of codification outside Europe was inextricably linked to colonialism.<sup>10</sup> Others were enacted by sovereign, non European states though still largely under the influence of European models.<sup>11</sup> The French, Swiss, German, and Austrian models are among the continental European models that have strongly influenced the rest of the world.

By making a historical and comparative reference to these four influential European countries, Gunther A. Weiss (hereinafter Weiss) has identified six core features of European codification. He has identified the six core features of continental European codification as:<sup>12</sup>

- (1) Authority
- (2) Completeness
- (3) System

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<sup>7</sup> Daphne Barak-Erez, 'Codification and Legal Culture: In Comparative Perspective' (1998) 13 Tul Eur & Civ L F 125.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> H. Patrick Glenn, 'The Grounding of Codification' (1997-1998) 31 UC Davis L Rev 765.

<sup>11</sup> Alexander Alvarez, 'The Influence of the Napoleonic Codification in other countries' [1918] 251.

<sup>12</sup> Gunther A. Weiss, 'The Enchantment of Codification in the Common-Law World' (2000) Yale J Int'l L 435.

(4) Reform

(5) National Legal Unification and

(6) Simplicity

Weiss has explained, although there is no general consensus in the literature with respect to which of these elements and to what degree are necessary, there are certain consensus in the literature when scholars explain codification.<sup>13</sup> He also emphasizes that it is a familiar problem with complex and abstract phenomena and this problem is solved by referring to Max Weber's 'ideal type' by combining varied empirical significance in order to create a model of taught.<sup>14</sup> These core features of codification are helpful in understanding reality and in qualifying certain efforts as codification.

This paper aims at applying these core features to the Ethiopian civil code in order to critically analyze whether the Ethiopian civil code complies with the core features of continental European codification or not.

Ethiopia is one of the Africa's states highly influenced by the model of continental European codification. During the regime of Emperor Haile Sellasie, particularly between 1957 and 1965, a group of highly complex codes – Civil code, Civil Procedure code, Penal code, Criminal Procedure code, Commercial code and Maritime code – were introduced which gives Ethiopia one of the most modern legal systems in the World.<sup>15</sup> Before the introduction of these codes, Ethiopia operated with an informal mixture of legislative/executive and customary laws.<sup>16</sup> Penal, Civil, Commercial and Maritime Codes were modeled on Continental European Law and the

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<sup>13</sup> Barak-Erez (n 7).

<sup>14</sup> *ibid.*

<sup>15</sup> Norman J. Singer, 'Islamic Law and the Development of the Ethiopian Legal System' (1971) 17 Howard LJ 130.

<sup>16</sup> Norman J. Singer, 'Modernization of law in Ethiopia: A study in process and personal values' (1970) 11 Harv Int 73.



remaining two Procedure Codes were based on British-Indian Common Law Models.<sup>17</sup> The introduction of these codes and Ethiopia's herculean effort towards modernization was described as unique for its 'eclecticism' and categorized the country as a 'mixed legal system'.<sup>18</sup> This is because of two apparent reasons. On the one hand, unlike most African countries which retained at least some post-colonial parental ties, Ethiopia (which has never been colonized) makes voluntary reception of foreign laws on the basis of what seems best, and on the other hand, the choice resulted in modeling from two different legal systems. As stated in the prefaces of most codes, the purpose and goal of these codes was, on the one hand, to establish a perfect knowledge of the law by providing a clear, systematic, compact, complete and authoritative statement of the law and on the other hand, to develop Ethiopian legal system towards modern system.<sup>19</sup> As a result, the introduction of these set of modern codes marks the end of unwritten and customary scattered rules and the beginning of the modern legislative framework of Ethiopia. Apart from the Penal code which was entirely replaced by the 2004 criminal code and some scattered amendments of Civil and Commercial Codes, all these six codes govern most fields of current legal activity and remain to be in force as primary source of law.

The civil code of Ethiopia was one of the codes highly influenced by the continental European model. The Ethiopian authorities took the side favoring the continental system by calling the French jurist to work out the preparatory plans of the civil code. As a result, the French man Rene David was the first well known comparative law jurist which codified the civil law.<sup>20</sup> Thus,

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<sup>17</sup> Heinrich Scholler, 'Recht und Politik in Athiopien: Von Der Traditionellen Monarchie Zum Modernen Staat' (LIT Verlag, 2008) (Peter H. Sand ed, 57 Am. J. Comp. L. 745 2009).

<sup>18</sup> *ibid* 3.

<sup>19</sup> J. Vanderlinden, 'Civil Law and Common Law Influences on the developing Law of Ethiopia' (1967) 16 Buff L Rev 250.

<sup>20</sup> Franklin F. Russell, 'The New Ethiopian Civil Code' (1962-1963) 29 Brook L Rev 236.

the Ethiopian civil code was to a large extent modeled on the French Code, and in this manner the French code had a direct influence on the Ethiopian civil code.

Unlike other legal systems that have grown from a tradition dating back to hundreds of years of development, the Ethiopian civil code with its twenty one part featuring 3367 articles developed over a short span of time. For nearly fifty two years, the civil code has been at the very heart of Ethiopian civil law and incorporates many legal concepts and institutions of continental European law, such as legal person, family, succession, goods, property, literary and artistic ownership, tort, agency, contract, arbitration and so on.

## **1.2 Methodology and structure of the paper**

This research argues that the Ethiopian civil code does not comply with the core features of continental European codification as put forwarded by Gunther A. Weiss. In order to examine and prove this hypothesis, particular attention will be directed towards examining the core features of codification in continental Europe in general and relate this to critically analyze the Ethiopian civil code. This will enable me to analyze and establish whether the Ethiopian civil code qualifies as a code and complies with the continental European codification. In order to cover the core elements, I will briefly explore: (1) authority; (2) completeness, in the sense of an (a) exclusive, (b) gapless, and (c) comprehensive code; (3) system; (4) reform; (5) national legal unification; and (6) simplicity. Considering the subject from the standpoint of continental European codification, these aspects of codification should be viewed as put forwarded by Weiss; but I do not propose to consider the mass of stock arguments for or against codification in either sense. I shall confine myself to a few fundamental problems. To be concrete rather than abstract, I propose to keep in mind the Ethiopian civil code as the one shedding most light on the

problems. In furtherance to establishing my hypothesis, I will use relevant laws as a case study in support of my hypothesis. Accordingly, this research will be a critical analysis, as accurate as possible, of all the factors which contributes for failure of Ethiopian civil code to comply with the core features of continental Europe. By doing so, the paper serves two purposes: It helps us to understand whether the Ethiopian civil code complies with the main core features of continental European codification, and the lessons such an analysis might teach us are indispensable for codification and might bring us closer to understanding of the status of our civil code. This paper is divided into eight chapters according to Weiss core features together with introduction and conclusion chapters. In each chapter, the paper reviews the Weiss core features of codification followed by a critical analysis of Ethiopian civil code.

## CHAPTER TWO – AUTHORITY

Authority is one of the elements of continental European codification that Weiss has identified. Basically, this element reflects that codification must be enacted by a legislator competent to make law and hence, the exercise of legislative authority defines codification as a modern codification.<sup>21</sup> With respect to the authoritative element, Weiss has explained that the history of codification is the history of legislation and codification reflects the *evolution* (emphasis added) from custom to the collection of preexisting law to legislation as positive law. Thus, codification itself became the source of law. In the history of continental European codification, this core feature appeared as a transition from old to new perception through evolution by the thesis of historical school taken over by the sociological school of law.<sup>22</sup> According to Weiss,

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<sup>21</sup> Weiss (n 12) 456.

<sup>22</sup> Rene David, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' (1963) 37 TUL L REV 187.

Codification does not derive its authority only from cases, scholarly discussions or reference to other sources of law.<sup>23</sup>

A closer look at the history of Ethiopian civil code with this core feature reveals the following two factors. First, the nature of Ethiopian civil code is more revolutionary than evolutionary; and second, there is a question of the exercise of legislative authority over the civil code.

With regard to the first nature, Ethiopia has chosen to have a civil code in the absence of previous monuments.<sup>24</sup> Prior to the introduction of the civil code, there existed neither a collection of jurisprudence nor a doctrinal work on the civil law; neither were there any laws except some very fragmentary dispositions contained in a law on loan, a law on nationality and an ordinance on prescription.<sup>25</sup> However, Ethiopia has had a functioning system with indigenous customary laws from different ethnic groups<sup>26</sup> and some legislation, primarily in the public sphere, in the form of statutes and decrees from the imperial government.<sup>27</sup> For centuries, Ethiopia was ruled by an amorphous combination of customary laws. Religious laws like 'Fetha Nagast' (Law of the Kings) were also applied under the monarchical administration in limited areas of the country.<sup>28</sup> Ethiopia, during the codification process, wanted to change and replace these scattered customary and religious rules to a comprehensive code and wishes the code to be a program envisaging a total transformation of the society.<sup>29</sup> This ambition was similar to the core features of codification that had happened elsewhere in Europe which evolved from custom

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<sup>23</sup> Weiss (n 12) 456.

<sup>24</sup> David (n 22).

<sup>25</sup> *ibid.*

<sup>26</sup> Norman J. Singer, 'The Ethiopian Civil Code and the Recognition of Customary Law' (1971-1972) 9 *Hous L Rev* 460.

<sup>27</sup> Yohannes Gebremedhin, *The Challenge of Society in Transition: Legal development in Eritrea* (The Red Sea Press, Inc, 2004) 65.

<sup>28</sup> G. Krzeczunowicz, 'The Present Role of Equity in Ethiopian Civil Law' (1969) 13 *Journal of African Law* 145

<sup>29</sup> John H. Beckstrom, 'Transplantation of Legal Systems: An early Report on the Reception of Western Laws in Ethiopia' (1973) 21 *AJCL* 557.

to the collection of preexisting laws to legislation as positive law. Nevertheless, the transformation of the society in Ethiopia was created by importing the best out of the external systems of law and practices that appeared to have worked in European societies.<sup>30</sup> Such laws were, however, supposed to be adapted in line with the Ethiopian traditions and culture.<sup>31</sup> Emperor Haileselassie I directed the codification commission and the foreign drafters to incorporate customary laws and traditional legal institutions of the country. Most importantly, the Emperor asked the reflection and combination of customary rules into the civil code and in such way that they would fit to the existing and the future needs of the country.<sup>32</sup> However, the draftspersons mostly were guided by the keen desire of modernization and largely disregarded and failed to give adequate place to customary laws and institutions. In connection to this, Ofosu-Amaah has provided the following:

Although the point of adaptation was stressed and the importance of infusing Ethiopian traditions and culture into the laws was an objective, it was clear that those who were responsible for the new codes were guided by the keen desire of modernization rather than by attempts to infuse traditional practices and values.<sup>33</sup>

Despite the emperor's guidelines and some effort to include customary laws in the civil code and despite the protest against the neglected of much developed centuries-old legal tradition,<sup>34</sup> the civil code was officially promulgated without leaving adequate space for the widely-practiced

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<sup>30</sup> W. Paatii Ofosu-Amaah, *Reforming Business-Related Laws to Promote Private Sector Development: The World Bank Experience in Africa*, (Washington, D.C.: World Bank, 2000) 15-16.

<sup>31</sup> *ibid.*

<sup>32</sup> The key direction of the Emperor can be found at the preface of the Ethiopian civil code which reads: "*the genius of Ethiopian legal traditions and institutions as revealed by the ancient and venerable Fetha Nagast, natural justice and the needs and customs of the people must be incorporated; that law must be clear and intelligible to each and every citizen of our empire; the laws must form a consistent and unfired whole; must be that which keep pace with the changing circumstances of this world of today.*"

<sup>33</sup> Ofosu-Amaah (n 30).

<sup>34</sup> Assafa Endeshaw, 'Legal Research and Development in the Ethiopian Context' in Siegbert Uhlig (ed), *Proceedings of the XV<sup>th</sup> International Conference of Ethiopian Studies* (Hamburg, 2003).

customary mode of dispute settlement.<sup>35</sup> It repealed not only customary rules that were inconsistent with the provision of the code but also all customary rules concerning matters provided for in the code.<sup>36</sup> Nor did the code allow some grace period until the code could be disseminated – both physically and in content – but rather its immediate enforcement was declared.<sup>37</sup> Thus, the effort resulted in repealing written and customary laws in Ethiopia and ended up with the importation of a foreign code. This has brought interference with the operation of customary and religious rules and brought a complete disruption of the institutions most closely valued by members of traditional society.<sup>38</sup> Hence, Ethiopia decided to bring about change in its legal system through a revolutionary way rather than an evolutionary one. In this case, the Ethiopian civil code is *revolutionary* than *evolutionary*. What is striking is that even if the code eliminates customary laws, the application of customary rules has continued to the present time. Furthermore, as shall be argued in chapter three, the 1995 Ethiopian constitution formally recognizes the jurisdiction of religious and regional customary courts which inevitably raises the vital question of the status of pre-code customary laws.

Second and following from the above, a general observation can be made on the exercise of legislative authority over the civil code. The Ethiopian civil code was promulgated on May 5, 1960 by the parliament. Here, we can conclude that the civil code was enacted by the competent legislator, i.e. the parliament and had its legislative authority as Weiss has identified. Nevertheless, when the civil code is analyzed through its fifty-two years life span, there is an apparent question over the exercise of legislative authority and the validity of the code under the current federal system of government. Here, as identified in the introductory section, the analysis

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<sup>35</sup> T.W. Bennett and T. Vermeulen, 'Codification of Customary Law' (1980) 24 Journal of African Law 206, 208.

<sup>36</sup> Article 3347 (1) of the 1960 Ethiopian Civil Code.

<sup>37</sup> The preamble of the 1960 Ethiopian Civil Code.

<sup>38</sup> Singer, 'The Ethiopian Civil Code and the Recognition of Customary Law' (n 26).

is made irrespective of time consideration as the civil code is still in force and applicable in the country. Therefore, it is legitimate to make an analysis over the civil code with the core features of codification irrespective of time.

Despite change in political and legal arrangement, the Ethiopian civil code more or less survived all political upheavals. Thus, a general remark on the constitutional development of Ethiopia will let us understand the current status of the civil code. Since the promulgation of the Ethiopian civil code, Ethiopia has adopted different constitutions within the last five decades. The regime of Emperor Haile Sellasie was characterized by its two imperial constitutions: the 1931 and 1955 constitutions. These constitutions were the basis for the enactment of the civil code and they are based on the principle of political and legal centralization and the legend of the Solomonic Dynasty and religious legitimacy. After fourteen years of power since the enactment of the civil code, the regime of Emperor Haile Sellasie came to an end with the coming to power of the Derg military regime. The 1987 Derg constitution, even if it did not alter the ideals of political and legal centralization, came up with a fundamentally different ideology and declared the country to a socialist state. The ideological basis of this constitution was the construction of an egalitarian society.<sup>39</sup> All existing imperial laws including the civil code, orders, and regulations were declared to continue to have effect unless they are contradictory with the Derg constitution.<sup>40</sup> Because the Derg regime did not alter the ideology of political and legal centralization, the civil code more or less continued to be a source of civil regulation. The transitional charter which crumbled the Derg regime and which was the basis for the current constitution was introduced during (1991 to 1994). To this end, the 1995 constitution has come up with a complete

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<sup>39</sup> Heinrich Scholler, *Ethiopian Constitutional and Legal Development: Essays on Ethiopian Constitutional Development* (Vol. I) (2005) at 70-77.

<sup>40</sup> Article 10 of Proclamation No. 1/1974.

divergence from previous regimes by establishing federalism as a political structure.<sup>41</sup> With a complete departure from the ideology of political and legal centralization of the Imperial and Derg constitutions, the 1995 constitution formally introduces a political and legal decentralization. By establishing a federal form of government, the constitution offered for plural law-making institutions and hence, legislation that affects a citizen can have either the federal or the state legislature's source. Like the Derg regime, all prior laws – both from the imperial and Derg regimes – were declared to have a continual effect unless they are inconsistent with the provisions of the constitution.<sup>42</sup> With this declaration, the civil code maintained its life to the present time. This time, however, the extension of the application of the civil code is not as easy as the Derg regime and there is a vital question over the exercise of 'legislative authority' and the application of the civil code in state jurisdictions.

Who has the power to legislate the civil code? Or who is the competent legislature regarding civil laws? Is the provision giving the civil code a continuous effect valid within the state jurisdictions? In principle, civil law is a matter reserved for the state legislature by virtue of article 52 of the constitution. However, as a matter of exception the federal government may enact civil laws when the House of Federation<sup>43</sup> declares that it is necessary to enact such laws to establish and sustain one economic community.<sup>44</sup> Because the House of Federation is composed of representatives elected by the state councils, the power to decide which civil laws should have a national application is entrusted to it. Thus, civil laws that will have a national application can only be enacted if the House of Federation decides and directs the House of Peoples

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<sup>41</sup> Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Netherlands, Wolf Legal Publishers, 2005/06) at 34-39.

<sup>42</sup> Article 5 of Proclamation No. 2/1995.

<sup>43</sup> The House of Federation is the upper house of the parliament composed of different representatives from different ethnic groups and has the power to interpret the constitution.

<sup>44</sup> Article 55 (6) of the 1995 constitution.



Representatives to enact the same. This shows two things: first there will be no single national civil code unless the House of Federation consent for the purpose of establishing one economic community and second, each state has an exclusive right to determine and enact civil laws within its jurisdiction. In other words, the competent legislature to enact civil laws is the state's legislature. Therefore, the parliament's declaration of the continuation of the application of the civil code as long as it is consistent with the constitution is valid only to the extent that the federal jurisdiction is concerned. This is because the House of Federation does not give its opinion on the application of the civil code in the whole country. Furthermore, apart from repealing and changing certain sections of the civil code, none of the states has declared the status of the civil code in their respective jurisdiction. For example, provisions of family law from the civil code (Articles from 198 to 338 and 550 to 828) were repealed and replaced with new family codes by some states<sup>45</sup> and by the federal government independently and with their respective working languages. The rest of the states either apply the provisions of the civil code or opt for the state customary or religious rules. As a result, the exercise of legislative authority over the civil code is constitutionally questionable and its applicability from state to state is different.

### **CHAPTER THREE – COMPLETENESS**

A historical and comparative study of continental European codification reveals that codification aims at being complete. Although 'completeness' has several implications in different literatures, Weiss has identified three sub-elements of completeness in the sense of an (a) exclusive, gapless and comprehensive as the second core feature of continental European codification. In this

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<sup>45</sup> The states of Amhara, Oromia and Tigray have their own family code with their respective state language.

chapter each of these elements will be briefly discussed followed by the analysis of the Ethiopian civil code.

### 3.1 EXCLUSIVENESS

Weiss has identified ‘exclusiveness’ as a sub-element of completeness in the sense that codification should completely regulate one area of law and exclude other sources of law.<sup>46</sup> The idea and goal behind a modern codification is that the code should answer all legal questions and that it would not be necessary to rely on multiple legal sources. It would also not be necessary to fall back on the judges’ opinions, customs or scholarly wisdom. Thus, reducing and excluding a number of legal sources was the goal of most historical codes.<sup>47</sup> The main representatives of European codification movement demonstrate the element of exclusion of other sources, but not in a radical and absolute form.<sup>48</sup> Weiss argued that even if ‘exclusiveness’ was not absolutely peculiar to all codifications and the degree of exclusivity varies, the codes are formally exclusive in the sense that although other sources of law may exist, the code itself must refer to them.<sup>49</sup>

So far as the Ethiopian civil code is concerned with the element of exclusivity, the following analysis can be made. As noted in chapter two, the introduction of the Ethiopian civil code which aimed at providing a comprehensive body of law in civil matters lead Ethiopia to abolish customary rules. Furthermore, the civil code excludes the application of any other sources of law and declared the primacy of the code within the legal system. Article 3347 was one of the main provisions that confer the civil code a primacy status within the legal system. Article 3347(1) of

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<sup>46</sup> Weiss (n 12) 456.

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid* 458.

<sup>49</sup> *ibid* 457.

the civil code unequivocally repealed all prior law that was not so enacted or preserved by the legislator. The article entitled 'Repeals' states: 'Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by the Code and are hereby repealed'.<sup>50</sup> On its face, it is clear that the provision excludes any other source and makes the civil code the only law in force. The article, first, repealed not only customary rules that were inconsistent with the provisions of the code but also all customary rules concerning matters provided for in the code. Second, the article states that any rules previously in force, no matter by whom they were enforced, are repealed unless one can find specific references for their retention. This shows that there are certain customary practices that are incorporated in the code and reference to the customary practice is possible only to the extent the code's reference. This is because there are some preserved customary rules within the code, for example, 'elders' as a decision makers in family matters, fixing the amount of fair compensation in tort and in some other provisions.<sup>51</sup> In doing so, the legislator abolished multiple legal sources and wanted the civil code to be a major source of law in civil matters. As a result, it is possible to conclude that the element of exclusivity was there in the Ethiopian civil code. However, while article 3347 of the Ethiopian Civil Code purports to eliminate customary laws and exclude the application of any other sources, the article was impliedly repealed by the provisions of the 1995 constitution. As discussed earlier, the Ethiopian civil code was introduced based on political and legal centralization trying to treat heterogeneous citizens with uniform legal rights and obligations. It was clear that article 3347 of the civil code was the result of this ideology which excludes and abolished legal pluralism. Legal pluralism refers to the recognition of customary norms or institutions within state law or to the independent co-existence of

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<sup>50</sup> Article 3347 (1) of the 1960 Ethiopian Civil Code

<sup>51</sup> See Articles 507, 573, 577, 580, 606, and 624 of the 1960 Ethiopian Civil Code.

indigenous norms and institutions together with state law.<sup>52</sup> Nevertheless, the 1995 constitution by giving recognition to the adjudication of disputes through religious and customary laws, it impliedly repealed article 3347 of the civil code and allowed multiple sources of law in the country. Article 34(5) of the 1995 constitution provides: 'This constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute'. The constitution further acknowledges both the federal government and states can establish or give official recognition to religious and customary courts.<sup>53</sup> This seems to have been made mainly in favor of legal pluralism which a number of codifications aimed at reducing. This raises a fundamental question here: the status of pre-code customary laws. The answer seems very obvious. As far as the provision of article 3347 is repealed and as far as the settlement of disputes by customary laws are constitutionally recognized all customary rules whether they are in conflict with the provisions of the civil code or not, whether the civil code failed to incorporate and make reference to the application of a custom, it does not matter. They become a source of regulation. As a result, the civil code provision that excludes the application of other multiple sources was repealed and hence, the element of exclusivity of completeness was also abolished. Needless to say, the civil code is no longer a primary source in the Ethiopian legal system and has lost its exclusive feature.

### **3.2 ABSENCE OF GAPS**

Absence of gaps is the second sub-element of completeness that Weiss has identified. This sub-element is concerned with the problems of gaps (lacune) in the code and the role of judges when

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<sup>52</sup> Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney L Rev 375, 390-391

<sup>53</sup> Article 78 (5) of the 1995 constitution

a code fails to provide a rule to solve a case.<sup>54</sup> Historically, it was often claimed that codes have no gaps and the role of judges are limited only to the extent of mechanical application of the code. In France and Germany, for instance, it is generally believed that codes are systematic and scientific and a systematic and scientific code did not contain gaps.<sup>55</sup> Judges are considered as mere executors of codes and if a case could not be solved with the help of the code, they are allowed to look at materials behind codification to ascertain legislators' intention. It is based on the idea of strict statutory positivism and of binding judges rigidly. This is because codes were regarded as complete and systematized in immutable and absolute principles. However, in reality as it is difficult to foresee all future cases and provide concrete rules, even the best codes have gaps and the existence of gaps in codes were accepted and recognized.<sup>56</sup> Switzerland, for example, established the primacy of the civil code and expressly recognized and codified allowing judges to decide according to existing customary law, in default thereof, according to the rules that Judges would lay down if they had to act as a legislator.<sup>57</sup> In both scenarios – looking at materials of codification and code procedures to follow if no provision of the code is applicable – shows that gapless code and cases of doubt were foreseen and hence, a gapless code is a feature to most codifications. By looking at the history of codification, Weiss has indicated that gaps in the code are inevitable and gaps in codes are usually solved by judges either by looking at the material behind codification or by a code provision to be followed when a gap is encountered.<sup>58</sup>

When analyzed from the perspective of a gapless code, the Ethiopian civil code depicts the following two major points.

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<sup>54</sup> Weiss (n 12) 461.

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

Firstly, apart from numerous articles suggesting courts on how to interpret specific cases, the civil code does not indicate the role of the judges in dealing with situations where there appears to be a gap in the code. For instance, the civil code provides rules of interpretation of contracts (Articles 1732 to 1739 and 3211), interpretation of wills (Article 910) in cases where contracts and wills are unclear, ambiguous, or fail to give the common intention of parties or testators. This, however, does not show the general direction of the civil code with the problems of gaps in the code and the role of judges when the code is unable to regulate a given case. Courts sometimes claim that the civil code has acknowledged gaps in the code.<sup>59</sup> It was claimed that the provision which states ‘...all rules whether written or customary *previously in force* (emphasis added) concerning matters provided for in this Code shall be replaced by the Code and are hereby repealed’ as having a gap filling role. As noted above, the function of article 3347 is to repeal all customary laws. Nevertheless, by giving attention to the word *previously in force*, it was asserted that the civil code repealed all customary rules that existed *before the coming into force* of the civil code and those customary practices that would come into operation *after the coming into force* of the civil code were not repealed and will have a gap filling role. This is, however, a stretched argument based on extended interpretation of the provision. It is true that the provision of article 3347 does not show the status of post-code customary practice. But at the same time, the provision does not clearly stipulate whether judges should take customary rules into consideration as a gap filling source or not. Furthermore, the article is entitled ‘repeal’ and it does not suggest anything about gaps in the code. Even if it does, the article was articulated vaguely and ambiguously. In practice, however, although there are no common directions and usage, different techniques of statutory interpretation are used to fill the gaps of the civil code.

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<sup>59</sup> Mulugeta M. Ayalew, *Ethiopia*, (Kluwer Law International, the Netherlands, 2010) 12-13.

Today, changes in the code are accepted as a normal development. This is because, as discussed earlier, the civil code is subjected to the provisions of the 1995 constitution.

Secondly, as the Ethiopian civil code was highly influenced by the French civil code, one could argue that the civil code was inclined with the ideas of a gapless code and of binding judges strictly. Therefore, judges are considered as mere executors of the code and they are allowed only to consult materials of codification where there exist gaps in the code. Even in this case, it is difficult for the Ethiopian judge to ascertain the intention of the legislator by looking at the materials of codification. This is because of the lack of materials of codification in the working languages of Ethiopia. The Ethiopian civil code was first drafted in the French language and translated to English and then to Amharic language.<sup>60</sup> Many concepts, traditions and meanings in the civil code have their root in French language. In order to understand the full meaning of the concepts of the civil code, one should consult codification materials, precedents and commentary works. For two reasons, judges are unable to consult background materials of codification in Ethiopia. First, there are very few background materials of the civil code, usually written in French and English languages and second, the existing materials are superficial, obsolete and can be rarely found.<sup>61</sup> There are no sufficient Amharic materials of codification in which judges can rely on and as a result, gaps in the code cannot be ascertained by looking to the materials of codification. Furthermore, the provision found under article 4 of the French Code which obliges judges not to refuse to give judgment on the pretext of a code being silent, obscure or insufficient cannot be found in Ethiopian civil code. Even if the French civil code is based on the idea of a gapless code, it impliedly acknowledged the occurrence of gaps in the code. It obliged judges to

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<sup>60</sup> When the Ethiopian civil code was introduced, Amharic language was the official language of Ethiopia. Currently, Amharic language is the working language of the federal government.

<sup>61</sup> Roger Briottet, 'French, English, Amharic: The Law in Ethiopia' (2009) 3 *Mizan L Rev* 331.

give judgment and in case of failure judges are prosecuted for being guilty of a denial of justice. However, there is no such obligation under the Ethiopian civil code and the argument that the Ethiopian civil code was inclined with the ideas of a gapless code and of binding judges strictly does not hold water.

### **3.3 COMPREHENSIVENESS**

Comprehensiveness is the third sub-element that Weiss has identified. Weiss argued that although codifications generally cover a broad field of the law, it cannot cover everything and it does not have to be fully comprehensive. Historically, codifications did not aim at encompassing the whole law in one all-comprehensive code. However, according to Weiss codification does not merely provide regulation for specific issues. The French style of having five codes civil code, penal code, commercial code, civil procedure, and criminal procedure code became generally accepted. Codification therefore seems to cover a field of law in its entirety. This element is more concerned with codifications as a whole within legal system. The element of comprehensiveness was there in Ethiopia as Ethiopia introduced the French style of five different codes together: a Penal Code was enacted in 1957, Civil, Commercial and Maritime Codes in 1960, a Criminal Procedure Code in 1961 and a Civil Procedure Code in 1965.

## **CHAPTER FOUR – SYSTEM**

System is commonly regarded as the main characteristics of modern codification and Weiss has identified ‘system’ as a third core feature of continental European codification. The goal of capturing the substance of the law in the form of a comprehensive and *systematic* code is one



actively pursued in different countries.<sup>62</sup> A code collects and regulates different fields of law into one organized system. Codification is not meant to be a compilation of texts where many different sources of law were intermingled. Rather, it is a '*systematic*' presentation, synthetically and methodically organizing a body of general and permanent rules governing one or several specific fields of law in a given country'.<sup>63</sup> The whole idea of a 'system' lies in the 'overall structure' of the code that corresponds to substantive law, the coherence, unity and interdependence of its dispositions, and exhibits the harmony of its component parts.<sup>64</sup> It reflects to an organized whole made of diverse elements, instruments, rules and institutions bound together by relations of logical solidarity.<sup>65</sup> Weiss has explained that though having a systematic character seems to be a crucial element of codification, the degree of systematization that codification requires shows a fundamental difference in different countries. He clearly emphasizes on two points of fundamental difference: *the degree of technicality* and the *object of systematization*.<sup>66</sup> The degree of technicality ranges from a mere alphabetical or numerical order to various rules under a dogmatic subject title. The object of systematization which is further distinguished as 'inner' and 'outer' system refers to legal concepts, concrete rules, or principles of law. According to Weiss, the way in which the code tries to structure and order its subject matter represents the "outer" system.<sup>67</sup> A code may distinguish, for example, the law of property, the law of succession, and the law of contract. It may further subdivide into subparts consisting more or less abstract legal concepts such as 'Agency' or 'Sales'. The 'inner' system, on the other hand, represents principles within the code which are crucial for the process of adjudication and

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<sup>62</sup> William B. Fisch, 'Civil Code: Notes for an uncelebrated Centennial' (1966-1967) 43 NDL REV 485.

<sup>63</sup> Jean Louis Bergel, 'Principal Features and Methods of Codification' (1987-1988) 48 La L Rev 1073.

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*

<sup>66</sup> Weiss (n 12) 464.

<sup>67</sup> *ibid.*

for doctrinal, judicial, and legislative development of the law.<sup>68</sup> Thus, legal scholars can easily understand the classification and principles of the code. Given the modern examples of continental codes, codification is surely meant to be more than a mere index, an alphabetical or loosely subject-related order. It aims, at least, to present a clearly structured and a consistent whole of legal rules and principles, promoting the internal coherence of the law, and providing a conceptual framework for further doctrinal, judicial, or legislative development.<sup>69</sup>

Depending on the above brief description, a general analysis can be made about the system of Ethiopian civil code. The system of the Ethiopian civil code was greatly affected by the work of codification commission and a short description on the work of the commission will guide us to construe whether the Ethiopian civil code has a systematic code feature or not.

Rene David, professor of comparative law at the University of Paris, was asked to prepare the work of the commission charged with drafting a new civil code.<sup>70</sup> The civil code was first established by a preparatory plan drawn up by the French expert with a French language which was later on translated to English and presented to the Ministry of Justice. The preparatory plan was then submitted to the codification commission which was composed of judges mainly from Ethiopia for further examination and critical study. Certain foreign experts residing in Ethiopia were also participated in limited sessions of the commission principally to hear objections made to certain texts of the preparatory plan and discuss possible problems arising with the commission.<sup>71</sup> The reason for limited participation of foreign experts was because of the

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<sup>68</sup> *ibid.*

<sup>69</sup> *ibid* 466.

<sup>70</sup> David (n 22) 192.

<sup>71</sup> *ibid.*

Amharic language. The commission had to formulate in Amharic language the definitions from French to the exclusion, whenever possible, of foreign words or phrases. It had to discuss problems of Amharic terminology and the foreigners were not able in all hypotheses to fulfill in a satisfactory manner the role of the commission.<sup>72</sup> The Amharic language does not very often have words capable of giving an exact idea of the institutions that one wished to regulate, and it was necessary for the commission in many instances to coin new expressions.<sup>73</sup> When a French word used by the expert in his draft text had no equivalent in Amharic, or when its equivalent might have led to a misunderstanding, the commission endeavored to find a *Geez*<sup>74</sup> word which could translate it. The commission studied and examined each word in the preparatory plan with great attention by questioning the soundness of the proposed dispositions and by asking for explanations from the expert in case of uncertainty. By referring to various sources including the common law digest, international instrument, judicial precedent and learned studies, the commission decided on many hypotheses to modify the rule originally proposed. It was not within the expert (Rene David) to ascertain to what extent the French text has been faithfully rendered in the Amharic text of the code.<sup>75</sup> The expert modified the preparatory plan to the extent only to the directions given by the commission and after a considerable work the codification commission finalized the civil code with both Amharic and English versions and submitted to Parliament. The civil code was finally promulgated having the Amharic language as the only authentic version which gives it the force of law and the English translation as being subsidiary.

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<sup>72</sup> David (n 22) 192.

<sup>73</sup> *ibid.*

<sup>74</sup> Geez is an ancient Ethiopian language that has no widespread usage today and remains only as the main language used in the liturgy of Ethiopian Orthodox Church.

<sup>75</sup> David (n 22) 199.

Having a brief description on how the Ethiopian civil code was drafted, analysis can be now made about the system of the Ethiopian civil code. With regard to the '*outer*' *system of the object of systematization*, the civil code, after a very brief preliminary title on the law in general, was promulgated containing five successive Books dealing respectively with Persons, Family and Successions, Goods and Possession, Obligations, and Special Contracts. The different Books of the codes are divided into Titles, which themselves include Chapters, divided in turn into several Sections, which contain several paragraphs and a number of Articles. The provisions are stated in Articles numbered and listed in a logical order. The basic structure of the code follows the civilian approach in its rigorous classification of material into categories of decreasing generality, constantly proceeding from the general to the specific. Indeed, the system of the Ethiopian civil code is thoroughly civilian in its approach and arrangement.

However, the formal presentation of the civil code shows a mere expression of its substantive coherence and the classification of subject matters. The divisions made under the civil code did not correspond to clear and authentic distinctions. Rene David pointed out that questions concerning what matters are appropriate for regulation in a civil code do not call for particular remarks on matters concerning Ethiopia.<sup>76</sup>

Firstly, the codification commission had no hesitation to include in the domain of the civil code certain matters which in other countries can be considered autonomous as they relate to other branches of law.<sup>77</sup> Provisions concerning Registration of Civil Status (Title I Chapter 3), Registers of Immovable Property (Title X), Collective Exploitation of Property (Title IX) and Administrative Contracts (Title XIX) are among the branches of law that were included in the

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<sup>76</sup> *ibid* 196.

<sup>77</sup> *ibid*.

civil code.<sup>78</sup> For example, these four branches of law are considered and regulated separately and they are not included in the French civil code. Moreover, Rene David did not include them in the first preparatory plan. Provisions of registration of civil status, for instance, were included in the civil code by the codification commission with further condition. Article 3361(1) of the civil code declares that the provisions regulating registration of civil status shall not come into force until notified by Order published in *Negarit Gazeta*. This has affected the logical coherence of the civil code. For one thing, it presupposes the enactment of further law outside the code which is unusual for codification and for another thing, it includes the subject matter under the law of persons which is unrelated. Furthermore, there was no separate Order published in *Negarit Gazeta* and the provisions were there for 52 years without regulating any activity. It was this year that the government enacted a new law concerning civil Registration and National ID separately by repealing provisions of civil status from Article 48 – 183 of the civil code. The new law is neither a notification as article 3361(1) of the civil code requires nor an addition/replacement of the provisions of the civil code. This is one indication that this subject matter should have not been included in the civil code in the first place. Moreover, recent social and economic progress at the national and global level led to the unavoidable consequence of enacting a large and growing number of specific pieces of legislation. The new legislative enactments derived from civil code subjects including: the Federal Family Code, the Warehouse Receipts system Proclamation, the Labour Proclamation, and the Condominium Proclamation were enacted and regulated separately by repealing the provisions of the civil code. Unlike continental European countries which expand, add, substitute new provisions without shattering the code's general principle, these laws in Ethiopia are enacted and regulated separately and they are not intact with the principles of the civil code. The French civil code, for example, has been

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<sup>78</sup> Singer, 'Modernization of law in Ethiopia: A study in process and personal values' (n 16) 87.

completely reformed by the substitution of new articles for old ones. The old articles on corporations (articles 1832-1873) were replaced and multiplied by adding indices to the numbers (articles 1843, **1843-1**, **1843-2**). In instances where the repeal of certain texts created available space; certain titles, chapters or sections were thoroughly reorganized on the occasion of the reforms (Act of July 11, 1975 on divorce and articles 229-310 of the civil code for example: Title 6 of Book I). The use of such methods shows that the updating and adaptation of the civil code, even by way of great scale reforms, is quite possible without disrupting the code's principle. However, the Ethiopian civil code was seriously affected by separate new legislation which have no longer intact with the principles of the code. Provisions of the civil code including Public Finance, Business Registration, Land Lease and Intellectual property are among the civil code subject areas that are repealed and replaced by separate new legislation which obviously affects the unity and coherence of the code. Evidently, this process affects and disrupts the code's harmony, coherence and fundamental logic.

Secondly, there was no concern to exclude certain matters from the civil code; provisions relating to nationality and conflict of laws were entirely left out from the civil code for unknown reasons.<sup>79</sup> Numerous and important transitory provisions which leads the experts to regret were also excluded from the civil code.<sup>80</sup> These provisions were included in the preparatory plan of the civil code and there is no logical explanation why these provisions were left out by the codification commission.

One can imagine easily how the structure and logical coherence of the civil code may be affected when the codification commission adds different subject matters and excludes certain important

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<sup>79</sup>David (n 22) 199.

<sup>80</sup> Singer, 'Modernization of law in Ethiopia: A study in process and personal values' (n 16) 86.

matters from the civil code. The Ethiopian civil code is one of the longest contemporary civil codes with 3367 articles. This is because apart from the reasons explained above, the codification commission wanted the civil code to be a complete legal source as much as possible. When Rene David explained the reason as to why the Ethiopian civil code has become the longest civil code he stated: the codification commission was preoccupied with being as complete as possible in a country where there exists outside the code no inherent doctrinal or jurisprudential monument to guide the jurists in the interpretation of the code.<sup>81</sup> However, the conception of the codification commission by itself was contradictory with continental European codification conception where it is believed that a code should not attempt to provide rules that are immediately applicable to every conceivable concrete case.<sup>82</sup> Thus, certain subjects such as Bodies Corporate and Property with a Specific Destination (Title III), Literary and Artistic Ownership (Title XI), Medical or Hospital Contracts, Contracts of Innkeepers, and Publishing contracts (Title XVI, Chapter 5, 6 and 7), which in other countries are often regulated by their own 'general principles' have given way to special regulation.<sup>83</sup> The matter of extra-contractual responsibility has given way to much more detailed regulation and considerably more extensive than those of other civil codes.<sup>84</sup> There are 151 articles (as opposed to five in the French Civil Code and seventeen in the Italian).<sup>85</sup> As a result, when the structure and division of the civil code is considered in comparison with the others, one might observe that the division was certainly not the best that one could find.

With regard to the 'inner system' of the object of systematization that Weiss has identified, the Ethiopian civil code does not seem to have given enough consideration to the inner system of the object of systematization as well. The reason for such failure is connected with the language in

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<sup>81</sup> *ibid.*

<sup>82</sup> Bergel (n 61) 1081.

<sup>83</sup> Singer, 'Modernization of law in Ethiopia: A study in process and personal values' (n 16) 87.

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

which the civil code is written. As noted above, the inner system of a code represents how a code provides a conceptual framework for further doctrinal, judicial, and legislative development of the law. Amharic language, however, became a barrier for the inner system of the Ethiopian civil code and for legal scholars. Even if the commission was aware of the importance of language and expressed the law in a clear and concise Amharic, the commission did not seem to have been aware of the major problems facing the inner system of the civil code. The civil code is full of concepts, meanings and institutions which have their root source in French tradition. A fuller understanding of a substantial portion of the law requires going back to the primary source and without these sources the civil code may not be fully understood. However, legal scholars in Ethiopia can no longer access these sources of law since they neither spoke nor understood French. Moreover, those who can read French find very few legal French books in the university, and commentaries in Amharic or in English dealing with French law are rare. The availability of internet, which could direct to some French sources, is very limited to legal scholars. As noted above, the Ethiopian civil code was promulgated giving the Amharic language a force of law and the English translation as being subsidiary. Although the work of the civil code was mainly inspired by the French legal principles and judicial practices and the work of the codification commission is based on the French preparatory plan, there was no room left for the original French text. Rene David was aware of the language difficulties and proposed the inclusion of a concordance of articles containing references to the foreign laws that had inspired the different parts of the code.<sup>86</sup> He particularly wanted the inclusion of a concordance of articles to be placed at the end of the code with the intention of helping legal scholars in the interpretation of the code. His idea, however, was considered and dropped believing references to foreign laws might

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<sup>86</sup> *ibid* 91.



cause only confusion in interpreting the code.<sup>87</sup> As a result, the law was cut off from its roots and the civil code became like a fish out of water. Codification was the fulfillment of a development in continental Europe that had stretched over many previous centuries. But with respect to this evolution the civil code of Ethiopia was an orphan –it was an off-shoot of the same general tradition and yet cut off from it, both in time and in space. Law students used to take a compulsory legal French course at Addis Ababa University in the early ages of the civil code. This is because the French language was considered as a useful tool to enhance and develop the Ethiopian legal system. However, through time French language disappeared from the law schools and legal system of Ethiopia. Currently, the only foreign language that legal scholars can understand is English and the medium of communication in law schools is conducted through English. Unlike African countries, which tie their legal system to wide linguistics group like French and English and can easily refer to that system in a language they understand and practice, the civil code is not affiliated with any other legal ‘family’ and is juridically ‘orphaned’ as it were.<sup>88</sup> Thus, the Ethiopian civil code was denied any continuing nourishment. As a result, the development of doctrinal, judicial and legislative framework has been severely undermined and hence, the inner system of the civil code ceases to be fully intelligible. This hinders the evolution of the law, causing its stagnation, and constituting an obstacle to its progress.

Finally, in terms of *the degree of technicality*, the Ethiopian civil code along with other major codes is the only code with a table of contents. Table of contents does not form part of the Ethiopian drafting style except for headings given in the course of the text of the Act. The table

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<sup>87</sup> *ibid.*

<sup>88</sup> Luzius Mader, ‘Evaluating the Effects: A Contribution to the Quality of Legislation’ (2001) 22 Statute Law Review 119-131.

of contents uniquely provides a list of contents and outlines the substantive coherence of the civil code.

## CHAPTER FIVE – REFORM

Codification was predominantly regarded as a radical reform in form and substance<sup>89</sup> and ‘reform’ is the fourth core feature of continental European codification that Weiss has identified. The element of ‘reform’ is concerned whether or not codification changes the form and substance of existing laws. By examining the five historical codifications, Weiss demonstrates that codification is always a combination of change in form and change in substance.<sup>90</sup> While some authors consider reform in substance as a decisive element of codification and others regard codification as a reform in form, Weiss indicated that codification is always both innovation in form and innovation in substance.<sup>91</sup> Change in form results when a code establish itself as a primary sources of statutory law and reduce multiple legal sources. Change in substance, on the other hand, is caused by the legislator’s decision of having one best legislative solution and restatement of the principles of existing law in a systematic way. From the subjective standpoint of the legislature, it may be possible to have only changes in form. From a practical point of view, this however is impossible. Even if the legislature merely tries to codify the existing law, it inevitably changes the law in substance. If, for example, the previous sources are contradictory regarding one legal problem, the legislature has to choose one source for the possible solutions. This is a change in the law, since the other previously authoritative or

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<sup>89</sup> R.C. VAN CAENEGEM, *An Historical Introduction to Private Law*, (D.E.L Johnston trans., Cambridge Univ. Press 1992) 13.

<sup>90</sup> Weiss (n 12) 466.

<sup>91</sup> *ibid.*

persuasive sources are eliminated.<sup>92</sup> Moreover, the mere fact that the law is reformulated and put in different words implies a change. Weiss concludes by stating that codification is, in practically all cases, a change in substance and in form.

Inferring from the historical upbringing of the Ethiopian civil code, it can be said that there was a change both in form and in substance and therefore, the Ethiopian civil code met the element of reform as Weiss identified.

With regard to change in form, as examined in detailed earlier, the Ethiopian civil code repealed all prior rules previously in force and declared its supremacy. Civil law provisions found under religious laws, different imperial legislation, customary and indigenous laws were all excluded from having application concerning matters provided in the civil code. The move from numerous written and unwritten sources of regulation to one comprehensive code shows that the introduction of the civil code in Ethiopia has brought a change in form. This has obviously resulted in change in form as Weiss identified. However, as examined in the exclusivity element of the civil code, the provisions of the 1995 constitution revives civil law provisions in different forms.

The introduction of the Ethiopian civil code has brought a change in substance as well. To consider and examine how the civil code affects the substance of prior existing written laws requires an extensive study. In this paper, however, I will only show certain examples on how the civil code changes at least the written laws. There are numerous recognized practices which were affected by the provisions of the civil code. Article 585 of the civil code, for example, declared that polygamy is not allowed in Ethiopia and favored the country to be monogamous.

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<sup>92</sup> *ibid* 467.

Before the promulgation of the civil code, however, polygamy marriage was not prohibited both in customary laws and Sharia law.<sup>93</sup> Furthermore, according to the civil code a man and a woman may not get married unless they attain the age of eighteen and fifteen respectively while the Fetha Nagast allowed the man to marry at the completion of the twentieth or the twenty-fifth year depending on the social status and the female upon completion, similarly, of the twelfth or fifteenth year.<sup>94</sup> All these provisions from Fetha Nagast including Family law, succession, donation, loan, pledge and administration, sale, partnership, lease and lesser were substantially altered by the civil code. Other parts of the code remain the original work of the expert (Rene David) with radical changes in substance for which the then-Ethiopian society was not ready. Such types of rules were either drawn independently to reflect Ethiopian values or were taken, where convenient, from some foreign law. For example, Rene David stated that the rules of contract are new to Ethiopian society. He stated that few rules concerning contracts that were found in Ethiopian law were imported or of recent fabrication, emanating from the legislature or from tribunals, without relation to true Ethiopian custom.<sup>95</sup> Moreover, article 2067 could be mentioned among the provisions included in civil code to harmonize the code with the Ethiopian sense of justice. This article provides that a person shall be held liable where by his act he inflicts bodily harm on another 'without fault'. Provisions regarding law of persons, public finance, extra contractual liability, guardianship, registers of civil status, registers of immovable property and unlawful enrichment were among the newly added subject matters which were not regulated in any of existing laws of Ethiopia. As explained by Weiss, the existence of a change in substance in the process of codification is inevitable and viewing the Ethiopian civil code in this regard would suffice to say that the criteria of substantive reform are met. As explained earlier in more

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<sup>93</sup> Singer, 'The Ethiopian Civil Code and the Recognition of Customary Law' (n 26) 107.

<sup>94</sup> *ibid* 104.

<sup>95</sup> David (n 22) 195.

detailed approach, the Ethiopian civil code has brought about a substantive reform revolutionary by replacing all existing laws.

## CHAPTER SIX – NATIONAL LEGAL UNIFICATION

Codification has often been the means of realizing unification within a particular country<sup>96</sup> and Weiss identified national legal unification as a core feature of continental European codification.<sup>97</sup> Codification often served to attain legal and political unity with previously heterogeneous legal sources.<sup>98</sup> This was particularly true in the nineteenth century, when codification became linked to the emergence of modern nation states. Weiss explained that the technical legal unification by means of codification often came hand in hand with political unification.<sup>99</sup> Nevertheless, codification was not limited only to one unique combination of political and social factor. According to Weiss codification flourished in different combination of political and social conditions including, the enlightened absolutism of the eighteenth century (Prussia), the nationalistic liberalism of the nineteenth century (Germany), and the socialist or democratic pluralist societies of the twentieth century (the Netherlands).<sup>100</sup> Although codification is not necessarily supportive of only one political idea and exclusively devoted to the idea of a nation state, codification often unifies different pre-existing laws and by so doing it may also promote political unity.

As far as the Ethiopian civil code is concerned, the primary and ultimate goal of the code was to bring a legal unification in Ethiopia and unlike other core features of codification the element of

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<sup>96</sup> Marc Ancel, 'From the Unification of Law to its Harmonization' (1976-77) 51 Tul L Rev 108, 109.

<sup>97</sup> Weiss (n 12) 467.

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid* 468.

national legal unification was unique to the code. During Emperor Haile Sellasie regime, the major source of rules governing social relations were found in customs and traditions of the various tribal, ethnic and religious groupings.<sup>101</sup> Historically, the diversity of national laws, like the diversity of local customs, within a single country is undesirable for reasons of soundness, general value and the supremacy of the law.<sup>102</sup> The same holds true for Ethiopia where the existence of different source of laws was seen as an obstacle to the development and national unity of the country. During Emperor Haile Sellasie, allowing various sources of customary and religious laws was regarded as undermining the nation-building effort. The Emperor had a strong ambition to bring these various sources of laws together and wishes the country to develop into a modern state.<sup>103</sup> The effort of modernizing the country and building a nation state was inspired earlier by a political factor. Emperor Haile Sellasie took a number of political initiatives which expressed his ambition to replace the traditional, decentralized governance structure with modern centralized state machinery.<sup>104</sup> One of the most important policy initiatives was the introduction of the country's first written constitution in 1931. This constitution was presumably the first step in the centralization process which was necessary for both national unity and modernization.<sup>105</sup> The aim of reducing the fragmentation of power and to centralize all powers with the emperor could already be inferred from article 1 of the constitution that stated: 'The territory of Ethiopia, in its entirety, is from one end to the other, subject to the Government of his Majesty the Emperor.'<sup>106</sup> Another constitutional provision that conferred ultimate power to the emperor could be inferred from article 6: 'In the Ethiopian Empire supreme power rests in the hands of the

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<sup>101</sup> Beckstrom (n 29) 559.

<sup>102</sup> Ancel (n 89).

<sup>103</sup> Robert Allen Sedler, 'The Development of Legal Systems: the Ethiopian Experience' (1967-1968) 53 *Lowa L Rev* 562.

<sup>104</sup> Christophe Van der Beken, 'Ethiopia: from a centralized monarchy to a federal republic' (2007) 20 *Africa Focus* 13, 22.

<sup>105</sup> Singer, 'The Ethiopian Civil Code and the Recognition of Customary Law' (n 26) 467.

<sup>106</sup> *ibid.*

emperor.<sup>107</sup> The emperor's policy of centralization was more accelerated with short duration (1936-1941) of Italian invasion and infringement of Ethiopian national sovereignty. The invasion of Italian troops and their defeat helped the Emperor to claim and argue the Ethiopian lost territories as a result of wars and migrations as a main tool to bring political centralization. To this end, the 1931 constitution of Ethiopia was amended by the 1955 constitution which strengthened the instrument of centralization and greater unification of Ethiopia's diverse people. Thus, the 1931 and 1955 constitutions were designed to implement the state policy of political centralization as well as legal unification. With these constitutions the power of the central government was fully consolidated and with such consolidation the need to govern citizens with uniform laws increased and at the same time, more and more activities were brought under the orbit of the written law.<sup>108</sup> This political factor played a great role in the inception of the idea of the codification of the laws of Ethiopia. In keeping with the general post-war attitude and as a part of the reform process, Ethiopia commissioned the preparation of a series of new codes. Major enactments between 1957 and 1965 including a group of highly complex codes – civil code, Civil Procedure code, Penal Code, Criminal Procedure Code, Commercial Code and Maritime Code – were introduced and considered essential in order to create the conditions necessary for the modernization of the society and develop modern economy.<sup>109</sup> Therefore, the centralization policy of Haile Sellassie was accompanied by attempts to develop a nation state in Ethiopia based on the European models of codification.<sup>110</sup> Various existing legal sources were, therefore, abandoned in favor of imported civil code, which provided a single legal system for

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<sup>107</sup> *ibid* 23.

<sup>108</sup> Sedler (n 96) 569.

<sup>109</sup> *ibid*.

<sup>110</sup> Van der Beken (n 97).

each and every person.<sup>111</sup> The basic policy stand of the Hailese regime was to bring about legal unification via a general codification of laws in line with the civil law tradition. Legal unification through western style codes was aimed at facilitating the intended political unification, assimilation and integration of the various groups in Ethiopia.<sup>112</sup> As examined in detail earlier, the introduction of the civil code threatened with either extinction or some degree of absorption of various sources of laws. Since then codification in Ethiopia has been viewed in such a light or has represented for some an instrument of legal nationalism. It is probable true to say that the codification of the civil law came to be looked upon, more in light of its political significance. However, as discussed earlier, this unique feature of the code has been disregarded especially with the introduction of federal form of government which allows multiple legal sources.

## CHAPTER SEVEN – SIMPLICITY

Simplicity is the last core feature of continental European codification that Weiss has identified. While the element of a gapless code was addressed to the judiciary, and the systematic element spoke to legal scholars, the element of simplicity is referred to the citizen.<sup>113</sup> Simplicity does not refer only to the technicality of drafting laws. It also raises an important political question – to whom is a codification addressed?<sup>114</sup> The idea of simplicity has always been a goal of good law and it can be found in most definitions of codification. Historically, the idea of ‘simple’ code was

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<sup>111</sup> Richard Frimpong Oppong, ‘Private International Law in Africa: The Past, Present, and Future’ (2007) 55 *The American Journal of Comparative Law* 677, 685

<sup>112</sup> Edmond J. Keller, ‘The Revolutionary Transformation of Ethiopian’s Twentieth-Century Bureaucratic Empire’ (1981) 19 *The Journal of Modern African Studies* 307, 325.

<sup>113</sup> Weiss (n 12) 468.

<sup>114</sup> *ibid.*



exercised intensively through legislation having two purposes: establishing a rule of law and providing citizens with simple and comprehensive law.<sup>115</sup> Weiss has discussed the arguments of some scholars emphasizing on the conflicting goals of addressing the code to the judiciary and legal scholars, and at the same time, to every citizen.<sup>116</sup> He also explained instances where scholars even considered drafting two versions of a code to each addressee. However, this type of twin code was never enacted. Historically, Weiss has noted the Prussian civil code as the only code enacted by taking into account both legal scholars and citizens. The Prussian civil code was drafted containing abstract rules with many definitions and numerous examples with the goal of teaching the law to citizens without the help of legal professionals.<sup>117</sup> He also cited the German civil code showing how the code was drawn by high technical language and addressed primarily to legal professionals and was not meant to be a first law reader for ordinary citizens.<sup>118</sup> Weiss concluded that although it is not necessarily a defining element of codification, simplicity in the sense of a simple law that can be understood by everybody is a desirable feature of codification. Indeed, one of the supposed advantages of codification includes certainty, simplicity and accessibility to the layman.<sup>119</sup>

With regard to the element of simplicity the following analysis can be made on the Ethiopian civil code. More or less, although the wording of the code was preferred to be somewhat more prolix, the Ethiopian civil code is situated within the same tradition of French legislative expression. The French civil code is inclined more to the idea of complete than simple code and expresses the law by taking into account legal scholars and the French way of life.<sup>120</sup> Thus, the

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<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid* 469.

<sup>118</sup> *ibid.*

<sup>119</sup> H. R. Hahlo, 'Codifying the Common Law: Protracted Gestation' (1975) 38 *The Mod L Rev* 23, 25.

<sup>120</sup> Portalis explained a complex state like France cannot be governed by simple laws as simple as poor society or smaller and this is what I mean by 'French way of life'. Weiss, (n 12) 469.

French civil code endeavored to frame the expression of the legal rule at the proper level of abstraction. It is not so abstract as to be incomprehensible or meaningless, and at the same time, it is not so concrete as to be inapplicable to a wide variety of cases or over a long period of time.<sup>121</sup> The Ethiopian civil code followed similar method of expression. Rene David drafted the preparatory plan with the proper level of abstraction having Articles divided into numbered paragraphs and limited each paragraph to one sentence.<sup>122</sup> This has facilitated the work of the codification commission and permitted them to express the rules of the civil code with more clarity.<sup>123</sup> From this, it can be inferred that the codification commission seems to have been guided by the French techniques of addressing the code to legal scholars. As mentioned before, the Ethiopian codification commission accomplished a considerable work in formulating the Amharic language the definitions translated from French and attempted to prepare a code that could be understood by the people. The commission intentionally excludes, whenever possible, any foreign words and phrases from the code.<sup>124</sup> When the commission encountered a French word which had no equivalent in Amharic, the commission endeavored to find a *Geez* word which could translate it. The code; thus, borrows very little word from European languages and maintains its national characteristics. Nevertheless, apart from the problems associated with the inner system of the civil code discussed under chapter four, there are some translation-related errors which greatly affect the simplicity of the code. Amharic thought does not develop as does western thought and it is not well developed in its own legal, conceptual terminology, and even less so in the exact equivalences of the foreign language terms.<sup>125</sup> This has resulted in a considerable amount of mistranslation. In the study conducted by Moreno whether the French

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<sup>121</sup> John E.C. Brierley, 'Quebec's Civil Law Codification' (1968) 14 McGill L 521, 568.

<sup>122</sup> David (n 22) 199.

<sup>123</sup> *ibid.*

<sup>124</sup> Briottet (n 60) 334.

<sup>125</sup> Beckstrom (n 29) 563.

terms were accurately translated into the English and Amharic versions, it was noted that there are some startling errors.<sup>126</sup> The civil code contains different confusing terminologies to convey one single idea. For example, the words '*debt*', '*credit*', '*claims*' and '*chose in action*' found in Articles (1048, 1347, 2865-68 and 2411(2)) of the civil code, were all translated from a single '*créance*' French word. Likewise, the French '*faute*' has been translated as '*offense*', '*default*', and '*fault*'. With the same method the Amharic version of the code employed different terminologies for both '*créance*' and '*faute*' terms. For French legal scholars the French civil code is relatively simple to understand because of uniform usage of terms throughout the code. In the Ethiopian case, however, different terminologies were used to convey the same idea both in the Amharic and English versions of the code. In addition to different terminologies there are some differences in the French and Amharic version of the code. For example, Article 668 of the civil code, 'Pronouncement of Divorce for Serious Cause,' states in the English and Amharic versions: 'The Family Arbitrators shall make an order for divorce within three months.' In the original French, it states 'one' month. With the intention of making the terminology used in the civil code uniform and to assist the use of similar terms to express the same idea, Rene David has provided a very detailed and important alphabetized table in the French version of the preparatory plan.<sup>127</sup> Unfortunately, this alphabetized table has been omitted in the Amharic and English editions for unspecified reason.<sup>128</sup> The alphabetized tables would have facilitated the understanding of the civil code in a country where even legal scholars let alone citizens were not yet familiar with different terminologies of the code. David also prepared an explanatory memorandum (*expose des motifs*) in an effort to make the civil code simple and relate the

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<sup>126</sup> Singer, 'Modernization of law in Ethiopia: A study in process and personal values' (n 16) 86.

<sup>127</sup> David (n 22).

<sup>128</sup> *ibid.*

abstract to concrete.<sup>129</sup> He planned to upgrade his explanatory memorandum to a formal commentary since he noticed lack of pre-existing body of laws for reference. However, his plan again was never brought to fruition and only small parts of the explanatory memorandum got the opportunity to be published.<sup>130</sup> The absence of these two important alphabetized tables of terms and explanatory memorandum hugely affects the simplicity of the code. Besides, lack of sufficient body of case law and doctrinal works continues to affect the simplicity of the civil code to present time.

In addition to this, the effort to keep the civil code in accordance with the Amharic language creates some additional problems to the civil code's feature of simplicity. Many legal concepts have been 'forced' into ill-fitting Amharic moulds.<sup>131</sup> Many of the provisions of the civil code contain archaic and outdated terms which are not even understood by judges. The problem of the language of the law was a more serious handicap for the non Amharic speaking scholar/people than it was for those Amharic speakers. Amharic language is not the mother tongue of the majority of inhabitants of Ethiopia. Regarding the rights of language, it may not be out of place to add here the provisions of the 1995 Ethiopian constitution. The constitution gives equal state recognition to all Ethiopian language and every Nation, Nationality and People have the right to learn with, to speak, to write and develop its own language.<sup>132</sup> According to the constitution members of the federation have the right to determine the working language of their respective states. As a result, state courts in Ethiopia adjudicate civil disputes with their respective state languages. For example, the state of Oromia, Tigray, Somalia and Afar use Afaan Oromo, Tigrigna, Somali and Afar languages respectively. However, the civil code has only Amharic and

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<sup>129</sup> Singer, (n 16) 90.

<sup>130</sup> *ibid* 91.

<sup>131</sup> Paul Brietzke, 'Private Law in Ethiopia' (1974) 18 *Journal of African Law* 149, 159.

<sup>132</sup> Article 5(1) and Article 39(2) of the 1995 Ethiopian constitution.

English versions. The civil code is very difficult for the majority of the people in states to get access to, read and understand. For the legal scholars in different states the English version of the civil code is being used as a common source. Since English language is the medium of instructions in law schools, the English version of the civil code is understood by all. Courts in different states, for example, translate the civil code either from the Amharic or English version to the state language and apply the provisions of the code to specific cases at hand. Even though the official version of the code is Amharic, the tendency to look for the Amharic version of the code is insignificant. It may safely be assumed that the Amharic version of the civil code has considerably less impact in different states of the country.

Moreover, the Ethiopian civil code, though eroded through time, served the society for a long time. Throughout this time, some terminologies become archaic and outdated for the society as well as intellectuals to understand. This is due to the non existence of a revision process in the Ethiopian drafting framework. For a certain law to be amended, visible and practical defects such as inconsistency with the constitution and restrictions on operation need to be demonstrated. The only methods that exist in the Ethiopian drafting system are amendment and repeal. The non existence of the concept of revision of laws on grounds of language evolution and changes in institutional names has made the civil code a very difficult text to understand for the modern day Ethiopian intellectuals as well as citizens. As mentioned previously, in the absence of Amharic equivalent for the French terms, Geez terms were used. Recently, Geez is among the most endangered languages and its applicability is limited only to the Ethiopian Orthodox Church. Geez language is not in the Ethiopian educational curriculum. Hence, it can be concluded that in the modern Ethiopian legal system, particularly in the civil code, some terms are foreign to most

intellectuals as well as citizens. When all of these factors interact, they create numerous instances of genuine code vagueness.

## CHAPTER EIGHT – CONCLUSION

Weiss has concluded by summarizing the core elements of continental European codification in the following way. Codification is a conception of the law that is centered upon a code. Such a code is authoritative rather than merely persuasive. It is complete in the sense that it is the primary source of the law with respect to the exclusion of other sources in the field of law that it covers. It requires a theory of adjudication that binds the judge to the code, yet gives the judge the power to fill in gaps and develop the law. This code aims at presenting a clearly structured and consistent whole of legal rules and principles ('outer' system), promoting the internal coherence of the law, and providing a conceptual framework for further doctrinal, judicial, or legislative development ('inner' system). It often serves to promote both legal and political unification.

When the Ethiopian civil code is analyzed against these core features of continental European codification, the nature of the civil code is more revolutionary than evolutionary and there is a question of the exercise of legislative authority over the civil code. While the Ethiopian civil code eliminates existing customary laws and declares its supremacy by excluding the application of any other sources, the 1995 constitution which favors legal pluralism impliedly repealed the supremacy of the civil code by recognizing the adjudication of disputes through religious and customary laws. The civil code does not indicate the role of the judges in dealing with situations where there appears to be a gap in the code. It is difficult for the Ethiopian judge to ascertain the intention of legislator by looking at the materials of codification. Though the system of Ethiopian civil code is thoroughly civilian in its approach and arrangement, the formal presentation of the civil code shows a mere expression of its substantive coherence and the classification of the

subject matters. The divisions made under the civil code did not correspond to clear and authentic distinctions. At this level, and not surprisingly in view of the absence of organized structures for the teaching of law, there was no doctrinal production, in either quantity or quality, able to accomplish the work of systematization. Translation-related problems and extra-code norms which nullify code provisions are among the main causes that affect the systematization of the civil code. The lack of re-publication, revision or translation of relevant legislative materials and the absence of judicial reports during the civil code entire life also affect the simplicity of the code. The primary goal of introducing the civil code in Ethiopia was to bring a legal unification and in so doing the code has brought both changes in substance and change in form. However, the introduction of the 1995 of constitution revived and seriously affects the core features of the civil code.

Based on these considerations, it seems reasonable to conclude that the Ethiopian civil code does not comply with core features of continental European codification.



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